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Débat humanitaire : droit, politiques, action

International Review of the Red Cross

Humanitarian Debate: Law, Policy, Action

Revue fondée en 1869
et publiée par le
Comité international
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Genève

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Mission de la Revue internationale de la Croix-Rouge

La *Revue internationale de la Croix-Rouge* est un périodique publié par le Comité international de la Croix-Rouge (CICR) qui entend favoriser la réflexion sur la politique, l'action et le droit international humanitaires et, en même temps, renforcer le dialogue entre le CICR et les autres institutions ou personnes intéressées par l'humanitaire.

● La *Revue* est au service de l'analyse, de la réflexion et du dialogue sur l'humanitaire en temps de conflit armé et d'autres situations de violence collective. Elle porte une attention particulière à l'action humanitaire elle-même, mais elle entend également contribuer à la connaissance de son histoire, à l'analyse des causes et des caractéristiques des conflits – pour mieux saisir les problèmes humanitaires qui en découlent – et à la prévention de violations du droit international humanitaire. La *Revue* entend stimuler un débat d'idées.

● La *Revue* sert de publication spécialisée sur le droit international humanitaire, rédigée à la fois pour un public académique et pour un public général. Elle cherche à promouvoir la connaissance, l'examen critique et le développement de ce droit. Elle stimule le débat entre, notamment, le droit international humanitaire, le droit des droits de l'homme et le droit des réfugiés.

● La *Revue* est un vecteur de l'information, de la réflexion et du dialogue relatifs aux questions intéressant le Mouvement international de la Croix-Rouge et du Croissant-Rouge et, en particulier, à la doctrine et aux activités du Comité international de la Croix-Rouge. Ainsi la *Revue* entend-elle contribuer à promouvoir la cohésion au sein du Mouvement.

La *Revue* s'adresse à plusieurs publics à la fois, notamment aux gouvernements, aux organisations internationales gouvernementales et non gouvernementales, aux Sociétés nationales de la Croix-Rouge et du Croissant-Rouge, aux milieux académiques, aux médias et à toute personne spécifiquement intéressée par les questions humanitaires.

Mission of the International Review of the Red Cross

The *International Review of the Red Cross* is a periodical published by the International Committee of the Red Cross (ICRC). Its aim is to promote reflection on humanitarian policy and action and on international humanitarian law, while at the same time strengthening the dialogue between the ICRC and other organizations and individuals concerned with humanitarian issues.

● The *Review* is a forum for thought, analysis and dialogue on humanitarian issues in armed conflict and other situations of collective violence. While focusing particular attention on humanitarian action per se, it also strives to spread knowledge of the history of such activity, to analyse the causes and characteristics of conflicts – so as to give a clearer insight into the humanitarian problems they generate – and to contribute to the prevention of violations of international humanitarian law. The Review wishes to encourage the exchange of ideas.

● The *Review* is a specialized journal on international humanitarian law, intended for both an academic and a more general readership. It endeavours to promote knowledge, critical analysis and development of the law. Its also fosters the debate on such matters as the relationship between international humanitarian law, human rights law and refugee law.

● The *Review* is a vector for information, reflection and dialogue on questions pertaining to the International Red Cross and Red Crescent Movement and, in particular, on the policy and activities of the International Committee of the Red Cross. The *Review* thus seeks to promote cohesion within the Movement.

The *Review* is intended for a wide readership, including governments, international governmental and non-governmental organizations, National Red Cross and Red Crescent Societies, academics, the media and all those interested by humanitarian issues.

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Texts published by the *Review* reflect the views of the author alone and not necessarily those of the ICRC or of the *Review*. Only texts bearing an ICRC signature may be ascribed to the institution.

Editorial

Avant la fin de cette année, un tribunal pénal international permanent – la Cour pénale internationale – verra probablement le jour. Soixante États ou plus y participeront. Sa compétence sera limitée aux futurs actes commis sur le territoire des États parties ou à ceux commis par leurs ressortissants. Même si certains grands pays et quelques pays qui sont depuis longtemps le théâtre d'un conflit armé ne relèvent pas de sa compétence, la création de ce tribunal comblera un vide dans le système de sécurité international. Le présent numéro de la Revue *comprend plusieurs articles qui traitent des divers aspects de la responsabilité à l'égard des crimes internationaux ; il examine aussi les différentes formes de tribunaux internationaux ou internationalisés.*

La future Cour pénale internationale sera principalement appelée à rendre un jugement dans les cas de crime de génocide, de crimes de guerre et de crimes contre l'humanité – tous ces crimes furent les principaux délits poursuivis devant les tribunaux de Nuremberg et de Tokyo après la Seconde Guerre mondiale. Ces crimes internationaux sont le plus souvent perpétrés au cours d'un conflit armé et ont une relation directe avec le respect du droit international humanitaire. Tandis que le manque de consensus sur la définition de l'agression n'a pas empêché les États d'inclure ce crime dans le statut de la Cour, les actes de terrorisme ont été exclus du catalogue des crimes sur lesquels la Cour exercera sa compétence, un accord n'ayant pu être trouvé pour les y inclure.

L'article de Jelena Pejic introduit la problématique du combat contre l'impunité. Aucun ordre supérieur ne peut exonérer leurs auteurs de leur responsabilité (article de Jacques Verhaegen). Le Statut

accorde une attention particulière à la nécessité d'assurer une protection adéquate des victimes et des témoins (article de Luc Walleyn). Un mandat spécifique comme celui du CICR dans les conflits armés, qui doit préserver le caractère confidentiel de ses informations pour pouvoir mener son action, peut même dispenser certains témoins d'attester en justice (voir le mémorandum explicatif sur ce sujet de Gabor Rona).

Contrairement aux tribunaux ad hoc pour l'ex-Yougoslavie et le Rwanda, les tribunaux nationaux auront la primauté sur la Cour pénale internationale (voir l'article de Sascha Lüder concernant sa nature juridique). Selon ce principe de complémentarité (article de Oscar Solera), aucun pays ne doit craindre de perdre sa souveraineté aussi longtemps que son système judiciaire national poursuit effectivement les inculpés. Ce manque de volonté et l'incapacité d'un État d'engager des poursuites devant les tribunaux nationaux ont été des éléments d'appréciation essentiels dans la conclusion du récent accord entre les Nations Unies et la Sierra Leone qui porte création d'un tribunal spécial international avec la participation des ressortissants sierra-léonais (article d'Avril McDonald).

Alors que ce tribunal spécial devra fonctionner avec peu de moyens, le système judiciaire internationalisé est encore plus problématique au Timor oriental et au Cambodge, où les ressources des tribunaux nationaux internationalisés sont encore plus limitées (voir article de Suzannah Linton). Les problèmes considérables auxquels ils sont confrontés sur les plans pratique, financier et du personnel et qui les empêchent de fonctionner même avec un minimum d'efficacité font passer les graves problèmes juridiques au rang de préoccupations comparativement mineures.

On ne peut, par conséquent, s'empêcher de se poser une question : faut-il ou non continuer de concevoir d'autres moyens complémentaires aux poursuites et à la justice traditionnelles ? Les commissions de la vérité, la lustration, les réparations et mesures coutumières locales, comme le système gacaca, *peuvent éventuellement aider à combattre l'impunité et à faire en sorte que ceux qui ont commis des crimes internationaux soient amenés, en partie du moins, à rendre des comptes (articles de Laura Olson et de Carsten Stahn).*

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La crise provoquée par les évènements du 11 septembre 2001 soulève de nombreuses questions et interrogations qui dépassent souvent le débat humanitaire. Mais l'adéquation du droit international humanitaire est également mise en doute. Dans sa récente intervention devant la Commission des Droits de l'Homme (voir sous Faits et documents), le CICR a donné quelques éléments-clés qui déterminent sa position sur ce sujet. Dans l'édition de septembre 2002, une année après la tragédie, la Revue *consacrera un numéro spécial à cette problématique du terrorisme et ses implications pour l'action et le droit humanitaire.*

LA REVUE

A note from the Editor

Before the end of this year, a permanent world criminal tribunal - the International Criminal Court – will most likely come into being. Sixty or more States will participate in it. Its mandatory jurisdiction will be limited to future acts perpetrated on the territory of States party to the Court's Statute or by their citizens. The creation of this tribunal will close a gap in the international security system, even though certain major States and some countries which are the scene of ongoing armed conflict will not be covered. This issue of the Review *contains several articles dealing with various aspects of accountability for international crimes and different forms of international or internationalized tribunals.*

The future International Criminal Court will be called on to render judgment first and foremost in cases of genocide, war crimes and crimes against humanity, all of which constituted the core of offences prosecuted at the Nuremberg and Tokyo Tribunals following World War II. These international crimes are most often committed during armed conflict and have a direct bearing on respect for international humanitarian law. Whereas the absence of consensus over a definition of the crime of aggression did not prevent the inclusion of this crime in the Statute of the Court, acts of terrorism have been excluded from the catalogue of crimes over which the Court shall exercise jurisdiction, since agreement could not be reached on their inclusion.

Jelena Pejic's article reviews the issues and trends in combating impunity. No superior order can relieve the perpetrator of his or her own responsibility (article by Jacques Verhaegen). Special attention was paid in the Statute to providing adequate protection for witnesses

and victims (article by Luc Walleyn). A specific mandate such as that of the ICRC during armed conflicts, which needs to preserve its action through confidentiality, may even exempt certain witnesses from giving evidence (see the explanatory memorandum on this subject by Gabor Rona).

In contrast to the ad hoc tribunals for the former Yugoslavia and Rwanda, national courts will have primacy over the International Criminal Court (see the article on its legal nature by Sascha Lüder). According to this principle of complementarity (article by Oscar Solera), no country need fear a loss of sovereignty as long as its national judicial system does in fact prosecute the suspects. Unwillingness and inability to prosecute by national courts were key factors in the conclusion of the recent agreement between the United Nations and Sierra Leone setting up an international Special Court with the participation of Sierra Leonean nationals (article by Avril McDonald).

While the latter tribunal will have to operate on a shoestring, the internationalized justice systems in East Timor and Cambodia raise even more problems, as the resources of the internationalized domestic tribunals are even more limited (see the article by Suzannah Linton). The immense practical, personnel and financial problems facing them, and possibly obstructing even minimal efficiency and effectiveness, relegate grave legal problems to the level of comparatively minor concerns.

One therefore cannot help wondering whether alternative means complementary to traditional prosecution and justice should be further developed: truth commissions, lustration, reparations and local customary measures such as the gacaca *may help to combat impunity and make those who have committed international crimes at least partially accountable (see articles by Laura Olson and Carsten Stahn).*

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The crisis provoked by the events of 11 September 2001 raises numerous questions and issues which often go beyond the subject of humanitarian debate. But the adequacy of international

humanitarian law is equally put into doubt. In its intervention before the United Nations Human Rights Commission (see under Reports and Documents), the ICRC has outlined some key elements which determine its position on the subject. The September 2002 edition, one year after the tragedy in the United States, will be devoted to the issues raised by "the war against terrorism" and its implications for humanitarian law and action.

THE REVIEW

Accountability for international crimes: From conjecture to reality

by
JELENA PEJIC

At a 1987 international colloquium devoted to the Nuremberg trials Professor Eric David posed a hypothetical question — could Augusto Pinochet be arrested and tried in Belgium for acts such as enforced disappearances, extrajudicial executions, torture and unlawful detention committed since his ascendance to power?[1] While Professor David answered in the affirmative,[2] at the time it was only academic conjecture that such a scenario could ever come to pass. And yet, just over a decade later, his hypothetical question proved to be prescient. Augusto Pinochet was arrested in the United Kingdom, whose highest court eventually ruled that he did not enjoy immunity from legal process for torture and conspiracy to commit torture perpetrated while he was in office.[3] It was a defining moment in the fight against impunity and perhaps the most important milestone in the struggle for international justice since the Nuremberg trials.

The proceedings against Pinochet did not, however, come out of the blue. Ever since the end of the Cold War and the resulting new impetus in international relations, the international community had been setting important markers in the fight against impunity. The trend only accelerated after the Pinochet case, allowing the full-fledged emergence of what can now be called a global movement

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against impunity.[4] The purpose of this brief text is to outline some of the major developments along the way[5] and to mention some of the challenges that lie ahead. But, before that, tribute should be paid to the heroes of that endevour: the victims of crime and abuse of power worldwide, as well as their families, whose perseverance and fortitude have spurred governments to action and galvanized NGOs. They were and will continue to be at the very centre of the global fight against impunity.

International ad hoc tribunals

It is no exaggeration to say that the flurry of normative developments prompted by the horrifying legacy of the Second World War died down fairly quickly when it came to establishing mechanisms that would ensure individual accountability for crimes under international law. Early efforts to establish a permanent international

1 Eric David, "L'actualite juridique de Nuremberg", in *Le Procès de Nuremberg: Conséquences et actualisation*, Actes du Colloque international, Université Libre de Bruxelles, 27 March 1987, Editions Bruylant, Brussels, 1988, p. 168.

2 *Ibid.*, p. 171.

3 *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others* Ex Parte *Pinochet*, (1999) 381 ILM 581 (UK House of Lords) [hereinafter *Pinochet Case*]; see Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, Kluwer Law International, The Hague, 2000, p. 40 [hereinafter *Brody and Ratner*].

4 A very useful — and rare — definition of "impunity" reads as follows: "Impunity means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims": "The administration of justice and the human rights of detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)", Final Report prepared by Mr Joinet Pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, Annex II, pp. 13-14 [hereinafter Joinet Report]. The definitional section of the document also refers to genocide, war crimes and crimes against humanity as being "serious crimes under international law". *Ibid.*, p. 15.

5 Due to lack of space, this article will not cover truth commissions as a non-penal mechanism in the fight against impunity. For a comprehensive review of the issue, see Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001. See also Joinet Report, *op. cit.* (note 4), pp. 14-17.

criminal court[6] did not get very far owing to Cold War tensions. While international human rights law did develop quickly, its monitoring mechanisms at the international level remained primarily political or quasi-judicial at best. After several decades of hardly any progress, the breakthrough came in 1993 and 1994 respectively, with the establishment of the two ad hoc criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

Even though the geographical focus of the two tribunals is different, they were created essentially because of the unwillingness or inability of the national authorities concerned to bring to justice the perpetrators of serious crimes under international law — genocide, war crimes and crimes against humanity. Regardless of how the totality of their jurisprudence and rules of procedure will be viewed in historical perspective, the precedential value of the ad hoc tribunals cannot be contested. Both tribunals were created by the Security Council which, treading on previously untested ground, drew on its Chapter VII powers to establish judicial organs with which all UN member States are legally obliged to cooperate. The tribunals, simply put, showed that international adjudicatory mechanisms were not only necessary but also possible, thus paving the way for the adoption, several years later, of a treaty for the world's first permanent International Criminal Court (ICC).[7]

In the almost nine years since its creation, the ICTY has clarified and developed key concepts of international humanitarian law and made an invaluable contribution to softening the distinction between the legal regimes applicable to international and non-international armed conflict. The way was paved fairly early on, with the well-known 1995 *Tadic Jurisdiction Decision*,[8] which essentially

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

7 Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF.183/9, 17 July 1998 [hereinafter ICC or ICC Statute].

8 *The Prosecutor* v. *Dusko Tadic*, Case No. IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 [hereinafter *Tadic Jurisdiction Decision*].

established that there is a common core of international humanitarian law rules applicable to armed conflicts *per se*, regardless of their character. In reaching that conclusion, the Tribunal relied on Article 3 of its Statute ("Violations of the laws or customs of war"), construing it as a residual basis of jurisdiction that may be invoked when more specific provisions of the Statute do not apply.[9] The *Tadic Jurisdiction Decision* was, moreover, "the first judgment rendered by an international tribunal confirming, in unequivocal terms, the criminal character of war crimes committed in [internal armed conflicts]".[10] The Decision also laid the groundwork for a number of later judgments in which the substantive content of the rules applicable to non-international armed conflict were developed.[11]

The ICTY's high point in practical terms has been the well-publicised transfer of former Yugoslav President Slobodan Milosevic to the Detention Unit at The Hague in June 2001. Milosevic, who is currently on trial, was initially indicted by the Tribunal — as the first ever serving head of State — for violations of the laws and customs of war and crimes against humanity committed against the Kosovo Albanian population in 1998-99. Since then he has also been separately indicted for grave breaches of the Geneva Conventions, violations of the laws or customs of war and crimes against humanity committed against the Croatian and other non-Serb populations in the Republic of Croatia and, in addition to those latter charges, for genocide and complicity in genocide during the war in

9 The more specific and related provisions would be Article 2 of the ICTY's Statute — Grave breaches of the Geneva Conventions of 1949 — which, according to the *Tadic Jurisdiction Decision*, *ibid.*, may be applied only to acts perpetrated in a conflict that has been established to be international.

10 Sonja Boelaert-Suominen, "The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts", *Leiden Journal of International Law*, Vol. 13, Issue 3, 2000, pp. 630-631.

11 As Boelaert-Suominen points out, "this jurisprudence shows that war crimes charges based on grave breaches of the Geneva Conventions have a corollary in war crimes charges based on Article 3 common to the Geneva Conventions". Thus, for example, several ICTY Trial Chambers have ruled that there is no qualitative difference between the terms "wilful killing" as a grave breach and "murder" as used in common Article 3. Similarly, the grave breach of "inhuman treatment" corresponds to "cruel treatment" within the meaning of common Article 3. *Ibid.*, pp. 637-638.

Bosnia and Herzegovina.[12] In view of the factual and legal findings that the proceedings are expected to generate, as well as Milosevic's refusal to appoint defence counsel,[13] it may safely be said that his trial will be the most closely watched in the ICTY's history.

Milosevic's transfer to The Hague by the Serbian authorities was effected under huge international pressure and almost immediately caused the fall of the then federal Yugoslav government, one faction of which was opposed to his surrender. The difficulties in surrendering indictees and other forms of non-cooperation of national authorities remain one of the major obstacles to the fulfilment of the Tribunal's mandate.[14] Even though the Tribunal's Statute, as mentioned above, demands the cooperation of UN member States, there is no established enforcement mechanism on which the Prosecutor can rely to bring indictees in. It is, in fact, fortuitous that there is an international military presence in the former Yugoslavia and that contributing States can sometimes be persuaded by Tribunal representatives to arrest indictees. The situation would, presumably, be quite different if there were no such forces, a reality that the future ICC is likely to face far more frequently. The international community therefore still has to take the step from having established international accountability mechanisms to endowing them with enforcement capacity. It is to be hoped that this will be one of the next advances in the fight against impunity.

Internationalized tribunals

The establishment of the ad hoc Tribunals paved the way not only for negotiations on the ICC treaty, but also, at least indirectly, made it possible to pursue work on the creation of three other judicial bodies: the first dealing with crimes committed two and a half decades

12 See *Milosevic Case* (IT-01-51), Case Information Sheet (CIS), 26 November 2001, ‹http://www.un.org/icty/glance/milosevic.htm› as well as CIS of 9 and 29 October (IT 01-50 resp. 99 37 I).

13 For Milosevic's possible strategy in terms of legal assistance, see Mirko Klarin, "Analysis: Milosevic to put NATO on Trial", *IWPR's Tribunal Update*, No. 248, 10-15 December 2001, ‹http://www.iwpr.net›.

14 See Address to the United Nations Security Council by the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Mrs Carla Del Ponte, 27 November 2001, ‹http://www.ictr.org/ENGLISH/speeches/delponte271101sc.htm›.

ago in Cambodia; the second dealing with crimes committed in Sierra Leone not that long ago; and the third dealing with crimes committed before and after the UN-administered referendum on the independence of East Timor in 1999.

The "Khmer Rouge tribunal", as it is colloquially called, has been the object of lengthy and rather complicated negotiations between the Cambodian authorities and the United Nations for over two years. At the time of writing this text, the outcome of those discussions is still uncertain, although the tribunal's basic mandate and structure are known. It would be composed of both Cambodian and international judges (and prosecutors), organized in three extraordinary chambers within the domestic court system, with subject-matter jurisdiction over serious violations of Cambodian and international law committed by senior leaders and others during the period of Democratic Kampuchea (1975-1979).[15] Stumbling blocks in the negotiations between the Cambodian government and the UN have included the procedure for issuing indictments and reaching verdicts, amnesty provisions, rules on foreign defence counsel, rules of procedure and, most recently,[16] the official language to be used in court.[17] Needless to say, both international and Cambodian human rights activists believe that the Khmer Rouge tribunal, if properly established, would be "the beginning of the end of a culture of impunity"[18] in Cambodia.

15 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as adopted by the National Assembly on 2 January 2001, ‹http://www.phnompenhdaily.com/06.01.01.htm›; see also Articles of Cooperation Between the United Nations and the Royal Government of Cambodia [in/Concerning] the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, *Phnom Penh Post*, Issue 9/22, 27 October–9 November 2000, ‹http://www.phnompenhpost.com› (both texts on file with the author).

16 See Colum Lynch, "UN Warns Cambodia on War Crimes Tribunal", *The Washington Post*, 3 February 2001, p. A22; see also Human Rights Watch Press Release, "Core Issues in the Khmer Rouge Tribunal Unresolved", 21 January 2001, ‹http://www.hrw.org/press/2000/01/cambo0121.htm›.

17 See "Khmer Rouge Trial Stalled Over Language", Reuters, Phnom Penh, 26 November 2001 (on file with the author).

18 Youk Chang, Director of Documentation Center of Cambodia, quoted in Amy Kazmin and Carola Hoyos, "Cambodia Moves Towards Tribunal of Khmer Rouge", *Financial Times*, 23 August 2001, ‹http://www.globalarchive.ft.com/globalarchive/›.

Moves to establish a special court for Sierra Leone were initiated by the government of that country in August 2000.[19] The UN Security Council responded in a matter of days, authorising the UN Secretary-General to negotiate an agreement with the Sierra Leonean government on the creation of an independent special court and requesting him to submit a report on ways of meeting the government's request.[20] According to the ensuing Secretary-General's report, this "treaty-based *sui generis* court of mixed jurisdiction and composition"[21] would have the power to prosecute persons "most responsible" for serious violations of "international humanitarian law and Sierra Leonean law committed in the territory" of that country since November 1996. The judges would be both Sierra Leonean and foreign; the Prosecutor would be appointed by the UN Secretary-General upon consultation with the government, while the Deputy Prosecutor would be Sierra Leonean. The special court would have concurrent jurisdiction with domestic courts, similar to the ad hoc tribunal model. Issues which generated further exchanges between the Security Council and the UN Secretary-General included the special court's jurisdiction over children[22] and how widely the net should be cast in terms of other aspects of the court's personal jurisdiction, as well as the future court's funding.[23] Despite the fact that not all the funding pledged had come in from UN member States, in January 2002 the United Nations and the government of Sierra Leone signed

19 See Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786, 10 August 2000.

20 UN Doc. S/RES/1315 (2000), paras 1 and 6, 14 August 2000.

21 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, para. 9. The Report, in its Annex, includes a draft Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and, in Enclosure, a draft Statute of the Special Court for Sierra Leone.

22 See Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/ 1234, 22 December 2000; see also Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40, 12 January 2001.

23 Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, *op. cit.* (note 22).

an agreement setting up the Special Court to prosecute persons bearing "the greatest reponsibility" for crimes committed in that country.[24]

For most of last year, an internationalized domestic tribunal established by the United Nations Transitional Administration in East Timor (UNTAET) has been trying persons suspected of having committed crimes in that region in 1999. The tribunal is composed of Special Panels — made up of one East Timorese judge and two judges of other nationalities — which are part of the District Court of Dili. The Special Panels are authorised to hear cases of genocide, crimes against humanity, war crimes, torture and specific violations of the Indonesian Penal Code. The first judgment, against ten militiamen, was rendered in a crimes against humanity case in December 2001. While this internationalized domestic tribunal presents a model that could potentially be of benefit in other situations as well, researchers have pointed out that the tribunal's main failings have been its link to a very weak domestic criminal justice system and lack of adequate resources and funding for the Special Panels.

International Criminal Court

The issue of resources and funding might also plague the permanent International Criminal Court given that it will essentially operate on the voluntary contributions of States Parties unless its proceedings are initiated by a Security Council referral.[25] This, it is submitted, is a regrettable development, because it hampers the ability of international mechanisms engaged in the fight against impunity to properly carry out their mandate.

The ICC will come into operation once the 1998 Rome Treaty has been ratified by 60 States.[26] At the time of writing this text, the treaty has garnered 50 ratifications[27] and the expectation is that the requisite number will be achieved "well before the summer of

24 See "Sierra Leone: UN Government sign historic accord to set up special war crimes court", UN NewsCenter, 16 January 2002, ‹http://www.un.org./apps/news/story.asp?NewsID=2639&Cr=Sierra&Crl=court›.

25 ICC Statute, Article 115.

26 *Ibid.*, Article 126(1).

27 For up-to-date ratification status, see Rome Statute Signature and Ratification Chart, ‹http://www.iccnow.org/rome/html/ratify.html›.

2002".[28] The Court will be situated in the capital of the Netherlands, the government of which is already well advanced in its preparations for hosting this new international judicial body.[29] While the ICC has yet to start functioning, the adoption of the Rome Treaty can only be characterized as a momentous event in the struggle for international justice, one that would have been simply unthinkable just a decade ago. Apart from the already mentioned political climate that facilitated negotiations on the ICC Statute, the Court's creation is based on the recognition that national authorities have far too often proven unable or unwilling to deal with the perpetrators of serious crimes under international law. The ICC will not supplant national criminal jurisdictions but will, in accordance with the principle of complementarity,[30] be available to step in when domestic prosecutions and trials prove unfeasible.

Of the many achievements of the Rome Statute, two deserve special mention in a review of developments related to the fight against impunity: the first is the ICC's subject-matter jurisdiction over war crimes committed in internal armed conflict and over crimes against humanity,[31] and the second is the Statute's approach to victims. The expansion of war crimes to include acts committed in non-international armed conflict was by no means a foregone conclusion when the treaty negotiations began. Even though Article 3 common to the 1949 Geneva Conventions and Additional Protocol II of 1977 prohibit certain acts in internal armed conflict, not all governments were happy to see some of them defined as war crimes entailing individual criminal responsibility. Partly as a result of the jurisprudence of the ad hoc tribunals and partly due to the obvious prevalence of internal conflicts globally, those objections were overcome. The ICC Statute is thus the first international treaty to explicitly provide for individual criminal responsibility for "serious" violations of common Article 3 and for

28 See Statement by the Minister of Foreign Affairs of the Kingdom of the Netherlands, Jozias J. Van Aartsen, during the Eighth Session of the Preparatory Commission for the International Criminal Court, New York, 25 September 2001, ‹http://www.iccnow.org/html/Netherland speechPrepCom8.html›.

29 *Ibid.*

30 ICC Statute, Article 1. See also ICC Statute, Articles 17-19.

31 The ICC will have jurisdiction over genocide, war crimes, crimes against humanity and the crime of aggression (once the latter is defined). See ICC Statute, Article 5.

twelve other "serious violations of the laws and customs" applicable in non-international armed conflict, including intentional attacks against civilians, crimes of sexual and gender violence, and forced displacement.[32] There is no doubt that the list should have been more expansive, but at least the Rome Statute will, as a matter of law, put a stop to claims that crimes perpetrated in internal armed conflict are a matter of solely domestic jurisdiction.

The ICC Statute's definition of crimes against humanity (Article 7) is just as important. Arriving at a definition was no easy task given that there was no accepted definition or list of such crimes as a matter of treaty law. Previous definitions, such as those included in the Nuremberg and Tokyo Charters, Allied Control Council Law No. 10 and the Statutes of the ad hoc Tribunals differ in both their elements and in the enumeration of acts considered to constitute crimes against humanity. The ICC Statute definition is groundbreaking in that, for a start, it omits a nexus to armed conflict, thus clarifying that crimes against humanity may be committed in peacetime as well as in war. The Article 7 *chapeau* also provides that crimes against humanity may be committed either as part of a "widespread" or "systematic" attack against a civilian population, thus eliminating the need to prove a cumulation of these two elements. Lastly, the definition does not provide that persecution must be a motive for any of the acts listed as crimes against humanity; instead, persecution is included in that list as a separate crime.[33] It should also be noted that the Statute defines the crimes of torture and enforced disappearance[34] more expansively than the relevant human rights instruments[35] by dissociating them from the requirement of the perpetrator's official capacity.

Largely due to NGO lobbying and the responsiveness of several key governments, the ICC Statute did not circumvent the interests of victims. It mandates *inter alia* the creation, within the future

32 ICC Statute, Article 8(2)(c)(e)(i), (vi) and (viii).

33 ICC Statute, Article 7(1)(h).

34 ICC Statute, Article 7(2)(f) and (i).

35 See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Article 1 [hereinafter Convention Against Torture], and Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, 18 December 1992, preambular para. 3.

Court's Registry, of a Victims and Witnesses Unit charged with providing protective measures, security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who may be at risk on account of testimony.[36] In a groundbreaking development, the treaty also includes provisions on reparations to victims and their families.[37] The Court may, either upon request or on its own motion (in exceptional circumstances), determine the scope and extent of any damage, loss and injury to, or in respect of, victims. It is authorised to order that a convicted person make reparations to the victims or their families, which may include restitution, compensation and rehabilitation. The Statute further provides for the establishment of a Trust Fund from which victims may be compensated[38] and permits the Court to order the seizure of property or assets of the convicted person or of the property used to commit the crime.[39] States Parties are obliged to implement a Court decision to that effect. The Statute's provisions on reparations have been further outlined in the ICC's Rules of Procedure and Evidence.[40]

Universal jurisdiction

As already mentioned, the ICC was created to offset the lack of willingness or ability of national authorities to mount domestic prosecutions and trials of perpetrators of serious crimes under international law. As a few high-profile cases have recently demonstrated, another avenue may in such circumstances be used to ensure justice — the exercise of universal jurisdiction by third States.[41] The most

36 ICC Statute, Article 43(6).

37 ICC Statute, Article 75.

38 ICC Statute, Article 79.

39 ICC Statute, Article 93(1)(k).

40 See Finalised Draft Text of the Rules of Procedure and Evidence, PCNICC/2000/1/Add.1, 2 November 2000, Sub-Section 4, Rules 94 to 99, ‹http://www.un.org/law/ icc/statute/rules/rulefra.htm›.

41 "Under the principle of universal jurisdiction, a state is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim. The only connection between the crime and the prosecuting state that may be required is the physical presence of the alleged offender within the jurisdiction of that state": International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, London Conference, 2000, p. 2 (on file with the author) [hereinafter ILA Report].

celebrated example is the 1998-1999 *Pinochet Case*, based both on passive personality and universal jurisdiction. It should be noted, however, that courts in Europe had initiated and successfully concluded proceedings based on universal jurisdiction against alleged offenders from the former Yugoslavia and Rwanda prior to Pinochet's arrest in England.[42] Since then other cases have been brought as well.[43] It is submitted that the gradual, but steady expansion of the exercise of universal jurisdiction is likely to be a permanent trend in the struggle for international justice.

It was the Spanish *Audiencia Nacional*'s ruling that "Spain could investigate crimes committed in Chile and that the court could exercise universal jurisdiction over crimes committed by and against non-nationals outside of Spanish territory"[44] that provided the basis for the formal request for Pinochet's extradition issued in Spain in November 1998. The Spanish request was followed by extradition requests from Switzerland, France and Belgium, respectively.[45] Leaving aside other seminal aspects of the Pinochet case,[46] the proceedings in the UK affirmed that States Parties have an obligation under the 1984 Convention against Torture[47] to take measures that would enable them to assert jurisdiction over an offender present in their territory and to

42 *Ibid.*, Annex. The Annex contains a review of various cases brought under the principle of universal jurisdiction — before Pinochet's arrest — in Austria, Denmark, France, Germany and the Netherlands.

43 France most recently declared admissible a complaint filed by six victims against Tunisian officials, alleging acts of torture, regardless of lack of presence of the alleged perpetrators in French territory. See Comité pour le respect des libertés et des droits de l'homme en Tunisie, *Une brèche importante dans la lutte contre l'impunité: la plainte déposée en France contre des tortionnaires tunisiens est jugée recevable*, Paris, 28 November 1998 (text on file with the author).

44 See Mary Griffin, "Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century", *International Review of the Red Cross*, No. 838, June 2000, p. 382.

45 *Ibid.* It should be noted in this context that a Belgian *juge d'instruction* ruled in Pinochet-related proceedings that a person suspected of having committed crimes against humanity could be brought to justice in Belgium on the basis of customary international law. See Juge d'instruction à Bruxelles, ordonnance, 6 November 1998 (on file with the author), reprinted in *Revue de Droit Pénal et de Criminologie*, 1999, pp. 278-300.

46 For a review of the Pinochet case, see Brody and Ratner, *op. cit.* (note 3). See also *Crimes Against Humanity: Pinochet Faces Justice*, International Commission of Jurists, July 1999.

47 Convention Against Torture, Articles 4, 5 and 7.

either prosecute or extradite such a person. They also confirmed that a former head of State cannot invoke immunity from extradition and prosecution for torture and conspiracy to torture. Britain's highest court did, however, conclude that a serving head of State would *ratione personae* have enjoyed immunity for the acts alleged,[48] a finding which, it is submitted, contradicts both the letter of the Nuremberg Charter and Judgment and their normative legacy.[49] It should be noted that the UK proceedings also had an effect in Chile itself — upon his return from Britain, Pinochet's parliamentary immunity and his senator-for-life position were lifted, enabling the initiation of domestic proceedings.[50]

Less than a year after the Law Lords' ruling in the *Pinochet Case*, in February 2000 a Senegalese court indicted former Chadian President Hissene Habre on torture charges and placed him under house arrest.[51] This action by the Dakar Regional Court, initiated by Chadian victims as well as by Chadian and international human rights groups, is believed to have been the first exercise of universal jurisdiction for human rights offences in an African country.[52] In July 2000, the Court of Appeals dismissed the charges against Habre, ruling that Senegal had not enacted legislation to implement the Convention Against Torture and therefore had no jurisdiction to pursue the charges because the crimes were not committed in Senegal, and in March 2001 Senegal's highest court essentially confirmed that ruling.[53] If there is one lesson to be learned from the Habre case, it is the

48 See Brody and Ratner, *op. cit.* (note 3), p. 44.

49 For a good review of the principles on immunity as enunciated in the Nuremburg Judgment and the normative follow-up, see Amnesty International, *The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes against Humanity*, EUR 45/21/98, October 1998.

50 See Federico Andreu-Guzman, "L'affaire Pinochet: historique des événements et exposé des incriminations, L'arrêt de la Cour suprême de justice du Chili et perspective du combat judiciaire contre l'impunité", Paper presented at the Journée d'études: L'immunité penale des gouvernants, FIDH — CEDIN, Assemblée nationale de France, 30 September 2000 (on file with the author).

51 See Frederic Kirgis, "The Indictment in Senegal of the Former Chad head of State", *ASIL Insights*, February 2000, ‹http://www.asil.org/insights/insigh41.htm›.

52 ILA Report, *op. cit.* (note 41), p. 27.

53 République Du Senegal, Cour d'Appel de Dakar, Chambre d'Accusation, Arrêt No. 135, 4 July 2000; see Human Rights Watch, "The Case against Hissene Habre", ‹http://www.hrw.org/justice/habre/intro_web2.htm›.

importance of States adopting implementing legislation (if required under domestic law) to give effect to the Convention's universal jurisdiction provisions. While non-implementation of the Convention Against Torture in Senegalese law ultimately defeated the proceedings, the Habre case did generate further developments well worth noting. It prompted the initiation of criminal proceedings against members of the political police that operated during Hissene Habre's regime by Chadian victims before Chadian courts. It also led the victims to request the UN Committee against Torture to apply interim measures of protection to prevent the former President from leaving Senegal except pursuant to an extradition demand, which the Committee granted.[54] Victims also filed a complaint against Habre in Belgium, under its law on universal jurisdiction mentioned below, seeking his extradition from Senegal.[55]

The purpose of universal jurisdiction is to deny safe haven to persons suspected of having committed egregious crimes which are an affront to the international community as a whole. Among them are genocide, war crimes, crimes against humanity, torture, slavery and piracy, and, some would argue, enforced disappearances as well. It should be remembered that the 1949 Geneva Conventions and their Additional Protocol I of 1977,[56] as well as the Convention Against Torture,[57] provide for mandatory universal jurisdiction by States Parties to those treaties. In practice, however, several conditions have to be met before proceedings in a third State can actually take place. To begin with, domestic implementing legislation will most often be required given that national judges will be hesitant to assert jurisdiction unless authorised to do so by domestic statute (Habre case). Unfortunately, fairly few States have so far taken that step.[58] A notable

54 Human Rights Watch, "The Case against Hissene Habre", *op. cit.* (note 53).

55 See Linda Keller, "Belgian Jury to Decide Case Concerning Rwandan Genocide", *ASIL Insights*, May 2001, ‹http://www.asil.org/insights/insigh72.htm› [hereinafter *ASIL Insights*].

56 See First Geneva Convention, Article 49(2); Second Geneva Convention, Article 50(2); Third Geneva Convention, Article 129(2); Fourth Geneva Convention, Article 146(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 86(1).

57 Convention Against Torture, Article 5.

58 See ILA Report, *op. cit.* (note 41), p. 12.

exception is Belgium, whose 1993 universal jurisdiction law,[59] as amended in 1999,[60] permits the exercise of universal jurisdiction by Belgian courts for genocide, war crimes (committed in both international and non-international armed conflict) and crimes against humanity even when the suspect is not present in Belgian territory. The law does not allow the invocation of official immunity to prevent application of its provisions.

The first full trial completed under the Belgian law was the recent, well-publicized, case of four Rwandan defendants — including two nuns — who were convicted in 2001 by a Belgian jury for complicity in the 1994 Rwandan genocide.[61] Complaints by victims have also been filed against a number of former and current high-ranking politicians from all quarters of the globe, including Israeli Prime Minister Ariel Sharon and Palestinian leader Yasser Arafat.[62] The law's "success" has produced a backlash in Belgium, whose political authorities are worried that it has turned their country into a "magnet for the world's human rights cases",[63] and who point to the diplomatic difficulties caused. Belgium's Foreign Minister and other officials have called for amendments to the law that would effectively restrict its application by mandating political oversight over the judicial process.[64] Human rights groups have responded by emphasizing that the solution lies in getting more States to also adopt universal jurisdiction laws, rather than in Belgium limiting its own.[65] It should be noted that the ICC ratification process and the implementing legislation required of States for compliance with that treaty provide a good opportunity for

59 Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 aout 1949 et aux Protocoles I et II du 8 juin 1977, additionels à ces Conventions, 16 June 1993, *Moniteur Belge*, 5 August 1993.

60 Loi relative à la répression des violations graves de droit international humanitaire, 10 February 1999, *Moniteur Belge*, 23 March 1999.

61 See *ASIL Insights*, *op. cit.* (note 55).

62 See "Rights Groups Support Belgian Law on Genocide", Agence France-Presse, Brussels, 26 November 2001. See also "Suit Against Sharon Defended", *International Herald Tribune*, 29 November 2001, p. 5.

63 See Press Release by Human Rights Watch, the International Commission of Jurists and the International Federation of Human Rights Leagues (FIDH), Brussels, 26 November 2001 (on file with the author) [hereinafter Joint Press Release].

64 See "Un sénateur veut restreindre la loi belge sur la compétence universelle", Agence France-Presse, Brussels, 20 June 2001.

65 See Joint Press Release, *op. cit.* (note 63).

appropriate amendments to domestic law that would allow the exercise of universal jurisdiction.

Amnesties

Apart from lack of implementing legislation, other obstacles to the exercise of universal jurisdiction include the possible official capacity — and therefore immunity from process — of the alleged perpetrator, lack of skills and resources in the third country, evidentiary problems and the effect of domestic amnesties.[66] Due to lack of space and to the fact that the issue of amnesties arises not only in proceedings based on universal jurisdiction in third countries, but also before national and international courts, it will be examined separately, albeit briefly, below.

The granting of amnesties to suspected perpetrators of serious crimes under international law violates the duty of States, under treaty-based and customary law, to bring to justice and punish suspected offenders.[67] If, over a decade ago, there might have been some doubt about the validity of this claim, a multitude of developments at both the national and international levels should have served to dispel it.[68] It is submitted that this trend is likely to not only continue, but accelerate.

At the international level, the incompatibility of amnesty laws with State obligations to investigate and punish serious crimes was indirectly recognized in the Vienna Declaration and Programme

66 See ILA Report, *op. cit.* (note 41), pp. 10-19.

67 International Covenant on Civil and Political Rights (Article 2), Convention Against Torture (Articles 4, 5 and 7), American Convention on Human Rights (Article 1), Inter-American Convention on Forced Disappearance of Persons (Article 1), Inter-American Convention to Prevent and Punish Torture (Article 1). See also non-treaty human rights standards such as the Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, 18 December 1992, and the Principles for the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ECOSOC Res. 1989/65, 24 May 1989.

68 For an excellent review of the current state of the law on impunity and the effect of amnesties, see "Argentina: Amicus Curiae Brief on the Incompatibility with International Law of the Full Stop and Due Obedience Laws", presented by the International Commission of Jurists, Amnesty International and Human Rights Watch before the National Chamber for Federal Criminal and Correctional Matters of the Republic of Argentina (June 2001), *International Commission of Jurists Occasional Papers*, 2001, p. 23 [hereinafter ICJ Amicus Brief].

of Action adopted at the 1993 World Conference on Human Rights which called on States "to abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law".[69] The UN Human Rights Committee dealt with the issue as early as 1978 in relation to Chile's amnesty law and has since made similar observations in regard to amnesty laws passed by Lebanon, El Salvador, Haiti, Peru, Uruguay, France, Yemen, Croatia and Argentina.[70] In its General Comment on Article 7 of the International Covenant on Civil and Political Rights prohibiting torture, the Committee stated that "amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible".[71] Non-treaty standards such as the already cited Joinet Principles have also dealt with the issue of amnesties, determining that the perpetrators of serious crimes may not be included in amnesties unless the victims have been able to obtain justice by means of an effective remedy.[72]

In July 1999 the UN Secretary-General affirmed the notion that domestic amnesties for crimes under international law are not legally binding at the international level by instructing his Special Representative to sign the Sierra Leone peace agreement "with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in Article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian

69 See the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 14-25 June 1993, A/CONF.157/24 (Part I), Chapter III, Section II, para. 60.

70 See ICJ Amicus Brief, *op. cit.* (note 68), pp. 30-32 and pp. 36-38.

71 See Human Rights Committee General Comment No. 20 on Article 7, Forty-fourth Session, 1992, para. 15.

72 Joinet Report, *op. cit.* (note 4), Principle 28(a).

law".[73] This understanding was reaffirmed in the Security Council's resolution calling on the Secretary-General to draw up a Statute for the Special Court[74] and a no-amnesty provision was included in the Court's Statute.[75] As already mentioned, differences over how to deal with a domestic amnesty have been a sticking point in the creation of the Khmer Rouge tribunal, the outcome of which is still uncertain.

Given that the obligations of States to repress grave breaches of the 1949 Geneva Conventions and of their Additional Protocol I of 1977 are well known, and that war crimes clearly fall within the designation of serious crimes under international law, there is no doubt that what has been said about amnesties thus far applies to these offences as well. What has sometimes generated controversy is the amnesty provision of Additional Protocol II of 1977 which allows, upon the cessation of hostilities in non-international armed conflict, for a broad amnesty to be granted to "persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained".[76] It should be emphasized that this provision essentially seeks to encourage the release of individuals who might be, or are subject to, criminal or other proceedings under domestic law for the fact of having taken part in hostilities. It should in no way be read as supporting amnesties for war crimes or other international offences committed in internal armed conflict.[77]

Innovative regional jurisprudence on the incompatibility of amnesties with the American Convention on Human Rights

73 Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/1999/836, 30 July 1999, para. 7.

74 UN Doc. S/RES/1315 (2000), preambular para. 5.

75 Statute of the Special Court for Sierra Leone, Article 10, reads: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution".

76 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 6(5).

77 Letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1975 and to the Department of Law at the University of California of 15 April 1997 (referring to CDDH, Official Records, 1977, Vol. IX, p. 319)(on file with the author).

has also been handed down by the Inter-American Court and Commission.[78]

Finally, it should be noted that the carefully crafted edifice of amnesties has started to crumble at the domestic level as well. In a historic ruling rendered in March 2001, Argentine federal judge Gabriel Cavallo declared unconstitutional and null the main provisions of the "Full Stop" and "Due Obedience" laws that had enabled impunity for human rights violations during military rule in that country between 1976 and 1983.[79] His decision was confirmed in November 2001 by the National Chamber for Federal and Criminal Matters of Argentina.[80]

Conclusion

It seems fitting to close this review with the briefest possible mention of two challenges that henceforth should not escape attention. The first is the role of national criminal justice systems and the other is fair trial rights.

If the preceding review failed to focus on the role of domestic courts in the fight against impunity for serious crimes, it did so because there is, unfortunately, not so much to report. The international and third-State mechanisms outlined above came into being precisely because States fail to fulfil what is their primary duty — to bring to justice the perpetrators of serious crimes. While some countries can indeed plead lack of skills and resources, far too often the problem clearly lies elsewhere, in the lack of political will by national authorities to tackle current or past offences. Unless and until that will is created, international mechanisms of one sort or another, both penal and non-penal, will be necessary. The challenge for the global

78 See generally, ICJ Amicus Brief, *op. cit.* (note 68). See also Douglas Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities", *Law and Contemporary Problems*, Vol. 59, School of Law Duke University, No. 4, Autumn 1996, pp. 197-230.

79 See "Argentine Judge Annuls Immunity Laws", The Associated Press, Buenos Aires, 6 March 2001 (on file with the author). For a background to the case see ICJ Amicus Brief, *op. cit.* (note 68), pp. 5-9.

80 See "La Camara Federal Confirma: Las leyes de Punto Final y Obediencia Debida son invalidas e inconstitucionales", *Centro de estudos legales y sociales*, Archivos de HOY, ‹http://www.cels.org.ar/background/archivos/info2001/info_45_20011115.htm›.

movement against impunity is therefore to concentrate more on the local level and to ensure that domestic courts and other bodies are able and willing to perform their tasks in the fight for justice.[81]

Justice, it should not be forgotten, means not only doing good by individual victims or segments of society affected by crime, but also ensuring that the fair trial rights of suspects and accused in criminal proceedings are fully respected. Once again, national criminal justice systems often fail to implement even a modicum of internationally prescribed standards aimed at safeguarding the life, health and dignity of alleged offenders. Justice cannot be done, nor can it be seen to be done, unless persons presumed to have committed international or other crimes are treated with full due process. The challenges ahead for the global movement against impunuty in this context, too, are enormous. The recent resurgence of the debate on the "balance" between State security and human rights after the events of 11 September 2001 is a troubling case in point.

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Résumé

Rendre compte des crimes internationaux de la conjecture à la réalité

par JELENA PEJIC

Les poursuites engagées en 1998-1999 contre Augusto Pinochet au Royaume-Uni étaient bien sûr sans précédent, mais elles n'auraient pas dû surprendre. L'arrestation de Pinochet n'a été qu'une étape très visible dans le processus qui aboutira à l'obligation de rendre compte des crimes internationaux – lequel a débuté avant le cas Pinochet et se poursuit depuis. L'article examine les divers

81 The ICRC's Advisory Service was set up in 1996 to encourage States to ratify international humanitarian law treaties and to fulfil their obligations under those treaties at the national level, including the repression of war crimes. The Advisory Service is attached to the ICRC's Legal Division in Geneva and has a team of legal experts based in each continent. Further information may be obtained on the ICRC's website at ‹http://www.icrc.org› or by E-mail at: advisoryservice.gva@icrc.org

mécanismes internationaux qui constituent aujourd'hui un cadre juridique général contre l'impunité. Il fait une revue des tribunaux pénaux internationaux ad hoc, *des tribunaux internationalisés, de la future Cour pénale internationale et des efforts qui sont déployés pour mettre en œuvre le principe de la juridiction internationale. L'article évoque brièvement « l'effritement de l'édifice » des amnisties internes, un moyen de soustraire à la justice les auteurs de crimes internationaux. Il recense les problèmes et les défis à surmonter pour aller de l'avant et recommande qu'une attention accrue soit consacrée à la manière dont la juridiction pénale nationale peut jouer un rôle utile dans la lutte contre l'impunité.*

Le refus d'obéissance aux ordres manifestement criminels

Pour une procédure accessible aux subordonnés

par
JACQUES VERHAEGEN

Une leçon capitale du procès de Nuremberg

C'est une remarque de l'accusé Speer au procès de Nuremberg (que le juge Jackson a reprise à son compte) qui semble avoir cerné le plus exactement, et dans toute son ampleur, la portée de la question de l'obéissance aux ordres criminels. Elle constituera l'une des leçons capitales de ce procès: «Ce fut alors que l'on vit la signification du principe d'après lequel tout ordre devait être exécuté sans discussion. Les dangers contenus dans ce système étaient devenus évidents, indépendamment des principes d'Hitler lui-même.»

«...Indépendamment des principes d'Hitler lui-même»! Le 4 décembre 1945, Sir Hartley Shawcross, représentant l'accusation pour le Royaume-Uni, en développait l'idée: «Le loyalisme politique, l'obéissance militaire sont des choses excellentes, mais elles n'exigent ni ne justifient la perpétration d'actes manifestement injustifiables. Il arrive un moment où un être humain doit refuser d'obéir à son chef, s'il doit aussi obéir à sa conscience. Même le simple soldat qui sert dans les rangs de l'armée de son pays n'est pas tenu d'obéir à des ordres illégaux.»

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Le principe sera reconnu à Nuremberg, suivant le libellé que nous connaissons : « Le fait d'avoir agi sur l'ordre de son gouvernement ou celui d'un supérieur hiérarchique ne dégage pas la responsabilité de (l'agent) s'il a eu moralement la faculté de choisir. »

Brûlante assurément, pour l'exécutant comme pour l'institution militaire elle-même, la *facultas resistendi* se fonde donc sur la constatation que son contraire – le principe de l'obéissance passive – est apparu, ainsi que Speer l'a rappelé, comme l'un des plus grands pourvoyeurs de crimes de guerre. La réalisation du crime n'est en effet rendue possible et ne peut atteindre une aussi grande échelle que grâce à la coopération des agents d'exécution et à leur stricte soumission à l'autorité. Sans eux, le décideur n'est rien, à telle enseigne que la réalisation du crime trouvera son premier rempart efficace dans la faculté individuelle de s'opposer à l'ordre. Obstacle infiniment plus efficace que l'interdit édicté abstraitement par la loi ou la perspective, très aléatoire pour l'exécutant, d'avoir à comparaître un jour devant un tribunal.

Si le devoir de désobéissance figure désormais dans l'énoncé officiel des principes de Nuremberg et se trouve inscrit aujourd'hui dans beaucoup de manuels militaires, ce serait cependant trop dire qu'il est accepté sans réticence. Dans certains milieux, l'obéissance passive et sans réplique aux ordres du supérieur continue à représenter la condition fondamentale, *sine qua non*, de la discipline et donc de l'action militaire efficace.

On se rappellera la déclaration quelque peu provocante du maréchal Montgomery s'adressant à l'armée britannique en 1946, alors même que se déroulait le procès de Nuremberg : « Si l'essence de la démocratie est la liberté, celle de l'armée est la discipline. Le soldat n'a rien à dire, quelque intelligent qu'il soit (...). Il est du devoir du soldat d'obéir, sans poser de questions, à tous les ordres que lui donne l'armée, c'est-à-dire la Nation. » [1]

Tel étant le préjugé encore solidement ancré dans certains milieux militaires, il pourrait paraître étonnant que la France du

1 Cité par la Défense à l'audience du 27 août 1946, *Procès des grands criminels de guerre devant le Tribunal militaire international de Nuremberg*, Nuremberg, 1949, *Office of chief of counsel*, t. XXII, p. 97.

général De Gaulle se soit dotée, en octobre 1966, d'un Règlement de discipline générale dans les Forces armées consacrant expressément le droit et le devoir, pour les subordonnés, de refuser obéissance à certains ordres. Mais il suffit de se rapporter à l'exposé des motifs dudit règlement pour comprendre les raisons empiriques et, pour tout dire, militaires, qui présidèrent à cette consécration.

Constatant, à la lumière des événements de la dernière guerre, que le principe de l'obéissance passive et inconditionnelle ne pouvait rendre compte, non seulement des impératifs moraux, mais aussi des nécessités mêmes de l'action militaire moderne et de l'évolution de la jeunesse appelée à y participer, les autorités militaires françaises décidaient de mettre l'accent, dans les normes actuelles de la discipline militaire, sur l'extension des responsabilités des subordonnés, celles-ci pouvant aller jusqu'au refus d'exécuter un ordre.

Quoi qu'il en soit, on constatera que, ni en France ni ailleurs, le principe de l'obéissance inconditionnelle du subordonné ne sera plus accepté comme tel, tout au moins là où cette obéissance passive aboutirait à compromettre l'efficacité même de l'action militaire.

Mais qu'en est-il de cette *facultas resistendi* exercée, comme l'ont voulu les procureurs et décidé les juges à Nuremberg, au nom des impératifs du droit humanitaire, là encore où la désobéissance risquerait de compromettre directement ou indirectement le succès d'une opération ?

La criminalité de l'ordre et la prétendue exception des intérêts vitaux de la nation

Le « nouveau droit » né à Nuremberg ne laisse aucun doute quant à la réponse à apporter à la question de l'exception dite du « salut de la nation » : le minimum d'humanité, dont les dispositions du droit des conflits armés sont censées assurer la sauvegarde dans la pire des circonstances, a et doit avoir prévalence sur toutes les nécessités de l'action politique ou militaire[2].

2 Voir notamment Conseil de guerre de Bruxelles, 11 mai 1951 : « Attendu que ni les intérêts de l'État ni même, en temps de guerre, les nécessités de l'État ne peuvent justifier tout, car, au-dessus de l'État, la conscience humaine générale et la

Comme l'occasion nous fut donnée de le rappeler lors de Journées d'études tenues en 1980 à l'Université de Louvain sur les règlements juridiques des conflits de valeurs[3], il importe que tout subordonné qui reçoit un ordre contrevenant au droit humanitaire intransgressible soit bien conscient de la nécessité de lui refuser obéissance. Il importe que cette réaction soit inscrite jusque dans les réflexes de l'agent : quel que soit l'argument d'utilité ou de nécessité invoqué, on ne recourt jamais à la pratique des otages, on n'attaque jamais une population civile paisible, on ne tue jamais un prisonnier réduit à merci, on ne contraint jamais à parler sous la torture...

Or, il n'est nullement certain que dans leur majorité les chefs militaires et les responsables politiques, même au sein de nos États dits démocratiques, aient été davantage que le maréchal Montgomery conscients de la mutation radicale et du caractère proprement révolutionnaire de ce principe introduit dans nos législations.

Comme le déclara Pierre-Henri Teitgen en 1946, « Substituant à la conception du droit à la merci des États celle du droit au-dessus des États, le principe né avec Nuremberg apporte au développement, au progrès, à la consolidation du droit international et, pourrait-on dire, du droit en général, une contribution telle qu'on peut dire que cet arrêt de Nuremberg marquera à coup sûr dans l'histoire une étape décisive » [4].

De ce renversement qu'un philosophe allemand a pu qualifier d'« aurore à peine croyable », il n'est pas certain que le public, même informé, ni que les juristes, même spécialisés, aient facilement ou réellement assimilé toutes les implications.

Témoigne notamment de cette réticence latente, le refus des principaux signataires des Conventions et des Protocoles de

conscience générale du droit placent des exigences que l'Autorité d'aucun État ne peut méconnaître sans briser les lois de l'humanité » et autres décisions citées par nous dans *La protection pénale contre les excès de pouvoir et la résistance légitime à l'autorité*, Bruxelles, Éd. Bruylant, 1969, p. 361, et dans « L'illégalité manifeste et l'exception de la nation en péril », *Journal des Tribunaux*, Bruxelles, 1973, pp. 629 à 634.

3 « L'humainement inacceptable en droit de la justification » in *Licéité en droit positif et Références légales aux valeurs*, Bruxelles, Éd. Bruylant, 1982, pp. 137 à 167.

4 *Revue de droit international et de sciences diplomatiques et politiques*, octobre 1946, p. 165 et suivantes.

Genève d'y inscrire expressément le droit et l'obligation de désobéir aux ordres contrevenant au droit humanitaire, sinon de façon implicite à travers le libellé de l'article 87 du Protocole I. On sait que cette disposition fait un devoir pour tout commandant d'unités et toute personne sous son autorité d'empêcher que soient commis des crimes de guerre et, au besoin, de les réprimer.

Nous en prendrons pour exemple le difficile ralliement de la Belgique au principe de la prévalence des impératifs du droit humanitaire et des limites que cette prévalence impose au principe de l'obéissance hiérarchique.

On sait que le principe de la responsabilité personnelle du subordonné dans l'exécution d'un ordre criminel, inscrit dans la loi belge de 1947 à l'égard des Allemands et de leurs collaborateurs, fut introduit en 1975 dans le nouveau Règlement de discipline des forces armées belges, dont l'article 11, par. 2 dispose: «Les militaires doivent exécuter fidèlement les ordres qui leur sont donnés par leurs supérieurs dans l'intérêt du service. Un ordre ne peut cependant être exécuté si cette exécution peut entraîner manifestement la perpétration d'un crime ou d'un délit.»

Pour le droit belge, il convient de le rappeler, ce n'était point là une nouveauté. Il est remarquable que dès l'adoption du Code pénal de 1867, son article 70 ait rappelé les limites du devoir d'obéissance, sans distinguer le militaire du civil. L'auteur principal de ce code, le professeur J.-J. Haus, s'en expliquait ainsi: «La responsabilité des militaires sous les armes est la même que celle des agents civils. Les uns et les autres sont coupables, lorsqu'ils ont exécuté un ordre dont la criminalité a dû leur apparaître d'une manière évidente.» [5]

Le Code pénal militaire de 1870 n'en décida pas autrement. Dans leur «Commentaire» de ce code paru en 1880, A. Moreau et C. Dejongh le rappellent: «... le supérieur n'a pas le droit d'ordonner à son subordonné de commettre une infraction. Un pareil ordre est illégal, dès lors l'inférieur n'a pas à y obtempérer. Bien plus, s'il obéit, connaissant l'illégalité de l'injonction, il commet un fait que réprouve le droit naturel comme la loi pénale...» [6]

5 J. J. Haus, *Principes généraux du droit pénal belge*, éd. 1879, n° 612 et 613.

6 A. Moreau & C. Dejongh, *Commentaire du Code pénal militaire*, 1880, p. 179.

Le principe de cette responsabilité des exécutants a reçu en Belgique plusieurs applications. C'est ainsi qu'en 1966, le Conseil de guerre de Bruxelles condamna un sergent belge qui, lors d'opérations consécutives à la reprise de Stanleyville (Congo), avait exécuté l'ordre d'un officier supérieur de supprimer une civile. Ainsi s'est exprimé le Conseil de guerre: «L'acte commis constitue non seulement un meurtre aux termes des dispositions des codes congolais et belge, mais aussi une violation flagrante des lois et coutumes de la guerre et des lois de l'humanité (...). L'illégalité de l'ordre n'était pas douteuse et le prévenu devait refuser de l'exécuter.» [7]

Cela ne signifie pas que les termes, même explicites, des lois belges aient suffi à surmonter les réticences.

Beaucoup de juristes et de militaires belges se rappelleront les avatars du Règlement A.2 diffusé en 1975 par l'État-major général, immédiatement après la promulgation de la loi portant le nouveau Règlement de discipline. Dans ce texte, l'État-major général soutenait que l'article 11 de la loi concernant le devoir de désobéissance n'avait pas à être appliqué lorsque se trouvait en jeu un intérêt vital de la nation.

Ainsi le formulait le Règlement: «En cas d'opération armée, le supérieur est justifié (de l'ordre pouvant entraîner manifestement la perpétration d'un crime ou d'un délit) s'il est établi que, dans les circonstances dans lesquelles il s'est trouvé, il ne pouvait agir autrement pour sauvegarder un intérêt vital pour la nation.»

Ce n'est qu'au terme de sept années de protestations, d'interventions et de démarches diverses des facultés de droit, auxquelles s'associèrent de hauts magistrats, des parlementaires et même un professeur de droit de l'École royale militaire, que fut finalement amendé le texte de 1975 – «honte de notre arsenal juridique» comme il fut dit à l'époque – pour le rendre compatible avec les lois belges et les engagements internationaux de la Belgique. En son article 5, la loi belge du 16 juin 1993 le dira de façon plus explicite encore: «Par. 1 – Aucun

7 Voir J. Verhaegen, «La culpabilité des exécutants d'ordres illégaux», *Revue juridique du Congo*, 1970, pp. 231 à 239; «L'ordre illégal et son exécutant devant les juridictions pénales», *Journal des Tribunaux*, Bruxelles, 1986, pp. 449 à 454.

intérêt, aucune nécessité d'ordre politique, militaire ou national, ne peut justifier, même à titre de représailles, les infractions prévues par les articles... ; par. 2 – Le fait que l'accusé a agi sur l'ordre de son gouvernement ou d'un supérieur hiérarchique ne dégage pas sa responsabilité si, dans les circonstances existantes, l'ordre pouvait manifestement entraîner la perpétration d'une infraction grave aux conventions... »

Si la prévalence du droit humanitaire sur les nécessités militaires a pu, en fin de compte, trouver sa formulation expresse en droit pénal belge, il s'en faut que les autres législations et les autres règlements militaires aient témoigné de la même évolution[8] et cette ambiguïté ne restera pas, on le devine, sans retentir sur l'interopérabilité de forces nationales différentes opérant au sein d'un même corps.

Lors d'un colloque tenu en 1999 à l'Université de Louvain et qui aborda précisément le problème de l'interopérabilité des forces armées, il fut rappelé avec insistance qu'aucune règle d'engagement, aucun ordre de l'autorité internationale ne pouvait contrevenir à la législation nationale en matière de droit des conflits armés et en particulier à l'article 5 par. 1 de la loi belge du 16 juin 1993[9].

Mais que soit finalement levée, par toutes les parties, la difficulté primordiale née de l'opposition entre nécessités militaires et impératifs irréductibles du droit des conflits armés, ne supprime pas pour autant d'autres difficultés majeures.

D'autres problèmes pourront en effet surgir et, dès l'abord, la difficulté pour le militaire de reconnaître le caractère « manifestement criminel » de l'ordre, difficulté assurément non négligeable dans un domaine essentiellement caractérisé par l'activité violente.

8 De cette carence, l'article 31.1.c du Statut de la Cour pénale internationale offre sans doute l'exemple le plus affligeant. Sur le sujet, voir J. Verhaegen, « L'article 31.1.c du Statut de la Cour pénale internationale : un autre négationnisme ? » in « *Actualité du droit international humanitaire* », dossier n° 6 de la *Revue de Droit pénal et de criminologie*, Bruxelles 2001. Voir également « L'article 31.1.c du Statut de la Cour pénale internationale – Travaux de l'atelier organisé par la Commission consultative de droit international humanitaire de la Croix-Rouge de Belgique », *Revue belge de droit international*, 2000/2.

9 Question que nous avons abordée dans « L'interopérabilité des forces armées et ses préalables légaux », in *Dignité humaine et hiérarchie des valeurs*, Bruxelles, Éd. Bruylant-Academia, 1999, pp. 101 à 131.

L'exécutant n'a pas reconnu la criminalité de l'ordre

La difficulté de reconnaissance pourra elle-même tenir à deux types de facteurs, suivant que l'exécutant a ignoré ou mal interprété la règle applicable, ou mal interprété la situation de fait à laquelle la règle est censée s'appliquer.

Il convient en effet d'envisager le cas où la règle que l'exécutant est appelé à respecter soit elle-même peu claire ou difficilement déterminable, sans parler du cas où l'interdit qu'elle contient n'aurait même pas été enseigné[10].

Il importera tout autant d'envisager l'hypothèse où la règle ayant été bien enseignée et bien assimilée, le caractère complexe ou incertain de la situation de fait ne permettrait pas à l'exécutant d'apprécier si celle-ci tombe effectivement sous le coup de la règle : le doute peut en effet s'installer quant à l'applicabilité d'une règle claire à une situation qui ne l'est pas.

On reconnaîtra par exemple que si l'interdit frappant la prise d'otages ne donne généralement lieu à aucune difficulté d'interprétation ou d'application, en revanche des ordres portant sur « la destruction de biens non justifiée par des nécessités militaires et exécutée sur une grande échelle » ou « l'attaque de monuments historiques en dehors des conditions énumérées » donnent à l'exécutant peu de possibilité d'apprécier si, en l'espèce, l'ordre répond effectivement à la définition du crime.

Et l'on ne niera pas que la difficulté pour le subordonné de reconnaître la criminalité de l'ordre risque de s'amplifier encore lorsque l'exécution de celui-ci peut se prévaloir de la caution du donneur d'ordres, présumé voir les choses de plus loin et conformément aux lois de son pays.

10 De l'ignorance de la règle applicable ou de son interprétation erronée, on citera un exemple très concret : l'inacceptable pratique des otages *légitimée* jusqu'au cours du dernier conflit mondial par les manuels militaires des belligérants.

L'exécutant ne dispose pas de ses facultés de contrôle intactes

Encore que la contravention à la loi ne ferait aucun doute (par exemple, l'ordre de supprimer des prisonniers encombrants), la parfaite conscience par le subordonné de la flagrante criminalité de l'ordre ne met pas encore fin au débat si l'on considère les contraintes qui, sous des formes très diverses, président à l'action du combattant et à l'exécution des ordres qu'il reçoit en opération.

Des menaces, plus ou moins diffuses, peuvent tenir tant à la situation hiérarchique du subordonné qu'au climat propre à toute opération armée.

Les psychologues militaires ont ainsi pu dénombrer bon nombre de tels facteurs. Qu'il suffise de citer les contraintes liées au type de discipline inculqué au militaire ou aux conditions stressantes du combat lui-même : peur, fatigue, colère, mimétisme... facteurs qui tous auront pour effet non seulement de réduire le discernement de l'agent, mais encore d'annihiler sa capacité de contrôler ses actes.

La question se posera alors : de telles conditions, propres aux opérations armées, toutes susceptibles de peser sur les facultés de discernement et de contrôle, ne vont-elles pas nécessairement influer sur la réponse à apporter à la question cruciale que nous examinons, celle de la responsabilité personnelle du subordonné dans l'exécution d'ordres illégaux ?

Solutions inadéquates apportées au problème de l'exécutant d'un ordre criminel

Face au problème ainsi posé, plusieurs attitudes sont possibles dont certaines, bien que classiques, apparaîtront d'emblée inacceptables.

Les « procès-catharsis »

La première consiste, pour les responsables politiques, à afficher *a posteriori* leur considération pour le droit humanitaire en faisant poursuivre et condamner quelque exécutant sans même se soucier, le cas échéant, de l'ignorance dans laquelle celui-ci aurait versé ou des contraintes qui auraient pesé sur son comportement.

Une telle attitude peut non seulement tenter les responsables politiques mais aussi les militaires dès lors qu'il s'agit de blanchir le corps, de rétablir sa respectabilité en se séparant du membre indigne. Le risque reste grand ici de voir se dérouler ce que l'on a pu appeler les « procès-catharsis » dont feront généralement les frais des exécutants subalternes[11].

Dans son livre *Lieutenant en Algérie*, consacré au temps qu'il passa dans les commandos du général de Bollardière (un chef admiré qui d'emblée rejeta la pratique des interrogatoires poussés), J.-J. Servan-Schreiber, peu suspect par conséquent de complaisance pour le comportement des tortionnaires, eut des appréciations très dures pour ces condamnations de circonstance : « En sanctionnant un sergent ou un capitaine, on se donne à soi-même l'impression d'agir – mais au prix de quelle hypocrisie ? – Vous mettez des hommes dans un système qui les conduit, mécaniquement, à des réactions criminelles. Vous constatez ces réactions. Faut-il punir ? En principe, bien sûr. Mais après ? D'autres hommes seront menés aussi inévitablement aux mêmes gestes, en pire : avec, en plus, le sentiment de l'injustice et beaucoup d'amertume (...). Ceux qui se mêlent, à quelque degré que ce soit, de prendre en charge leurs concitoyens – comme sous-lieutenant ou comme président du Conseil – sont responsables des situations qu'ils créent. Condamner les victimes de ces situations, comme si elles en étaient responsables, c'est, bien sûr, ajouter la lâcheté à l'incompétence... » [12]

Acquittements ambigus

Certes, on dira que les juges peuvent se montrer plus équitables et tenir meilleur compte, là où elles se rencontrent, des erreurs et contraintes qui ont pu effectivement affecter le comportement des inculpés que, dès lors, ils acquitteront. La légalité de pareille solution ne pourra se discuter. Encore faut-il, pour que le jugement conserve son rôle éducatif et ne soit pas contre-productif, que sa motivation reste

11 J. Verhaegen, « Savoir où porter le fer (à propos de la condamnation de six para-commandos) », *Journal des Tribunaux*, Bruxelles, 1973, pp. 137 à 141.

12 Cité notamment dans « L'ordre illégal et son exécutant devant les juridictions pénales », *op. cit.*, p. 454.

particulièrement transparente et évite toute confusion possible entre l'exonération de l'auteur du crime et la justification de son acte[13]. Dans le *leading case* « Muller et consorts », dont eut à connaître la Cour de cassation de Belgique, le procureur général sut remarquablement éviter cette confusion en disant que si les conditions dans lesquelles s'était passée l'exécution de certains otages pouvaient et devaient valoir aux exécutants le bénéfice de leur erreur, cet acquittement ne supprimait nullement le caractère objectivement injustifiable et criminel de l'ordre lui-même, lequel apparaissait et devait clairement apparaître à travers le jugement, comme « la contradiction même des lois de l'humanité ».

Une immunité pénale généralisée...

Non moins pernicieuse apparaît une troisième attitude qui consiste à ne plus tenir compte du nouveau droit en décidant d'office que les contraintes pesant sur le militaire en opérations sont telles que l'exécutant ne saurait, sans injustice, être tenu pour responsable de l'exécution d'un ordre criminel, le subordonné méritant *a priori* et dans tous les cas de bénéficier d'une absolution anticipée et généralisée.

Cette attitude, qui pratiquement rétablit au profit des militaires l'immunité dénoncée à Nuremberg, a fait l'objet de réflexions intéressantes au XIVe Congrès international de droit militaire et de droit de la guerre tenu à Athènes en mai 1997. Y ont été notamment stigmatisés les « classements sans suite » auxquels donnent lieu certaines affaires portées à la connaissance des autorités disciplinaires ou

13 Comme le rappelle la Commission de réforme du droit du Canada, il importe de distinguer parmi les causes d'exonération les justifications et les excuses : « L'excuse permet à l'accusé de s'exonérer. Elle est fondée sur les principes qui établissent ce qui ne peut, en toute équité, être exigé d'une personne ordinaire ; on ne peut traiter une personne qui agit le couteau sur la gorge comme si elle avait été libre de ses actes. Ainsi l'accusé qui bénéficie d'une excuse n'est pas coupable de l'acte illégal qu'il a commis. La justification enlève à un acte le caractère illégal qu'il aurait autrement. Cela revient à dire que lorsqu'une personne agit avec une justification elle ne peut être condamnée car, dans les circonstances, son acte est légitime. Ainsi, une personne qui agit dans l'intérêt de l'application de la loi (qui effectue une arrestation légale, par exemple) ne commet pas d'infraction. Au contraire, elle a eu raison d'agir de la sorte car son acte est justifié. » (« Responsabilité et moyens de défense », *document de travail n° 29*.)

judiciaires, les grâces accordées par les plus hautes autorités politiques aux auteurs de crimes après leur condamnation, les amnisties dont traditionnellement bénéficient dans leurs pays respectifs les criminels de guerre[14].

Une telle attitude que trop de politiques essayeront de défendre par des considérations de justice et de nécessaire « réconciliation », mais en fait, et le plus souvent, pour ne pas heurter de front la classe militaire, annihile purement et simplement la leçon de Nuremberg et les acquis qu'elle représente pour les victimes de la guerre. Elle ne rend pas davantage compte de la réalité des faits dans la mesure où elle amplifie à l'excès les arguments de l'ignorance et des contraintes.

Une autre voie ?

Dépassant ces trois réponses inacceptables au problème de l'ordre criminel, il importe de se pencher sur les autres moyens susceptibles de satisfaire à la fois l'intérêt bien compris du militaire et celui de ses victimes potentielles.

Tarir les sources de l'ordre criminel

La démarche consiste dans un premier temps à tarir, autant que possible par des mesures préventives appropriées, les sources habituelles des ordres criminels.

Pareilles mesures préventives peuvent être de trois ordres. Il s'agit tout d'abord d'une information générale et préalable des militaires et du public quant aux limites intransgressibles imposées par le *jus in bello*, quand bien même l'État concerné serait constitué en état de légitime défense...

Peut aussi y aider la création de ce qu'on a appelé les « délits-obstacles », autrement dit, l'incrimination dès le temps de paix de comportements non criminels par eux-mêmes mais susceptibles de favoriser l'accomplissement de crimes en période de crise.

14 Nous avons abordé la question *in* « Entraves juridiques à la poursuite des infractions au droit humanitaire », *RICR*, n° 768, novembre-décembre 1987, pp. 634 à 647.

La loi belge de 1993 a ainsi heureusement innové en incriminant l'ordre criminel, même non suivi d'effet, la préparation d'une activité criminelle ou la passivité du supérieur qui, apprenant l'existence d'une entreprise criminelle, ne ferait rien pour l'empêcher ou pour la porter à la connaissance de l'autorité qualifiée.

Cela implique enfin l'organisation de recours, tant auprès de conseillers juridiques spécialement formés à cette fin que devant l'autorité supérieure dûment informée, contre tout ordre ou instruction dont il existerait des raisons suffisantes de suspecter le caractère criminel du fait, notamment, de l'aide qu'il fournirait au crime.

Il peut être utile de rappeler que de telles mesures préventives, envisagées lors de la préparation de la loi belge de 1993, ont reçu l'appui sans réserve de tous les militaires consultés, particulièrement soucieux de transparence en la circonstance. Cela n'a rien de surprenant : trop de commandants d'unités ont trop souvent été les victimes de la carence de hauts responsables politiques peu pressés de leur indiquer en toute clarté et sans équivoque ce qui, dans le dilemme opposant intérêt militaire et impératifs humanitaires, doit nécessairement l'emporter ! [15]

Si les mesures préventives constituent, certes, un indispensable arrière-plan du processus visant à tarir les sources de l'ordre criminel, elles ne règlent pas encore le cas des ordres manifestement criminels qui, en dépit des filtres prévus pour en empêcher la transmission, parviendraient malgré tout jusqu'aux échelons subalternes, laissant l'agent d'exécution tragiquement seul devant la redoutable question d'avoir à l'exécuter ou à le refuser.

Pour une procédure de refus individuel

Le problème paraît assurément crucial. Aussi ne se pose-t-il pas seulement dans les cas ici examinés mais dans toute situation de crise.

15 En constitue un exemple particulièrement significatif le flou avec lequel les manuels militaires traitent généralement du sort à réserver aux prisonniers « encombrants ». Voir notamment notre rapport introductif au Symposium de la Société internationale de Droit militaire et de Droit de la guerre (Bruxelles, 27-28 novembre 1986), *R.D.M.D.G.*, T. XXVII / 2, 1988, p. 232.

Ce type de problème serait-il, comme il est parfois affirmé, irréductible à toute loi, à toute réglementation même élémentaire ?

Que l'on cerne bien la question ici posée : il s'agit de prévoir dans un règlement militaire les mesures permettant aux subordonnés d'exercer à bon escient, et sans avoir à déployer un courage exceptionnel, leur devoir de refuser obéissance à des ordres, peut-être militairement utiles, mais manifestement criminels.

Les participants au XIVe Congrès de droit de la guerre (Athènes, 1997) voudront bien se rappeler la recommandation dont il nous fut donné de proposer l'adoption : « Les règlements de discipline militaire devraient prévoir une procédure permettant aux subordonnés d'exercer, sans dommage pour eux et dans le respect de la discipline, leur droit et leur devoir de ne pas obéir aux ordres dont l'exécution entraînerait manifestement la réalisation d'un crime de guerre. »

Ladite proposition était justifiée de la sorte :

> « Le principe de Nuremberg (visant la désobéissance due aux ordres criminels) qui figure aujourd'hui dans les législations nationales est certes irréprochable mais il risque de se réduire à un trompe-l'œil et à n'exercer aucune action préventive véritable si le contexte dans lequel agissent les subordonnés ne leur laisse pratiquement aucune faculté de choisir, sauf à escompter de leur part une attitude pleine de risques, voire héroïque, devant l'ordre donné... Lorsqu'en pareilles circonstances, le tribunal acquitte l'exécutant d'un ordre criminel, tout en prenant soin de réaffirmer le caractère inacceptable de l'ordre, ce tribunal rend certainement un « bon jugement » : il a apprécié correctement tant le fait objectivement criminel que l'agent subjectivement irresponsable. Mais il est difficile de dire que ce jugement juridiquement correct ait fait avancer d'un pas la solution du problème. Un simple effort d'imagination devrait conduire à la mise en place d'une procédure suffisamment efficace permettant aux subordonnés d'exercer leur droit et leur devoir en pareille circonstance... »

Adoptée au terme du Congrès, la «recommandation» fut ultérieurement reprise par le Comité scientifique du Séminaire belge de droit militaire et de droit de la guerre lequel décida d'y donner suite en mettant à l'étude l'introduction de pareille procédure en droit militaire belge et en chargeant un groupe de travail de présenter un avant-projet en ce sens[16].

Soumis à la discussion préalable d'officiers supérieurs de toutes armes, tous professeurs militaires à l'Institut royal supérieur de défense, le texte de l'avant-projet fut approuvé et encore revu par le Séminaire de droit militaire et de droit de la guerre lequel, en sa séance plénière du 22 juin 2001, en adopta la formulation définitive avant sa transmission au ministre compétent[17].

En substance, il est apparu aux promoteurs du projet qu'une procédure efficace, capable de préserver tout à la fois la nécessaire discipline militaire et le respect de la loi, sans pour autant réclamer du subordonné un effort disproportionné, pouvait prendre la forme d'une simple question adressée au donneur d'ordre quant à la légalité de cet ordre, non point parce que le subordonné douterait de sa criminalité, mais parce que pareille procédure doit permettre

16 V. ASBL Séminaire de droit militaire et de droit de la guerre, Session 1998-1999, Fascicule «*Le refus d'obéissance aux ordres manifestement criminels*», pp. 10 à 13.

17 Il est inséré sous le par. 2 de l'article 11 de la loi du 14 janvier 1975 portant le Règlement de discipline des Forces armées, un par. 3 libellé comme suit.

Le subordonné qui reçoit un ordre tel que visé au paragraphe précédent fera valoir son objection en demandant, en application du présent Règlement de discipline, confirmation de la légalité de cet ordre au supérieur qui le lui donne.

Une telle demande ne pourra en aucun cas être considérée comme un manquement à la discipline.

Le supérieur qui en est saisi est tenu d'y répondre après s'être assuré, le cas échéant, de la légalité de l'ordre donné.

Le supérieur qui omet de répondre à une demande de confirmation de la légalité de l'ordre est passible de sanction disciplinaire du chef de transgression de l'article 9, 2° du présent Règlement, sans préjudice de l'application des dispositions pénales relatives à la participation à un crime ou à un délit.

Ni l'impossibilité de demander ou d'obtenir la confirmation de la légalité de l'ordre ni la confirmation de cette légalité par un supérieur ne dispensent le subordonné de son devoir de ne pas exécuter un ordre susceptible selon lui d'entraîner manifestement la perpétration d'un crime ou d'un délit.

Dans tous les cas, le subordonné qui décide de ne pas obéir à un ordre dont l'exécution lui paraît pouvoir entraîner manifestement la perpétration d'un crime ou d'un délit s'expose, si son appréciation s'avère erronée, aux peines prévues par le Code pénal militaire du chef d'insubordination.

d'attirer impunément l'attention des chefs concernés sur le crime ordonné.

De l'obligation pour le supérieur de répondre à la question, il est attendu qu'elle puisse déjà le dissuader de persévérer dans une voie susceptible de le conduire au crime.

Quant au subordonné, cette procédure particulière devrait lui permettre de lever à son avantage les difficultés psychologiques que présente – même dans un État démocratique – toute contestation d'un ordre militaire, fût-il manifestement criminel.

●

Abstract

Refusal to obey orders of an obviously criminal nature
Providing for a procedure available to subordinates

by

JACQUES VERHAEGEN

The XIVth Congress of the International Society of Military Law and the Law of War, held in Athens in May 1997, adopted the following recommendation : "Disciplinary regulations should provide for a procedure allowing subordinates to exercise, with no prejudice to themselves and without breaching discipline, their right and duty not to obey orders whose execution would obviously lead to the commission of a war crime."

In the year 2000, the Belgian Seminar of Military Law and the Law of War set up a working group with the task of preparing a draft text that would give effect to this recommendation and could be incorporated in the Belgian army's disciplinary regulations.

Victimes et témoins de crimes internationaux : du droit à une protection au droit à la parole

par
LUC WALLEYN

Les crimes de guerre et les crimes contre l'humanité, en particulier le génocide, peuvent engendrer un nombre très élevé de victimes. Lors d'une instruction relative à de tels crimes, des victimes survivantes seront interrogées à titre de témoins. Bien que toutes les victimes ne soient pas des témoins et que d'autres que des victimes comparaissent comme témoins à la barre, les deux groupes ont pour caractéristique commune d'être un groupe vulnérable, qui mérite une protection particulière, tant lors de l'instruction que dans le cadre d'une éventuelle procédure pénale. Quand le conflit armé est toujours en cours, et que les auteurs des crimes de guerre continuent à occuper des positions de pouvoir, les risques d'intimidation ou de vengeance sont réels, à l'égard non seulement de ceux qui sont directement concernés, mais aussi des membres de leur famille éventuelle.

Depuis quelques années, les victimes s'émancipent. Avec le soutien d'organisations de défense des droits de l'homme, elles ne se contentent plus d'un rôle passif de « personnes protégées », mais revendiquent le droit d'être entendues comme partie au procès.

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Progressivement, elles acquièrent un droit à la parole devant les juridictions pénales internationales, et même les témoins deviennent des sujets de droit.

La position des victimes de crimes internationaux devant les juridictions pénales internationales

L'État comme représentant de «ses» victimes?

Traditionnellement, le droit international est un droit qui règle la relation entre les États. Il en est ainsi également pour le droit des conflits armés. Pendant des siècles, le préjudice occasionné aux civils pendant un conflit était, dans le meilleur des cas, compensé par le versement d'indemnités de guerre au gouvernement de leur pays, l'État étant supposé représenter ses ressortissants. C'était encore le cas après la Seconde Guerre mondiale. La République fédérale d'Allemagne a créé un précédent historique en 1949, en promulguant des mesures visant à payer des indemnités individuelles à certains étrangers victimes de la terreur nazie[1].

Malgré les nombreux conflits de la seconde moitié du XXe siècle, il faudra attendre 1991 pour que soit à nouveau instauré un système d'indemnisation des victimes de la guerre par une partie fautive. Après la guerre du Golfe, le Conseil de sécurité a créé une commission chargée d'examiner des demandes trouvant leur origine dans l'occupation du Koweït et de décider du montant des indemnisations[2]. La Commission d'indemnisation traite des dossiers introduits par l'intermédiaire des États[3].

Les traités de droit international humanitaire, notamment les quatre Conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre et leurs deux Protocoles additionnels du 8 juin 1977, prévoient qu'il y a lieu de sanctionner pénalement ceux qui en violent les prescriptions, mais ne prévoient pas de droit à l'indemnisation pour les victimes. Ils ne connaissent pas non plus le droit

1 Récemment, la République fédérale a créé un nouveau fonds pour des travailleurs forcés, suivis en cela par l'Autriche.

2 S/Rés. 687 (1991). Voir site Web ‹ www.un.org.ch/uncc ›.

3 Le travail de cette commission est sujet à critique : A. Gresh, « L'Irak payera – Enquête sur une commission occulte », *Le Monde diplomatique*, octobre 2000.

des victimes de provoquer des poursuites judiciaires contre les auteurs de crimes de guerre, d'intervenir dans la procédure relative à la question de la culpabilité et d'obtenir réparation.

Ce sont les conventions relatives aux droits de l'homme, et l'évolution de la pensée en matière de droits de l'homme en général, qui ont progressivement fait pénétrer dans le droit humanitaire l'idée que les victimes ont un droit individuel à l'indemnisation de leur préjudice. Ainsi, le Pacte international relatif aux droits civils et politiques du 19 décembre 1966, la Convention européenne des droits de l'homme du 4 novembre 1950, et d'autres conventions régionales reconnaissent le droit de plainte et d'indemnisation aux victimes dont les droits fondamentaux ont été violés[4]. C'est aussi le cas pour des conventions plus spécifiques, telles que la Convention des Nations Unies contre la torture[5]. Par cette dernière convention, les Nations Unies ont également institué un fonds pour les victimes de tortures.

Un nouveau pas vers la reconnaissance internationale des droits des victimes résulte de la *Déclaration des principes fondamentaux de justice relatifs aux victimes de la criminalité et aux victimes d'abus de pouvoir*, adoptée par l'Assemblée générale des Nations Unies le 29 novembre 1985[6]. Cette déclaration donne un aperçu général des droits des victimes : droit de plainte, droit à la dignité et à la réhabilitation, restitution de biens et indemnisation, assistance médicale, psychologique et sociale.

Quand, en 1993, a été créé le premier tribunal international pénal depuis Nuremberg, les victimes ont été quelque peu oubliées. Le Tribunal pénal international pour l'ex-Yougoslavie (TPIY)[7], comme plus tard le Tribunal pénal international pour le

4 Pour une étude détaillée, voir Naomi Roht-Arriaza, « Sources in international treaties of an obligation to investigate, prosecute, and provide redress », *Impunity and Human Rights in International Law*, Oxford University Press, 1995, pp. 24-38. Voir aussi Philippe Frumer, « La réparation des atteintes aux droits de l'homme internationalement protégés – quelques données comparatives », *Revue trimestrielle des droits de l'homme*, 1996, p. 539.

5 Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, 10 décembre 1984.

6 A/Rés. 40/34 (1985).

7 Tribunal pénal international pour l'ex-Yougoslavie (TPIY) créé par S/Rés. 808 (1993) et 827 (1993), avec siège à La Haye.

Rwanda (TPIR)[8], a élaboré des règlements de procédure entièrement basés sur le modèle anglo-saxon qui ne prévoit pour les victimes que des mesures protectrices, et particulièrement en tant que témoins[9].

Un tournant en faveur des victimes interviendra à l'occasion de l'adoption, à Rome, en 1998, du Statut de la Cour pénale internationale (CPI)[10] et ce sous la forte pression d'organisations internationales non gouvernementales. Rassemblées en une coalition, elles ont effectué sur ce point un travail de *lobbying* très important, qui a été poursuivi lors de l'élaboration du Règlement de procédure et de preuves adopté par la Commission préparatoire de la Cour pénale internationale le 12 juillet 2000[11].

Qui est victime en droit international?

Pour ce qui concerne la définition de «victime», une contribution importante a été livrée par la Déclaration de l'Assemblée générale de 1985, dont les articles 1 et 2 définissent ainsi les victimes:

> «1. On entend par «victimes», des personnes qui, individuellement ou collectivement ont subi un préjudice, notamment une atteinte à leur intégrité physique ou mentale, une souffrance morale, une perte matérielle, ou une atteinte grave à leurs droits fondamentaux, en raison d'actes ou d'omissions qui enfreignent les lois pénales [...].
>
> «2. Une personne peut être considérée comme une «victime» [...] que l'auteur soit ou non identifié, arrêté, poursuivi ou déclaré coupable, et quels que soient ses liens de parenté avec la victime. Le terme «victime» inclut aussi, le cas échéant, la famille proche ou les personnes qui ont subi un préjudice en intervenant pour venir en aide aux victimes en détresse ou pour empêcher la victimisation.»

8 Tribunal pénal international pour le Rwanda (TPIR) créé par S/Rés. 955 (1994), avec siège à Arusha.

9 Règlement de procédure du TPIY a été adopté le 11 février 1994 et a été modifié à plusieurs reprises.

10 Statut de Rome de la Cour pénale internationale, 17 juillet 1998, signé par 139 États et ratifié par 43 (état 1er novembre 2001), alors que 60 ratifications sont nécessaires pour son entrée en vigueur.

11 Doc. ONU PCNICC/2000/INF/add. 1 (Projet de Règlement de la CPI). Le texte doit être approuvé par l'Assemblée des États parties.

L'important dans cette définition est le fait qu'elle couvre tant les victimes directes que les ayants droit et les membres de la famille, et même les personnes qui ont subi un préjudice en portant assistance aux victimes. Rien n'indique toutefois que cette définition vise également des personnes morales. Tel est bien le cas de la résolution 687/91 du Conseil de sécurité qui prévoit que:

> «L'Iraq [...] est responsable, en vertu du droit international, de toute perte, de tout dommage – y compris les atteintes à l'environnement et la destruction des ressources naturelles – et de tous autres préjudices directs subis par des États étrangers et des personnes physiques et sociétés étrangères du fait de son invasion et de son occupation illicites du Koweït.»[12]

La Commission d'indemnisation pour l'occupation du Koweït, créée en exécution de cette résolution, utilise une définition très large du terme «victime». Ainsi, entrent en ligne de compte, pour l'obtention d'une indemnisation, les pertes commerciales indirectes subies par des sociétés étrangères et les sommes consacrées à l'assistance aux réfugiés. Une définition trop large ouvre la voie aux abus. Des sommes considérables auraient été versées à des sociétés israéliennes, y compris des vendeurs de fleurs et des exploitants de cinéma, pour les pertes commerciales subies à cause de la situation de guerre, et certains pays auraient même tenté de soumettre des notes pour l'effort de guerre[13].

À première vue, rien ne justifierait d'accepter des critères moins larges pour indemniser le préjudice résultant d'une violation du droit des conflits armées (*jus in bello*) que pour indemniser celui résultant d'une violation de la Charte des Nations Unies (*jus ad bellum*). Pourtant, les statuts et règlements de procédure des deux Tribunaux *ad hoc*, qui ont été créés quelques années plus tard, utilisent toujours une définition très étroite, limitée à «toute personne physique à l'égard de laquelle aurait été commise une infraction relevant de la compétence du tribunal»[14].

12 S/Rés. 687 (1991), par. 16.

13 Alain Gresh. *op. cit.* (note 3), p. 17.

14 Règlement de procédure du TPIY, règle 2 (A), et Règlement de procédure du TPIR, règle 2 (A).

Une définition plus large a été élaborée par le professeur van Boven dans un rapport soumis aux Nations Unies intitulé *Principes fondamentaux et directives concernant le droit à la réparation des victimes de violations des droits de l'homme et des libertés fondamentales*[15], qui inclut notamment la famille.

Le Statut de la Cour pénale internationale ne définit pas le terme de victime. Un séminaire international sur les droits des victimes, tenu à Paris en avril 1999, a proposé, en vue de l'élaboration du règlement de procédure, une définition proche de celle fournie par van Boven :

> « 1. (...) toute personne ou groupe de personnes qui, directement ou indirectement, individuellement ou collectivement, a subi un préjudice à raison de crimes relevant de la compétence de la Cour. Le terme « préjudice » comprend toute atteinte physique ou mentale, toute souffrance morale, tout dommage matériel ou atteinte substantielle aux droits fondamentaux. Le cas échéant, des organisations ou des institutions qui ont pâti directement du crime peuvent aussi être des victimes. »[16]

Un compromis a été trouvé dans le Règlement de procédure et de preuve de la future Cour (règle 85) :

> « a) Le terme « victime » s'entend de toute personne physique qui a subi un préjudice du fait de la commission d'un crime relevant de la compétence de la Cour ; b) Le terme « victime » peut aussi s'entendre de toute organisation ou institution dont un bien consacré à la religion, à l'enseignement, aux arts, aux sciences ou à la charité, un monument historique, un hôpital ou quelque autre lieu ou objet utilisé à des fins humanitaires a subi un dommage direct. »[17]

15 Doc. ONU E/CN.4/1997/104 du 16 janvier 1997. T. van Boven avait été désigné comme expert indépendant par le Conseil économique et social. Ce rapport inclut la troisième version des « Principes », la première datant de 1993 (E/CN.4/Sub 2/1993/8). Les travaux ont été poursuivis par Cherif Bassiouni. Voir son rapport final E/CN.4/2000/62.

16 Séminaire international sur l'accès des victimes à la Cour pénale internationale, Rapport des ateliers, Paris, 1999.

17 Projet de Règlement de la CPI, règle 85.

Contrairement à ce qui est actuellement prévu dans les statuts des Tribunaux *ad hoc*, les membres de la famille et les ayants droit pourront à l'avenir être reconnus comme victimes, sans qu'il y ait une extension illimitée vers un préjudice indirect. L'énumération des organisations et des institutions dont le préjudice peut donner lieu à une indemnisation rappelle les dispositions des Protocoles additionnels aux Conventions de Genève qui concernent la protection de biens culturels et de biens destinés au culte[18].

Victimes et saisine du tribunal

En ce qui concerne les Tribunaux *ad hoc*, seul le procureur est compétent pour saisir le tribunal et il n'est pas prévu que les victimes puissent y jouer un rôle quelconque. En revanche, lors des négociations relatives au Statut de la CPI, le travail de *lobbying* des organisations de victimes et des droits de l'homme a reçu le soutien de la majorité des pays à tradition juridique continentale, ainsi que du groupe des pays *like minded*. Cela a finalement abouti à un statut offrant aux victimes une série de possibilités, qui ont encore été élargies par le Règlement de procédure et de preuve.

L'article 15 du Statut de Rome prévoit explicitement que le procureur de la future cour internationale vérifie le sérieux des informations qu'il reçoit et collabore notamment avec des organisations non gouvernementales. Il est prévu que les victimes pourront se faire représenter dans le cadre d'une procédure préliminaire[19]. Cela n'est pas encore un droit de saisine et on ne peut pas parler de « constitution de partie civile ». Néanmoins, il s'agit d'une vraie révolution par rapport à la tradition de *common law*, qui détermine la procédure des Tribunaux *ad hoc*.

Le Statut prévoit également qu'en cas de contestation sur la compétence de la Cour ou l'admissibilité des poursuites, possibilité soit donnée aux victimes d'intervenir dans les débats[20]. Le projet de

18 Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), du 8 juin 1977, art. 53, et Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II), du 8 juin 1977, art. 16.

19 Statut de Rome, art. 15 (2).

20 *Ibid.*, art. 19 (3).

Règlement de procédure et de preuve introduit le principe que le procureur doit avertir les victimes ou leur conseil éventuel dès qu'il décide d'ouvrir une instruction. Il peut le faire d'une façon collective via les organisations de victimes et faire appel à la Division d'aide aux victimes et aux témoins de la CPI. Les victimes ainsi averties peuvent se faire représenter dans la procédure devant la Chambre préliminaire et y faire valoir leur point de vue, sans limite quant au fond. La décision de la Chambre préliminaire, qui est sans appel, leur est communiquée[21]. Tel est le cas également pour toute décision du procureur de ne pas poursuivre[22]. Contre une telle décision, seul un État ou le Conseil de sécurité peuvent introduire un recours auprès de la Chambre préliminaire, qui peut également revoir d'office la décision du procureur.

L'article 107 du Règlement de procédure et de preuve prévoit que dans les deux situations, la Chambre peut inviter les victimes à faire connaître leur point de vue. Cela pourrait conduire, dans la pratique, à une procédure qui ressemble fort à celle du règlement de procédure dans les pays d'un système pénal de tradition continentale.

Intervention dans la procédure au fond

L'article 6 (b) de la Déclaration de 1985 prévoyait déjà que le point de vue des victimes devrait être entendu dans la procédure pénale :

> « En permettant que les vues et les préoccupations des victimes soient présentées et examinées aux phases appropriées des instances, lorsque leurs intérêts personnels sont en cause, sans préjudice des droits de la défense, et dans le cadre du système de justice pénale du pays. »

Récemment, la Commission des droits de l'homme des Nations Unies est allée un pas plus loin, en adoptant une recommandation relative à l'intervention de groupes de victimes dans la procédure, afin de « présenter des demandes collectives de réparation et de recevoir collectivement réparation »[23]. Le règlement de procédure des

21 Projet de Règlement de la CPI, règle 50.

22 Art. 92 (2), Projet de Règlement de la CPI.

23 Commission des droits de l'homme, Doc. E/CN.4/2000/62.

Tribunaux *ad hoc* ne prévoit cependant aucune possibilité d'intervention des victimes dans un rôle autre que celui de témoins du ministère public. Cela est ressenti comme un manquement sérieux par les victimes, et notamment par des organisations de survivants et de proches des victimes du génocide rwandais, alors que devant les tribunaux rwandais internes, ceux-ci peuvent se constituer partie civile et même citer l'État comme civilement responsable[24].

Le TPIR lui-même a reconnu le problème et a essayé de le compenser en laissant intervenir, en tant que *amicus curiae*, des représentants de certaines associations de victimes ou d'experts qui leur sont proches. Par ailleurs, le greffe a élaboré un programme d'assistance aux victimes, qui inclut un fonds pour des indemnisations. L'année passée, tant le TPIR que le TPIY ont envisagé d'adapter leur règlement de procédure afin de permettre la représentation des victimes et éventuellement l'octroi d'indemnisations. Finalement, il a été décidé d'y renoncer en raison, notamment, de la charge supplémentaire que cela entraînerait pour ces tribunaux. Le 12 octobre 2000, le président du TPIY a adressé au secrétaire général des Nations Unies un rapport détaillé sur le problème de l'indemnisation des victimes et de leur participation aux procédures, qui plaide pour la création d'un fonds d'indemnisation, avec un renvoi explicite à la Commission d'indemnisation des Nations Unies[25]. Une lettre allant dans le même sens a été adressée quelques semaines plus tard au secrétaire général par le président du TPIR[26].

Le Statut de la CPI prévoit bel et bien une place pour les victimes, non seulement dans la phase préparatoire mais aussi et surtout dans la procédure au fond. L'article central concernant les victimes est l'article 68 dont le titre, *Protection et participation au procès des victimes et des témoins*, en reflète le caractère historique (dans le projet

24 Gasana Ndoba, « Les victimes face à la justice. Rwanda, deux ans après le génocide : quelles juridictions pour quels criminels ? », A. Destexhe et M. Forêt (Éds), *De Nuremberg à La Haye et Arusha*, Éd. Bruylant, Bruxelles, p. 93.

25 TPIY, *Indemnisation et participation des victimes*, Annexe à la lettre du président Jorda au secrétaire général des Nations Unies du 12.10.2000, Doc. ONU S/2000/1063.

26 TPIR, Lettre du 14.12.2000 du Président Pillay au secrétaire général des Nations Unies, Doc. ONU S/2000/1198.

initial ne figurait que la notion de protection). Une véritable ouverture a ainsi été créée pour une intervention dans la procédure.

> « 3. Lorsque les intérêts personnels des victimes sont concernés, la Cour permet que leurs vues et préoccupations soient exposées et examinées, à des stades de la procédure qu'elle estime appropriés et d'une manière qui n'est ni préjudiciable ni contraire aux droits de la défense et aux exigences d'un procès équitable et impartial. Ces vues et préoccupations peuvent être exposées par les représentants légaux des victimes lorsque la Cour l'estime approprié, conformément au Règlement de procédure et de preuve. »

Remarquons que pour certains juristes de tradition anglo-saxonne, les « intérêts personnels des victimes » n'ont rien à voir avec la question de la culpabilité et touchent uniquement, par exemple, à leur protection en tant que témoins[27].

À nouveau, le projet de Règlement de procédure et de preuve a élargi les éléments qui étaient inclus dans le Statut et élaboré une procédure à forte connotation continentale. Conformément à ce projet, les victimes pourront introduire une demande en vue d'intervenir dans la procédure. Une telle demande sera en principe accueillie par la Chambre si le requérant est réellement une victime au sens du Règlement. Les victimes peuvent se faire représenter individuellement ou collectivement par des avocats ou d'autres conseils. Ceux-ci seront invités aux audiences et recevront de la part du greffe une copie des pièces de procédure.

Avec l'article 91 du Règlement de procédure et de preuve, la percée est complète. Cet article prévoit que les conseils des victimes auront en principe le droit d'assister aux audiences. Dans des circonstances exceptionnelles seulement, la Chambre pourra limiter l'intervention de ces conseils aux plaidoiries ou au dépôt de conclusions. Toutefois, ils pourront demander à la Chambre d'interroger les témoins experts et l'accusé ou faire poser des questions par le président. Cette disposition a été reprise directement des propositions du

27 Voir par exemple American Bar Association, *Proposed Rules of Evidence and Procedure for the ICC* (proposition faite en février 1999 lors des débats de la Commission préparatoire de la CPI), Rule 63. ‹www.igc.apc.org.icc/htlm.aba.htm›.

séminaire de Paris[28]. On y a ajouté un rappel de la nécessité de respecter les droits de la défense, notamment sous l'influence d'*Amnesty International* qui, dans un texte présenté lors d'une réunion de la Commission préparatoire, avait exprimé des inquiétudes à ce sujet[29].

Si, dans les débats sur la question de la culpabilité, les droits des représentants des victimes sont encore quelque peu limités par rapport à ceux de la défense, ces limites disparaissent complètement dans la phase de la procédure où est plaidée l'indemnisation du préjudice. Dans cette phase, un interrogatoire direct du prévenu, des témoins et des experts par les conseils des victimes est possible.

Indemnisation du préjudice encouru

On peut se demander s'il y a, dans le droit international, une base juridique pour les demandes directes d'indemnisation des victimes, les victimes de crimes de guerre étant traditionnellement renvoyées à l'intervention de leur État pour éventuellement négocier une indemnisation. Ici encore, c'est la Déclaration de l'Assemblée générale de 1985 qui a introduit dans le droit international la notion d'un droit personnel à l'indemnisation du préjudice. Aujourd'hui, il est généralement admis que les victimes de crimes internationaux peuvent prétendre à une indemnisation. Le rapport final que le rapporteur spécial a présenté à la Commission des droits de l'homme en 1999 met en évidence le droit des victimes de crimes internationaux aux formes suivantes de réparation: indemnisation, réadaptation, satisfaction et garanties de non renouvellement[30]. La Commission d'indemnisation des Nations Unies est une application claire de ce principe, fût-ce dans le cadre de crimes contre la paix.

Les statuts et règlements de procédure des deux Tribunaux *ad hoc*, par contre, ne prévoient toujours que la restitution des biens à leurs propriétaires légitimes[31]. L'indemnisation proprement dite est

28 *Op. cit.* (note 16), p. 15.

29 Amnesty International, *The International Criminal Court: Ensuring an effective role for victims*, Prepcom Juillet 1999, p. 15, ‹www.icg.apc.org/icc/htlm/ai199907a›.

30 Rapport du Rapporteur spécial C. Bassiouni, Doc. ONU E/CN. 4/2000/62, Annexe n° 21.

31 Statut TPIR, art. 23 (3). La restitution est considéré comme une « sanction ». Voir également TPIY, Règlement de procédure, art. 105.

renvoyée aux tribunaux internes, qui peuvent utiliser le jugement du tribunal international comme précédent[32].

En décembre 1998, le docteur Agwu U. Okali, greffier du TPIR, a présenté une note dans laquelle il proposait la création, au sein du tribunal, d'un fonds d'indemnisation des victimes alimenté par des cotisations volontaires[33]. Plus qu'un programme réaliste, ce projet était l'expression de la frustration du TPIR qui était confronté à la situation choquante dans laquelle se trouvaient notamment les survivants du génocide rwandais, au regard des moyens prévus pour l'entretien et la défense des prévenus. Le 26 septembre 2000, ce même greffier a présenté à Taba[34], lors d'une cérémonie très médiatique, un programme élaboré par le tribunal pour aider les victimes. Ce programme comprend divers volets : avis juridique, assistance psychologique, rééducation physique et aide financière à la réinstallation. Officiellement, c'est un programme d'« assistance aux témoins et témoins potentiels »[35] mais il se présente en réalité comme un programme d'aide aux victimes, élaboré en collaboration avec cinq ONG rwandaises.

La question de l'octroi éventuel d'une indemnisation aux victimes à charge des prévenus a également été discutée lors des deux assemblées plénières des Tribunaux *ad hoc* en 2000. Bien qu'à Arusha, le procureur ait d'abord plaidé pour une modification du Règlement de procédure afin de rendre possible l'octroi d'une indemnité, le TPIY et le TPIR sont finalement arrivés à un consensus pour constater que cela nécessitait une modification des statuts. Ils ont par ailleurs estimé qu'il serait plus opportun de laisser à une autre instance le contentieux relatif à une telle indemnisation[36].

Le Statut de la future Cour pénale internationale prévoit cependant la possibilité d'accorder une indemnité aux victimes. Selon son article 75 :

32 TPIY, Règlement de procédure, art. 106.

33 A. U. Okali, *Rwanda genocide : Towards a victim-oriented justice. The Case for an ICTR Assistance to Victims Program*, Note, Arusha. Décembre 1998.

34 Taba est le village rwandais dont l'ex-maire Akayesu était le premier condamné du TPIR. La date également était bien symbolique, puisque M. Okali s'est référé dans son allocution tant à l'anniversaire de l'ouverture du procès de Nuremberg, qu'à celui de l'ouverture du procès d'Akayesu à Arusha.

35 Communiqué de presse IPTR. 26.9.2000. ICTR/INFO-9-2-242.

36 *Op. cit.* (note 25), p. 18.

«1. La Cour établit des principes applicables aux formes de réparations, telles que la restitution, l'indemnisation ou la réhabilitation, à accorder aux victimes ou à leurs ayants droit. Sur cette base, la Cour peut, sur demande, ou de son propre chef dans des circonstances exceptionnelles, déterminer dans sa décision l'ampleur du dommage, de la perte ou du préjudice causé aux victimes ou à leurs ayants droit, en indiquant les principes sur lesquels elle fonde sa décision.

2. La Cour peut rendre contre une personne condamnée une ordonnance indiquant la réparation qu'il convient d'accorder aux victimes ou à leurs ayants droit. Cette réparation peut prendre notamment la forme de la restitution, de l'indemnisation ou de la réhabilitation. Le cas échéant, la Cour peut décider que l'indemnité accordée à titre de réparation est versée par l'intermédiaire du Fonds visé à l'article 79.»

Cette disposition constitue une avancée énorme. Elle prévoit non seulement la réparation matérielle mais aussi la restitution et la réhabilitation. De plus, il s'agira d'une compétence de la Cour elle-même, qui pourra estimer le dommage à réparer sans même qu'une demande spécifique soit formulée. La condamnation peut être prononcée à charge du prévenu, mais la Cour peut également octroyer une indemnisation à charge d'un fonds qui sera alimenté par des amendes ainsi que par le produit de biens confisqués, et complété par des contributions volontaires[37]. Les États parties au traité sont tenus non seulement d'exécuter sur les biens du condamné une condamnation à des dommages et intérêts, mais aussi de collaborer avec la Cour en vue de localiser ces biens[38].

Malheureusement, le Statut ne prévoit pas la condamnation des complices ou de ceux qui donnent les instructions, lesquels peuvent être éventuellement des personnes morales ou même des États. Le projet original avait pourtant envisagé la possibilité d'une telle disposition, et certains États, de même que la plupart des ONG, l'avaient soutenu[39]. Toutefois, une décision de la CPI revêtue de

37 Statut de la CPI, art. 79.

38 *Ibid.*, art. 75 (4) et 5.

39 Voir Avocats sans frontières, Point de vue sur la Cour criminelle internationale. Rome, juillet 1998, p. 2.

l'autorité de la chose jugée lie les États nationaux et peut, lorsque le droit interne le permet, constituer la base de procédures à charge de tiers (notamment devant un tribunal civil). Enfin, l'article 75, par. 6, dispose que l'indemnisation obtenue devant la CPI ne peut porter préjudice aux droits que le droit interne reconnaît à la victime.

La procédure d'indemnisation des victimes a été élaborée dans le projet de Règlement de procédure et de preuve (sous-section 4). Selon la règle 97, c'est la CPI elle-même qui évaluera le préjudice des victimes, éventuellement sur base d'une expertise, et après avoir entendu les parties. Si la Cour a l'intention d'accorder d'office une indemnisation, elle prévient l'accusé et, dans la mesure du possible, les victimes[40]. La Cour a d'ailleurs l'obligation de donner la publicité la plus large à chaque procédure relative à l'indemnisation, éventuellement en collaboration avec les États parties, pour que le plus grand nombre de victimes soient en mesure de faire valoir leur demande. Si le nombre de victimes est très élevé, la Cour peut considérer qu'une indemnisation collective est plus appropriée et décider que l'indemnisation à laquelle l'accusé est condamné sera attribuée au Fonds au profit des victimes créé auprès de la CPI. Ce Fonds recevra également des indemnités s'il est provisoirement impossible de les remettre aux victimes individuelles.

Représentation des victimes et aide légale

Le Statut de Rome ne fait que quelques références très indirectes aux «représentants des victimes» qui devraient faire connaître les positions des victimes à la Cour ou être entendus par celle-ci. L'article 90 du projet de Règlement de procédure et de preuve stipule que les victimes peuvent librement choisir leur conseil, à condition que celui-ci possède les qualifications nécessaires comme c'est le cas pour les conseils des accusés[41]. Si le nombre des victimes est élevé, la Cour peut leur demander de se faire représenter collectivement. Cela fera l'objet de négociations entre le greffe et les conseils dans un premier temps. À défaut d'accord, la Chambre peut demander

40 Projet de Règlement de la CPI, règle 95.

41 Projet de Règlement de la CPI, règle 90 (6), qui renvoie à la règle 22 (1).

au greffier de désigner un ou plusieurs représentants communs. Chambre et greffe doivent cependant veiller à ce que les intérêts spécifiques de chaque victime soient pris en considération (par exemple l'intérêt, pour des femmes victimes de crimes sexuels, d'être représentées par une femme[42]) et à ce que des conflits d'intérêts soient évités. Les victimes, individuellement ou collectivement indigentes, peuvent prétendre à une indemnité financière de la part du greffe[43].

En fait, les règles pour la représentation et la défense des victimes sont largement inspirées de celles prévues pour la défense des accusés.

Droit des témoins à une protection et au respect

Protection des témoins lors d'enquêtes internationales

Si, hormis les procédures qui ont suivi la Seconde Guerre mondiale, la poursuite des crimes de guerre devant des tribunaux internationaux est un phénomène récent, cela ne signifie pas pour autant que la communauté internationale n'a pas prêté attention à l'investigation de violations graves du droit international humanitaire. C'est ainsi que le Protocole I de 1977 a créé un mécanisme de contrôle, la Commission internationale d'établissement des faits, qui est cependant restée en grande partie lettre morte[44]. Dans le cadre d'enquêtes sur la mise en œuvre des droits de l'homme, les Nations Unies ont cependant de plus en plus procédé à des enquêtes dans des situations de guerre[45]. En particulier, la Commission des droits de l'homme et, depuis 1993, le Haut Commissaire aux droits de l'homme ont ordonné dans de nombreux conflits armés une enquête sur le terrain par un rapporteur spécial.

Des organisations internationales régionales comme l'Organisation pour la sécurité et la coopération en Europe ou l'Organisation de l'unité africaine mènent des enquêtes sur le terrain,

42 Statut de la CPI, art. 68 (1).

43 Projet de Règlement de la CPI, règle 90 (5).

44 L. Condorelli, «La Commission internationale humanitaire d'établissement des faits : un outil obsolète ou un moyen utile de mise en œuvre du droit international humanitaire ?», *RICR*, n° 842, juin 2001, p. 393.

45 Pour plus de détails, voir Sylvain Vité, *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Éd. Bruylant, Bruxelles, 1999.

et des ONG comme *Human Rights Watch*, la Fédération internationale des ligues des droits de l'homme ou *Amnesty International* essayent de présenter des rapports fondés sur un examen des faits. Des commissions d'enquête créées par des initiatives nationales, comme la Commission de clarification historique au Guatemala, ont parfois bénéficié du soutien et de la collaboration des Nations Unies. Pour de telles enquêtes, des déclarations de témoins ont une importance primordiale.

Durant toutes ces années, de nombreux témoins ont subi des mesures de rétorsion, parfois payé de leur vie leur collaboration avec des enquêteurs internationaux. Des ONG qui ont fourni des informations à des équipes d'enquête ont été soumises à des pressions. On ne peut dès lors trop souligner la responsabilité des enquêteurs eux-mêmes qui doivent prêter la plus grande attention aux risques qu'entraîne un témoignage, même si le témoin lui-même ne l'invoque pas. La personne interrogée doit savoir à quoi servira sa déclaration. Il y a en effet une grande différence entre l'information donnée d'une façon confidentielle et celle qui est destinée à être publiée. Ce problème a été soulevé tant devant le TPIY que lors de l'élaboration du Règlement de procédure et de preuve de la future CPI.

Un témoignage doit, pour être fiable, être fourni sans crainte, mais il est tout aussi important qu'un témoin, notamment s'il a déjà été victime d'une violation de ses droits fondamentaux, ne soit pas de surcroît sanctionné suite à son témoignage. Lors d'une enquête internationale, l'État sur le territoire duquel l'enquête est menée est théoriquement tenu de protéger les témoins, mais cette règle se révèle souvent illusoire dans la pratique. Pire, c'est souvent l'État lui-même qui constitue une menace de pression ou de représailles.

En 1980, l'Association de droit international a élaboré un projet de réglementation qui prévoyait assez candidement qu'un représentant de l'État pouvait être présent lors de l'audition d'un témoin, à condition de donner la garantie qu'il n'y aurait pas de représailles...[46]. Actuellement, la plupart des enquêteurs internationaux

46 Association de droit international, *Minimal Rules of Procedure for International Human Rights Fact-Finding Missions*, 59e Conférence, Belgrade, 1980.

considèrent que la discrétion de l'enquête et l'anonymat des témoins sont la meilleure protection. Cela n'est pas toujours possible, notamment quand des traitements inhumains ou des pratiques de torture dans des lieux de détention sont dénoncés par des victimes qui sont toujours détenues. Des visites régulières aux lieux de détention d'un représentant du Comité international de la Croix-Rouge peuvent offrir une protection dans certains cas. Exceptionnellement, c'est la renommée internationale de la victime ou du témoin, ou l'attention des médias qui constituera une forme de protection.

La poursuite de la protection des témoins peut s'avérer nécessaire même quand la guerre ou le conflit est terminé. Ainsi, la Commission de vérité des Nations Unies chargée d'enquêter au Salvador sur les crimes commis lors de la guerre civile, a décidé de conserver la confidentialité de ses sources, même après qu'un accord de paix a été conclu[47].

Protection des témoins lors d'une enquête pénale internationale

Depuis la création des Tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda, la problématique de la protection des témoins s'est accentuée. En effet, un témoignage en justice n'a pas seulement des effets politiques ou moraux, et peut avoir des conséquences graves pour l'accusé.

Les témoins ne disent pas toujours la vérité. Ils peuvent subir des pressions dans l'un ou l'autre sens, être influencés ou craindre des représailles, même vis-à-vis de leur famille. Ils peuvent aussi se tromper. Il est donc normal que dans le cadre d'une enquête judiciaire, les exigences quant à la qualité d'un témoignage soient plus strictes que dans celui d'une enquête sur des faits où cela peut tout au plus être un élément à charge d'un État. La plupart des législations internes prévoient des garanties telles que la prestation de serment et des sanctions du parjure, la possibilité pour la défense d'avoir accès aux déclarations faites dans le cadre du dossier pendant l'instruction ou au

47 *De la folie à l'espoir: une guerre de douze ans au Salvador*, Rapport de la Commission de vérité pour le Salvador, Doc. ONU S/25500.

moins avant l'audience, d'interroger les témoins à l'audience ou de les faire interroger par le tribunal. Ces garanties sont également prévues par l'article 6 de la Convention européenne des droits de l'homme et l'article 14 du Pacte international relatif aux droits civils et politiques.

Les témoins aussi ont cependant des droits, qui peuvent éventuellement entrer en conflit avec ceux des accusés. Si les témoins sont de surcroît des victimes, ils ont droit à la dignité, à la protection de leur sécurité et de leur vie privée et ne peuvent pas être soumis à des pressions. Ces droits s'imposent lors de la recherche et de l'audition des victimes comme témoins.

Lors de la création du Tribunal pénal pour l'ex-Yougoslavie, il était prévu que la procédure devrait tenir compte de «la protection des victimes et des témoins»[48], traités ainsi comme un seul groupe. L'article 22 du Statut du TPIY prévoit que le règlement de procédure doit garantir la protection des témoins et des victimes, le cas échéant en protégeant leur identité. Cela a été élaboré dans le Règlement de procédure rédigé par le tribunal[49]. Avant même qu'il ne soit question d'une citation, le procureur peut demander au tribunal de ne pas divulguer l'identité de certains témoins, et ce conformément à l'article 69 de ce Règlement. Des dispositions similaires s'appliquent également au Tribunal pénal international pour le Rwanda.

Les règlements de procédure élaborés par les deux tribunaux prévoient en outre la création, au sein du greffe, d'une *section d'aide aux victimes et aux témoins*[50]. Cette section donne des avis sur les mesures à prendre pour garantir la sécurité des témoins et fournit une assistance aux victimes et aux témoins, notamment quand ceux-ci ont été victimes de viols et/ou violences sexuelles. Il est précisé qu'il doit être tenu compte, lors de la nomination du personnel de la section, de la nécessité d'y employer des femmes ayant une formation spécialisée[51]. Le parquet a également prêté une attention particulière à la protection

48 Statut du TPIY, art. 20.

49 Règlement de procédure du TPIY, art. 69.

50 *Ibid.*, art. 34.

51 Sur 600 témoins interrogés par le TPIR dans la période 1999-2000, 113 avaient été confrontés à des délits de violences sexuelles. TPIR, Rapport annuel, A/55/435/S/2000/927.

des témoins en prévoyant non seulement une protection physique mais aussi un accompagnement médical et psychologique, ce qui n'est pas un luxe dans une procédure de tradition de *common law*, avec auditions croisées des témoins par les parties, et compte tenu du profond traumatisme subi par les victimes de génocide, de massacres et de viols collectifs.

Le parquet auprès des tribunaux internationaux ne dispose d'aucune force de police propre. La protection des témoins en dehors du siège du tribunal n'est dès lors possible qu'en collaboration avec les pays de la région concernée ou d'autres pays qui veulent accueillir et protéger des témoins, éventuellement sous une autre identité[52]. Dans la pratique, cela n'est pas toujours réalisable, et les premières années, la discrétion de l'instruction a parfois laissé à désirer. Plusieurs témoins (potentiels) du TPIR ont été assassinés. Malgré cela, le procureur du TPIR n'a pas le droit de décider qu'un témoignage restera confidentiel. Seul le tribunal peut accorder certaines mesures protectrices. Si le procureur n'en a pas sollicité, il doit donner connaissance de l'intégralité du dossier à la défense et cela, dans un délai raisonnable avant l'audience. Dans l'affaire Bagasora, la deuxième Chambre du Tribunal d'Arusha a ordonné la communication par le procureur des déclarations faites par les témoins pendant l'enquête et ce, dans les deux semaines[53].

Intégrant l'expérience des deux Tribunaux *ad hoc*, le Statut de Rome consacre également une série de dispositions visant à protéger les intérêts des témoins tant durant la phase de l'enquête que dans celle de la procédure. Le Statut prévoit la création d'une section permanente pour l'assistance et l'aide aux victimes et aux témoins qui devra d'une part donner des avis et d'autre part fournir une assistance effective, notamment en matière de gestion des traumatismes[54]. Le projet de Règlement de procédure et de preuve a précisé cette mission et

52 Selon le site Web du TPIR, un programme de relocalisation a déjà été mis en place pour plus de vingt témoins, pour certains au Rwanda, pour d'autres ailleurs. Voir aussi Thordis Ingadottir *et al.*, *The International Criminal Court — The Victims and Witnesses Unit*, A discussion paper, P.I.C.T., mars 2000, p. 25 et suiv.

53 TPIR, décision du 27 novembre 1997, ICTR-96-7-T.

54 Statut de la CPI, art. 43 (6).

prévu que la section devra, au besoin, faire une distinction, au sein de ses propres services, entre l'assistance aux témoins à charge et l'assistance aux témoins à décharge.

Le droit à la protection n'est pas réservé aux témoins et aux victimes qui comparaissent devant la Cour. Il couvre d'autres personnes (membres de la famille, par exemple) susceptibles d'être visées à cause de cette comparution devant la Cour. Il est prévu également que des audiences peuvent être tenues à huis clos dans l'intérêt des victimes, en particulier les enfants ou les victimes de crimes sexuels, et que des témoins peuvent être interrogés par l'intermédiaire d'un circuit vidéo ou par d'autres techniques[55]. Quand la sécurité d'un témoin ou de sa famille est menacée, le procureur peut retenir certaines preuves et en communiquer uniquement un résumé. L'identité de certains témoins peut être écartée du dossier. De telles mesures doivent cependant être compatibles avec les droits de l'accusé à un procès équitable.

Soulignons que les témoins peuvent aussi introduire eux-mêmes une demande de protection, y compris une demande d'anonymat. Le projet de Règlement prévoit alors une procédure spéciale, dans laquelle le témoin peut intervenir et le cas échéant se faire représenter par un conseil. Lors d'une telle miniprocédure, l'intervention du témoin lui-même peut se faire anonymement[56].

Protection des témoins durant la procédure

Témoigner devant un tribunal n'est pas une sinécure pour une victime de crimes graves. Ces dernières années, on a pris conscience du fait qu'une audition peut laisser des séquelles psychiques, notamment dans des causes de violences sexuelles et lorsque la victime est confrontée directement à son agresseur. Dans les procédures pour crimes de guerre et crimes contre l'humanité, beaucoup de témoins ont été victimes de torture, de traitements inhumains ou de viols, ce qui crée une situation comparable. C'est la raison pour laquelle le statut des deux Tribunaux *ad hoc* a prévu explicitement que

55 Projet de Règlement de la CPI, règles 67 et 68.

56 Projet de Règlement de la CPI, règles 87 et 88.

le Tribunal peut siéger à huis clos[57]. L'article 75 du Règlement de procédure du TPIY prévoit que le tribunal peut prendre des mesures pour protéger les victimes et les témoins par des moyens adaptés, notamment en permettant, lors d'un témoignage, l'usage d'un circuit de télévision fermé unidirectionnel.

Le Statut du TPI a repris cet acquis. Le projet de Règlement de procédure et preuve contient une série de dispositions qui doivent protéger l'équilibre psychique et la vie privée des témoins victimes de violences sexuelles. Ainsi, un interrogatoire croisé n'est pas requis pour que leur témoignage puisse être valable.

Le consentement de la victime ne peut pas être pris en considération en cas de menaces ou d'environnement menaçant, et ne peut pas être déduit du silence ou de l'absence de résistance de la part de la victime. La crédibilité, l'honorabilité ou la disposition sexuelle de la victime ne peuvent pas être déduits de son comportement sexuel avant ou après les faits. La preuve de tels faits n'est d'ailleurs pas autorisée[58]. De telles dispositions auront certainement leur influence sur la façon dont les témoins de tels crimes seront entendus. Enfin, des victimes, de violences sexuelles en particulier, peuvent être entendues non seulement à huis clos sans être présentes dans la salle d'audience, par l'intermédiaire d'un circuit vidéo fermé, mais aussi en présence d'une personne de confiance (psychologue, membre de la famille, etc.)[59].

Le dilemme du témoin anonyme

Certains témoins peuvent conditionner leur collaboration avec la justice à la protection de leur anonymat, notamment certains «repentis». Un témoignage anonyme est cependant une restriction importante des droits de la défense.

Dans les procédures devant les Tribunaux pénaux, deux droits fondamentaux s'affrontent. D'une part, les victimes et les témoins ont droit au respect et à la protection, d'autre part, l'accusé a droit à un procès équitable, ce qui implique la possibilité de prendre connaissance de l'intégralité du dossier et d'interroger ou de faire

57 Statut du TPIY, art. 22.
58 Statut du TPIY, art. 70 et 71.
59 Projet de Règlement de la CPI, règle 88.

interroger les témoins à charge. Dans l'arrêt *Kostovski*[60], la Cour européenne des droits de l'homme a adopté une attitude critique à l'égard des témoignages anonymes comme moyen de preuve, sans toutefois les exclure de façon absolue. Elle s'est en effet demandé si une telle atteinte aux droits de la défense pouvait être justifiée par les éléments de la cause. Dans sa jurisprudence ultérieure, notamment dans l'affaire *Doorson*[61], la Cour a précisé sa jurisprudence en indiquant les circonstances dans lesquelles un témoignage anonyme est exceptionnellement admissible, ainsi que les garanties de procédure qui doivent alors être prévues. Ce débat est cependant loin d'être clos.

On peut par ailleurs poser la question de savoir s'il faut nécessairement appliquer les mêmes règles dans les dossiers de droit commun et dans des dossiers relatifs à des crimes de guerre. D'une part, les tribunaux internationaux devraient donner l'exemple. D'autre part, si de façon générale une mise en balance des intérêts en jeu, à la lumière des droits de l'homme, est nécessaire, tel est d'autant plus le cas dans la situation exceptionnelle à laquelle sont confrontés les tribunaux internationaux. Ces tribunaux n'ont pas de police et dépendent donc de la collaboration des États, parfois des belligérants, pour la protection de leurs témoins, notamment quand il s'agit d'organiser un programme de protection effective (changement d'identité, nouveau domicile, etc.). Contrairement à ce qui s'est passé après la Seconde Guerre mondiale, des procès ont lieu alors que le conflit se poursuit (Bosnie) ou que la situation sur le terrain est loin d'être stabilisée (Kosovo), ce qui augmente évidemment les risques de représailles après un témoignage.

Dès les toutes premières causes, le TPIY a été confronté à la demande d'anonymat du procureur pour certains témoins[62]. Comme le Règlement de procédure était resté flou sur ce point, le Tribunal a précisé dans l'affaire *Tadic* les conditions dans lesquelles une

60 CEDH, 20 novembre 1989, Série A, vol. 166.

61 CEDH, 26 mars 1996, Recueil 1996-II.

62 Voir J. de Hemptinne, « La déposition de témoins sous anonymat devant le Tribunal pénal international pour l'ex-Yougoslavie », *Journal des Tribunaux*, 24 janvier 1998, p. 65.; A. Klip, « Witnesses before the International Criminal Tribunal for the former Yugoslavia », *International Review of Penal Law*, 1996, p. 267.

protection spéciale d'un témoin s'impose, en réponse à une demande du procureur tendant à laisser témoigner anonymement trois personnes[63]. Un tel témoignage implique que toute référence à l'identité doit être écartée du dossier et que le public comme la presse, de même que l'accusé et ses défenseurs, ne peuvent pas avoir de contact visuel avec le témoin. Pratiquement, on travaille avec un circuit vidéo, déformant la voix et l'image du témoin, qui se trouve dans un autre espace que l'accusé et qui ne le voit même pas.

Il n'est pas facile de déterminer les conditions dans lesquelles un témoignage anonyme est acceptable. Cela résulte notamment du fait que, dans l'affaire citée, l'un des juges (Kay Stephen) a adopté une *dissenting opinion* qui va énergiquement à l'encontre de la décision de ses collègues qu'il estime être une violation des droits de la défense. Le tribunal a donc retenu les conditions suivantes:

- Il existe une crainte fondée quant à la sécurité du témoin ou de sa famille.
- Le témoignage doit être important pour l'accusation.
- Aucun élément ne met en cause la crédibilité du témoin. Cela exclut le témoignage anonyme d'une personne ayant un passé criminel ou d'un complice (repenti ou pas). Des informations sur la personnalité de la victime doivent être communiquées à la défense dans la mesure du possible.
- Le tribunal tient compte du fait que tout programme effectif de protection des témoins fait défaut.
- Les mesures doivent être limitées à ce qui est strictement nécessaire.

Ces conditions ont même été renforcées dans la jurisprudence ultérieure, en particulier dans l'affaire *Blaskic*[64]: le procureur ne peut pas se limiter à invoquer une crainte de représailles, l'importance du témoignage et la crédibilité du témoin, mais doit également apporter des éléments objectifs qui étayent sa position. Dans cette décision, le Tribunal a accepté l'anonymat du témoin vis-à-vis du public et de la presse, mais l'a rejeté vis-à-vis de la défense. Le procureur a donc dû

63 TPIY, décision du 10 août 1995, ICTY-94-1-PT.

64 TPIY, décision du 10 juillet 1997, ICTY-95-14-PT.

communiquer à l'audience l'identité des témoins qui étaient restés anonymes lors de l'instruction et même durant une certaine période avant l'audience, afin de permettre à la défense de préparer l'audition.

Le Tribunal pénal international pour le Rwanda a élaboré une jurisprudence comparable[65]. La protection des témoins ne joue pas uniquement pour les victimes. Les témoins à décharge que la défense fait convoquer peuvent en effet être soumis à des pressions ou faire l'objet de représailles. Dans l'affaire *Ruggiu*[66], le TPIR a pris, à la demande de la défense, des mesures pour protéger des témoins à décharge. Un témoin de la défense ne pouvait pas être filmé ou photographié. Son identité ne pouvait être communiquée qu'au tribunal et au procureur. Dans les pièces de procédure, on a fait usage d'un pseudonyme et le dossier a été épuré de tout élément susceptible de fournir une information sur son identité.

Le Statut de Rome a prévu de très larges possibilités pour préserver la confidentialité de certaines informations lors de l'instruction, mais la question des témoignages anonymes a été laissée en suspens. Le séminaire de Paris[67] avait adopté une recommandation, non sans des débats parfois violents[68]. Le projet de Règlement de procédure et de preuve a tranché en prévoyant explicitement que les Chambres peuvent décider d'entendre des témoins à distance, par l'intermédiaire d'un circuit électronique déformant la voix et l'image. Le témoin ou même la victime qui veut intervenir en tant que tel, peut obtenir l'autorisation d'être connu seulement sous un pseudonyme par la défense et d'être interrogé anonymement. Les conditions et les modalités pratiques de telles mesures sont laissées à l'appréciation de la Cour.

65 TPIR, décision du 27 septembre 1996, ICTR-96-4-T (Akayesu).

66 TPIR, décision du 9 mai 1997, ICTR-97-32-I.

67 *Supra*, note 16.

68 Fédération internationale des ligues des droits de l'homme, *Cour pénale internationale : les nouveaux défis*, Rapport de position, 1999, p. 16.

Confidentialité et secret professionnel des témoins et informations obtenues par les collaborateurs du CICR

Le Règlement de procédure des Tribunaux *ad hoc* contenait déjà une série de dispositions permettant au procureur de préserver la confidentialité d'informations fournies par des tiers et communiquées à son office, et le témoignage de personnes, que le Tribunal ne peut forcer à violer le secret professionnel[69]. Le projet de procédure et de preuve de la Cour pénale internationale est plus précis et reconnaît le caractère confidentiel des relations entre une personne et son médecin psychiatre, son psychologue, son conseil ou son confesseur.

La déclaration des Nations Unies de 1985 précisait déjà que des personnes assistant des victimes pouvaient subir elles-mêmes un préjudice et être dès lors assimilées à des victimes. Un problème spécifique se pose pour les représentants des organisations humanitaires. Envisager que les collaborateurs de ces organisations se retrouvent eux-mêmes dans un rôle de victime n'est malheureusement pas une hypothèse purement théorique. Les médecins et d'autres collaborateurs d'organisations humanitaires doivent pouvoir travailler dans un environnement de confidentialité. Une violation de cette confidentialité peut mettre en danger non seulement ces personnes mais aussi d'autres collaborateurs de l'organisation ou les civils qui leur ont communiqué de telles informations.

Pour le CICR, la nécessité de préserver la confidentialité de certaines informations est intimement liée à la crainte de perdre l'accès aux victimes (lieux de détention, etc.) si l'interlocuteur doit craindre un témoignage contre lui. Dans un arrêt, le TPIY a reconnu le droit des représentants du CICR de ne pas communiquer les informations relatives à leurs activités[70]. Le projet de Règlement de procédure et de preuve de la CPI contient également des dispositions précises pour la protection du secret professionnel des collaborateurs du

69 Art. 70, B et D des Règlements de procédure TPIY et TPIR.

70 TPIY, Décision du 27 juillet 1999 de la Chambre III. Voir Stéphane Jeannet, « Recognition of the ICRC's long-standing rule of confidentiality — An important decision by the International Criminal Tribunal for the former Yougoslavia », *RICR*, n° 838, juin 2000, p. 403.

CICR : toute information que les collaborateurs du CICR ont obtenue dans le cadre de leurs activités est confidentielle[71]. Cela implique que ni le procureur ni le Tribunal ne peuvent, à l'occasion d'un témoignage, imposer la communication de telles informations. Le CICR peut cependant lui-même renoncer à cette obligation de confidentialité, ce qui peut faire l'objet d'une entente entre la Cour et l'institution.

Une telle règle de confidentialité n'est pas prévue pour d'autres organisations humanitaires. Seul le CICR bénéficie de cette protection, qui ne s'étend pas aux collaborateurs des Sociétés nationales de la Croix-Rouge ou du Croissant Rouge.

Les droits de la défense menacés ?

Certains droits et garanties accordés aux victimes et aux témoins peuvent paraître inquiétants, parce qu'ils portent atteinte aux droits de la défense des accusés. Tel est le cas non seulement du témoignage anonyme, mais aussi de l'interrogatoire à distance ou des limites apportées à l'interrogatoire de victimes de crimes sexuels. La nature des crimes jugés par les juridictions internationales ne peut pas justifier qu'on réduise outre mesure les droits de l'accusé. Au contraire, les juridictions internationales doivent être exemplaires aussi pour ce qui concerne les droits de la défense.

Il y a lieu toutefois de prendre en considération le fait que la procédure devant la CPI ne sera pas purement accusatoire, et que le procureur aura aussi l'obligation d'instruire à décharge, ce qui compense en partie certaines mesures qui pourraient paraître restrictives par rapport aux droits de la défense. Enfin, c'est la Cour qui devra toujours chercher l'équilibre entre les intérêts des personnes en cause (accusés, victimes et témoins) et ceux de la justice elle-même.

71 Projet de Règlement de la CPI, règle 74 (4) à (6). Voir Stéphane Jeannet, « Testimony of the ICRC delegates before the International Criminal Court », *RICR*, n° 840, décembre 2000, p. 993.

Conclusion

La réflexion sur les droits des victimes et des témoins a été profondément modifiée durant la dernière décennie. Les Tribunaux *ad hoc* ont élaboré des mécanismes de protection des témoins, qui n'existaient pas dans la majorité des systèmes internes. Alors que la position juridique des victimes ou l'absence d'une telle position dans ces tribunaux est insatisfaisante, un compromis acceptable entre les droits des victimes et ceux des accusés a été élaboré pour ce qui concerne la future Cour internationale pénale. Il serait souhaitable, comme l'ont suggéré une partie des juges du TPIY et du TPIR, que les deux statuts se rapprochent à l'avenir et que les victimes yougoslaves ou rwandaises acquièrent les mêmes droits que ceux dont jouiront les victimes devant la CPI. Cela sera d'autant plus nécessaire que le reliquat des affaires pendantes devant les Tribunaux *ad hoc* pourrait éventuellement être confié à des chambres spécialisées de la Cour.

La protection des témoins est l'un des problèmes les plus difficiles du droit international humanitaire, notamment dans le cadre des procédures à charge des auteurs de violations graves de ce droit. Ni la protection des témoins ni les droits de la défense ne peuvent être considérés comme un principe absolu. Dans chaque situation, il y a lieu de mettre en balance les intérêts respectifs, et en cas de doute, cette balance doit pencher en faveur de l'accusé, nonobstant la gravité des crimes qui lui sont reprochés. On peut en tout cas considérer que les deux Tribunaux *ad hoc* ne gèrent pas cette problématique à la légère et qu'ils réussissent assez bien ce difficile exercice d'équilibre.

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Abstract

Victims and witnesses of international crimes : From the right to protection to a right to expression

by LUC WALLEYN

Any international crime creates victims, often in a large number. Such victims may be asked to testify in court about what has happened: they become witnesses. This article examines the role that victims of international crimes currently play in international criminal proceedings and gives an account of the protection provided by international law to safeguard the rights of this especially vulnerable category of persons. Particular emphasis is placed on the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, respectively, and on the Draft Rules of Procedure and Evidence which will be applicable to proceedings before the International Criminal Court.

The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice

by
SASCHA ROLF LÜDER

To understand how the International Criminal Court (ICC) works, it is important to clarify its legal nature as an institution. In this paper the legal nature of the ICC will be considered in three steps. First, the Court's status as a subject of international law will be addressed. We shall then enquire whether the Court must be classified as an international organization. Finally, some thought will be given to the question whether, and to what extent, the ICC is vested with supranational authority.

The ICC as a subject of international law

An international legal person enjoys rights and carries out duties directly under international law and has the general capacity to act upon the international plane. The concept of international

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personality is thus derived from international law. Sovereign independent States are the principal subjects of that law. Conversely, intergovernmental organizations are often seen as derivative subjects of international law with their legal personality stemming from their member States' recognition of them as articulated in the founding charter.[1]

The status of the ICC as a subject of international law is spelled out in Article 4, para. 1, of the Rome Statute of the International Criminal Court, of 17 July 1998 (hereinafter Statute)[2], which determines: "The Court shall have international legal personality."

This is a very helpful clarification, but it should be noted that even without such an explicit recognition the international legal personality of the ICC would follow from a reasoning similar to that which has been applied to the United Nations (UN). Since unlike the Statute, the UN Charter does not contain an explicit recognition of the Organization's international legal personality, in order to determine it, the International Court of Justice (ICJ) referred to the doctrine of implied powers. In its Advisory Opinion on reparation for injuries suffered in the service of the United Nations the ICJ stated:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[3]

If this reasoning is applied to the Court, it is evident that there are a number of provisions in the Statute which presuppose the international treaty-making power of the Court: Article 2 of the Statute refers to a relationship agreement to be concluded between the

1 I. Brownlie, *Principles of Public International Law*, 5th ed., Oxford University Press, Oxford, 1998, pp. 57-58; V. Epping, in K. Ipsen, *Völkerrecht*, 4th ed., C. H. Beck'sche Verlagsgesellschaft, Munich, 1999, p. 51; R. Jennings and A. Watts (eds), *Oppenheim's International Law I*, 9th ed., Longman/London/New York, 1996, pp. 119-120.

2 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.

3 *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports* 1949, p. 182.

ICC and the UN.[4] In addition to this, the Court is empowered, according to Article 3, para. 2, of the Statute, to enter into a headquarters agreement with the Netherlands, the host State of the ICC.[5] Furthermore, Article 87, para. 5 (a), of the Statute allows the Court to conclude an agreement with any State not party to the Statute on international co-operation and legal assistance.[6] To mention one final example, Rule 16, Sub-rule 4, of the Rules of Procedure and Evidence envisages the conclusion of agreements between the Court and States to protect vulnerable or threatened witnesses. Thus there can be no doubt that, under the ICJ's Reparation rationale, the international subjectivity of the ICC would have to be affirmed even in the absence of Article 4, para. 1, of the Statute.

On the international legal personality of the ICC *ratione personae*

As a general rule, only States Parties are bound by the provisions of a treaty. This basic rule also applies, of course, to the constituent instruments of intergovernmental organizations. Vis-à-vis non-member States, the international legal personality of such organizations depends on their explicit or implicit recognition by those States.[7] This recognition is said to be of a constitutive nature. However, in exceptional cases the international legal personality *erga omnes* of an intergovernmental organization has been recognized.[8] The ICJ, in its aforesaid Advisory Opinion, stated that:

4 See K. Dörmann, "The first and second sessions of the Preparatory Commission for the International Criminal Court", in *YIHL*, Vol. 2, 1999, p. 283; F. Jarasch, "Errichtung, Organisation und Finanzierung des Internationalen Strafgerichtshofs und die Schlußbestimmungen des Statuts", in *HuV-I*, Vol. 12, 1999, p. 10; A. Marchesi, in O. Triffterer (ed.), *Commentary on the Rome Statute for the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, Article 2, note 11.

5 See Dörmann, *op. cit.* (note 4), p. 283; Jarasch, *op. cit.* (note 4), p. 10.; G. A. M. Strijards, in Triffterer, *op. cit.* (note 4), Article 3, note 5.

6 C. Kreß, in Triffterer, *op. cit.* (note 4), Article 86, note 3.

7 Epping, in Ipsen, *op. cit.* (note 1), p. 402.

8 Brownlie, *op. cit.* (note 1), pp. 678-681; Epping, in Ipsen, *op. cit.* (note 1), p. 402; Jennings/Watts, *op. cit.* (note 1), pp. 16-22; I. Seidl-Hohenveldern and G. Loibl, *Das Recht der internationalen Organisationen einschliesslich der supranationalen Gemeinschaften*, 7th ed., Carl Heymanns Verlag, Cologne/Berlin/Bonn/Munich, 2000, p. 42.

"...fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone..."[9]

The question arises whether this reasoning can be applied to the ICC *mutatis mutandis*. An affirmative answer does not seem too far-fetched.[10] According to its Article 125, paras 1 and 3, the Statute shall be open for signature or to accession by all States. It is foreseeable that the overwhelming majority of the community of States will ratify it. And, in substance, the ICC clearly complements the UN: the Statute establishes a collective system of criminal justice which augments the collective security system of the UN Charter, and these systems constitute the key components of an international legal order devoted to the maintenance of peace. It should also be noted that the ICC's key function is to deal with crimes which, according to the Preamble, are "... of concern to the international community as a whole". It is thus arguable that the ICC will be another instance of an international legal subject created by a treaty and yet effectively existing *erga omnes*.[11]

The international legal personality of the ICC *ratione materiae*

The first sentence of Article 4, para. 1, of the Statute does not contain any limitation of the international legal personality of the ICC *ratione materiae*. This cannot mean, however, that the ICC has unlimited international legal personality. General international legal personality applies only to sovereign States as the principal subjects of international law. In the other cases the international subjectivity is a partial one, depending on the powers which have been conferred upon the legal person in question.[12] The three essential powers of an

9 *Op. cit.* (note 3), p. 185.

10 W. Rückert, in Triffterer, *op. cit.* (note 4), Article 4, note 5.

11 Compare, with regard to the UN and other large international organizations, R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, Oxford, 1994, p. 48.

12 Epping, in Ipsen, *op. cit.* (note 1), p. 53; Jennings/Watts, *op. cit.* (note 1), pp. 16-22, Seidl-Hohenveldern/Loibl, *op. cit.* (note 8), pp. 39-42.

international legal person are the treaty-making power, the right to entertain diplomatic relations with other subjects of international law, and active and passive international responsibility. It has been said that these powers are even intrinsically linked with international legal personality.[13]

A number of provisions which presuppose the treaty-making power of the ICC have already been mentioned above. It will also be necessary, or at least highly useful, for the ICC to entertain diplomatic relations. The Statute, starting from the principle of complementarity and extending to the enforcement stage, is based on an intimate interrelation between the national and the international level. In practice, the smooth operation of the new international criminal justice system can be enhanced only by regular contacts between the ICC and States.[14] Thus the entertainment of diplomatic relations would be fully in line with the ICC's functions.

Finally, it is difficult not to recognize the active and passive international responsibility of the ICC, even though this attribute is not dealt with in any great detail in the Statute. Issues of international responsibility will arise above all within the framework of international cooperation and the enforcement regime under Parts 9 and 10 of the Statute. The most important and simultaneously most difficult scenario will be the failure of States to live up to their respective duties. In light of the only rudimentary regulation contained in the Statute itself (cf. Article 87, paras 5 and 7, in connection with Article 112, para. 2(f)), the crucial task will be to intertwine the specifics of the Statute with the general law of international responsibility.[15]

13 Ch. Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales", *RdC*, 1984-IV, p. 163; H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity*, 3rd ed., Kluwer Law International, The Hague/Boston/London, 1995, section 1801.

14 See M. Bergsmo, in Triffterer, *op. cit.* (note 4), Preamble, notes 20-21.

15 For a stimulating first analysis, see C. Kreß and K. Prost, in Triffterer, *op. cit.* (note 4), Article 87, notes 24-27.

The ICC as an international organization

We shall now turn to the question whether the ICC is an international organization, a question which evidently is closely related to the issue of international subjectivity.

Characteristics of an international organization

Under general international law, the criteria for the legal personality of an international governmental organization may be summarized as follows:

- a lasting association of States;
- an organic structure;
- a sufficiently clear distinction between the organization and its member States;
- the existence of legal powers exercisable on the international level; and
- lawful purposes.[16]

The ICC obviously meets all these criteria: the Court is created by virtue of an inter-State treaty and, according to Article 1 of its Statute, is meant to become a permanent institution. Under Article 34, the ICC is endowed with organs: the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor and the Registry. These organs will not be subject to the instruction of States Parties but will operate independently in their respective fields of action. From this it follows that the ICC is itself an international organization and not — as are the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY and ICTR) — only a subsidiary organ of an international organization.[17]

16 Brownlie, *op. cit.* (note 1), pp. 678-981; Epping, in Ipsen, *op. cit.* (note 1), pp. 391-392; Jennings/Watts, *op. cit.* (note 1), pp. 16-22; Schermers/Blokker, *op. cit.* (note 13), section 34.

17 Rückert, in Triffterer, *op. cit.* (note 4), Article 4, note 3.

The typology of international organizations and the ICC

There are a number of criteria to categorize international organizations. One distinction is made according to the aims pursued. Depending on the historical development of international organizations, traditional international law has in the first place differentiated between international peace organizations and other international organizations, especially those pursuing economic goals.[18] The ICC is an international peace organization if the term peace is, therefore, understood as being intimately linked to that of *justice*. As has been said above, the Court complements the collective security system of the UN with a system of collective criminal justice. The ICC will be an important component of an international order based on the rule of law in that it will strengthen individual criminal responsibility, particularly of individuals in positions of State leadership.

In addition, international organizations are categorized according to their organizational structure. Despite the many differences in detail, some common features have been identified. In particular a distinction is usually drawn between three types of organs: those representing the common interest of the organization, those representing the interests of member States, and, finally, judicial organs.[19] Again on a very general level and starting from the classic three sovereign powers, in the case of international organizations the focus traditionally lies on the legislative and executive area.

The ICC differs sharply from these traditional models. Its organizational structure reflects the peculiarity of the Court as being primarily an international justice organization. All the organs listed in Article 34 of the Statute (so-called *integrated organs*) will act through international personnel not subject to instructions from governments of States Parties. From the perspective of Article 34 of the Statute, the ICC is thus a completely integrated international judicial organization. Its institutional structure can, however, be viewed from a wider

18 Epping, in K. Ipsen, *op. cit.* (note 1), p. 390; Schermers/Blokker, *op. cit.* (note 13), section 48; Seidl-Hohenveldern/Loibl, *op. cit.* (note 8), pp. 13-15.

19 Seidl-Hohenveldern/Loibl, *op. cit.* (note 8), pp. 104-106.

perspective so as to include the Assembly of States Parties described in Article 112 of the Statute. The Assembly is not an integrated organ, as States Parties will be represented by persons acting on governmental instructions. And the area of competence of the Assembly clearly extends beyond the Court's judicial function, for the Assembly of States Parties is primarily a legislative and executive organ. Of utmost importance is the Assembly's power to adopt recommendations of the Preparatory Commission (Article 112, para. 2 (a), of the Statute), which includes the Draft Rules of Procedure and Evidence.[20] The question whether or not the Assembly of States Parties can be regarded as an organ of the ICC is an interesting one. From a formal point of view it must be answered negatively, as the Assembly is not included among the organs listed in Article 34. Considered thus, the Assembly instead appears to be a treaty organ *sui generis*.

However, it is not impossible to take a different, more substantive approach in analysing the ICC's structure. If the legislative authority of the Assembly of States Parties is deemed to be an essential element of the ICC Statute, much can be said for classifying the Assembly as an organ of the ICC in terms of substance. Viewed thus, the institutional structure of the international organization known as the ICC would be more complex. If the Assembly were to be considered part of its judicial core, consisting of the organs listed in Article 34 of the Statute, the organization would also have an executive and, more importantly, a legislative component to enact norms of a derivative nature. With regard to the principle of the separation of powers, the attribution of the latter function to an organ which is institutionally clearly detached from the judicial component constitutes a major advance compared to the ICTY and ICTR.

20 Compare K. Ambos, "'Verbrechenselemente' sowie Verfahrens- und Beweisregeln des Internationalen Strafgerichtshofs", in *NJW*, Vol. 54, 2001, pp. 407-410; H.-P. Kaul, "Der Aufbau des Internationalen Strafgerichtshofs: Schwierigkeiten und Fortschritte", in *VN*, Vol. 49, 2001, pp. 215-217.

The ICC as an international organization with supranational elements

What does supranational mean?

The authority of an international organization to bind a member State does not entail the exercise of sovereign power: traditional international organizations have authority only over their member States, and not within them.[21] The essential characteristic of supranationality, as the term is understood here, is that enactments by the international organization have direct effect within the respective member States' territory and on individuals.[22] This legal effect, which incidentally can flow from a legislative, executive or judicial act, directly obliges or empowers the individual subjects within a State, without the interposition of any transforming, receiving or *exequatur* act of that State.[23] From the viewpoint of the individual, supranationality thus results in the partial substitution of the sovereign. Supranationality — understood in that sense — has been foreshadowed by a number of international river commissions such as the Mosel Commission or the Central Commission for the Rhine Ship Traffic, but remained largely unknown until the end of World War II.[24]

The European Community as the current example of a supranational organization

Nowadays, the European Community (EC) is the paradigm of supranational cooperation, as evidenced by Article 249,

21 H. Mosler, in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland VII*, C. F. Müller Verlag, Heidelberg, 1992, pp. 609-611; A. Randelzhofer, in Th. Maunz and G. Dürig (eds), *Grundgesetz: Kommentar*, 8th ed., C. H. Beck'sche Verlagsbuchhandlung, Munich, 1998, Article 24, para. 1, notes 30, 61.

22 M. Baldus, "Übertragung von Hoheitsrechten auf ausländische Staaten im Bereich der Sicherheitsverwaltung", in *Die Verwaltung*, Vol. 32, 1999, pp. 488-489; Randelzhofer, in Maunz/Dürig, *op. cit.* (note 21), Article 24, para. 2, note 30; K. T. Rauser, *Die Übertragung von Hoheitsrechten auf ausländische Staaten*, C. H. Beck'sche Verlagsbuchhandlung, Munich, 1991, p. 34.

23 Epping, in Ipsen, *op. cit.* (note 1), p. 77; R. Geiger, *Grundgesetz und Völkerrecht*, 2nd ed., C. H. Beck'sche Verlagsbuchhandlung, Munich, 1994, p. 139.

24 F. Berber, *Lehrbuch des Völkerrechts III*, 2nd ed., C. H. Beck'sche Verlagsbuchhandlung, Munich, 1977, pp. 318-324; O. Rojahn, in I. von Münch and Ph. Kunig (eds), *Grundgesetz-Kommentar 2*, 3rd ed., C. H. Beck'sche Verlagsbuchhandlung, Munich, 1995, Article 24, note 43, 48; Seidl-Hohenveldern/Loibl, *op. cit.* (note 8), pp. 15-16.

para. 2, of the Treaty establishing the European Community. Under this provision the EC can enact regulations which not only have general application but are each binding in their entirety and directly applicable in every member State. In comparison, directives are binding, as to the result to be achieved, upon each member State to which they are addressed, but must leave to the member State's authority the choice of form and methods. As a corollary to this supranational legislative power, individuals may turn directly to the European Court of Justice, which secures the protection of their rights.

The International Criminal Tribunals for the Former Yugoslavia and for Rwanda: emergence of supranational elements

Traditionally the United Nations has been perceived as a classic international organization.[25] Articles 24 and 25 of the UN Charter have been seen as the legal basis for adopting decisions which are binding upon member States but without having any direct effect in the latter's territory.[26] This position needs reconsideration in light of the UN's subsequent practice, and more particularly the establishment of the two ad hoc Tribunals. The powers of both international criminal tribunals are not confined to States as such, even though States and State-like entities are the primary addressees of the Tribunal's decisions.[27] In *The Prosecutor* v. *Tihomir Blascic* the ICTY has recognized the Tribunal's power in two cases to issue orders which are addressed directly to individuals.[28] The first case is where the respective State allows such direct effect, i.e. the ICTY expresses the desirability of its decisions to have a direct effect, but leaves the States to decide on the permissible extent thereof. An interesting consequence of this view is the possibility of relative supranationality *ratione personae*. The second

25 Ch. Tomuschat, in H.-J. Abraham (ed.), *Bonner Kommentar zum Grundgesetz*, 91st ed., C. F. Müller Verlag, Heidelberg, 1999, Article 24, note 114.

26 Geiger, *op. cit.* (note 23), p. 140.

27 C. Kreß, "Jugoslawien-Strafgerichtshof", in H. Grützner and P.-G. Pötz (eds), *Internationaler Rechtshilfeverkehr in Strafsachen*, 2nd ed., C. F. Müller Verlag, Heidelberg, 2000, note 60.

28 ICTY, Trial Chamber I, Judgment of 29 October 1997, *Blascic*, IT-95-14-AR 108 *bis*, para. 41.

case specifically concerns the States directly involved in the underlying armed conflicts. Vis-à-vis those States the Chamber allows on-site investigations even in the absence of an authorization by the territorial State. In the view of the Chamber it is critical for the efficiency of the international investigation that interviews may be conducted on site without any authority of the territorial State being present.

A further supranational element to which the *Blascic* judgment alludes is the Tribunals' primacy over national criminal jurisdiction, under Article 9, para. 2, of the ICTY Statute and Article 8, para. 2, of the ICTR Statute. On the basis of these provisions the two tribunals can request a national court at any stage of its procedure to defer a case to the international level and the national court would be bound to comply with such a request. A German court experienced such a situation in the Tadic case, where the accused had to be surrendered to the ICTY even though the national proceedings were about to reach the trial stage.[29]

Supranational elements in the ICC Statute

It is interesting to examine the extent to which the "supranationalization" of international criminal law which has surfaced in the practice of the ad hoc tribunals has been maintained in the ICC Statute. The crucial difference between the ICC and the two ad hoc tribunals must be noted at the outset: the ICC Statute is based on the principle of complementarity.[30] Under this regime, the ICC may

29 See R. Griesbaum, "Über die Verfahrensgrundsätze des Jugoslawien-Strafgerichtshofes, auch im Vergleich zum nationalen Recht", in H. Fischer and S. R. Lüder (eds), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof*, Berlin Verlag Arno Spitz, Berlin, 1999, p. 117; J. MacLean, "The enforcement of the sentence in the Tadic case", in H. Fischer, C. Kreß and S. R. Lüder (eds), *International and national prosecution of crimes under international law*, Berlin Verlag Arno Spitz, 2001, p. 729.

30 See P. Benvenuti, "Complementarity of the International Criminal Court to national criminal jurisdictions", in F. Lattanzi and W. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court I*, Editrice il Sirente, Ripa di Fagnano Alto, 2000, p. 21; J. Holmes, "The principle of complementarity", in R. S. Lee (ed.), *The International Criminal Court*, Kluwer Law International, The Hague/Boston/London, 1999, p. 41.

exercise its jurisdiction only on a subsidiary basis. Supranationality and subsidiarity are not, however, mutually exclusive concepts.[31]

According to the ICC Statute the Prosecutor may take specific investigative steps on site: Article 99, para. 4, of the Statute empowers him to carry out certain non-compulsory investigative steps on the territory of a State requested for assistance, and to do so without the presence of the authorities of that State, and Article 57, para. 3 (d), of the Statute gives the Prosecutor wide-ranging investigative power in the special case of a disintegrated State.[32]

Another interesting element can be found in Article 58, para. 7, of the Statute. Under this provision, the Prosecutor is authorized to directly summon a person if there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance.

Third, a warrant of arrest issued pursuant to Article 58, para. 1, of the Statute has direct effects within the national legal system. In particular, the arrest warrant determines with binding force — not to be questioned by national authorities in the course of the arrest proceedings — that the conditions of Article 58, para. 1, of the Statute are fulfilled.[33] As a corollary the individual concerned has the right to challenge the arrest warrant directly at the international level. This right is usefully specified in Rule 117, Sub-rule 3, of the Rules of Procedure and Evidence. Once the person is arrested, the custodial State has to apply Article 59, para. 4, of the Statute and not its national law in deciding whether to grant interim release.

31 Compare O. Lagody, "Legitimation und Bedeutung des Ständigen Internationalen Gerichtshofes", in *ZStW*, Vol. 113, 2001, p. 803.

32 For the details on Article 99, para. 4, of the Statute see H.-P. Kaul and C. Kreß, "Jurisdiction and cooperation in the Statute of the International Criminal Court: Principles and compromises", in *YIHL*, Vol. 2, 1999, pp. 168-169; C. Kreß, "Strafen, Strafvollstreckung und internationale Zusammenarbeit im Statut des Internationalen Strafgerichtshofes", in *HuV-I*, Vol. 11, 1998, pp. 160-161; K. Prost and A. Schlunck, in Triffterer, *op. cit.* (note 4), Article 99, notes 11-29; S. R. Lüder and G. Schotten, "A guide to State practice concerning international humanitarian law: Germany", in *YIHL*, Vol. 3, 2000, in preparation.

33 Compare C. Kreß, "Völkerstrafrecht in Deutschland", in *NStZ*, Vol. 20, 2000, p. 623.

Finally, such direct effects do not end with the surrender of a person to the ICC. Rather, they continue to flow from the transferred judicial powers throughout the whole process before the ICC, including the final judgment over such a person. The judgment constitutes no doubt the most extreme effect of a decision by an international organization upon an individual person.

Conclusions

The International Criminal Court is a subject of international law and has all three core capabilities, i. e. treaty-making power, the right to entertain diplomatic relations, and active and passive international responsibility. Arguably, the ICC's legal personality is valid *erga omnes*.

The ICC is an international organization. It constitutes a new form of integrated international judicial organization. In a wider sense the new international justice system, extending to the Assembly of States Parties, is an even more complex organization which includes executive and above all legislative powers. The exercise of these powers is left to an organ composed of State representatives. Compared to ICTY and ICTR, this institutional arrangement better reflects the principle of the separation of powers.

Notwithstanding the principle of complementarity, the ICC Statute contains a number of supranational elements. First of all there are the powers to conduct on-site investigations. In addition, the summons of a suspect and the issuance of an arrest warrant entail direct effects. Finally, there is some justification for qualifying all orders issued directly by the ICC vis-à-vis individuals in the course of criminal proceedings as supranational.

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Résumé

La nature juridique de la Cour pénale internationale et l'émergence d'éléments supranationaux dans la justice pénale internationale

PAR SASCHA ROLF LÜDER

Dans cet article, l'auteur examine différentes questions soulevées par la nature juridique de la Cour pénale internationale (CPI). Le Statut de Rome, dans son article 4, précise que cette Cour a « la personnalité juridique internationale ». En se référant à la doctrine développée par la Cour internationale de Justice selon laquelle une organisation internationale doit disposer des attributs indispensables à l'exercice de ses fonctions, on peut donc conclure que la personnalité juridique internationale de la CPI est de toute façon reconnue. Dans le même esprit, on peut déduire que la CPI est une organisation internationale, c'est-à-dire une nouvelle forme d'organisation judiciaire internationale intégrée, dans le sens qu'elle n'est pas assujettie aux instructions émanant des gouvernements des États parties. Selon le Statut de Rome, la Cour est effectivement composée de différents organes qui ont soit des pouvoirs législatifs, soit des pouvoirs exécutifs. Enfin, l'auteur constate que la CPI a des pouvoirs supranationaux, car elle peut, par exemple, délivrer des mandats d'arrêt avec effets directs pour les autorités nationales.

New approaches to international justice in Cambodia and East Timor

by
SUZANNAH LINTON

Throughout 2001, the *United Nations Transitional Administration in East Timor (UNTAET)*[1] held trials of persons accused of committing atrocities in East Timor in 1999. On 11 December 2001, the first judgement in a crimes against humanity case was delivered — the ten accused militiamen were convicted and sentenced to a total of 206 years. The cases have been conducted at the District Court of Dili, where Special Panels of international and East Timorese judges have jurisdiction to try what are known as "Serious Crimes", namely genocide, crimes against humanity, war crimes, torture and certain violations of the applicable domestic legislation, the Indonesian Penal Code. This project, the first of its kind to be implemented, draws from an early model of a Cambodian tribunal for the prosecution of Khmer Rouge atrocities and reportedly also from the abandoned War Crimes and Ethnic Crimes Court project for Kosovo.

SUZANNAH LINTON practises international law, has worked in many countries, including East Timor, and is currently based in Cambodia. This article is written in a personal capacity. Developments up to 31 December 2001 are incorporated. The decision of the United Nations to end negotiations with Cambodia to set up a tribunal, announced on 8 February 2002, is not specifically discussed in this article.

On 23 July 2001, Cambodia's Senate approved legislation for the creation of *Extraordinary Chambers* for the prosecution of crimes committed during the reign of the Khmer Rouge from 1975 to 1979. These Chambers, which do not yet exist, will consist of panels of judges of different nationalities functioning within the Cambodian justice system. The Extraordinary Chambers will have jurisdiction to try both international and domestic crimes arising from the atrocities perpetrated by the Khmer Rouge, including genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions on the protection of war victims and violations of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

These "internationalized domestic tribunals" are the result of a new approach to international justice by the United Nations. They are not ad hoc international tribunals created by the Security Council under Chapter VII of the United Nations Charter, nor are they regular domestic courts. They can be seen as the product of partnerships between the State concerned and the United Nations, which has a considerable input into the design and structure of the court. In East Timor, the United Nations as *de facto* ruler drafted, adopted and implemented the necessary legislation; it has also funded and administered the project through the provision of materiel and international personnel. By contrast, the project in Cambodia will be administered and controlled by Cambodians, although it is premised on there being extensive international support.

The purpose of this paper is to provide an outline of the internationalized domestic tribunals in Cambodia and East Timor. Constraints of space mean that this examination can only be a brief one that simply highlights the key features of these new mechanisms of justice and identifies some of the many major issues.[2] Drawing on

1 UNTAET was established by SC Res. 1272 (1999).

2 For more detailed examinations of issues covered in this paper, see Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in international justice", *Criminal Law Forum*, Issue 12(2), pp. 185-246; "Prosecuting atrocities at the District Court of Dili", *Melbourne Journal of International Law*, Vol. 2/2, 2001, pp. 414-458; "Rising from the ashes: The creation of a viable criminal justice system in East Timor", *Melbourne University Law Review*, Vol. 25/1, 2001, pp. 122-180.

the experience of East Timor, the paper seeks to draw on some of the lessons that can be learnt from the East Timor experiment and makes a number of recommendations for the court in Cambodia, should it ever come to fruition.

Cambodia

On 17 April 1975, Cambodia's capital Phnom Penh fell to the forces of the Communist Party of Kampuchea, popularly known as the Khmer Rouge. From then until 1979, the Cambodian people endured horrific abuses of international humanitarian and human rights laws. These atrocities were generally not the isolated acts of individual officials, but rather resulted from the policies of the Khmer Rouge and its leaders. A shadowy group of persons functioned as Angkar ("the Organization") and the victory over the pro-US Lon Nol regime was trumpeted as ending thousands of years of subjugation of the Khmer peasantry at the hands of foreign and class enemies. The exact nature of the Khmer Rouge movement has been controversial — there has been much debate over whether this was a "complete peasant revolution", a Marxist-Leninist experiment or a uniquely Cambodian phenomenon driven by a perverse concept of a superior race.[3] What is clear is that the movement brought unspeakable horror and suffering to millions of Cambodians.

Having finally seized power, the new leaders of Cambodia directed their energies towards eliminating those regarded as internal enemies, who threatened the vision of a fully independent, socially and ethnically homogeneous Cambodia. Within days of the Khmer Rouge seizure of power, hundreds of thousands of urban dwellers were forcibly deported from the cities. Those that did not die or get murdered along the way were dispatched to work camps in the rural areas to be re-educated through enslavement. Countless persons were murdered or died of starvation, overwork or sickness and disease. Purges of urban dwellers (who became known as "New People") continued

3 See, for example, Michael Vickery, *Cambodia 1975-1982*, Boston 1984; Ben Kierman, *The Pol Pot Regime*, Yale University Press, 1996; David Chandler, *Voices from S-21*, Silkworm Books, 1999.

throughout the reign of the Khmer Rouge and there were also waves of internal purges of Khmer Rouge cadre considered to have become threats to the system. Entire villages suspected of harbouring enemies of Democratic Kampuchea were decimated. "To counter the perceived threat and build a 'clean social system', the regime launched a uniquely thorough revolution whereby all pre-existing economic, social and cultural institutions were abolished, all foreign influences were expunged and the entire population was transformed into a collective workforce, required to work at breakneck speed to build up the country's economic strength."[4]

On 6 January 1979, an invading Vietnamese Army liberated Cambodia from the Khmer Rouge but did not leave until 1989. The various often conflicting estimates of the death toll during the Khmer Rouge reign point to approximately 20 per cent of the April 1975 population of 7.3 to 7.9 million people having lost their lives.[5] This has led many to describe the acts of the Khmer Rouge as genocidal.[6]

The road to an internationalized tribunal in Cambodia

For 20 years, there seemed to be no institutional move towards bringing those responsible for the atrocities of the Khmer Rouge to account. In 1997, the situation changed when the Cambodian government sought the assistance of the United Nations. The United Nations appointed a Group of Experts to evaluate existing evidence with a view to determining the nature of the crimes committed, to assess the feasibility of apprehending the perpetrators, and to explore the legal options for bringing them to justice before an

4 Report of the Group of Experts for Cambodia established pursuant to UNGA Res. 52/135 (Group of Experts Report), transmitted by the Secretary-General along with his own report, UN Doc. A/53/850, S/199/231, paras 15 and 16.

5 *Ibid.*, para. 35.

6 See, for example, Ben Kiernan, "The Cambodian genocide: Issues and responses", in George J. Andreopoulos (ed.), *Genocide: Conceptual and Historical Dimensions*, University of Pennsylvania Press, 1994; Kathryn Railsback, "A Genocide Convention action against the Khmer Rouge: Preventing a resurgence of the Killing Fields", *Connecticut Journal of International Law*, Vol. 5, 1990, pp. 457-465.

international or national jurisdiction.[7] The Group of Experts' close study of the situation and the various possible models led it to recommend that the only suitable option was to create an ad-hoc international tribunal, controlled and administered by the United Nations. It noted the prevalence of corruption and political influence over the judiciary, and concluded that Cambodia's system fell short of international standards of criminal justice required by the 1966 International Covenant on Civil and Political Rights.[8] The experts in fact advised against an internationalized domestic tribunal of the type that has subsequently been created by the Law on Extraordinary Chambers.[9] Cambodia rejected the recommendation, and the United Nations eventually agreed to the compromise proposal of a tribunal situated within the Cambodian legal system, with jurisdiction over both international and national crimes and manned by both internationals and Cambodians. United Nations' support was conditional upon the relevant law being in accordance with a draft Memorandum of Understanding.[10] This draft Memorandum of Understanding set out the blueprint for an internationalized domestic tribunal, and the modalities for cooperation between Cambodia and the United Nations, and was to have been signed after the passing and adoption of the Law on Extraordinary Chambers.

The *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Cambodia* (Law on Extraordinary Chambers) was initially passed by Cambodia's National Assembly on 2 January 2001 but, due to amendments made by the Senate, was returned for reconsideration. It was finally approved by the Senate on 23 July 2001 and came into law upon being signed by the King on 10 August 2001.[11] This law differs in a number of material aspects from the draft Memorandum of Understanding. It was announced to be one of the reasons of the United Nations to withdraw from the negotiations with

7 UNGA Res. 52/135.

8 Group of Experts Report, para. 129.

9 *Ibid.*, para. 137.

10 "Tribunal Memorandum of Understanding Between the United Nations and the Royal Government of Cambodia", ‹http://www.yale.edu/cgp/tribunal/mou_v3.htm›.

11 For the text see ‹http://www.derechos.org/human-rights/seasia/doc.krlaw.html›.

the Cambodian Government to set up a tribunal.[12] Yet Cambodia's leaders have repeatedly stated that they will proceed with or without the involvement of the United Nations.

The Extraordinary Chambers

Article 3 of the Law on Extraordinary Chambers establishes the court's jurisdiction over the crimes of homicide, torture and religious persecution as violations of the 1956 Penal Code of Cambodia. Given that the crimes in issue are at least 22 years old, the Penal Code's statute of limitations has been extended for a further twenty years. Genocide as defined in Article 4 derives from Articles 2 and 3 of the 1948 Genocide Convention. Article 5's definition of crimes against humanity is taken from the Statute of the International Criminal Tribunal for Rwanda (ICTR). Article 6 gives the Extraordinary Chambers jurisdiction over war crimes, limited here to grave breaches of the 1949 Geneva Conventions. There is also jurisdiction over breaches of the 1954 Cultural Property Convention. Finally, the Law on Extraordinary Chambers provides that crimes against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations may also be prosecuted.[13] It is important to note that jurisdiction is limited to senior leaders of Democratic Kampuchea and those most responsible for the atrocities committed during the reign of the Khmer Rouge (17 April 1975 to 6 January 1979).

The Law on Extraordinary Chambers creates special chambers within Cambodia's domestic court structure. By all accounts, including that of the Cambodian government itself, this is a weak system that is subject to much undue influence and corruption.[14]

12 ‹http://www.un.org/apps/news/story.asp?NewsID=2829&Cr=cambodia&Cr1=court›.

13 The basis of criminal action is in fact contained in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.

14 Group of Experts Report, para. 129; letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the UN Secretary-General, annexed to UN Doc. A/1997/488 of 24 June 1997. See also the reports of the Special Representative of the Secretary-General for Human Rights in Cambodia, in particular UN docs E/CN.4/1999/101 of 26 February 1999 and E/CN.4/2001/103 of 24 January 2001, and the Secretary-General's Report to the General Assembly A/54/353 of 20 September 1999.

Cambodian judicial personnel will not just participate in the work of the courts but, being in a majority, will control the Extraordinary Chambers.[15] All judges and prosecutors will be appointed by Cambodia's Supreme Council of the Magistracy, although the international personnel are to be selected from a list prepared by the United Nations Secretary-General. Human Rights Watch is not alone in alleging that this body is subject to much political manipulation and control by the ruling CPP party — its reform is seen as a key element in creating an independent and impartial Cambodian judiciary.[16]

The chambers will be three-tiered, mirroring the existing structure of Cambodian courts. There will be a Trial Court, sitting as a court of first instance with three Cambodian judges and two international judges; an Appeal Court, hearing appeals from the Trial Court, with four Cambodian judges and three international judges; and a Supreme Court composed of five Cambodian judges and four international judges. The President of each of the chambers will be Cambodian.

A Cambodian and an international judge are to be appointed as Co-Investigating Judges. They will be jointly responsible for investigations and are equal in status. Likewise, a Cambodian and an international jurist will be appointed Co-Prosecutors, jointly responsible for the preparation and issuing of indictments and trial proceedings. In addition to the three levels of court, there is also to be a specially appointed Pre-Trial Chamber, whose task seems to be just to sort out the differences between the Co-Prosecutors and Co-Investigating Judges. All these layers are hardly likely to promote expeditious trial. It appears that questions that may be put to the Pre-Trial Chamber are only those which are capable of having an affirmative or negative answer, for example, whether to proceed with a particular course of action. If the Pre-Trial Chamber cannot reach a decision (voting by Super Majority — see below), Article 20 provides that "prosecution may proceed" in the case of Co-Prosecutor disputes and

15 In this context, see *Cambodia: Judiciary on Trial*, New York/London, 20 June 2001, Press Release by Amnesty International and Human Rights Watch.

16 Human Rights Watch, Cambodia, *World Report 2001*.

Article 23 provides that the "investigation may proceed" in the case of Co-Investigating Judge disputes. These provisions therefore do not adequately address the other issues of controversy that can be expected to arise between Co-Prosecutors and Co-Investigating Judges and which will require a specific decision, such as disputes on the selection of appropriate charges. A stalemate on the chamber may in fact block any investigative or prosecutorial action on the case.

Apart from a provision prohibiting the use of superior orders to negate criminal responsibility, the Law on Extraordinary Chambers has no provisions that deal with defences. The Constitution recognises the right to defend oneself at trial but Cambodia's current criminal procedure laws, which will apply, do not contain any provisions on defences. The 1992 Supreme National Council Decree on Criminal Law and Procedure ("UNTAC Law") identifies factors that can mitigate sentence, including necessity and the psychological or psychiatric state of an accused, which are usually regarded as defences. It would therefore seem that recourse must be had to the law applicable at the time of the crimes, the 1956 Cambodian Penal Code. This recognises the following as defences: (1) Insanity or unsoundness of mind; (2) Youth (for those under 18 years of age, the court must determine the capacity for discernment); (3) Duress arising from a state of absolute necessity, that is when the accused was exposed to an actual and imminent danger that arose from circumstances beyond his control, and had no other option; (4) Superior orders, provided the order came by law or a legitimate authority; (5) Self-defence or the defence of another, subject to certain conditions.

Cambodia's criminal procedure is famously unsatisfactory but this is the law that has been chosen to apply to proceedings under the Law on Extraordinary Chambers.[17] Several laws will be simultaneously applicable: the 1993 Constitution, UNTAC Law and the 1993 State of Cambodia Law on Criminal Procedure ("SOC Law"). As mentioned, there are major human rights concerns that arise from the

17 See the reports cited in note 14. A new draft criminal procedure code is being drafted with French assistance.

provisions dealing with arrest and detention, the trial process, as well as large gaps in areas such as defences. SOC Law requires prosecutors to seek and follow political instruction in "exceptionally serious cases".[18] UNTAC Law requires that a person must be tried within six months of the date of arrest; this is also interpreted by some as meaning that anyone who has been released pending trial cannot be tried after six months.[19] Cambodia's judicial process places great reliance on confessions, which are usually extracted while a suspect is in the custody of the Judicial Police and prior to his/her coming before an Investigating Judge. The law considers the dossier of the Judicial Police to be authentic unless evidence to the contrary is shown. An accused who seeks to retract his confession at trial faces an uphill battle to convince the court to disregard the confession. There are no procedural safeguards of the rights of an accused who confesses or pleads guilty. Many published reports about the Cambodian justice system have highlighted the use of torture to obtain confessions and the willingness of judges to accept confessions as the main, sometimes only, evidence of guilt.[20] In order to strengthen the human rights protections for an accused, the Law on Extraordinary Chambers has through Article 35 drawn in Article 14 of the International Covenant on Civil and Political Rights. Nevertheless, the actual procedure remains deeply flawed.

As noted above, the 1956 Penal Code provided that superior orders could amount to a defence if the order arose as a result of law or came from a legitimate authority. At the time of the crimes, one could not be convicted for acting in pursuance of superior orders in certain situations. The drafters of the Law on Extraordinary Chambers chose to remove this defence, even for those crimes prosecuted under the 1956 Penal Code. International law has not been settled on the

18 Art. 55: "In cases where the committed crime or misdemeanor is exceptionally serious, the prosecutor shall inform immediately the General Prosecutor at the Appeal Court and the Minister of Justice. The prosecutor shall carry out the instruction he/she receives from them in this matter."

19 See, however, the discussion on the 1999 Law on Duration of Pretrial Detention discussed at the end of the article.

20 See, for example, Basil Fernando, *Problems Facing the Cambodian Legal System*, 1998, Asian Human Rights Commission and Human Rights Watch, Cambodia, *World Report 2001, 2000, 1999*.

issue of superior orders as a defence, even in relation to crimes of universal jurisdiction, so this is not a situation where one could turn to general principles of law recognised by the community of nations. This raises a serious issue of legality, for it is a basic principle of criminal justice and human rights (see Article 15 of the International Covenant on Civil and Political Rights) that a person cannot be prosecuted for an act or omission that was not a crime at the time it was committed.

Control of the tribunal has been a particularly contentious issue. Cambodian judges will form the majority, but a significant compromise between the United Nations and Cambodia was brokered through the adoption of a voting formula known as the "Super Majority". As a result, decisions on innocence or guilt can be made only on the basis of unanimity or a qualified majority. For example, a Trial Chambers is to be composed of five judges, three Cambodians and two internationals. Where there is no unanimity, a conviction can be agreed upon only if approved by at least four judges, one of whom would have to be an international judge.

Controversy still surrounds the bars to prosecution that exist in Cambodia today, specifically the pardon granted to Ieng Sary, a senior Khmer Rouge leader who was convicted *in absentia* in 1979 and amnesties granting immunity from prosecution given to others who surrendered to the government in 1996. The United Nations is insistent that "there shall be no amnesty for the crimes of genocide, war crimes and crimes against humanity. An amnesty granted to any person falling within the jurisdiction of the chambers shall not be a bar to prosecution."[21] Article 40 of the Law on Extraordinary Chambers provides that "[t]he Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law". This provision would still permit the King of Cambodia to grant amnesties pursuant to his constitutional powers and laws to be passed which could shield persons from being investigated or prosecuted under the Law on Extraordinary Chambers. Unaddressed are

21 *Op. cit.* (note 10), Art. 9.

the questions of what happens to someone who has already been pardoned and those who benefit from existing amnesties.

Funding is anticipated as being provided by Cambodia, the United Nations (through a specially created trust fund composed of voluntary contributions), States contributing staff and other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations and private donors.

East Timor

For most of 1975, the Portuguese colony, or "non-self-governing territory", of East Timor seemed well on the way to becoming an independent State.[22] However, on 7 December 1975 East Timor was invaded by the armed forces of the Republic of Indonesia. Indonesia's 24-year-long occupation of East Timor was a particularly brutal one; the firepower of a modern army that had been trained and armed by the West was unleashed upon a small, poorly armed yet determined national liberation movement and on the civilian population that provided it with extensive grassroots support. The Indonesian forces were assisted by domestic militias and other paramilitary groups. Allegations of planning, ordering and perpetrating genocide in East Timor have regularly been levelled at Indonesia.[23]

Indonesia remained in occupation of East Timor until 25 October 1999, when its armed forces were withdrawn in accordance with the outcome of a United Nations-administered referendum held on 30 August 1999. In that referendum, despite an intimidating and violent environment created by pro-Jakarta militias and the Indonesian authorities, 78.5% of East Timorese voters made it clear they wanted to be free of Indonesia. It did not take long for the backlash to come. Within hours of the announcement of the result, an

22 In 1960, the UN General Assembly declared East Timor to be a non-self-governing territory administered by Portugal. UNGA Res. 1542(XV).

23 See Arnold Kohen and John Taylor, *An Act of Genocide: Indonesia's Invasion of East Timor*, Tapol, London, 1979; John Taylor, *East Timor: The Price of Freedom*, Zed Books, London, 1999; Roger Clark, "Does the Genocide Convention go far enough? Some thoughts on the nature of criminal genocide in the context of Indonesia's invasion of East Timor", *Ohio Northern University Law Review*, Vol. 8, 1981, p. 321.

already violent situation escalated dramatically throughout East Timor, with widespread murders, kidnappings, rape, property destruction, theft of homes and property and the burning and destruction of military installations, offices and civilian residences. The United Nations withdrew to its compound in Dili where it was besieged by marauding militias and eventually evacuated its staff and some East Timorese civilians. It was not until 20 September 1999 that an international force (INTERFET) mandated by the Security Council in its Resolution 1264 (1999) was able to land in East Timor and start restoring order. The United Nations has taken over the administration of East Timor by establishing UNTAET, headed by a Special Representative of the Secretary-General (SRSG) who acts as Transitional Administrator of the territory. Following national elections on 30 August 2001, UNTAET is now in the process of devolving authority to the democratically elected representatives of East Timor.

The road to an internationalized domestic tribunal

In East Timor, the United Nations engaged its own experts to investigate what had happened in 1999 and to establish responsibility for the crimes committed. An International Commission of Inquiry[24] and three Special Rapporteurs were dispatched to the region.[25]

Both the International Commission of Inquiry and Indonesia's own investigators from KPP-HAM (an investigatory body created by the Indonesian Human Rights Commission) identified key elements of what constitutes a crime against humanity, namely widespread, systematic attacks on the civilian population of East Timor coupled with Indonesian government involvement through its

24 Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726, S/2000/59 (2000) (Report of the International Commission of Inquiry).

25 Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Special Rapporteur of the Commission on the Question of Torture and Special Rapporteur of the Commission on Violence against Women, Its Causes and Consequences. Their common report is contained in the Report submitted by the Secretary-General to the General Assembly on the Situation of Human Rights in East Timor, UN Doc. A/54/660 (1999) (Report of the Special Rapporteurs).

military and police.[26] The Special Rapporteurs applied the tests of dependency and effective control utilized by the International Court of Justice in the *Nicaragua Case* to establish State responsibility for the acts of armed groups[27] and found that there was sufficient evidence that Indonesian armed forces participated in the operational activities of the militia, which for the most part were the direct perpetrators of the crimes.[28] They concluded that this involvement was sufficient to incur the responsibility of the Government of Indonesia. These findings were cited with approval by the Special Panel in *The Prosecutor v. Joni Marques et al*, the first crimes against humanity case to be tried in East Timor.[29]

Both international investigations called for the creation of an international tribunal to try the 1999 East Timor atrocities; their mandates had precluded the examination of the preceding 24 years of Indonesia's occupation. The International Commission of Inquiry suggested Indonesian and East Timorese participation in such a tribunal,[30] and the Special Rapporteurs recommended that if Indonesia failed in a matter of months to "investigate TNI involvement in the past year's atrocities (...) both in the way of credible clarification of the facts and the bringing to justice of the perpetrators", an international tribunal should be created.[31] The Special Rapporteurs also wisely foresaw that the "as yet unformed East Timorese judicial system could not hope to cope with investigations into atrocities of this scale", and that "the best efforts would be unlikely to result in complete investigations into the full range of crimes".[32] Moreover, it was only as an interim measure pending the establishment of an international tribunal that the

26 *Ibid.*, paras 135-142; KPP-HAM, Report on the Investigation of Human Rights Violations in East Timor (2000), paras 22, 60. Only an Executive Summary of this report has been officially made public in English: Embassy of Indonesia, Ottawa, Canada, Doc. No. BB-451/DEP/030300, ‹http://www.indonesiaottawa.org/news/Issue/HumanRights/ham-kpp-timtim-01312000.htm›.

27 *Nicaragua* v. *USA*, I.C.J. Reports 1986, pp. 64–65.

28 Report of the Special Rapporteurs, para. 72.

29 *The Prosecutor v. Joni Marques et al [nine others]*, Case No. 09/2000, Judgment, 11 December 2001.

30 Report of the International Commission of Inquiry, para. 153.

31 *Ibid.*, para. 74. — TNI: Indonesian Armed Forces.

32 *Ibid.*, para. 73.

International Commission of Inquiry recommended strengthening UNTAET's investigative capacity.[33] However, Indonesian promises to try perpetrators persuaded the international community to put its faith in the justice system of the nation whose forces had brutally occupied East Timor for 24 years. It was also decided that UNTAET's own investigative capacity in East Timor should be developed, which led to the establishment of the Serious Crimes project.

Within months of taking over as *de facto* ruler of East Timor, UNTAET designed an ambitious scheme for the prosecution of atrocities by way of an internationalized domestic tribunal centred at the District Court of Dili, and passed the necessary implementing legislation.[34] It has been a controversial scheme, and UNTAET has been criticized for not carrying out sufficient or meaningful consultation with the East Timorese on this issue. For this reason, the adoption of the crucial Regulation 2000/15 was greeted with much anger by the judges, prosecutors and public defenders of the District Court of Dili. There is in fact great support among the East Timorese for an ad hoc international tribunal to deal with the atrocities committed not just in 1999 but during the 24 years of Indonesian occupation.[35] This has been fuelled by a perception that both UNTAET's Serious Crimes enterprise and the efforts in Indonesia have failed to deliver much awaited justice. Nevertheless, there has been precious little State support for the establishment of an ad hoc international tribunal for East Timor. And, given the changed priorities of the post September 11 world, the prospects are not good. The District Court of Dili is therefore the only venue where the atrocities of 1999 are being actively prosecuted.

33 *Ibid.*, para. 150.

34 UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor (promulgated 6 March 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.1 (Regulation 2000/11); and UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (entered into force on 6 June 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add. 3, 99 (Regulation 2000/15).

35 On 20 June 2001, East Timor's National Council passed a resolution calling for the creation of an international tribunal. See "East Timor National Council sets up truth commission to probe rights violations", *UN Department of Public Information*, 20 June 2001. For a minority view in favour of amnesties see "Human rights tribunal not a priority: Gusmao", *Jakarta Post*, 20 April 2001.

East Timor's Serious Crimes project at the District Court of Dili

UNTAET's Serious Crimes project derives from its Regulations 2000/11[36] and 2000/15.[37] On the basis of these instruments, a dedicated prosecution service (almost exclusively "international" in composition, with an exclusively "international" investigation unit) pursues cases of genocide, crimes against humanity, war crimes, torture and certain violations of the Indonesian Penal Code (murder and sexual violence) before panels of judges known as the Special Panels. The panels are part of the District Court of Dili and each consists of one East Timorese judge and two judges of other nationalities. Their judgments can be appealed to the Court of Appeal (the majority of whose members are again "international"), which hears all appeals from the four district courts of East Timor.

Section 4 of Regulation 2000/15 adopts the customary definition of the crime of genocide as codified by the 1948 Genocide Convention and the ICC Statute. Section 5.1 replicates the definition of crimes against humanity in the ICC Statute, with the subtle distinction that both the punishable act and the widespread or systematic attack must be directed against the civilian population. Section 6.1 allows for the prosecution of war crimes. It mirrors Article 8(2) of the ICC Statute and includes four categories of war crimes: grave breaches of the 1949 Geneva Conventions; other serious violations of the laws and customs applicable in international armed conflict; serious violations of Article 3 common to the Geneva Conventions; and serious violations of the laws and customs applicable in armed conflicts not of an international nature. Torture may be prosecuted either as a stand-alone crime or as a crime against humanity, a war crime or a means of perpetrating genocide. Murder and sexual offences that took place between 1 January 1999 and 25 October 1999 can be tried by the Special Panel as violations of the Indonesian Criminal Code.

Regulation 2000/15, which provides the "nuts and bolts" of the project, reiterates many of the substantive legal provisions of the Statute of the International Criminal Court (ICC). This reliance on

36 *Op. cit.* (note 33).

37 *Ibid.*

the ICC Statute to prosecute atrocities that span a 24-year-long occupation raises particular problems. That Statute is not designed to be retroactive and some of its provisions are reflective of *lex ferenda* rather than *lex lata*. Should acts of torture committed by "private" persons in the 1970s, 1980s and even the 1990s be prosecuted on the basis of Regulation 2000/15, questions with regard to retroactive prosecution and violations of the principle of legality will undoubtedly be raised. Moreover, the prosecution for acts of torture is complicated by the fact that Regulation 2000/15 utilizes two definitions for this offence, neither of which conforms with the definition contained in the 1984 UN Torture Convention.[38]

Those accused of Serious Crimes in East Timor are entitled to raise the same defences as those who will appear before the ICC. In occupied East Timor, one could not be found guilty under Indonesian law if one acted in pursuance of superior orders in circumstances set out in Article 51 of the Indonesian Penal Code. Under Regulation 2000/15, superior orders are not recognised as a defence but merely a factor that may be considered in mitigation. The problems of retroactively changing the substantive criminal law that applied at the time of commission of the crimes when its provisions were not inconsistent with international standards, have already been discussed in relation to Cambodia and apply equally to East Timor.

Implementation of the Serious Crimes project in East Timor

Despite certain serious flaws in design, the Serious Crimes project is an innovative scheme that has always had much potential to bring justice and accountability to East Timor. It has, however, had a troubled record, facing major problems that prevented the fulfillment of that promise and which have arguably caused further injustice to the people of East Timor. After over a year of inertia in the face of much publicised problems (those who voiced concerns included the

38 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1.

Security Council and the High Commissioner for Human Rights[39]) UNTAET finally recognised the damage that was being done and that immediate remedial steps were needed. The Serious Crimes Unit has now been removed from the control of the Ministry of Justice and comes under the supervision of the SRSG's office. Meaningful resources have finally been made available and offices are being opened in the rural districts of East Timor. Prosecutors are now permitted to supervise investigations directly. There is new leadership at the Ministry of Justice and in the Office of the General Prosecutor, including the Serious Crimes Unit. All these changes will hopefully bring positive results but it remains to be seen what can be achieved in the remaining months of the project's existence.

Despite the promising reforms, there is much to be gained from a closer examination of the Serious Crimes project in East Timor. Lessons learnt, if applied, will certainly benefit the other projects that are pending in Cambodia and Sierra Leone. A major problem has been the Serious Crimes project's association with a dangerously weak criminal justice system.[40] From the charred ruins left behind by Indonesia, UNTAET rushed to create a justice system apparently without a master plan and without sufficient focus on the development of local capacity or on the viability of that system. Poor administration of the courts has been identified as the source of many of the shortcomings of the justice system, including the Serious Crimes project.[41] Lack of resources has played a role too — the Serious Crimes project faced enormous difficulties in 'getting up and running' with no material or personnel allocated to it (staff and equipment were

39 See Report of the Security Council Mission to East Timor and Indonesia, UN Doc. S/2000/1105 (2000), para. 8, and concerns voiced by the Security Council when extending UNTAET's mandate to 31 January 2002, UN Doc. S/RES/1338 (2001). See also Report of the High Commissioner for Human Rights on the situation of human rights in East Timor, UN Doc. E/CN.4/2001/37, para. 13.

40 Although there are many media reports highlighting the problems of the criminal justice system, in particular the Serious Crimes project, there have been few substantive examinations. Among these are the reports of Amnesty International, in particular *East Timor: Building a New Country based on Human Rights*, 2000, and *East Timor: Justice Past, Present and Future*, 2001. The author's studies, *op. cit.* (note 2), and Judicial System Monitoring Programme, "Justice in Practice: Human Rights in Court Administration", *JSMP Thematic Report 1*, November 2001.

41 *JSMP Thematic Report 1, op. cit.* (note 40).

'loaned' from other departments). Once it was operational, the minimal resources that were allocated to the ambitious project until recently have hindered effective investigation of the complete range of crimes committed in East Timor and led to a focus on prosecuting low-ranking militiamen, and doing so using domestic law rather than international law. To date, over 30 indictments have been filed and out of 12 judgements delivered, only one has been in a case prosecuted as a crime against humanity. There are no witness protection or counselling programmes for victims and witnesses. There is no provision for witness expenses. Forensic facilities have been, and continue to be, extremely basic. Criticisms about the pace of work have, however, not been entirely fair, for cases were identified, investigated and prosecuted with minimal resources. The first Special Panel, which only started to function actively in January 2001, achieved a very respectable rate of convictions for crimes prosecuted as violations of the Indonesian Penal Code[42] and was engaged for almost six months on the first crimes against humanity case. In light of the tremendous obstacles to the successful investigation, prosecution and trial of Serious Crimes in East Timor, it is important to recognise that a remarkable amount has in fact been achieved.

The other crucial factor behind the problems of the venture has been the failure/inability of UNTAET and/or the International Community to provide adequate material support (through resources and suitable personnel with the necessary professional skills) and political support (for example, in addressing the many reported problems and creating a culture of transparency and accountability). This has resulted in many suspects being released and others being prosecuted for domestic rather than international crimes due to lack of resources. It has also impacted on the ability of the Serious Crimes Unit to investigate fully what occurred in 1999, let alone earlier years. There were persistent, highly damaging personnel disputes within the Serious Crimes Unit and there emerged public

42 Between 1 January and 31 August 2001, the Special Panel rendered decisions in 12 cases. There were ten convictions with sentences ranging from 4 to 15 years imprisonment and two dismissals (currently on appeal). There have been no acquittals. Source: Judicial System Monitoring Programme, Dili, East Timor.

allegations of incompetence, mismanagement, lack of communication, political interference and an absence of direction, strategy or policy in investigations and prosecutions. In this context, it should be noted that there has been large staff turnover (there have been many resignations by legal and investigative staff). All the senior personnel in the justice and prosecution sectors have now been replaced as part of UNTAET's recent shake-up, carefully timed to merge with accelerated 'Timorisation' of the administration following the 30 August 2001 elections.

There have also been serious concerns about whether international human rights standards have been respected, in particular relating to arrest and detention, due process and fair trial. Some of these problems have been addressed; others continue. Both the quality and quantity of interpretation and translation facilities into the four languages used in court (Bahasa Indonesia, Tetum, English and Portuguese) are regarded as impacting negatively upon the fairness of the trial process and the rights of accused persons.[43] Given that the prosecution have laboured under tremendous limitations in developing cases, the fact that there have been no acquittals to date may reflect the reality that East Timorese defence counsel were given little training or mentoring to equip them for the task of defending persons accused of the most serious crimes. Also, certain highly questionable decisions have been made by the Special Panel. One case raised particular concerns when the panel made findings of fact about Indonesia's role in the East Timor carnage without evidence being submitted by the parties, without the issues being litigated, by relying on a test of 'what even the humblest and most candid man in the world can assess' and by drawing on extraneous sources of information.[44]

The reports indicate that the other major factors that have hindered the effectiveness of the Serious Crimes project have included: (1) The International Community's continuing faith in the justice system of the nation that occupied East Timor for 24 years,

43 Judicial System Monitoring Programme, *Justice in Practice: Human Rights in Court Administration, JSMP Thematic Report 1*, November 2001.

44 See *Prosecutor v. Joseph Leki*, Judgment of the Special Panel, 11 June 2001, Case No. 5/2000, p. 7.

despite ample evidence of a concerted effort to block both prosecutions for the East Timor atrocities in Indonesia itself and UNTAET's own investigations. (2) UNTAET's wooing, under the banner of reconciliation, of militia leaders currently in West Timor, with a view to securing the return of up to 100,000 refugees currently under their control, and the impact that this has had on Serious Crimes Unit strategy and decisions. For example, militia leaders engaged in reconciliation negotiations appear to be benefitting from *de facto* immunity from arrest and prosecution. There also continues to be concern about the impact on criminal justice of the new Reception, Truth and Reconciliation Commission. (3) Weak, or the absence of any effective, investigative and prosecutorial strategy which led to scant resources being spent focusing on "small fry" rather than developing cases against the responsible leaders. There has also been a perceived failure to develop a policy in relation to atrocities that were committed between 1975 and 1999, which has resulted in a complete failure of the Serious Crime authorities to investigate or prosecute atrocities of that era.[45] In addition, the prosecution of cases as domestic crimes rather than international ones has been seen as diminishing the significance of the crimes committed, letting those involved "get off easily" and creating an incorrect historical record. (4) The development of the Serious Crimes project as an "international" process with marginalised East Timorese participation, and in spite of public preference for the establishment of an ad hoc international tribunal. The problem of a local population that was alienated from the process was worsened by a perceived failure to engage in outreach to the East Timorese and explain the Serious Crimes process, and allegations of cultural insensitivity and arrogance on the part of UNTAET's foreign personnel.

45 It is also possible that this may reflect Regulation 2000/15's inadequacy for use in prosecuting atrocities committed over a 24-year-long period in accordance with international standards.

The United Nations withdrawal from the Cambodian Tribunal

The United Nations announced on 8 February 2002 it was ending negotiations with Cambodia to set up the tribunal.[46] It concluded "that the proceedings of the Extraordinary Chambers would not guarantee the international standards of justice required for the United Nations to continue to work towards their establishment (...) [A]s currently envisaged, the Cambodian tribunal 'would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have'."[47]

The Government's refusal to accept an agreement that would have governed the UN's involvement in the court and Phnom Penh's unwillingness to address the Organization's concerns about the national law that was passed last year paving the way for the tribunal were other obstacles according to the Legal Counsel of the United Nations.

The author takes no position on whether the United Nations should or should not involve itself in the process, but it is clear that an enterprise of this nature requires enormous international assistance if it is to meet recognised standards of fair trial and due process.

Lessons to be learned

An internationalized domestic tribunal has much potential as a new method of ensuring accountability. Unlike at the international tribunals for the Former Yugoslavia and Rwanda, where Yugoslav and Rwandese involvement was shunned, the internationalized domestic tribunal embraces the local legal community. Institution-building is thus an important by-product. Such an institution is also more cost-effective than an ad hoc international tribunal and, if properly administered, justice may be achieved expeditiously and in accordance with international human rights standards.

46 ‹http://www.un.org/apps/news/story.asp?NewsID=2829&Cr=cambodia&Cr1=court›.

47 Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, 8 February 2002, ‹http://un.org/News/dh/infocus/Cambodia/corell-brief.htm›, quoted in *Ibid.*

However, this short discussion has revealed that despite the potential, there are major problems of implementation. The law on Extraordinary Chambers is now promulgated and it is the stated goal of the Cambodian Government to establish it as soon as possible (even without United Nations assistance), but some lessons from the East Timor experience can still be drawn.

For a start, an internationalized domestic tribunal that is grafted onto a weak domestic criminal justice system which cannot guarantee respect for fundamental human rights is unlikely to succeed in its task of bringing justice in accordance with international standards. International control of the process in such a situation is crucial, but it should not be assumed that United Nations control of the process will guarantee that the process will accord with international standards. The Cambodian tribunal in its current form has internationals in a minority; this makes it all the more important that international personnel involved in the project have the appropriate specialisation and practical experience in international criminal and humanitarian law.

Another important lesson from East Timor is that the judicial mechanism adopted should be compatible with local expectations. It must be realistic in light of the circumstances of the country and the ability of its institutions to cope with the demands placed upon them. There does not currently appear to be interest in a truth-and-reconciliation mechanism in Cambodia; if any such mechanism is eventually established, it must clearly be subordinate to judicial institutions and the criminal justice process.[48]

The tribulations of the Serious Crimes project have taught that provision of resources is a most useful way of controlling the effectiveness of any enterprise. If the institutions connected with the Extraordinary Chambers project are not provided with adequate

48 East Timor has recently established a Truth and Reconciliation Commission to deal with atrocities committed between 1975 and 1999 during the period of occupation by Indonesia. The Commission is expected to operate for at least 2 years and work in conjunction with the East Timorese judicial system. While the Commission will deal with more minor offences, cases dealing with serious offences such as rape and murder will be passed on for prosecution to the Special Panels.

resources to enable them to perform their tasks, the project will undoubtedly fail to deliver justice. It is therefore of utmost importance that sufficient resources are provided to the investigation, prosecution and trial of accused persons at start-up and throughout the lifetime of the Extraordinary Chambers project.

Immediate reform is needed to strengthen Cambodia's courts and investigative agencies. The Cambodian government has in fact prepared a Master Action Plan for the reform of the judicial sector, but has yet to implement its proposals. Many reports of the United Nations SRSG on Human Rights in Cambodia and by non-governmental organizations have identified ways to deal with the problems of impunity, corruption, political influence over judges and prosecutors, inadequate legal regulation and weak institutions. One of the first steps towards developing institutional capacity to deal with the Extraordinary Chambers project would be the strenghening of court administration and the establishment of a professionally run registry.[49]

A special unit of Judicial Police investigators that exclusively investigates crimes within the jurisdiction of the tribunal should be established. In this, international assistance is crucial and the Ministry of Interior should consider permitting specialist investigators to work alongside Cambodian investigators. The existing forensic facilities badly need to be strengthened. Preparation needs to be made for the development of victim and witness protection programmes, along with counselling facilities.

While trial and appeal judges will also need training, Judicial Police, Investigating Judges and Prosecutors require additional training to develop particular skills for investigating crimes of such magnitude. Given that there will be enormous pressure for the enterprise to get to work immediately once the "green light" is given, Cambodian personnel should be appointed as soon as possible in order that there is sufficient opportunity to develop their capacity through highly intensive and specialised training in international criminal,

49 The Law on Extraordinary Chambers creates an Office of Administration, but the duties of its Director are only stated as being to oversee the work of the staff of the Chambers and Offices of the Co-Investigating Judges and Co-Prosecutors.

human rights and humanitarian law. Substantive work should not begin until local staff have received adequate training — it would be advisable for the institutions to be given a grace period to have their offices established before being expected to commence work. There will also be a need for ongoing training and to have legal experts attached to both the judiciary and prosecution in order to advise on substantive legal matters from the start.

Cambodia's current criminal procedure is unsatisfactory and if used for the Extraordinary Chambers will hamper its work and the rights of accused persons. The new Criminal Procedure Code that is being drafted with French assistance may offer a solution but this has long been on the drawing board and shows no sign of materialising as an approved law in the immediate future. Specially adapted Rules of Procedure and Evidence along the lines of those used at the International Criminal Tribunals for the the Former Yugoslavia and Rwanda may therefore be the most appropriate alternative for the Extraordinary Chambers.

An issue that is crucial to fair trial and due process is the availability of competent and experienced defence counsel who are able, willing and provided with the means to defend persons facing severe punishment for their alleged perpetration of the most heinous crimes. Few if any local lawyers have the expertise to defend persons accused of these most serious of crimes; intensive training would be one option, another would be to lift restrictions on foreigners appearing before Cambodian courts as defence counsel.

International standards require prosecutorial and judicial independence from undue influence. A compromised system will result in tainted justice and every effort needs to be made to select personnel who are, and can be expected to remain, immune to improper influence. Many observers have written about the lack of integrity of the Cambodian judiciary, arising more than anything because of the deplorable working conditions of court staff and the particular history of Cambodia. An impartial and independent Supreme Council of Magistracy would be a significant step towards ensuring that both local and international appointees are persons with the necessary competence, moral integrity, impartiality and independence. The swift

adoption of a Code of Ethics containing provisions for dealing with misconduct would be advisable, as would a substantial increase in the woefully inadequate salaries of magistrates. Also, Cambodian law does not recognise interference with the course of justice as a crime and serious thought should be given to the criminalisation of any wilful attempts to obstruct, pervert or interfere in the course of justice as a means of both preventing such acts and protecting court personnel from improper pressure. Nevertheless, principles of professional independence should not prevent an administrator from taking a proactive role to address personnel issues and other problems, for example insisting upon accountability for professional misconduct or mismanagement. A culture of accountability needs to be established from the start and prompt remedial action for any emerging problems is essential.

There are currently two persons held in detention in Cambodia in relation to Khmer Rouge atrocities.[50] Kang Keck Ieu (Duch) was the commander of the notorious S-21 detention facility in Phnom Penh. Ta Mok was a major leader of the Standing Committee of the Khmer Rouge (Brother Number Four). The two have been held in detention well beyond UNTAC Law's six-month limit within which trial must be held. The Law on Duration of Pre-Trial Detention was passed by the National Assembly on 12 August 1999 to deal with their situation, extending the maximum period of detention to three years in cases of genocide, war crimes and crimes against humanity. The current discussion is about whether the three-year period will need to be extended even further given the delay in getting the tribunal established. There are therefore already issues concerning the right to expeditious trial and excessive pre-trial detention. The autho=rities will have to consider carefully their obligations under domestic and international law, both in relation to prosecuting international crimes expeditiously and respecting basic human rights in the process.

50 The two were charged by the military court in Phnom Penh with violating the 1994 Law Outlawing the Democratic Kampuchea Group, and with genocide under a Vietnam-era 1979 law whose compliance with international standards of justice was suspect. Human Rights Watch and other human rights organizations questioned the legality of the involvement of the military court, since neither had served in the Royal Cambodian Armed Forces.

A lesson from East Timor is that the choice may be between having to release the accused due to excessive detention or proceeding with charges under the applicable domestic law, namely the 1956 Penal Code which will enable a swifter investigation and trial.

The role of other States is a sensitive issue and one that may impact on the efficacy of many judicial projects to secure individual criminal responsibility for atrocities. A much heralded *Memorandum of Understanding between the Republic of Indonesia and UNTAET on Cooperation in Legal, Judicial and Human Rights Related Matters* signed on 6 April 2000 has delivered little benefit to the investigation and prosecution of Serious Crimes in East Timor. It has been denounced in Indonesia as contrary to national sovereignty and Constitutional provisions prohibiting the extradition of Indonesian nationals — no one has been surrendered or is likely to be surrendered to face trial in East Timor. The intelligence services of the United States, the United Kingdom and Australia are believed to have material that is highly relevant to the prosecution of atrocities in East Timor but so far no such evidence has emerged during trial. In 1979, the Vietnamese-backed regime prosecuted, *in absentia*, the major leaders of the Khmer Rouge and it is believed that Vietnam possesses material evidence derived from those trials and from other sources. The roles of Vietnam, the United States and China may well come under scrutiny in the course of trials. Also, their intelligence reports may be of great importance in uncovering the truth. There should be established a reliable mechanism for securing international cooperation. One option that may be considered (but only where the United Nations is a partner in the process) is for the Security Council to become "seized" if the Extraordinary Chambers come into existence and may in certain circumstances exercise its powers to assist Cambodia in securing international cooperation.

Finally, the Cambodian public must have a sense of ownership and involvement in the judicial process. Meaningful local involvement in the process is one of the potential strengths of the internationalized domestic tribunal. In post-conflict societies where a decision has been made to pursue individual criminal responsibility, it is crucial that the public understands that decision and the steps being

taken to implement it. If trials are to be a means of achieving reconciliation through justice, the ordinary citizen has to be informed about the judicial process. This will require close monitoring of the trials and dissemination through unbiased and objective media coverage, public education on the importance of the rule of law and of a fair trial (especially the presumption of innocence). If Cambodian society is ever to heal the wounds it still carries, the opportunity provided by the trials must be used to encourage public discussion about the justice process and what happened between 1975 and 1979 as well as the years preceding and following Cambodia's terrible nightmare.

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Résumé

Nouvelles mesures prises en vue de l'établissement d'une justice internationale au Cambodge et au Timor oriental

PAR SUZANNAH LINTON

*L'Administration transitoire des Nations Unies au Timor oriental (ATNUTO), établie par la résolution 1272 (1999) du Conseil de sécurité pour administrer ce territoire, a créé une chambre spéciale (*special panel*) au tribunal de district de Dili pour juger les crimes graves commis au cours du déferlement de violence qui a suivi le référendum sur l'indépendance, en septembre 1999. Au Cambodge, la communauté internationale a pris l'initiative de faire en sorte que les crimes commis sous le régime des Khmers rouges ne restent pas impunis.*

L'auteur fait l'historique de ces deux décisions et se penche sur les premières expériences faites par le biais de cette nouvelle approche qui, au lieu d'établir un tribunal international ad hoc, crée une forme de juridiction nationale internationalisée. Il reste cependant beaucoup à faire avant d'aboutir à une justice qui fonctionne d'une manière satisfaisante.

Sierra Leone's shoestring Special Court

by
AVRIL MCDONALD

The lengthening arm of international criminal justice is about to reach even further with the creation of a Special Court for Sierra Leone. Plans to establish the Court have been on the drawing board since mid-2000; its creation has been delayed by negotiations on some contentious aspects of the Court's Statute and the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (the Agreement). Final agreement on both was reached in early 2001. Delays since then have mainly been due to difficulty in finding enough money to establish the Court.

Despite these difficulties, the United Nations and the Government of Sierra Leone signed eventually, in January 2002, an agreement setting up the Special Court to prosecute persons bearing the "greatest responsibility" for crimes committed in that country.[1]

This note first examines the process leading to the finalization of the Statute for the Special Court, before turning to a brief discussion of the provisions of the Agreement and the Statute. To round off, a few conclusions are offered. The aim is to highlight the most significant, contentious and troubling aspects of the Court's

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Statute and the Agreement and to compare key provisions with those of the Statutes of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Statute of the International Criminal Court (ICC Statute).

Although not discussed here, it should be noted that Sierra Leone is currently also in the process of establishing a Truth and Reconciliation Commission (TRC).[2] It is the first time that an international court, even a quasi one such as the Special Court, will function simultaneously with such an institution, and offers an interesting experiment in how criminal prosecutions can complement other processes aimed at providing justice and promoting reconciliation and peace-building. It is not yet clear what the relationship will be between the Special Court and the Truth Commission,[3] but it is to be hoped that they will work in cooperation and harmony in order to maximize the potential of these two complementary mechanisms.

Security Council Resolution 1315

On 14 August 2000, the United Nations Security Council unanimously passed Resolution 1315 (2000), initiating a process intended to lead to the creation of a Special Court for Sierra Leone. The resolution expressed the Council's concern at the "very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity", stated that those who commit such crimes are individually responsible and asserted "that the international community would exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law". Further, it recognized that "in the particular circumstances of Sierra Leone, a credible system of justice

1 See "Sierra Leone: UN, Government sign historic accord to set up special war crimes court", UN News Center, 16 January 2002.

2 Pursuant to The Truth and Reconciliation Commission Act 2000 of 22 February 2000.

3 While SC Res. 1315 (2000), initiating the creation of the Court, noted the steps taken by Sierra Leone to establish a national truth and reconciliation process, it did not specifically request that the possible relationship between the Special Court and the Truth and Reconciliation Commission be considered, and the Secretary-General subsequently failed to take any initiative in this regard.

and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace".

Resolution 1315 was a complete about-turn with regard to a resolution on Sierra Leone passed by the Council a year earlier. Resolution 1260 of 20 August 1999 welcomed the signing of the Lomé Peace Agreement, which was meant to put an end to almost nine years of fighting in Sierra Leone, and commended the Government for its "courageous efforts to achieve peace, including through legislative and other measures already taken towards implementation of the Peace Agreement (...)" — a reference to the blanket amnesty, seats in the government and other concessions to the rebels provided for in the Lomé Agreement. At the time of the signing of the Lomé Agreement on 8 July 1999 it was widely accepted, including by the UN, the government of Sierra Leone and the governments of other involved States, particularly the United States and United Kingdom, that the price of peace was complete impunity for all those who had committed serious violations of international humanitarian law, although the UN Secretary-General's special representative to Sierra Leone added a disclaimer to the Peace Agreement that the United Nations did not recognize the validity of the amnesty in respect of war crimes, crimes against humanity or genocide.[4]

A year later, it had become clear that the gamble had not paid off. The Revolutionary United Front (RUF) had failed to honour its commitments and was flagrantly violating the Peace Agreement and obstructing the peace process, which had, in fact, collapsed. Attacks on civilians and on the UN peacekeepers sent to enforce the agreement continued, culminating in the kidnapping of over 500 UN peacekeepers in May 2000. With the credibility of UN peacekeeping and the Organization itself on the line, the spirit of reconciliation fading in Sierra Leone and the government calling for the Security Council's

4 See UN Doc. S/1999/836, p. 2, para. 7. For national and international responses to the 1999 Peace Agreement, see A.J.M. McDonald, "The amnesties in the Lomé Peace Agreement and the UN's dilemma", *Humanitäres Völkerrecht*, No. 1, 2000, pp. 11 at 12-14.

help in prosecuting the numerous accused persons it already had in its custody,[5] and some prominent States, including the US and UK, expressing their support for prosecutions, it was clear that the momentum had changed in favour of holding perpetrators of serious crimes accountable.

The nine-paragraph Resolution 1315 entrusted the Secretary-General with the task of negotiating with the government of Sierra Leone an agreement to create an independent special court. This showed a marked divergence from the approach taken in establishing the ICTY and ICTR, where the governments of the territorial States were not involved in the tribunals' creation, and where the Statutes were drafted by the UN Secretariat and adopted by the Security Council. The manner of the Special Court's creation is directly related to its funding. There was no political support for setting up another, very expensive, international criminal tribunal,[6] and the Court could be established only with the full support and cooperation of Sierra Leone, which, in any event, wanted a mixed tribunal with national and international components. It is thus a *sui generis* Special Court, not so much because this was necessarily the best or most effective approach to take in the particular circumstances of Sierra Leone, but because it was the only politically acceptable option.

Resolution 1315 recommended that the subject matter jurisdiction of the Court should cover crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law.

5 UN Doc. S/2000/786.

6 Ralph Zacklin, UN Assistant Under-Secretary-General for Legal Affairs, said that there was no longer support on the Council for establishing subsidiary legal bodies, and that the UN Security Council, while it was supportive of other ad hoc Tribunals, would not fund them as it did the ICTY and ICTR. Robert McMahon, "UN: International justice – ad hoc Tribunals fill void (Part 4)", *Radio Free Europe/Radio Liberty*, 7 September 2001.

The Report of the Secretary-General and negotiations towards final agreement on the Statute and the Agreement

On 4 October 2000, the Secretary-General submitted his Report on the establishment of a Special Court for Sierra Leone.[7] Annexed to it were a draft statute of the Court and a draft agreement between the United Nations and Sierra Leone. Most of the provisions suggested by the Secretary-General were retained in the final drafts. The main bones of contention were the Court's jurisdiction *ratione personae*, and in particular the question whether it should exercise jurisdiction over child soldiers; the size of the Court; and funding for the Court. Differences of opinion between the Secretary-General and the Security Council were resolved over the following months through a series of letters;[8] more precisely, they were not so much resolved as cleared in that the Secretary-General made a final determination of the matter. By early February 2001, final agreement was reached.[9]

The Agreement and the Statute

Unlike the ICTY and ICTR, which were established by a Security Council resolution, the Special Court is established by an Agreement between the UN and the government of Sierra Leone. The main disadvantage of this approach is that the Court lacks Chapter VII powers, powers that have proven indispensable for the operation of the *ad hoc* Tribunals. In his report, the Secretary-General noted that the Court's primacy extends only to the courts of Sierra

7 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000.

8 Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234; Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40; Letter dated 31January 2001 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2001/95.

9 By a letter of 9 February 2001 to the Legal Counsel, the Government of Sierra Leone expressed its willingness to accept the Statute and Agreement. Letter from the Secretary-General to the President of the Security Council, UN Doc. S/2001/693, 13 July 2001. However, the Court would only be established once the Secretary-General had ascertained that sufficient contributions were in hand.

Leone and not to those of third States. It thus lacks the power to, for example, order that another State arrest an accused person or compel evidence to be handed over. The Secretary-General requested the Security Council to consider endowing the Court with Chapter VII powers for the specific purpose of requesting the surrender of an accused person, but as of October 2001, the Council had not done so.[10]

There is considerable overlap between the Agreement and the Statute. They should be read together, as a single instrument, rather than as two separate instruments. — Article 1 of both the Agreement and the Statute provides for the competence of the Court, dealing with its personal and temporal jurisdiction: the Court shall have jurisdiction over those persons who bear the greatest responsibility[11] for serious violations of international humanitarian law committed in Sierra Leone since 30 November 1996. However, Article 1 of the Agreement goes further insofar as it actually establishes the Court. Like the Statute, the Agreement also deals with such matters as the composition of the Special Court and the appointment of Judges (Arts 12 and 2, respectively), the Prosecutor (Arts 3 and 15) and the Registry (Arts 4 and 16). In addition, the Agreement provides for operational aspects of the Court, such as premises (Art. 5) — which are the responsibility of the government — and their inviolability (Art. 7); expenses (Art. 6); the seat of the Court (Art. 9); juridical capacity (Art. 10); privileges and immunities of the Judges, the Prosecutor and the Registrar (Art. 11) and of international and Sierra Leonean personnel (Art. 12); immunity of defence counsel (Art. 13); and of witnesses and experts (Art. 14). Article 15 provides that the UN Mission in Sierra Leone (UNAMSIL) shall provide security, pending the restructuring and rebuilding of the Sierra Leonean Armed Forces.

Article 16 deals with cooperation between the Special Court and the Sierra Leonean government. It provides for a legal obligation on the government to comply without undue delay with any request for assistance by the Court and any order issued by the Trials Chamber or the Appeals Chamber. Article 17 provides that the

10 *Ibid.*, para. 10.

11 UN Doc. S/2000/1234.

Court's working language shall be English. Article 18, governing practical arrangements, stipulates that, in order to maximize efficiency and cost-effectiveness, the Court shall be established in a graduated or phased manner. The first phase will consist of the appointment of the Judges, Prosecutor and Registrar, along with the investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

As noted by the Secretary-General in his report to the Security Council, in order to determine the Special Court's temporal jurisdiction it was first necessary to pronounce on the legality of the amnesties granted in the Lomé Peace Agreement. If they were legal, the Court's jurisdiction would be restricted to crimes committed after 7 July 1999; if they were not legal, the Court could have jurisdiction over crimes committed before as well as after that date.[12] The Secretary-General stated that "the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law".[13] Article 10 of the Statute thus provides that an amnesty granted to anyone falling within the Court's jurisdiction is no bar to prosecution of international crimes.[14] However, it pointedly excludes mention of crimes under Sierra Leone's national law. It has thus been argued that the Court's temporal jurisdiction may differ as regards international and national crimes, and that regarding the latter, the Court's temporal jurisdiction may begin on 7 July 1999.[15]

While recognizing that the conflict in Sierra Leone began on 23 March 1991, when RUF forces invaded Sierra Leone from

12 *Ibid.*, para. 21.

13 *Ibid.*, para. 22.

14 It provides: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution." Crimes under Sierra Leonean law are referred to in Article 5.

15 Micaela Frulli, "The Special Court for Sierra Leone: Some preliminary comments", *EJIL*, vol. 11, 2000, p. 859.

Liberia and launched a rebellion to overthrow the one-party rule of the All People's Congress, the Secretary-General observed that, in deciding on the Special Court's temporal jurisdiction, he was guided by several considerations, *inter alia* that the Prosecutor and Court should not be overloaded. It was necessary to avoid a date with political connotations, but it should be such as to encompass the most serious crimes which have been committed by all sides. For these reasons, the date of 30 November 1996 was chosen. It was the date of the signing of the Abidjan Peace Agreement, the first comprehensive agreement between the government of Sierra Leone and the Revolutionary United Front (RUF), the country's main rebel group.

As the conflict is still ongoing, the Court's temporal jurisdiction is open-ended. Its life span is limited, however, and will be determined by a subsequent agreement between the parties upon completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. Any agreement terminating the Court should also provide for matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Court.[16]

Articles 2 to 5 of the Statute deal with jurisdiction *ratione materiae*, and cover three sets of crimes: crimes against humanity; violations of the law applicable in internal armed conflicts; and certain crimes under Sierra Leonean law. Article 2, concerning crimes against humanity, provides a different, simpler, definition of this crime than the equivalent provisions of the ICTY, ICTR or ICC Statutes.[17] While there is overlap between the acts constituting crimes against humanity in all cases (with the exception that Article 7 of the ICC Statute criminalizes a much broader range of acts as crimes against humanity than do Articles 5 and 3, respectively, of the Statutes of the *ad hoc* Tribunals

16 UN Doc. S/2000/1234, paras. 25-28.

17 It also departs from the definition of crimes against humanity in the United Nations Transitional Administration in East Timor (UNTAET)'s Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, which follows the ICC definition. Regulation 2000/15 also adopts a definition of war crimes almost identical to that in Art. 8 of the ICC Statute.

or Article 2 of the Special Court), the elements of the opening paragraphs differ. According to Article 2 of the Special Court's Statute: "The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) Persecutions on political, racial, ethnic or religious grounds; (i) Other inhumane acts."[18] As noted by one commentator, unlike the Statute of the ICTR, which Article 2 most closely resembles, "and in conformity with customary international law, the Special Court definition does not require a discriminatory *animus* for crimes against humanity (except those charged as persecution)".[19] The prohibited acts almost precisely mirror the equivalent provisions of the ICTY and ICTR Statutes. The only difference is in Article 2(g) dealing with sexual crimes, which is far more detailed than sub-paragraphs (g) of Articles 5 and 3 of the *ad hoc* Tribunals' Statutes, and has more in common with, though is less comprehensive than, Article 7(1)(g) of the ICC Statute.

Article 3 of the Statute of the Special Court, giving it jurisdiction over violations of Article 3 common to the 1949 Geneva Conventions and of their Additional Protocol II of 1977, mirrors Article 4 of the ICTR Statute except in the wording of the opening paragraph: Article 3 states that the violations coming under this provision "shall include: ...", whereas the said Article 4 goes on to specify that "the violations shall include, but shall not be limited to: ...". The acts prohibited are those enumerated in Article 4(2) of Protocol II and

18 Art. 3 of the ICTR Statute stipulates in addition that, to be subject to prosecution by the ICTR, the acts should be committed "as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*" (emphasis added). Art. 5 of the ICTY Statute adds a different requirement: that the crimes should be committed "in armed conflict, whether international or internal in character, and directed against any civilian population". Finally, Art. 7 of the ICC Statute provides that crimes against humanity are the enumerated acts, "when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack".

19 Robert Cryer, "A "Special Court" for Sierra Leone?", *ICLQ*, vol. 50, 2001, p. 443.

probably have the status of customary international law, according to the ICTY Appeals Chamber in the *Tadic* jurisdiction decision.[20] Most of the prohibited acts are also outlawed under common Article 3, which unquestionably has the status of customary international law.[21]

Article 4 of the Statute of the Special Court gives it jurisdiction over "[o]ther serious violations of international humanitarian law". Rather than being a residual clause, akin to Article 3 of the ICTR Statute, Article 4 enumerates the three types of offences included in this provision.[22] Its wording is taken almost directly, but with some variation in the section dealing with children, from Article 8(2)(e)(i), (iii) and (vii) of the ICC Statute.[23] Article 4(b) could prove especially interesting if it provokes a debate on whether UN and ECOMOG peacekeepers were entitled to the protection of the 1994 UN Convention on the Safety of United Nations and Associated Personnel or could be considered as combatants bound by international humanitarian law.

Article 5 gives the Court jurisdiction over certain crimes under Sierra Leonean law,[24] distinguishing its Statute from those of the ICTY, ICTR and ICC, which cover only international crimes. Similarly, UNTAET Regulation 15 establishing Special Panels in East Timor gives them jurisdiction over national as well as international

20 *Prosecutor* v. *Duško Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 117.

21 *Nicaragua* v. *USA*, I.C.J. Reports 1986, Judgment,, para. 218; confirmed in *Tadic* jurisdiction decision, *ibid.*, para. 98; *Prosecutor* v. *Duško Tadic*, Opinion and Judgment, 7 May 1997, para. 609.

22 "(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities."

23 See *op. cit.* (note 18), p. 444, and *op. cit.* (note 14), pp. 864-865.

24 That is, offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and to the 1861 Wanton Destruction of Property under the Malicious Damages Act.

crimes, although the national crimes included differ in each case.[25] The inclusion of this article necessitates having judges with local knowledge or a common law background. Thus, the Secretary-General, in seeking nominations for judges from States, will be encouraging in particular nominations of persons from ECOWAS or Commonwealth countries.[26]

Article 6, concerning individual criminal responsibility, mirrors the equivalent provisions of the Statutes of the ICTY and ICTR, but also contains an additional clause, paragraph 5, which states: "Individual criminal responsibility for the crimes referred to in Article 5 shall be determined in accordance with the respective laws of Sierra Leone." It might have been preferable in drafting this provision to be guided instead by the equivalent provision of the ICC Statute (Art. 25), which is much more detailed, although there are arguments over the extent to which some parts of Article 25 reflect customary law, particularly as it stood in 1996.

Article 9, concerning *Non bis in idem*, resembles the equivalent provisions in the Statutes of the ICTY (Art. 10) and ICTR (Art. 9), except in one respect. The latter state that no persons shall be tried before a national court (without specifying any restriction of this provision to the courts of the former Yugoslavia or Rwanda) for crimes for which he or she has already been tried by one of the International Tribunals. Conversely, Article 9 of the Statute of the Special Court provides that: "No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court." It is odd that the Secretary-General decided to phrase the provision in this way. This can hardly mean that persons who had already been tried before the Special Court could be tried for the same acts before the courts of third States.

Personal jurisdiction

The question as to the personal jurisdiction that the Court should exercise had two interconnected facets: it was necessary to clarify

25 Regulation 15 gives the Special Panels jurisdiction over murder and sexual offences under the applicable Penal Code in East Timor (sections 8 and 9).

26 Agreement, Art. 2(2)(a).

what level of defendant the Court should pursue and whether it should prosecute child soldiers. Regarding the former, the Secretary-General's original draft Statute provided that the Special Court should have jurisdiction over "persons most responsible for serious violations of international humanitarian law and Sierra Leone law (...)".[27] The Security Council changed the wording to "persons who bear the greatest responsibility (...)".[28] The Secretary-General responded that while he agreed that the Court should prosecute those most responsible for serious violations of international humanitarian law, this "does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term 'persons who bear the greatest responsibility' in any given case falls initially to the Prosecutor and ultimately to the Special Court itself".[29] Given its financial constraints, however, which are mentioned below, the Special Court is unlikely to be able to prosecute all those who bear the greatest responsibility but only a handful of top suspects. The Security Council also added to the Secretary-General's draft the wording "including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone".[30] This wording is now included in the final Statute, but as the Secretary-General noted, "the words (...) do not describe an element of the crime but rather provide guidance to the prosecutor in determining his or her prosecutorial strategy".[31]

These amendments by the Security Council reduce the likelihood of persons other than rebels being tried by the Court. To reinforce the idea that the Special Court is not established to try UN peacekeepers or members of the regional peacekeeping force ECOMOG, the Security Council added two paragraphs to the original draft Article 1. They make it clear that the primary responsibility

27 Art. 1.

28 UN Doc. S/2000/1234.

29 Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40; Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2001/95.

30 *Ibid.*

31 UN Doc. S/2001/40, para. 3.

for prosecuting peacekeepers falls to the sending State.[32] Only "[i]n the event the sending State is either unwilling or unable genuinely to carry out an investigation or prosecution" may the Court, "if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons".[33] The Secretary-General pointed out that the "amended article, however, falls short of inducing the unwilling State to surrender an accused person situated in its territory, with the result that a State which is unwilling to prosecute a person in its own courts would in all likelihood be unwilling to surrender that person to the jurisdiction of the Special Court".[34] He suggested that Article 1(c) be reformulated to permit the President of the Special Court, where he is convinced that the sending State is either unable or unwilling to cooperate, to report this to the Security Council "and seek its intervention with the State in question to induce it to investigate and prosecute or to surrender the accused to the jurisdiction of the Court".[35] However, the Security Council responded negatively to this suggestion.[36]

The question of whether the Court should exercise jurisdiction over *child soldiers* was perhaps the most controversial. The Secretary-General's report noted the moral dilemma posed by the question of how to deal with child soldiers who committed some of the worst atrocities but who themselves had been abducted, drugged and were acting under duress. His solution was to leave open the possibility of trying them but to build in a number of safeguards in the event that they should be tried, including separate trials from adults, protective measures and provisional release pending trial. At all stages of the proceedings, minors should be treated with "dignity and a sense of worth, taking into account his or her young age and the desirability

32 Art. 1(2) of the Statute provides: "Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending state."

33 Statute, Art. 1(3).

34 UN Doc. S/2001/40, para. 4.

35 *Ibid.*, para. 5.

36 UN Doc. S/2001/95.

of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society".[37] The Secretary-General's initial draft Statute gave the Court jurisdiction "over persons who were 15 years of age at the time of the alleged commission of the crime".[38] This would allow the Court the possibility to prosecute child soldiers if they could be considered as being amongst those persons with the greatest responsibility.

Responding to the Secretary-General's draft, the Security Council took the view that "the Truth and Reconciliation Commission will have a major role to play in the case of juvenile offenders, and the members of the Security Council encourage the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end".[39] It thus amended (and significantly abridged) Article 7.[40]

The Secretary-General in turn noted that Article 7 of the draft Statute, as amended, retains the principle of juvenile justice but omits any reference to a minimum age or to the guarantees of juvenile justice. On the understanding the members of the Security Council did not intend to allow prosecution below the age of 15, (...) Article 7 should be amended to read: "The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. (...)". "It is also my understanding that persons in this age group [i.e., between 15 and 18], if brought before the Court, will be entitled to all the guarantees stipulated in the draft Statute annexed to my report."[41] The Security Council subsequently concurred with all of the Secretary-General's suggestions, while reiterating that it is extremely unlikely that juvenile members will in fact come before the Special Court.[42]

37 Art. 7(2) of the draft Statute of October 2000, in Annex to Special Report of the UN Secretary-General.

38 *Ibid.*, Art. 7.

39 UN Doc. S/2000/1234.

40 To read in full: "Should any person who was at the time of the alleged commission of the crime below 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child."

41 UN Doc. S/2001/40, para. 7.

42 UN Doc. S/2001/95.

Should a juvenile be prosecuted by the Court, its Statute stipulates that he or she shall not be subject to imprisonment.[43] The Secretary-General insisted that Article 7(3)(f) of his original draft Statute, providing for sentencing options, should be retained as Article 7(2) of the final draft. It provides that in the disposition of the case of a *juvenile* offender, the Court may order any of the following: "care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies." Judges, prosecutors, investigators and registry staff should be experienced in juvenile justice.[44] Moreover, Article 15 of the Statute provides that in the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to the Truth and Reconciliation Commission where possible.

It could be argued that the Statute strikes an acceptable balance between the desire to ensure that child soldiers do not escape justice and guaranteeing their rights and interests. While neither the Statutes of the ICTY, ICTR or the ICC extend jurisdiction to persons below 18 years of age, this Court has to confront the reality of the circumstances of Sierra Leone, where there was considerable popular support for prosecuting juveniles. There is nothing in international law to prevent such prosecution — it is foreseen even by the Convention on the Rights of the Child,[45] and children as young as ten are subject to prosecution before national jurisdictions.[46]

On the other hand, leaving the decision of whether to prosecute juveniles to the Prosecutor, while emphasizing that their

43 Art. 7(2).

44 Arts 13(2), 15(4) and 15(5).

45 Arts 37 and 40.

46 In its report to the Committee on the Rights of the Child, the government of Sierra Leone stated that its age of criminal responsibility was ten. Initial Report of Sierra Leone, 03/06/96 CRC/C/3/Add. 43 para. 33. Persons over 17 years are considered as adults and can be subject to the death penalty: Chapter 44 of The Children and Young Persons Act, 31 December 1948, Part I, Article 2.

prosecution should be exceptional, is something of a cop-out. It is also inconsistent with and runs counter to the current international legal trend towards standard-setting in the field of children's rights and interests. Under international law, anyone under the age of 18 is a child, and the recently adopted Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict prohibits the recruitment or use of children under 18 years as soldiers.[47] Article 39 of the Convention on the Rights of the Child provides: "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

The child soldiers of Sierra Leone who have committed the most heinous crimes are themselves victims of the armed conflict who have been subjected to all the forms of abuse mentioned in the above provision. Their recovery and reintegration into normal, civil society should be the top priority. Arguably, this cannot be achieved by subjecting children under 18 years to the criminal justice process, but through a non-judicial, mediative process, perhaps in the context of the Truth Commission, or in a special children's commission or commissions which should ideally be community-based.

Structure and size of the Special Court

The Special Court will be an entirely self-contained, independent Court. Like the ICTY and ICTR, it is to consist of three organs: the Registry, Chambers, and the Office of the Prosecutor. However, unlike the ICTY and ICTR, both of which have three Trial Chambers,[48] it is to consist of a single Trial Chamber and an Appeals Chamber. The Security Council rejected the Secretary-General's call

47 Of 25 May 2000.

48 Pursuant to requests of both Tribunals and by virtue of SC Res. 1165 (1998), 30 April 1998, and 1166 (1998), 13 May 1998, respectively.

for two Trial Chambers, saying that "the Special Court should begin its work with a single Trial Chamber, with the possibility of adding a second Chamber should the developing caseload warrant its creation".[49] It also rejected his suggestion of having alternate judges.

Given the Special Court's instant docket, the need for at least two Chambers seems evident. In the case of the *ad hoc* Tribunals, even two have not proven sufficient.[50] Undaunted by the experiences of the *ad hoc* Tribunals, the Statute provides for a total of eight judges, of which three will sit in the Trial Chamber and five in the Appeals Chamber.[51] The government of Sierra Leone will appoint one of the Trial Chamber judges and two of the Appeals Chamber judges.[52] The Secretary-General will appoint the remainder. One, necessarily tireless, law clerk, is envisaged for all of the judges.[53]

The Security Council had asked the Secretary-General to look into the possibility of the Special Court sharing an appeals chamber with the *ad hoc* Tribunals, but he rejected this option. While recognizing the theoretical benefits of such an approach, including the desirability of having an overarching appeals chamber which, as the ultimate judicial authority in matters of interpretation and application of humanitarian law, would offer the guarantee of a coherent development of the law, the Secretary-General found that this goal could also be achieved "by linking the jurisprudence of the Special Court to that of the International Tribunals. (...) The main consideration in rejecting the option of a single appeals chamber for all three courts was the fact that the already overburdened Appeals Chamber would not be able to cope with the additional workload without risking collapse and delays which are not consistent with the fair and prompt administration of justice, including the right to have one's case heard within a reasonable time. However, Article 20(3) of the Statute of the Special Court pro-

49 UN Doc. S/2000/1234, para. 3.

50 In fact, even three have not proven sufficent for the ICTY. In response to its request the UN Security Council, by res. 1329 (2000), voted to create a pool of 27 so-called "*ad litem*" judges to serve in ICTY Trial Chambers on a single case. There will thus be three Trial Chambers each consisting of three sections, that is, up to nine sections of Chambers hearing cases at trial.

51 Agreement, Art. 2.

52 Agreement, Art. 2(2).

53 UN Doc. S/2000/915, para. 57.

vides that it shall be guided by the decisions of the Appeals Chamber of the *ad hoc* International Criminal Tribunals, while Article 14(1) provides that the Rules of Procedure and Evidence of the ICTR shall be applicable *mutatis mutandis* to the proceedings before the Special Court."[54]

The Prosecutor of the Special Court will be chosen by the Secretary-General and shall be assisted by a Sierra Leonean deputy (Art. 15 of the Statute). The Prosecutor shall be entirely independent and free from interference by any government. The Registrar shall be appointed by the Secretary-General and shall serve as a UN staff member (Art. 16).

UNAMSIL is to provide technical and support assistance to the Special Court during its initial operational phase. It was recognized that, given the security situation in the country, UNAMSIL is the only credible force capable of providing adequate security to the personnel and premises of the Special Court. Its role and relationship with the Special Court will have to be worked out by the United Nations, the government of Sierra Leone and UNAMSIL. The entrusting of any such additional tasks to UNAMSIL would necessitate a change in its mandate, which would have to be approved by the Security Council, as well as additional financial, personnel and other resources.[55]

Financing of the Court

The Secretary-General's original budget estimates for the Court had to be drastically scaled back when it became clear that even his modest targets[56] could not be met. Concerned about the viability of a Special Court budgeted at a reduced level, he convened a meeting of Security Council members on 1 June 2001. The message of that meeting was that the Special Court would have to be a bargain base-

54 *Ibid.*, paras 40-46.

55 *Ibid.*, para. 66.

56 His original estimated requirements for the establishment and first year of operation of the Court and for the following 24 months were $30.2 million and $84.4 million, respectively, a total of $114.6 million. Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/693, 13 July 2001.

ment court, while at the same time complying with the requisite standards of due process and other human rights. At a meeting on 14 June, "the Secretariat presented to the group of interested States revised budget estimates amounting approximately to $57 million for the first three years of operation of the Court, with $6.5 million for the first year".[57] The Secretary-General stated that the revised budget estimates reflect "a scaled down operation of the Special Court, while maintaining its nature and *sui generis* character, international standards of justice and the applicable law".[58] However, even these reduced estimates could not be met: as of 6 July 2001, the Secretary-General had received pledges of only $15 million. He noted: "Very limited contributions of personnel have been offered,"[59] although one State had offered some furniture. Despite deciding to press ahead with the creation of the Court, his misgivings about the difficulties of running a court on the basis of voluntary contributions had not been entirely assuaged, and he reserved "the right to revert to the Council at any time in the course of the operation of the Special Court and ask it to reconsider alternative means of financing the Court".[60]

As the Secretary-General's determined efforts to secure a more stable financial basis for the Court's existence than the voluntary contributions that the Security Council insisted on have failed, the Special Court will be in a far more precarious financial position than the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), which are funded directly out of the UN budget, and which demonstrate that international criminal justice, to be credible and effective, carries a very hefty price tag.[61] It is not clear why the Security Council considers that it will be significantly cheaper doing international judicial business in Freetown than in The Hague or Arusha.

57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 *Ibid.*

61 The ICTY's budget, for example, has risen steadily from $276,000 in 1993 to $96,443,900 in 2001. Source: ICTY Key Figures, 9 August 2001. ‹http://www.un.org/icty/glance/keyfig-e.htm›.

Conclusions

The Special Court for Sierra Leone has its work cut out for it. It is to deliver justice and assist reconciliation in a country that has been traumatized beyond comprehension and remains highly volatile. Its situation in the territorial State and its mixed national/international nature has some benefits in terms of its greater relevance for the population, whereas the siting of the ICTY and ICTR outside the former Yugoslavia and Rwanda has contributed to their apparent remoteness from the affected populations. However, security reasons largely determined the decision to situate the ICTY in The Hague and the ICTR in Arusha, and the security situation remains equally grave in Sierra Leone.

The Special Court faces a peculiar problem in that, unlike the ICTY and ICTR, there are many potential defendants awaiting it in custody. Fair and speedy trials are a requisite of international justice, yet with but a single trial chamber and very few resources, it is hard to see how it will be able to deliver either. Criticisms of the Special Court extend not only to its underfunding and undersizing but also to the serious deficiencies and gaps in its Statute. For example, unlike the Rome Statute, which criminalizes all recruitment of children under 15, the Special Court will have jurisdiction only over those who recruited children under 15 by means of force or abduction. This is a particularly unfortunate omission, given the reality of the war in Sierra Leone, and is at odds with the new international standard established in the Optional Protocol to the Convention on the Rights of the Child, which bans the compulsory recruitment of children under the age of 18 years.[62] The Statute does not include the crime of slavery as a war crime. Nor is genocide included. While the Secretary-General said that there was no evidence that genocide had been committed,[63] Amnesty International noted that "this is a decision for an independent Prosecutor to make on the basis of the evidence presented to him

62 Art. 2.
63 UN Doc. S/2000/915, para. 13.

or her, and is not a decision that should be made when drafting the Statute".[64]

Furthermore, the provisions on crimes against humanity and war crimes are far less detailed than in the ICC Statute, which should now be considered as the international gold standard, rather than the ICTY and ICTR Statutes which were drafted before it. The Special Court notably has jurisdiction only over crimes committed in non-international armed conflicts. This means that it will not be able to examine the extent to which the RUF had outside assistance, particularly from Liberia, and whether this was sufficient to internationalize the conflict. As a result, the conflict in Sierra Leone will be treated in isolation, rather than as part of a regional conflict, and its root causes will not be properly or fully addressed.

A major failing of the draft Statute is the absence of provisions relating to reparations for victims and their participation in the criminal proceedings. This represents a major backtracking from the relatively progressive provisions of the ICC Statute. Another significant limitation is the absence of Chapter VII powers obliging all States to cooperate with it. The Special Court's inadequate funding will affect every part of its operations, but most seriously its capacity to investigate and prosecute and mount fair trials. The lesson of the *ad hoc* Tribunals is that it costs several million dollars to prosecute and defend an individual case.

It may be too early to write off the Special Court, before it has even commenced its work, yet it seems reckless to hail the dawn of a new chapter in international criminal justice and wonder about what interesting new legal developments this exercise may bring without sounding a note of caution. Recent years have shown that international criminal justice is indeed possible, if enormously challenging. Even in the best of circumstances it disappoints expectations, but its validity and efficacy have been proven. The *ad hoc* Tribunals repre-

64 *Sierra Leone: Recommendations on the Draft Statute of the Special Court*, Amnesty International, AFR 51/083/2000, 14 November 2000.

sent high-end justice; East Timor's Special Panels and now the Special Court for Sierra Leone are the low-end of the scale. It may be too early to properly critique these different manifestations of *ad hoc* justice, given that they are still evolving, and unfair to compare them, given the specificity of their respective jurisdictions, yet one thing already seems clear: cut-price and shoddy attempts at international criminal justice run a huge risk not only of discrediting the idea of justice itself but of further alienating the affected populations. The experiences of the *ad hoc* Tribunals have shown that even copious resources are no guarantee of success, and do not necessarily ensure the ultimate legitimacy of the institution and its proceedings, in particular in the affected territories. But adequate resources are surely the least of what is required.

As the Special Court gets running, it will no doubt quickly become clear that it cannot function on its current budget and at its envisaged size. More funds will have to be found, if the Court is not to be remembered primarily for its contribution to the regression of human rights. For too long, Sierra Leone has been short-changed. An opportunity has now emerged for the international community to finally redeem itself, but it will require putting the hand deeper into the pocket and facing up to the tangibility of international criminal justice.

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Résumé

Le Tribunal spécial pour la Sierra Leone: une instance aux moyens très limités

par AVRIL MCDONALD

Par la résolution 1315 du 14 août 2000, le Conseil de sécurité des Nations Unies a demandé au Secrétaire général de négocier avec le gouvernement de la Sierra Leone un accord portant création d'un tribunal spécial chargé de juger les atrocités commises sur le territoire de cet État meurtri par plusieurs années de guerre civile. L'accord a été conclu en février 2001. Le Tribunal spécial sera notamment compétent pour poursuivre les crimes contre l'humanité, les crimes de guerre et les autres violations graves du droit international humanitaire commis au cours de cette époque. L'auteur examine en détail le statut du Tribunal spécial, qui s'inspire d'ailleurs des statuts élaborés pour la Cour pénale internationale et les deux tribunaux ad hoc. *En conclusion, l'auteur constate avec amertume que les moyens matériels mis à la disposition du Tribunal spécial pour la Sierra Leone ne suffiront jamais pour instaurer une justice adéquate et performante, condition* sine qua non *d'un retour à la paix en Sierra Leone.*

Complementary jurisdiction and international criminal justice

by
OSCAR SOLERA

For the last ten years the notion of jurisdiction has been a central issue in many discussions on international humanitarian law. The reason is simple: in a world where the punishment of international crimes is essential to the maintenance of international peace and security, how do we reconcile international criminal jurisdictions with the jurisdiction of domestic courts in situations where both are competent to try the same case.

The question was not addressed in depth until the late 1980s. States previously applied general principles of criminal jurisdiction to determine which national court was competent to try an individual charged with acts amounting to internationally recognized crimes. In 1989, however, the creation of an international criminal court was proposed to the General Assembly of the United Nations by the delegation of Trinidad and Tobago, with the objective of combating what they considered to be one of the newly acknowledged international crimes: drug trafficking. The proposal, which was not new for the United Nations, echoed the earlier work of two special committees set up by the General Assembly to develop draft international criminal tribunal statutes in 1951 and 1953.

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The International Law Commission (ILC) was charged by the General Assembly with the preparation of the new draft statute. Although the chances of success were not very high, a series of events between 1989 and 1992 cleared the way for the Commission's efforts: the creation by the Security Council of international criminal tribunals for the former Yugoslavia and Rwanda thus provided, for the first time since World War II, for the investigation and trial at the international level of individuals for violations of international humanitarian law.

In 1994 the ILC, in the course of its work on the Draft Code of Crimes Against Peace and Security of Mankind, presented the draft Statute of the International Criminal Court (ICC) to the General Assembly. The ILC's proposal was based on international precedents, such as the Nuremberg and Tokyo tribunals, the 1951 and 1953 draft statutes, the 1980 draft Statute for the Creation of an International Criminal Jurisdiction to enforce the Apartheid Convention, and the statutes for the Tribunals for Yugoslavia and Rwanda.

The draft ICC Statute was then analysed by an Ad Hoc Committee established by the General Assembly, in order to review the major substantive and administrative issues arising from the text. The work of the Committee, notwithstanding its failure to reach sufficient agreement to call a conference of plenipotentiaries, allowed States to grow used to the idea of creating an international criminal tribunal that would try individuals. As emerged in subsequent discussions, States were reluctant to accept the idea of having a completely independent international judicial body which could assess individual responsibility for international crimes. Many saw in this notion a potential loss of sovereignty.

The discussions and conclusions of the Ad Hoc Committee led to the establishment of a Preparatory Committee in 1996 to examine the ILC's draft Statute for the ICC, taking into account the different views, the remarks made by the Ad Hoc Committee and the written comments submitted by States and international organizations. To deal with the different issues, the Committee defined a list of subjects, including one designated as the

Complementarity and *Trigger Mechanism*. The idea was to discuss the proposed international court's relationship with domestic systems.

On submitting its final report in 1998, the Committee proposed a new version of the draft Statute that was then discussed at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The issue of complementarity was again included in the discussion, but was not taken up by any specific working group in its agenda and was thus left to the Committee of the Whole. The concept was finally accepted as proposed by the Preparatory Committee and explicitly incorporated in the Preamble and in Articles 1, 17, 18 and 19 of the Statute, although it is clear that it permeates the whole structure and functioning of the Court.

Complementary jurisdiction: domestic vs. international criminal jurisdictions?

To solve the problem of linkage between domestic and international jurisdiction the Security Council, in creating the International Criminal Tribunal for the former Yugoslavia (ICTY) and its counterpart for Rwanda, decided to vest both tribunals with what was called concurrent jurisdiction,[1] coupled with a "primacy clause".

The experience of the two ad hoc international tribunals led to further developments of the notion of jurisdiction. The primacy given to these tribunals gave rise to much controversy, since States felt that their sovereignty was being eroded. A new type of relationship was required in order to preserve State sovereignty without detriment to the goal of reducing impunity. It was therefore considered that the international court, instead of having primacy over domestic courts, should be complementary to such courts and intervene only when national criminal jurisdiction was not available or unable to perform its tasks.

1 It should be considered that the concept of concurrent jurisdiction has been applied to inter-State relations for quite a few years. For further developments, see Ian Brownlie, *Principles of Public International Law*, 4th edition, Clarendon Press, 1995, p. 317 ff.

Complementary jurisdiction dictates that the ICC would be competent to investigate and try a case, unless there is a State that claims jurisdiction. States continue to play the central role. But if they fail or find it impossible to assume that role, or show disinterest or bad faith, the ICC will step in to ensure that justice is done. In particular, it is designed to operate in cases where there is no prospect of international criminals being duly tried in domestic courts. Emphasis is placed on the Court being a body which will complement existing domestic jurisdictions and existing procedures for international judicial cooperation in criminal matters, and which is not intended to exclude the existing jurisdiction of domestic courts or to affect the right of States to seek extradition.[2]

Proposed as an option by the ILC, the concept of complementary jurisdiction survived all stages of the negotiation process and was finally accepted and incorporated in the ICC Statute.

The notion of complementary jurisdiction is quite new. It stems from the increasingly important relationship between States and international organizations, for the role played by international entities other than States has forged a new conception of the international system and of the distribution of rights, responsibilities and tasks. In domestic law, it is not easy to foresee how the notion of complementary jurisdiction will develop. Internal legal systems usually possess

2 In furthering the definition of complementarity, the Ad Hoc Committee on the Establishment of an International Criminal Court felt obliged to clarify how this concept should be understood within national jurisdiction. Once a clear definition of the concept had been established, it could then move on to determine the relationship between the national and international jurisdictions, giving special consideration to the nature of exceptions to the exercise of national jurisdiction, to determining the authority competent to decide on those exceptions, and to the timing requirements. National jurisdiction was seen as "not limited to territorial jurisdiction but also [as including] the exercise of jurisdiction by the States competent to exercise jurisdiction in accordance with established principles and arrangements: thus, with respect to the application of military justice, it was not so much the territorial State that was important, but the State whose military was involved. The status-of-forces agreements and extradition agreements also had to be taken into consideration in determining which State had a strong interest in the issue and should consequently exercise jurisdiction." Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, 50th session, Supplement No. 22 (A/50/22), para. 39.

hierarchical structures in which judicial bodies have a more or less clear sphere of action, and it is difficult to imagine a judicial body failing to perform its function and the case being resolved by a substitute jurisdiction. At the inter-State level, the predominant trend appears to favour concurrent rather than complementary jurisdiction.

Admittedly, as awareness of the gravity of certain forms of conduct grows not only in domestic fora but also within the international community, States have realized that in certain circumstances their national apparatus or internal legislation is insufficient to deal with crimes that undermine the most essential principles of humanity. In order to preserve the ideal of justice, but above all to avoid impunity, States have consequently come to accept the fact that their systems, being imperfect, are in need of new mechanisms to complement them. The idea of international jurisdiction is thus viewed as a way to reinforce efforts against impunity, always with preservation of the ideal of justice in mind.

The creation of the ICTY shows that some States were finally ready to accept an international judicial body mandated to intervene in criminal matters, more specifically in those which, because of their gravity, have an international impact. However, as will be seen below, the relationship with a permanent international criminal court was not perceived in the same manner. Many States argued that the primacy of the ad hoc tribunals was due to their special link with the Security Council. This was not the case for the projected ICC, since it would be created by treaty. The idea of complementary jurisdiction appeared to be a good compromise for States that feared a limitation of their sovereignty.

The ILC and the definition of the ICC's jurisdiction

The main problem: the threat to sovereignty

The Commission clearly recognized that any proposal for the creation of an international court had to take into consideration resistance by States. Two problems had to be avoided: (1) that the Court did not undermine the sovereignty of States; and (2) that the mechanism to be adopted did not threaten the efforts which were being made in national systems to enact adequate legislation for the

punishment of international crimes under universal jurisdiction.[3] Indeed, these two problems were discussed by State delegations within the Preparatory Committee. For instance, when analysing the importance of the Court and its relationship with national tribunals, some delegations referred unequivocally for the first time to one of the Court's main objectives. It was said that even if national authorities had the primary responsibility with regard to the crimes listed in the Statute, an international court was necessary to avoid impunity, and that this was so, notwithstanding the awareness that the Court should intervene only in those cases where the solution would not be satisfactory at the domestic level.[4] Such a statement is far from being banal. It accurately expresses the situation that States were about to face during the Conference of Plenipotentiaries: did they want to preserve sovereignty at any price, even at the risk of condoning impunity for serious crimes against human rights and humanitarian law?

It should be noted that the Commission itself was convinced of the need to create an international criminal tribunal. For instance, in its report it dealt with the objections of certain States to the Court's establishment. One of the claims made by States was that the current system of international proceedings based on the rule of universal jurisdiction had worked fairly well, and that establishment of the Court could consequently restrict and hinder the effective application of that rule. In its reply, the Commission drew attention to the burden that the system of universal jurisdiction imposed on States, adducing that in certain circumstances it may lead to impunity due to external or internal pressures (blackmail, terrorist attacks, etc.), thus risking that the outcome of the trial may not be equitable.[5]

The ILC's proposals

The Commission proposed three options to the General Assembly: (1) an international criminal court with exclusive jurisdiction, according to which individual States should refrain from

3 *Yearbook of the ILC, ibid.*, paras 118-119.

4 Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add. 1, para. 157.

5 *Yearbook of the ILC*, 1992, Vol. II, part 1, para. 7.

exercising jurisdiction over crimes falling within the competence of the Court; (2) concurrent jurisdiction of the international criminal court and domestic courts; and (3) an international criminal court having only review competence that allowed it to examine decisions of domestic courts on international crimes.[6]

The Commission saw some disadvantages in the second alternative, considering it contrary to uniformity of application. It also viewed as problematic the potential situation in which one party wished to initiate an action before a domestic court and another party wanted it brought before the international court. However, Special Rapporteur Thiam — who had prepared an earlier draft statute for the international criminal court[7] — and the Commission deemed the possibility of having concurrent jurisdiction to be satisfactory and a good compromise. In fact, without expressly referring to the concept of complementary jurisdiction, the Commission indicated that in those cases where both domestic and international jurisdiction concur, preference would be given to domestic courts and the international court would have jurisdiction only if the competent States decide not to investigate.[8]

This solution was not uncontroversial within the Commission, especially for those who saw it as a source of conflicts of jurisdiction that may lead to paralysis and injustice. Some members therefore supported the idea of the ICC having exclusive jurisdiction, which would eliminate possible conflicts of jurisdiction between it and domestic courts. In this context it is important to note that some members of the Commission emphasized that the principle of

6 *Yearbook of the ILC*, 1990, Vol. II, part 2, para. 130.

7 In this first draft statute, the Special Rapporteur proposes the following text: "1. The Court shall try individuals accused of the crimes defined (...) in respect of which the State or States in which the crime is alleged to have been committed has or have conferred jurisdiction. 2. Conferment of jurisdiction (...) shall be required only if such States also have jurisdiction, under their domestic legislation, over such individuals." The Comments to these proposals state that: "(...) Here again, the Special Rapporteur has thus taken account of the comments of the members of the Commission who expressed concern that the criminal jurisdiction of States should be respected." *Yearbook of the ILC*, 1991, Vol. II, part 1, paras 38-41.

8 *Yearbook of the ILC*, 1991, Vol. II, part 2, para. 114.

sovereignty was no longer considered to be an absolute principle as in classic international law.[9]

The Commission — following a proposal made by the Special Rapporteur — also proposed a fusion of options (1) and (2), according to the types of crimes to be investigated: for certain crimes the Court would have exclusive jurisdiction and for others concurrent jurisdiction.[10] The problem with this proposal was to compile the list of crimes which would fall under each type of jurisdiction and on which views differ sharply.[11]

The third option — the Court having powers of judicial review — also had some supporters, who argued that this solution dealt with the uniformity problem raised by those in favour of exclusive jurisdiction. In their opinion this alternative "would also perform a preventive role in that it would be an incentive to national courts to be more careful and watchful in applying the norms of international law",[12] and could be acceptable to States if similar systems in all existing complaints procedures in international human rights law were taken into account. However, it was finally ruled out as an unrealistic option.[13]

The ILC's draft Statute: the starting point

In Resolution 47/33 of 25 November 1992 the General Assembly requested the ILC to undertake the elaboration of a draft Statute for the ICC as a permanent judicial body. The Working Group established within the Commission to that effect presented its first report in 1993.[14] In this first formal draft the Working Group adopted the principle of complementary jurisdiction, with the particular proviso that the Court may not exercise its jurisdiction unless all States that may be competent give their consent. In its commentary to Article 24 of the draft, the Working Group indicated which

9 *Ibid.*, para. 115.

10 *Yearbook of the ILC*, 1991, Vol. II, part 1, para. 41.

11 *Ibid.*, para. 42.

12 *Yearbook of the ILC*, 1991, Vol. II, part 2, para. 116.

13 *Yearbook of the ILC*, 1992, Vol. II, part 2, para. 57.

14 *Yearbook of the ILC*, 1993, Vol. II, part 2, Annex.

concurring States will have to consent for the Court to establish jurisdiction: (a) any State having jurisdiction under the relevant treaty; (b) any State party to the Genocide Convention of 1948; (c) the State of which the person accused of the crime is a national (the national State); and (d) the State on the territory of which the conduct in question occur-red (the territorial State).

The Working Group also proposed that the Court should have jurisdiction, this time exclusive jurisdiction, when the Security Council refers a case to it. In this situation no State may validly claim jurisdiction over the Court's own jurisdiction.

Jurisdiction as proposed by the Working Group aroused immediate reactions from the General Assembly's Sixth Committee and from States, which saw the provisions as creating a great deal of uncertainty. The Working Group consequently proceeded to re-examine the draft Statute, presenting a final version in 1994. This time the ILC stated that the Statute had been drafted bearing in mind "the fact that the court's system should be conceived as complementary to national systems which function on the basis of existing mechanisms for international cooperation and judicial assistance (...)".[15] The Commission's intention was to let the Court intervene in cases where there is no prospect of a potential criminal being tried in national courts. Emphasis was therefore placed on the idea that the Court would act as a body complementing existing national jurisdictions and existing procedures for international judicial cooperation. Hence, it was not intended to exclude the existing jurisdiction of domestic courts, or to affect the right of any State to seek extradition.

On the basis of these considerations, the Commission proposed a group of articles to delimit and make possible the complementary character of the Court's jurisdiction. Draft Articles 20, 25, 27, 34 and 35, among others, accordingly established the basic requirements for the Court to exercise jurisdiction. In the view of the Commission, "it is thus by the combination of a defined jurisdiction, clear requirements of acceptance of that jurisdiction and principled

15 *Yearbook of the ILC*, 1994, Vol. II, part 2, para. 81.

controls on the exercise of jurisdiction that the statute seeks to ensure, in the words of the preamble, that the court will be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective".[16]

These last words of the Commission were to become the accepted definition for complementary jurisdiction. From then on, this concept was adopted by the Ad Hoc Committee and the Preparatory Committee, and undoubtedly permeated the Statute as approved at the Rome Conference.

The concept nonetheless did not escape criticism. On the contrary, as will be seen in the following sections, both the Ad Hoc Committee and the Preparatory Committee felt obliged to refine it, tacitly recognizing that any decision on the jurisdiction of the Court would determine its whole functioning.

Is complementary jurisdiction the best solution?

Despite the ILC's success in putting together the draft Statute in a fairly short time, taking into consideration observations made — in writing and at the General Assembly's Sixth Committee — by members of the Commission and States, it fell short of representing a widely supported agreement. There was still great concern about the implications of creating an international judicial body.

In view of these worries, and notwithstanding the Commission's recommendation to "convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court",[17] the General Assembly created an Ad Hoc Committee to review the draft.

Although the Committee did not reach sufficient consensus to call for an international conference after two years' work, the discussions did enable States to analyse in greater detail the various aspects needing further consideration or deliberation. The Bureau of

16 *Yearbook of the ILC*, 1993, Vol. II, part 2, Annex, p. 37.

17 *Yearbook of the ILC*, 1994, Vol. II, part 2, para. 90.

the Committee proposed that the first issue that should be discussed was the concept of complementarity.[18]

In fact, the Ad Hoc Committee did make an in-depth analysis of the concept and implications of considering the Court as complementary to national tribunals. In its report to the General Assembly in 1995, the Committee tried to build the necessary theoretical framework within which complementarity should be understood. It is entirely conceivable that the intention was to provide States with sufficient elements to allow them to appreciate the advantages of such a system of jurisdiction.

Given that some agreement on formulating the terms of the ICC Statute had proved possible, and in view of "the educational value produced by the work of the Ad Hoc Committee",[19] the General Assembly decided to establish a Preparatory Committee to discuss the draft Statute prepared by the ILC and the comments made by States, paving the way for the International Conference of Plenipotentiaries.

Although there were doubts about the efficiency of the Committee in the first twelvemonth, especially its ability to agree on a text before the deadline set for it, it did manage to finish its work on time and its final report was duly presented in April 1998. It included the draft Statute for the ICC, the draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC, the draft Rules of Procedure for the conference, and the draft organization of work of the conference.

Despite the multiple obstacles faced by the Committee during its first year of work, it did, however, extensively analyse the issue of complementarity and its consequences for the Statute in terms of content and procedure.

18 Recommendations of the Bureau concerning the work of the Ad Hoc Committee during the period 14-25 August 1995, Informal Paper No. 5/Rev. 2.

19 Cherif Bassiouni, "Observations concerning the 1997-98 Preparatory Committee's work", in *Nouvelles Etudes Penales — The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, No. 13, érès, 1997, p. 9.

General considerations regarding the ICC's jurisdiction

The Ad Hoc Committee emphasized that the ILC and the Committee itself did not intend the proposed Court to replace domestic courts in criminal procedures. However, it recognized the fear of States that an abstract definition would lead to confusion and thus render the Court non-operational. It was consequently seen as desirable "to have a common understanding of the practical implications of the principle of complementarity for the operation of the international criminal court".[20] According to a number of States, the concept should stress the presumption that national jurisdictions would have preference over the proposed court.[21] Conversely, other States considered that the idea of concurrent jurisdiction should prevail, coupled with a primacy provision in favour of the international court.[22]

It was also stressed that the ILC was not considering the creation of a hierarchy between the international court and domestic courts. Therefore, even if the international court were to determine that a domestic court's decision was ill-founded, this could not and should not be seen as the review power of a superior court. The underlying objective was to avoid a situation in which a criminal was shielded by a State in order to avoid his prosecution or a higher penalty. An additional situation in which it was thought that the international court would be entitled to intervene was if national

20 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, 50th session, Supplement No. 22 (A/50/22), para. 30.

21 Delegations supporting this position argued that national systems have the following advantages:

"(a) all those involved would be working within the context of an established legal system, including existing bilateral and multilateral arrangements; (b) the applicable law would be more certain and more developed; (c) the prosecution would be less complicated; (d) both prosecution and defence were likely to be less expensive; (e) evidence and witnesses would normally be more readily available; (f) language problems would be minimized; (g) local courts would apply established means for obtaining evidence and testimony, including application of rules relating to perjury; and (h) penalties would be clearly defined and readily enforceable. (...)", *ibid.*, para. 31.

22 *Ibid.*, para. 32.

authorities failed, without justification, to take action in respect of a crime being committed.[23]

One important consideration put forward is the need to safeguard the primacy of national jurisdictions while simultaneously ensuring that the international court's jurisdiction does not become merely residual. This consideration is very pertinent and should be seen as a call for caution: it is true that State sovereignty should be preserved, but what is the purpose of creating an international body with such limited scope of action that it would never get a chance to perform? Remember that, as mentioned above, the whole idea of establishing an international criminal court was based on an ideal of justice, on the conviction that when faced with heinous crimes that affect the international community, impunity was unacceptable. Now if all national systems were effective, efficient and just, as well as able to deal with such crimes, no international court would be necessary. However, some members of the international community nevertheless felt that that was not the case. So the warning is not superfluous. On the contrary, it is a reminder that at some point States deemed that there was a need to have such an international body, and that action taken must be consistent with that goal. The above consideration does not affect the fact that further clarification is required and that other related issues should be taken into account.[24]

Exceptional character of the Court's jurisdiction

Both the Ad Hoc Committee and the Preparatory Committee reiterated that complementarity should be seen within the framework of the relationship between national jurisdiction and the jurisdiction of the international criminal court, and that the latter is to be considered as exceptional.[25] It was pointed out that, given the limited resources the proposed Court would have, it would be better to

23 Report of the Ad Hoc Committee, *op. cit.* (note 2), para. 45.

24 The Committee mentioned international judicial cooperation, surrender, extradition, detention, incarceration, recognition of decisions and applicable law.

25 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Supplement No. 22 (A/51/22), Vol. I, para. 154.

avoid bringing cases that could easily be dealt with by domestic courts. A better justification for this argument would be that in international law, the exercise of police power and penal law are deemed to remain within the competence of the State, and that the jurisdiction of the Court should therefore be considered as an exception to such State prerogative.[26] This idea was reinforced by the assessment of certain States that the establishment of the Court did not and should not diminish or serve as a substitute for the State's obligation to prosecute and punish those individuals suspected of having committed international crimes.[27] According to the said view, that remains an international obligation for all States, because those crimes affect the international community as a whole. But the foregoing assertion should not be understood as granting an absolute character to national jurisdiction, because this would lead to defining the jurisdiction of the Court in terms of what it could not do, instead of determining what it could do. It was therefore proposed that a specific article should be incorporated in the text of the draft.[28] The same proposal was made to the Ad Hoc Committee, but received insufficient support. The situation changed within the Preparatory Committee, where it was finally accepted.[29]

According to the Preparatory Committee, the exceptions that would lead to intervention by the Court were to be deduced from the draft Preamble, which referred to cases where trial procedures in national criminal justice systems were not available or were ineffective.[30] States felt that the concepts of "available" and "ineffective" were unclear and thus might raise questions as to the standards for making such a determination. Reference was made in the Ad Hoc Committee to the ILC's intention when using these concepts, in the sense that the Commission "only expected the international criminal court to operate in cases in which there was no prospect that alleged perpetrators of serious crimes would be duly tried in national courts".[31] This would

26 *Ibid.*, para. 155.

27 *Ibid.*, para. 156.

28 *Ibid.*, para. 161.

29 Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add. 1, p. 10.

30 *Ibid.*, p. 9.

31 Report of the Ad Hoc Committee, *op. cit.* (note 2), para. 42.

preclude its intervention in the case of decisions made by domestic courts to acquit, to convict or not to prosecute, unless it is determined that they were not well founded.

Although it may seem a purely terminological matter, the notions of "unavailable" and "ineffective", as referred to in the draft Statute, or "unwillingness" and "inability", as provided for in Article 17.1(b) of the Rome Statute, may lead to ambiguity until the Court determines the standards to be applied. The provisions in Articles 17.2 and 17.3 of the Rome Statute are not very helpful in clarifying the above-mentioned terms. Instead, they add to the complexity of the problem by making reference to other subjective notions.[32]

It was also considered that another exception to the exercise of national jurisdiction was the case of a State voluntarily waiving or relinquishing its jurisdiction in favour of the Court. Although this idea was contested by some States, which argued that it seemed inconsistent with the concept of complementarity, it appears to follow logically from that concept: the international court should intervene only in a situation of default by a competent national jurisdiction. Hence, if the competent State determines, for whatever reason, that it will not exercise its right of jurisdiction, it should be entitled to decline the exercise thereof and open the door to the ICC's intervention in order to avoid impunity.

Finally, it was stated that these exceptions to national jurisdiction should be considered even before the ICC Prosecutor initiated an investigation, arguing that even the investigation might interfere with the exercise of national jurisdiction. At the same time, if a case was being investigated or was pending before a domestic court, the international court was expected to suspend its jurisdiction, although it could resume its investigation if the competent State desisted from

32 Paragraphs 2 and 3 of Article 17 refer to the criteria that the Court should apply in deciding the admissibility of a case. Reference is made to proceedings being taken "for the purpose of shielding" a person from criminal responsibility, "unjustified delay" in the proceedings, or acting in a way which "is inconsistent with an intent to bring the person concerned to justice".

its investigation, or if any of the exceptional circumstances mentioned above were established.[33]

Who determines if the International Criminal Court has jurisdiction?

Once the possible situations in which the international court would be entitled to intervene had been determined, opposing views arose within the Ad Hoc Committee and the Preparatory Committee as to which body should decide whether the exceptional circumstances mentioned above were present. Some saw the approach adopted in the ICTY Statute as the rule to follow, considering that the said power needed to be vested in the Court itself. Reference was furthermore made to the provision in draft Article 24, which stated that the Court had to satisfy itself that it had jurisdiction. Since this is part of the powers of a judicial body, it is consequently up to the Court to determine whether it may commence an investigation or not. On the other hand, some delegations were against this proposal, considering that the precedent established by the ICTY was not representative of the current opinion of States, but that the Ad Hoc Tribunal was the product of very special circumstances. It was therefore proposed that standards be created which would apply to the diverse situations that may arise.

Three options were tabled to resolve these questions: (a) the Court would exercise its jurisdiction only with the consent of the States competent to investigate; (b) the Court would determine its own jurisdiction, according to a series of criteria expressly laid down in the Statute; and (c) the Court would be free to establish its own jurisdiction within flexible parameters.[34] Delegations saw the last two options as problematic because they did not require State consent for the opening of an investigation, a situation which they were not ready to accept. It was therefore considered necessary to study in depth the consequences of a refusal by a State of the Court's jurisdiction.[35]

33 Report of the Ad Hoc Committee, *op. cit.* (note 2), para. 51.

34 Report of the Preparatory Committee, *op. cit.* (note 25), para. 162.

35 *Ibid.*, para. 163.

Working on the details: admissibility, *non bis in idem*, and judicial cooperation

• Admissibility

The ILC felt that in the draft Statute submitted by it the principle of complementarity was given operational expression in, *inter alia*, Article 35, which referred to admissibility. In this regard the Preparatory Committee thought that the range of situations in which the Court would have to declare a complaint inadmissible was greater than those considered by the ILC.[36] Only interested States[37] would be able to raise questions of inadmissibility which, according to the Committee, would have to be submitted before the trial starts or, at the latest, when it is opened by the Court.[38]

• The principle of *non bis in idem*

The Preparatory Committee also considered the importance of the principle of *non bis in idem* in determining the notion of complementarity. The prohibition on trying a person for a crime for which he or she has already been tried by the same or another judicial body has major implications for the Court's jurisdiction, because it may impede an effective application of justice: a domestic court may wish to shield an accused person from a higher penalty by imposing a lower penalty, thus preventing the Court from taking any action. The Committee therefore determined that the principle of *non bis in idem* should not be interpreted in a manner that would allow criminals to escape from effective prosecution.[39] At the same time, it was considered that the Court should not have the power of judicial review of judgments passed by domestic courts. Hence it was decided by the Committee, and so drafted in its April 1998 proposal, that the principle of *non bis in idem* would not be applicable to the ICC when the proceedings held in the domestic court were for the purpose of shielding the accused from criminal responsibility or were not conducted

36 *Ibid.*, para. 164.

37 Interested State was defined as "the State of which the accused is a national, the State(s) of which the victim or victims are nationals, the State which has custody of the accused, the State on which the alleged crime was committed (State of *locus delicti*) or any other State which could exercise jurisdiction in respect of the crime". *Ibid.*, para. 167.

38 *Ibid.*, para. 168.

39 *Ibid.*, para. 170.

independently or impartially, or took place in a manner inconsistent with the intent to bring the person to justice.[40]

• Complementarity and judicial cooperation: which jurisdiction has priority?

Under draft Article 53 concerning surrender and extradition, a problem would arise in the event of competing requests by the ICC (surrender) and by a State (extradition). This prompted the Committee to present three options for Article 87, paragraph 6.[41] A person may, for instance, be requested by a State for a common crime and by the ICC for an international crime. Which jurisdiction has priority? Should the requested State extradite to the requesting State, provided there is a treaty obligation to do so, or should it surrender the suspect to the ICC? Some States argued that to give priority to the ICC would be inconsistent with the principle of complementarity, because it would make international jurisdiction prevail over national jurisdiction. Two remarks are called for here: first of all, consideration should be given to the relative impact of crimes under domestic law and international crimes. International crimes are those crimes the gravity of which shocks the international community; they are considered as offences against humankind. It thus seems appropriate that priority be given to the trial of forms of conduct that offend humanity over forms of conduct which, however terrible, will hardly reach the level of gravity of an international crime. Secondly, any confusion when talking about competing requests in a complementary jurisdiction framework should be avoided. If a domestic court claims jurisdiction over a person to be charged with international crimes, the ICC's jurisdiction would have to yield precedence to that court.

The result of the 50-year saga: the ICC Statute

Without any doubt, the work of the Ad Hoc Committee was of fundamental importance for acceptance of the ICC. It allowed States to examine in greater detail an idea that was more than fifty years old. However, the events that were taking place during the

40 Report of the Ad Hoc Committee, *op. cit.* (note 2), p. 45.

41 *Ibid.*, pp 135-136.

nineties led States, probably for the first time, to recognize the need to create an international criminal tribunal, opening the path for an international conference that took place three years later.

The efforts made by the Preparatory Committee did clear the way for the International Conference of Plenipotentiaries, held in Rome in June and July 1998. At the same time, the final product of the hard work accomplished by the three bodies concerned — the ILC, the Ad Hoc Committee and the Preparatory Committee — set the tone for the discussions held at the Conference. The fact that the complementarity issue was included in the agenda of the Committee of the Whole, instead of being assigned to a specific committee, may be interpreted as signaling sufficient agreement. The details of the application of complementarity were more controversial. But in the end, the notion was adequately integrated in various provisions in the Statute (though this does not mean that their interpretation will go smoothly), establishing a new precedent in the field of humanitarian law and international criminal tribunals.

Defining complementarity: the Preamble and Article 1

As remarked above, complementarity is to be found in many different forms throughout the Court's procedure, and even in the investigation phase to be carried out by the Prosecutor.

First of all, the introduction to the complementary character of the Court was spelled out and emphasized in the Preamble:[42]

"(...) Emphasizing that the International Criminal Court established under this Statute shall be complementary to national jurisdictions (...)"

42 The Ad Hoc Committee put forward two options for regulating complementarity: the first held that a statement in the Preamble to the Statute was insufficient and that more precision was therefore required in a specific provision to that effect; this was seen as a way of indicating the importance attached to this principle. An alternative view stated that the principle of complementarity could be elaborated in the Preamble; the rules of interpretation of the Vienna Convention on the Law of Treaties would be sufficient to determine the context in which the Statute as a whole was to be interpreted and applied. Report of the Ad Hoc Committee, *op. cit.* (note 2), paras 35-37.

This statement is supplemented by the preceding paragraphs, which establish the grounds for complementarity and the manner in which it should be understood: international crimes shock the conscience of humanity, threaten the peace, security and well-being of the world, and should not go unpunished; States have the main responsibility for taking the required measures to avoid impunity; and an international criminal court is needed, for the sake of present and future generations, to guard them against the most serious crimes of concern to the international community as a whole.

As already proposed in the draft prepared by the Preparatory Committee, the Statute contains in Article 1 the formula establishing the Court's jurisdiction:

"An international Court (...) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. (...)"

Triggering the investigation

The preconditions for the exercise of its jurisdiction are spelled out in Article 12, under which the jurisdiction of the Court is automatically accepted by States that become party to the Statute. Hence, for the Court to exercise its jurisdiction, the following States must be parties to the Statute or must have accepted its jurisdiction in accordance with Article 12.3: (a) the territorial State (...); and (b) the national State.

Under Article 13, the procedure is triggered by three possible mechanisms: (a) referral by a State Party; (b) referral by the Security Council acting under Chapter VII of the Charter of United Nations, in which case the Court may initiate the investigation even if the national and territorial States have not accepted the Court's jurisdiction; and (c) by an investigation ordered by the Prosecutor on his or her own initiative.

Conditions for admissibility: when is a State unable or unwilling to prosecute?

• When can the ICC investigate?

The issue of admissibility arises at the point when the Court examines the suspect's judicial situation in terms of national jurisdiction: if the Court concludes that the matter has been submitted to a domestic court, it has to declare the case inadmissible.

It is interesting to see that the misgivings expressed by many delegations as to the Court's possible subjectivity when determining a State's unwillingness or inability to prosecute led to the definition of certain criteria which the Court must apply. Article 17 reflects the main elements of the relationship between the Court and domestic tribunals; it construes the jurisdiction of the Court in a negative manner — saying what it *cannot* do, instead of defining what it *can do*. Nevertheless, this article sets a pattern for the Court's intervention. For a case to be admissible, four conditions must be met, namely:

- that no competent State is investigating or prosecuting the person concerned for the same acts that constitute the international crime;
- that no competent State has decided not to prosecute;
- that the person concerned has not already been tried;
- that the case is of sufficient gravity to justify further action by the Court.

These conditions should be seen as cumulative, i.e. all must be met to allow the Court's intervention. The first requirement represents the situation in which the Court yields in favour of national jurisdictions. The second has elements of the first — primacy of domestic courts — and of the third, which relates to the principle of *non bis in idem*. The exception to which paragraph 17.1(c) refers is also covered by paragraph 17.2(a). The fourth requirement calls for a qualified intervention by the Court, in order to prevent it from being regarded as a substitute for domestic courts.

• A difficult decision: determining "inability" and "unwillingness"

More likely to be problematic are the exceptions to the aforesaid requirements. Certainly, affirming that a State is acting in bad faith or is unwilling or unable to prosecute is a serious accusation. If

the situation ever comes about in practice, it is sure to be a source of contention. The Statute foresees three types of State conduct that may lead the Court to rule that a State is unwilling to prosecute: (a) when the proceedings have been instituted to shield the person concerned; (b) when an unjustified delay is considered inconsistent with a genuine effort to bring a person to justice; and (c) when the competent domestic court is not independent or impartial. Regarding the inability to prosecute, the Statute refers to the lack of effective mechanisms at the national level to gather evidence and testimony or to arrest the accused.

The exceptions may consequently be classified as subjective and objective. The former are found in the first three situations, and the latter in the situations described in paragraph 17.3.

It is possible to interpret the first two elements of paragraph 17.2 as referring to the concept of bad faith. Thus shielding the accused or delaying indefinitely the proceedings may be ways of allowing the accused to go unpunished. The third situation may be due to external pressures, not only political but also, as mentioned by the ILC, threats by terrorist groups that may impede the proper course of the judicial proceedings.

As for the objective conditions, it is clear that a State without sufficient means to gather the necessary evidence or to arrest the accused may be deemed unable to carry out an adequate investigation. In such circumstances, the complementary jurisdiction of the ICC is required.

The question to be asked is whether all these conditions are consistent with the definition given for complementary jurisdiction. The answer seems to be in the affirmative, especially considering that Article 17 takes into account the various objectives set out in the Preamble, i.e. to avoid impunity, respect national jurisdictions and ensure that States adopt a responsible attitude towards grave violations lest they be divested, via exception, of primary jurisdiction over the case.

• Articles 18 and 19: procedural aspects of admissibility

Articles 18 and 19 complement the provisions laid down in Article 17. Article 18 establishes the procedure to be followed for

rulings on admissibility. It should be stressed that this article calls for close contact between the Prosecutor and the competent State regarding the progress of an investigation or a prosecution at the national level. This precaution is intended to avoid any unjustified delay in the proceedings.

On the other hand, Article 19 contains the rule — which many considered to be implicit in the judicial function — that the Court must establish that it has jurisdiction in any case brought before it. Its decision to admit a case may be challenged by the accused or by a State which has jurisdiction over the case, either because that State is already investigating the case or because its acceptance of the Court's jurisdiction was required under Article 12.

A synopsis of complementarity in the ICC Statute

Without entering into a procedural analysis, the following outline should clarify this first stage of the proceedings, in which the issue of complementarity plays a more visible role:

• Initiation of an investigation: the Prosecutor is in charge of this part of the proceedings and will take such action when a situation is referred to the Court by a State Party or by the Security Council, or on his or her own initiative. The first and latter instances require that the territorial State or the national State have accepted the Court's jurisdiction (Arts 9, 12, 13, 14 and 15).

• The Prosecutor will notify his intention to open an investigation to all States Parties and to those States which would normally exercise jurisdiction. Within one month, these States must inform the Court whether or not they are investigating or have investigated the acts that constitute the subject-matter of the Court's intervention. If this is so, the Prosecutor must defer to the State's investigation (Arts 15, 16 and 18).

• If the Prosecutor finds that there is a reasonable basis to proceed with an investigation, he or she must submit to the Pre-Trial Chamber a request for its authorization. The Prosecutor may request this authorization even if the case is already being investigated by a State (Art. 15).

• The Pre-Trial Chamber may authorize the Prosecutor to proceed with the investigation. This decision will not prejudice the subsequent determination of the Court regarding the jurisdiction and admissibility of the case. The Pre-Trial Chamber may also refuse the Prosecutor's request, but that will not preclude a subsequent request based on new facts regarding the same situation. All these decisions are subject to appeal to the Appeals Chamber by the State concerned or by the Prosecutor (Arts 18, 19, 57 and 58).

• If there is sufficient evidence, the Prosecutor will request the Pre-Trial Chamber to issue a warrant of arrest or summons to appear. Upon the surrender of the person to the Court, the Pre-Trial Chamber must hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. Once the charges are confirmed, the Presidency must constitute the Trial Chamber which will be responsible for the trial (Arts 58 and 61).

• In order to proceed, the Court must satisfy itself that it has jurisdiction over the case, based on the criteria set forth in Article 17. Its decision may be challenged by the accused or by a State which has jurisdiction over the case. If the challenge is made before confirmation of the charges, it will be referred to the Pre-Trial Chamber. Otherwise, it will be referred to the Trial Chamber (Arts 17, 19 and 82).

This is the crucial moment when the Court will examine its relationship with national jurisdictions in order to determine its own jurisdiction, in other words, when complementarity comes to the fore.

Other issues closely related to complementarity which emerge later in the proceedings, such as judicial cooperation, extradition and surrender, and enforcement of sentences of imprisonment, are fields in which complementarity may also be discovered. Nevertheless, it is undoubtedly in the initial phase of the proceedings that complementarity plays its central role, because consideration of it then coincides with that moment, so feared and so awaited, when the Court will evaluate whether or not it may commence its investigation or trial. Time will tell whether practice confirms this view or not.

Concluding remarks

Explaining how delegations at the Rome conference arrived at the text which was finally approved is not an easy task. One can speculate and say that agreement before the conference was sufficient and that the negotiations went smoothly. It is evident, however, from the media coverage of the conference, and from the attitude of at least one powerful State towards the final Statute, that this was not the case.

A plausible answer is that States foresaw even before the Rome conference that complementarity was the only solution that could reconcile their interest in protecting national sovereignty with their altruistic concern about international crimes and impunity. At least one thing was sufficiently clear: a large majority of States wanted an *international* criminal court and supported the idea of its establishment. From the diverse proposals for the Court's jurisdiction they were able to see that complementary jurisdiction could be a good compromise.

What conclusions can be drawn from this process of almost ten years' duration?

• Humanitarian law has reached a stage where most States agree that it is in the interest of the entire international community to try individuals suspected of having committed grave violations of human rights and humanitarian law. It became clear, first during elaboration of the Draft Code of Crimes against Peace and Security of Mankind and then through the ILC's work on the establishment of the ICC, that in many cases States are unwilling or unable to prosecute at the national level. The only available solution was to vest an international body with the power to prosecute individuals.

• The second point is closely linked to the first. States recognized their concern about impunity, especially when dealing with international criminals. In view of the many problems that this type of trial posed for domestic courts, this new awareness of their obligations spoke in favour of an international forum which would represent the interests of the international community.

• The concept of sovereignty still has a great impact on international law and international relations; States are not yet ready to give up these privileges. Faced with the necessity of dealing with international crimes, States could therefore accept a permanent international court only if it acted on a limited basis, i.e. when the competent States agree that appropriate action cannot be taken at the national level. States are not willing to allow an international body to impinge on their sacrosanct judicial authority. The sole way to gain acceptance for such a body was to create a mechanism that would complement national jurisdictions, thus a complementary jurisdiction.

• The concept of complementary jurisdiction is not trouble-free; when, how, under what circumstances this mechanism will be triggered is still subject to further definition. Practice will certainly refine and adapt what as yet only exists in writing. But the general aspects of complementary jurisdiction have been clarified at each stage of the negotiations: the ILC, the Ad Hoc Committee and the Preparatory Committee devoted a considerable amount of time to working out a clear-cut concept. And without any doubt, the Court itself will contribute to further clarification of its jurisdiction.

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Résumé

Juridiction complémentaire et justice pénale internationale

par OSCAR SOLERA

Cet article analyse le développement de la notion de juridiction complémentaire proposée par la Commission de droit international et adoptée dans le Statut de la Cour pénale internationale compte tenu de la nécessité de renforcer le système de justice criminelle pour éviter l'impunité. L'étude porte sur les discussions de fond qui ont eu lieu au sein de la Commission de droit international, du Comité ad hoc *établit par l'Assemblée générale pour réviser le projet proposé par la Commission, et du Comité préparatoire des Nations Unies pour la création d'une cour criminelle internationale. Le résultat obtenu à Rome est surtout le produit de l'accord des États sur le besoin de la*

communauté internationale de disposer d'un organe juridictionnel international permanent chargé de statuer sur la responsabilité individuelle relative aux crimes de caractère international. Mais cet organe doit permettre à la juridiction pénale nationale compétente de s'exercer au préalable et n'interviendrait qu'en l'absence d'une telle juridiction ou dans l'incapacité de celle-ci d'éviter l'impunité.

Mechanisms complementing prosecution

by
LAURA OLSON

"In the final analysis, punishment is one instrument, but not the sole or even the most important one, for forming the collective moral conscience."
Raoul Alfonsin, Argentina's first elected president after the collapse of the military regime.[1]

Each State facing a period of transition, whether from a repressive regime or an armed conflict, must decide *whether* to deal with its history of violations. Those States that have chosen to face their past for purposes of reconciliation and preventing future atrocities still must determine *how* to do so. Should emphasis be placed upon holding accountable those responsible for violations of the law *or* upon acknowledging the truth of what happened? The solution usually involves a combination of the two.

During periods of fragile transition, trying suspected criminals, who are often the political and military leaders, does not always appear the adequate or easiest policy choice. However, prosecution — holding perpetrators accountable — demonstrates that the

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principle of the rule of law stands above political decisions. Many of the violations committed during a former repressive regime or conflict are not only violations of national law but also those of international law requiring prosecution.[2] Failure to prosecute promotes a culture of impunity and denies what some consider as "the most effective insurance against future repression".[3]

If the political will to prosecute exists, common problems still cause few trials to occur: a barely functioning judicial system whether due to lack of human resources (including expertise) or financial resources; police and prosecutors without skills to investigate and present a strong case, or worse, the presence of corrupt or compromised officials; a lack of concrete evidence; the practical or logistical impossibility to prosecute large numbers of accused; absence of the necessary national legislation (implementing international treaty obligations); or the passing of an amnesty law imposing constraints. The "right to justice"[4] advocating prosecution still does not mean prosecute for prosecution's sake. All judicial guarantees must be in place to ensure fair prosecution.

1 Raoul Alfonsin, "'Never again' in Argentina", *Journal of Democracy*, Vol. 4, January 1993, p. 19.

2 Some examples include: grave breaches of international humanitarian law (Arts 50/51/130/147 respectively of the four Geneva Conventions of 1949 and Arts 11 and 85 of Additional Protocol I of 1977) and violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1994 Inter-American Convention on the Forced Disappearance of Persons, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, and for the crimes articulated in the 1998 Rome Statute of the International Criminal Court.

3 Diane F. Orentlicher, "Settling accounts: The duty to prosecute human rights violations of a prior regime", *The Yale Law Journal*, Vol. 100, 1991, p. 2542; see also Jaime E. Malamud-Goti, "Transitional governments in the breach: Why punish State criminals?", *Human Rights Quarterly*, Vol. 12, 1990, p. 12.

4 Three rights are articulated – the victims' right to know, the victims' right to justice and the victims' right to reparations – in the Final Report on "The administration of justice and the human rights of detainees: Question of the impunity of perpetrators of human rights violations (civil and political)", prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/
20, 26 June 1997 [hereinafter Joinet Report].

Even an ideally functioning judicial system is limited in the role it can play in reconciliation and a successful transition to peace or away from a repressive regime. Prosecution handles individual accountability well, but it does not address institutional accountability, i.e. the recognition that certain institutions played a role in the violations, perhaps even the judiciary, and it does not make proposals for reform of those institutions. A criminal trial seeks to determine the guilt or innocence of an individual for a certain crime by satisfying a standard of proof; this is not necessarily the same objective as exposing the truth. Of course, truth emerges during criminal trials,[5] but a court's necessary compliance with rules of evidence often limits the facts — the truth — exposed. Criminal trials focus on individual guilt and often on a single incident. Paul van Zyl, a lawyer who was senior staff member of the South African Truth and Reconciliation Commission, contends that:

> "...trials have a limited explanatory value. They're about individual culpability, not about the system as a whole. Trials set up an 'us versus them' dynamic. A trial is not about *our* complicity. It makes it look like *they're* guilty, not us. So all of white South Africa can look at Eugene de Kock and say 'evil guy' and not realize they made him possible. Middle-class suburban housewives and white businessmen voting for the National Party made Eugene de Kock possible. But a trial will never say that."[6]

A trial is designed neither to research the history of the political and economic structure of a system that permitted the armed conflict or repressive regime nor to assess the societal impact of violence committed by the regime or parties to the conflict; both those processes, however, are necessary for institutional reform and to create a collective memory of the past contributing to reconciliation. At such

5 In Argentina, for example, trials during the mid-1980s of former *junta* members received extensive media coverage, providing testimony from hundreds of victims and witnesses; Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001, p. 100.

6 *Ibid.*, p. 101, citing interview with Paul van Zyl in Johannesburg, South Africa (November 1997).

time, prosecution is best complemented by other mechanisms. This article briefly describes the most important of these complementary mechanisms.

Truth commissions

"Truth commission" is the title commonly used when referring to commissions of inquiry today. This title presumes that a commission will reveal the truth; it also presumes that there exists a clear understanding of what is truth. Nevertheless, as that is the general name used, it is used here as well, and it remains preferable as a general title rather than "truth and reconciliation commission", which falsely assumes that all commissions have reconciliation as their aim. In fact, it is not even universally accepted that truth commissions help to promote national reconciliation; some argue that they create deeper resentment by reopening old wounds.[7]

There have been more than twenty official commissions since 1974,[8] and they can be identified as bodies of inquiry with the following characteristics:[9]

- a truth commission focuses on the *past*;
- it investigates a pattern of abuses over a period of time, rather than a specific event;
- it is a temporary body, typically operating for six months to two years, and completing its work with the submission of a report; and
- it is officially sanctioned, authorised or empowered by the State (and sometimes also by the armed opposition, as in a peace accord).

7 Priscilla B. Hayner, "Fifteen truth commissions — 1974 to 1994: A comparative study", in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1, United States Institute of Peace Press, Washington, 1995, p. 225, p. 229 [hereinafter *Transitional Justice*]; see also Hayner, *op. cit.* (note 5), p. 230.

8 Truth commissions in chronological order, with the dates they operated: Uganda (1974), Bolivia (1982-1984), Argentina (1983-1984), Uruguay (1985), Zimbabwe (1985), Uganda (1986-1995), Nepal (1990-1991), Chile (1990-1991), Chad (1991-1992), South Africa (ANC) (1992), Germany (1992-1994), El Salvador (1992-1993), South Africa (ANC) (1993), Sri Lanka (1994-1997), Haiti (1995-1996), Burundi (1995-1996), South Africa (1995-2000), Ecuador (1996-1997), Guatemala (1997-1999), Nigeria (1999-2000), and Sierra Leone (2000-2001). See Hayner, *op. cit.* (note 5), Appendix 1, Chart 1, pp. 291-297. Truth commissions in Peru and East Timor are currently under way.

9 *Ibid.*, p. 14.

Truth commissions serve a variety of purposes. Their investigations establish an accurate and authoritative record of the past, acknowledged by the government. This *documentation* of abuses and the government's involvement in them is itself a complementary mechanism to prosecution in that it provides a fuller account of the pattern of abuses than could individual criminal trials; when this documentation is handed over to the judiciary, it can be crucial to later prosecutions. In addition to truth commissions, private non-governmental organizations also engage in documentation. However, their findings often receive no official acknowledgement.

A truth commission provides victims the platform to tell their stories, which many consider necessary for the healing process of reconciliation to proceed. However, certain precautions must be taken so as not to retraumatize them. Because truth commissions aim to gather as much information as possible within a relatively short time, they request individuals to tell their stories in significant detail. For some this may provide a release and represent a form of justice after years of silence or denial by the government. However, for others this contact with the truth commission causes retraumatization, which can lead to feelings of revenge and anger, thus quite the opposite of reconciliation. Most truth commissions have provided little, if any, support service, such as appropriate counselling. There are only a few examples of them doing so: the staff of the Chilean and Argentine truth commissions included psychologists and social workers; the truth commissions for Haiti and El Salvador offered their staff a small amount of training on how to take testimony in a sensitive manner; and the South African Truth and Reconciliation Commission provided the most extensive psychological support, and only this Commission attempted to set up a system for follow-up of traumatized witnesses.[10]

Truth commissions also serve as a means to identify victims so they may obtain some form of redress;[11] they furthermore recommend institutional or legislative reforms necessary to avoid

10 *Ibid.*, pp. 145-146.

11 In Chile and in Argentina reparation programmes relied on their truth commissions' records. *Ibid.*, p. 172.

repetition of past abuses.[12] Sometimes truth commissions have been used to establish who was responsible and provide a measure of accountability for the perpetrators. They are not, however, the same as judicial bodies: they clearly hold fewer powers than a court, e.g. they can neither impose punishment, such as a jail sentence, nor compel testimony.[13] When truth commissions take on even quasi-judicial functions difficulties arise. For example, they often face the dilemma of whether to name suspected perpetrators. Naming names is part of the truth-telling process, even more so when the judicial system clearly does not function well enough to expect that they will be prosecuted.[14] This need to tell the truth, however, collides with the principle of due process;[15] due process requires that individuals receive fair treatment and be allowed to defend themselves before being pronounced guilty. Establishing an outline of fair standards of proof by which a truth commission should abide would alleviate some due process concerns.[16] Nevertheless, the threat of revenge killings remains. The Rwandan Commission, for example, named dozens of officials, two of whom were killed in the months after the report's publication.[17]

The Commission on the Truth for El Salvador chose to name names despite fierce governmental resistance. The Commission reasoned that:

> "In the peace agreements, the Parties made it quite clear that it was necessary that the 'complete truth be made known', and that was why the Commission was established. Now the whole truth cannot be told without naming names. After all, the Commission was not asked to write an academic report on

12 Margaret Popkin and Naomi Roht-Arriaza, "Truth as justice: Investigatory commissions in Latin America", in *Transitional Justice, op. cit.* (note 7), p. 262.

13 Hayner, *op. cit.* (note 5), p. 16.

14 *Ibid.*, p. 107; Hayner, *op. cit.* (note 7), pp. 254-255; Juan E. Méndez, "Accountability for past abuses", *Human Rights Quarterly*, Vol. 19, 1997, p. 265.

15 Méndez, *op. cit.* (note 14), p. 265; José Zalaquett, in Alex Boraine *et al.* (eds), *Dealing with the Past: Truth and Reconciliation in South Africa*, 1994, p. 51.

16 Hayner, *op. cit.* (note 7), p. 257; see also Méndez, *op. cit.* (note 14), p. 265.

17 Rebels killed one, and the other was apparently killed by government death squads to cover up evidence. Hayner, *op. cit.* (note 7), p. 257.

El Salvador, it was asked to describe exceptionally important acts of violence and to recommend measures to prevent the repetition of such acts."[18]

The Argentine National Commission on the Disappearance of Persons did not list names in its report, but it did not delete from the report quotations of witnesses' testimony containing names of some accused; however, the confidential list of names given to the Argentine president was later leaked to the press.[19] Unlike other truth commissions, the South African Truth and Reconciliation Commission[20] held mainly public hearings with the names of accused broadcast regularly, and it provided more safeguards for the accused. The act creating the Commission stipulates that anyone negatively implicated must be afforded the "opportunity to submit representations to the Commission within a specified period of time (...) or to give evidence at a hearing of the Commission".[21] In addition, after the South African Appeals Court[22] held against the Commission, it established procedures giving a twenty-one-day written notice to those expected to be named in a public session; these procedures were also used for those individuals the Commission intended to name in its final report.[23]

To better ensure the successful work of a truth commission, it should meet certain minimal requirements.[24] The truth

18 *From Madness to Hope: Report of the Commission on the Truth for El Salvador*, p. 25, quoted in Hayner, *op. cit.* (note 5), p. 117.

19 Hayner, *op. cit.* (note 5), pp. 110-111. Five days after the Commission's report was released, a broad amnesty law was passed shielding all named. *Ibid.*, p. 40.

20 The South African Truth and Reconciliation Commission is the only commission authorized to offer individualized amnesty.

21 Promotion of National Unity and Reconciliation Act, No. 34 (1995) (South Africa), Section 30, quoted in *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, 1999, chap. 7, para. 21, p. 179.

22 Case No. 3334/96, *Truth and Reconciliation Commission* v. *Du Preez and Another*, 1996 (3) SA 997; Case No. 4443/96 (Appellate Division) — cited in *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, 1999, chap. 7, sec. 21-76, pp. 179-190.

23 Hayner, *op. cit.* (note 5), p. 125.

24 Hayner, *op. cit.* (note 7), p. 259. For a description of an ideal truth commission, see comments by Jamal Benomar, Director of the Human Rights Program at the Carter Center of Emory University quoted in Mary Albon, Conference Rapporteur, "Truth and justice: The delicate balance — documentation of prior regimes and individual rights", in *Transitional Justice*, *op. cit.* (note 7), pp. 290-291.

commission's mandate or terms of reference, which set its aim, scope of inquiry and powers and is usually determined by presidential decree, the legislature or a peace agreement, must be clear. A mandate of limited scope greatly restricts the extent of truth exposed. By broadly interpreting the mandate, commissioners may gain some latitude regarding the scope of the truth commission, yet others have interpreted their mandate restrictively due to constraints such as time, limited resources and lack of sufficient or reliable information. The truth commission must operate impartially and in good faith, independent from political forces, with the necessary resources[25] and with free access to information for full investigation. Often the greatest hurdle facing truth commissions is political pressure which may, directly or indirectly, restrict its work, e.g. by hindering access to information. The mandate should grant the truth commission the power to make recommendations that can be expected to be given serious consideration, and when possible it should be agreed in advance that the truth commission's recommendations are obligatory. The truth commission's report should be published immediately and be readily available to the public.[26]

A truth commission should be set up as soon as possible after resolution of the conflict or government transition, during this momentum for change, and should operate for a limited, specified period of time.[27] Meeting the time limit may be difficult, but a truth commission must focus on the most important aspects, as it cannot investigate all cases. If no deadline is set, the truth commission's work could continue for years, as in the case of the Ugandan Commission of Inquiry (1986-1995), eliminating any effective contribution by it to the immediate transition. Finally, agreement to establish a truth commission must coincide with a real commitment to making significant improvements.

25 Hayner, *op. cit.* (note 7), p. 251.

26 *Ibid.*, p. 254. The Haiti Truth Commission was a failure in this regard because it published a report six months *after* the mandate of the Truth Commission ended and did not widely distribute it. Méndez, *op. cit.* (note 14), p. 269.

27 Hayner, *op. cit.* (note 7), p. 249.

Lustration

Lustration means purification or illumination.[28] It is an administrative mechanism, defined as "the disqualification and, where in office, the removal of certain categories of officeholders under the prior regime from certain public or private offices under the new regime".[29] This consists mainly of exclusion from candidacy for political office but also sometimes denial of a licence to exercise certain professions, e.g. teaching.

Primarily the former Soviet bloc countries[30] chose to deal with the past through lustration, disqualifying former Communist officials and collaborators and sidestepping criminal prosecution; hence these lustration laws were also sometimes referred to as "de-Communization laws".[31] Lustration statutes were passed in the Czech Republic and Slovakia (1991), Albania (1992), Bulgaria (1992, 1997, 1998), Poland (1992, 1997, 1998), Hungary (1994, 1996) and Romania (1998).[32] However, only Albania, the former Czechoslovakia[33] and Germany[34] conducted purges affecting large numbers of individuals. The others refrained from doing so, primarily because of widespread indifference among the population: during the final decades of the communist regimes political repression had become much less extreme, and there were fewer victims in the 1980s.[35] At the time of transition the Communist elite, in general, handed over power peacefully

28 Herman Schwartz, "Lustration in Eastern Europe", in *Transitional Justice*, *op. cit.* (note 7), p. 461, No. 1. Lustration is also referred to as purges. The term comes from the Latin *lustratio*, which means purifying by sacrifice; see Alexandra Barahona De Brito, Carmen Gonzaléz-Enríquez and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies*, Oxford University Press, Oxford, 2001, p. 6 [hereinafter *The Politics of Memory*].

29 Schwartz, *op. cit.* (note 28), p. 461.

30 Luc Huyse, "Justice after transition: On the choices successor elites make in dealing with the past", *Law & Social Inquiry*, Vol. 20, 1995, cited in *Transitional Justice*, *op. cit.* (note 7), p. 337. In Belgium, France and the Netherlands after World War II, lustration was accompanied by criminal conviction. *Ibid.*

31 *The Politics of Memory*, *op. cit.* (note 28), p. 6; Schwartz, *op. cit.* (note 28), p. 463.

32 *The Politics of Memory*, *op. cit.* (note 28), p. 6.

33 *Ibid.*, p. 219. In Slovakia, the lustration law ceased to be in force when the Federation broke up on 1 January 1993. It was never formerly repealed, but the necessary administrative mechanisms to enforce it were never activated; *Ibid.*, p. 228.

34 *Ibid.*, p. 6.

35 *Ibid.*, p. 219.

unlike Latin America where the former elite feared revenge. Most of the populace's lack of intense interest was also because thirty to forty per cent of them were either party members or closely related to party members. Simultaneously, most Eastern Europeans were struggling economically, with little time to take an interest in a mechanism that was an unpleasant reminder of the purges undertaken by the Communists after 1945.[36] Yet despite seemingly popular indifference, lustration dominated parliamentary agendas. The new political elites found it a means of clearly indicating a break with the past, especially as many of them, even if they had not been part of the old elite, were not associated with an anti-regime stance or known for their suffering under political repression.[37]

Lustration as a policy of settling accounts with the past raises serious concerns of procedural fairness and due process: the right to defence becomes extremely fragile, and often the burden of proof is reversed onto the accused.[38] Many individuals purged were identified through examination of secret police files. For example, in Germany political police records were opened and a commission re-viewed them, resulting in dismissal for collaboration of thousands of civil servants, including judges and police officers.[39] This *documentation* (exposure of information) as a form of acknowledgement serves a similar purpose to that of documentation undertaken by a truth commission; however, in these cases many police records were faulty — either incomplete or falsified to make the agent look better[40] — augmenting the due process concerns associated with lustration. The lustration process also tends to become highly politicized. Avoiding some of these difficulties necessitates insisting that each case of lustration be treated individually, based solely on the actions of that particular individual.[41]

36 *Ibid.*, p. 220.

37 *Ibid.*, p. 221.

38 Huyse, *op. cit.* (note 30), p. 346.

39 *The Politics of Memory, op. cit.* (note 28), p. 6.

40 Schwartz, *op. cit.* (note 28), p. 464. The former Czechoslovakia provides one example. See *The Politics of Memory, op. cit.* (note 28), p. 225.

41 Schwartz, *op. cit.* (note 28), p. 466; see generally, Andrzej Rzeplinski, "A lesser evil?", *East European Constitutional Review*, Vol. 1, 1992, pp. 33-35, reprinted in *Transitional Justice, op. cit.* (note 7), pp. 484-487.

This approach presents other disquieting dilemmas. Many governments have had recourse to lustration statutes during a period of transition to democracy, purging people for being part of a now condemned group; this is contrary to basic democratic principles to which the States employing this method aspired. How far should disqualification extend? Who was truly "innocent"?[42] Harmful effects of lustration extend to families and friends of those purged, resulting in the alienation of a huge proportion of the population. In practical terms, the new State also deprives itself of many of its specialists. Pavel Dostal, a member of the Czechoslovak Federal Assembly, commented on the Czechoslovak Screening Act of 1991: "Providing we are not blind with hatred, we must incorporate these people, since among them are specialists and experts whom we will need if we really want to join Europe."[43]

Reparations

In contrast to the mechanisms previously discussed, reparations focus more on the victim than on the offender. International law establishes the "right to reparation",[44] thus imposing an obligation on States to provide reparations for violations of their international obligations.[45] In order to successfully fulfil this obligation, States must dedicate the significant time and resources required for any reparations programme.

42 "All of us are responsible, each to a different degree, for keeping the totalitarian machine running. None of us is merely a victim of it, because all of us helped to create it together": Vaclav Havel, "New Year's Address" (1 January 1990), quoted in Andrew Nagorski, *The Birth of Freedom*, Simon and Schuster, New York, 1993, p. 89; Schwartz, *op. cit.* (note 28), p. 461.

43 Huyse, *op. cit.* (note 30), p. 348.

44 Joinet Report, *op. cit.* (note 4).

45 Regional and international human rights treaties, confirmed in decisions by international courts. See "United Nations Commission on Human Rights: Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report", Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993, 8 July 1993; see also Joinet Report, *op. cit.* (note 4).

The four main forms of reparation are restitution, indemnity, satisfaction, and declaratory judgment;[46] they may be material or non-material. Material reparation may be in cash or other monetary terms, e.g. education, housing or restitution of wrongfully seized property. For example, Germany has paid over US $600 billion to Nazi victims and their families in the last fifty years. More than fifteen years after the end of military rule in Brazil, the government instituted a reparations programme providing approximately US $100,000 to each of some 135 families of disappeared persons.[47] In Chile, 4,886 persons receive monthly cheques beginning at US $345 as part of a "pension plan" set up in 1997 for family members of those killed or disappeared under the military dictatorship; family members of those killed and disappeared also receive educational and health benefits, and a waiver of mandatory military service.[48] The South African Truth and Reconciliation Commission also made recommendations for material and non-material reparations for victims, which have resulted in limited programmes.[49]

Yet how can suffering and loss be quantified in monetary terms? Are all victims entitled to the same amount? For some victims or their families even a small sum can be a symbolic demonstration of the State's responsibility. For others, such as the members of Mothers of the Plaza de Mayo in Argentina, where a reparations law for families of disappeared was put in place in 1994, any sum is rejected as "blood money" for life has no price.[50]

Even if a monetary amount can be agreed upon, many governments do not have the means to provide for direct financial compensation to all victims. Non-material reparation includes a range of measures. One of the most important forms of non-material reparation is disclosure of the truth accompanied by the government's

46 "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities", Theo van Boven, Special Rapporteur, Preliminary Report, UN Doc. E/CN.4/Sub.2/1990/10, 26 July 1990, paras 25-29.

47 Hayner, *op. cit.* (note 5), p. 180.

48 *Ibid.*, pp. 172-173.

49 *Ibid.*, p. 178.

50 *Ibid.*, p. 177.

formal acknowledgement of this truth and its responsibility for the wrongs done. Erecting memorials in order to show respect for the victims and establishing preventative measures, such as constitutional and institutional reforms or human rights training, are other examples of this form of reparation. Argentina again provides an example by its creation of a new legal status of "forcibly disappeared"; this status is legally equivalent to death for civil matters, thereby allowing families to process wills or close estates, for example, but it does not declare the person dead. Prior to this law, families could not settle the affairs of someone who had disappeared until they had declared that person "presumed dead"; this status was unsatisfactory for them because it did not recognize government responsibility.[51] The prosecution of perpetrators, hence the rejection of amnesty laws, is furthermore extremely important not only because victims feel that justice is done, but also, if perpetrators are not prosecuted, it becomes extremely difficult for victims to gain access to the necessary evidence, even if they have the means, to bring their case to court for awards from the State. In some countries general amnesties block both criminal prosecution and civil claims.

Customary methods — two examples

All the complementary mechanisms described in this article can contribute to successful transition and reconciliation, but the extent may be determined by the local, customary methods available. For example, in Mozambique traditional rituals opened the path to reconciliation after an extremely violent fifteen-year conflict between the government and the Mozambican National Resistance (Renamo), which ended in 1992 with the Mozambican peace settlement.[52] At the end of the conflict national and international organizations found that while they "were all thinking about how to increase peace and reconciliation, (...) when [they] came to the grassroots, [the people] were reconciling already. (...) [Their] ideas were only confusing and stirring

51 *Ibid.*

52 Alcinda Honwana, "Sealing the Past, Facing the Future: Trauma Healing in Rural Mozambique", *Accord — An International Review of Peace Initiatives*, 1998, ‹http://www.—c-r.org/accord/acc_moz/honwana.htm›.

up trouble."[53] The remarkable phenomenon of Mozambicans living to-gether again without ongoing conflict so quickly is largely due to the local importance of traditional healing mechanisms. "[R]ecent studies of war-affected populations in Mozambique (...) show that talking about traumatic experience does not necessarily help patients 'come to terms' with their distress."[54] The tradition of performing cleansing rituals to purify people from experiences of wartime atrocities makes it possible, after the purification, for links to the past to be cut and the individual to be reintegrated into the community. Also, rituals venerating ancestral spirits "in postwar context (...) restore severed ancestral links and (...) obtain spiritual guidance and protection to face the challenges of social reconstruction."[55]

At the political level and through customary methods at the individual level the decision was made not to dwell on the past. Raul Domingos, a former senior Renamo leader who also headed the Renamo party in parliament, explains the meaning of reconciliation in Mozambique: "The word *reconciliation* is a word used to mean forget the past and be tolerant. We killed each other, but we forget this because we are sons, brothers, and we have lived together. Without this the war would never have ended."[56] Mozambique remains an interesting case to study on the choice between remembering or forgetting the past and between accountability and reconciliation.

The *gacaca*[57] in Rwanda is an example of a customary mode of justice. In Rwanda, approximately 120,000 individuals are detained in connection with the 1994 genocide, and it has been estimated that Rwandan national courts and the International Criminal Tribunal for Rwanda (ICTR) would need at least 100 years to try

53 José Luís Cabaço, the former Frelimo government official, quoted in Hayner, *op. cit.* (note 5), p. 191.

54 Honwana, *op. cit.* (note 52), p. 2; Hayner, *op. cit.* (note 5), pp. 193-195.

55 Honwana, *op. cit.* (note 52), p. 5.

56 Hayner, *op. cit.* (note 5), p. 192, interview with Raul Domingos, former senior Renamo leader, in Mozambique.

57 On 12 October 2000, the National Assembly of Transition voted the law instituting the *Gacaca*. *Gacaca* is a Kinyarwanda term for the grass on which traditional village assemblies used to be held. Herve Bar, "Rwanda-Rwandans elect judges for grassroots courts for genocide hearings", AFP via NewsEDGE, 4 October 2001.

them all.[58] In order to alleviate the situation, the Rwandan government has decided to set up the *gacaca*, an alternative system of transitional justice using participatory and proximity justice whereby individuals from the communities act as "people's judges". The Rwandan President Paul Kagame contends that "[i]f the gacacas succeed, it will show our ability to find a typically Rwandan therapy for the ills of our society. Classical justice, even endowed with all the necessary means, cannot resolve all the problems inherited from the genocide. The gacacas will bring out the truth on what happened, accelerate the process, eradicate impunity, reconcile Rwandans and consolidate the unity of the country."[59]

Many remain sceptical of the *gacaca*, not only because of existing logistical constraints and concerns about the competence of the "people's judges", but also due to the fact that traditional forms of justice are no longer fully accepted by the entire population.[60] In addition, the traditional *gacaca* was never conceived to try serious crimes such as genocide; this new variant of *gacaca*, imposing penal law, comes nearer to repression than a search for reconciliation found in the traditional *gacaca* and is criticized for lacking the minimum judicial guarantees. The *gacacas* are scheduled to start in May 2002.

Conclusion

The mechanisms discussed above are often referred to as alternatives to prosecution, when they should more accurately be seen as complements not only to prosecution but to each other as well. Rarely can one mechanism satisfy all the needs for a successful transition after serious violations have taken place. Satisfying the "right to know"[61]

58 "Rwanda: Genocide surivors worried about people's courts", Agence France-Presse via NewsEDGE, 10 March 2001. Other estimates include 150 years: Abigail, Zoppetti, "Crime de guerre. Au Rwanda, retour à la justice coutumière de les 'gacaca'", *Le Temps*, 19 July 2001; and 200 years: Gabriel Gabiro and Julia Crawford, "Les Rwandais expriment des sentiments partagés sur les 'gacaca'", *Arusha International Criminal Tribunal for Rwanda News*, Agence de Presse Hirondelle, 4 May 2001.

59 Bar, *op. cit.* (note 57).

60 Charles Ntampaka, "Le gacaca rwandais, une justice répressive participative", *Actualité du droit International Humanitaire*, Les Dossiers de la Revue de Droit Pénal et de Criminologie, Vol. 6, la Charte, Brussels, 2001, p. 211, p. 213.

61 Joinet Report, *op. cit.* (note 4).

requires that the truth be told; this can occur through criminal trials, documentation and, more extensively, through truth commissions. By engaging any of these mechanisms and acknowledging the truth, the State also provides non-material reparation to the victims, one response to the "right to reparation". Truth commissions suggest reforms, e.g. of the judiciary; the government's implementation of these reforms represents a guarantee of non-repetition, also a form of reparation. When documentation, whether gathered by a truth commission investigation or a private non-governmental organization, is handed over to the judiciary, this aids in the prosecution of offenders as required by the "right to justice"; prosecution of the perpetrator or the use of an administrative form of accountability, such as lustration, can simultaneously be considered as a form of reparation. The context determines the appropriate combination of complementary mechanisms and specific composition of each necessary to promote reconciliation and prevent future atrocities.

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Résumé

Mécanismes pour compléter les poursuites judiciaires

par LAURA M. OLSON

*Tout État qui vit une période de transition, au sortir d'un régime répressif ou à l'issue d'un conflit, doit décider d'*affronter ou pas *son passé de violations. Les États qui ont choisi de faire face à leur passé doivent déterminer* comment *procéder. Faut-il s'attacher à demander des comptes à ceux qui sont responsables des violations du droit* ou *reconnaître la vérité de ce qui est arrivé ? La solution fait généralement combiner ces deux éléments.*

Engager des poursuites – c'est-à-dire, demander des comptes aux auteurs des violations –, c'est montrer que le principe du respect du droit prime sur les décisions politiques. Ne pas en engager, c'est promouvoir une culture de l'impunité et faire fi de ce que certains considèrent comme le moyen de dissuasion le plus efficace contre une

répression future. Pourtant, même quand la volonté politique existe d'engager des poursuites, des problèmes courants font que peu de procès ont lieu et qu'un système judiciaire fonctionnant au mieux est limité dans le rôle qu'il peut jouer en faveur de la réconciliation et d'une transition réussie à la paix, ou à un régime non répressif.

Dans ce cas, il est des plus opportun de compléter les poursuites par d'autres mécanismes. Cet article décrit brièvement les mécanismes les plus importants : commissions de la vérité, lustration, réparations et méthodes coutumières.

United Nations peace-building, amnesties and alternative forms of justice: A change in practice?

by
CARSTEN STAHN

How to deal with the consequences of gross human rights violations has become one of the greatest challenges for the United Nations in the past decade. The creation by the Security Council of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) and the adoption, under United Nations auspices, of the Rome Statute of the International Criminal Court have been the focus of international attention. It is less well known, however, that the United Nations has simultaneously played an active role in the promotion of various forms of national reconciliation, involving *inter alia* the granting of amnesties for the perpetrators of human rights violations. The practice of the world organization in this context has long been characterized by two features: first, a contradictory position with regard to amnesty clauses, ranging from the endorsement of rather general amnesties as a means of restoring peace to their condemnation;[1] and second, a rather strict distinction between the concepts of national reconciliation and international prosecution.

While UN human rights bodies have traditionally been critical of the granting of amnesties,[2] a different picture prevailed for

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quite some time in the field of UN peace-keeping activities. When analysing the early peace-building efforts of the United Nations, it can be seen that the world organization has generally felt free of legal constraints in endorsing amnesty-for-peace deals. In most cases, however, the grant of amnesty was accompanied by the parallel establishment of a truth commission.[3] An early example, illustrating the general approach taken by the United Nations, is the peace process in El Salvador. The United Nations was actively involved in the negotiation of the El Salvador peace accords.[4] The issue of amnesties was not expressly dealt with in those accords. But the "Mexico Agreements" signed on 27 April 1991 under UN auspices provided for the establishment of a truth commission,[5] which was to consist of "three individuals appointed by the Secretary-General of the United Nations after consultation with the parties". The Commission was mandated to investigate "serious acts of violence" committed in El Salvador between 1980 and 1991. It was originally not conceived as a substitute

1 For an overview, see M. P. Scharf, "Justice versus peace", in S. B. Sewall and C. Kaysen (eds), *The United States and the International Criminal Court*, Rowman & Littlefield, Boston, 2000, p. 179.

2 In 1985, United Nations Special Rapporteur Louis Joinet suggested in a report that international crimes should not be subject to amnesties. See "Study on amnesty laws and their role in the safeguard and promotion of human rights", Preliminary Report by Louis Joinet, Special Rapporteur, UN Commission on Human Rights, UN Doc. E./CN.4/Sub.2/1985/16 (1985). Furthermore, the Human Rights Committee noted in its General Comment No. 20(44) on Article 7 of the International Covenant on Civil and Political Rights that amnesties are "generally incompatible" with the obligation of the States Parties under Articles 2(3) and 7 of the Covenant, UN Doc. No. CCPR/C/21/Rev.1/Add.3, 7 April 1992. See also N. Roht-Arriaza, "Sources in international treaties of an obligation to investigate, prosecute, and provide redress", in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Oxford, 1995, pp. 24 and 29; and N. Roht-Arriaza, "Special problems of a duty to prosecute: Derogation, amnesties, statutes of limitation, and superior orders", *ibid.*, pp. 57 and 59.

3 See generally on truth commissions as institutions, challenging the option of prosecution, J. Dugard, "Dealing with crimes of a past regime: Is amnesty still an option?", *Leiden Journal of International Law*, Vol. 12, 1999, p. 1002.

4 The accords were concluded between the government of El Salvador and a coalition of rebel groups. They are reprinted in United Nations, *El Salvador Agreements: The Path to Peace*, UN Department of Public Information, No. 1208-92614 (1992).

5 T. Buergenthal, "The United Nations Truth Commission for El Salvador", *Vanderbilt Journal of Transnational Law*, Vol. 27, 1994, p. 498.

for judicial proceedings.[6] However, shortly after presentation of the Truth Commission's report, the government of El Salvador adopted a law which granted amnesty to all persons charged with serious crimes, even those mentioned in that report.[7] The cautious reaction of the United Nations to this sudden about-turn reflects quite well the prevailing legal view at that time. The Secretary-General expressed concern about the immediate, sweeping amnesty law, noting that it should have been based on a broader national consensus, but did not condemn the grant of amnesty as such.[8]

Only two years later, the United Nations helped to negotiate the "Governors Island Agreement"[9] allowing President Aristide to return to Haiti after agreeing to a controversial amnesty for the military leaders who had taken control of the country.[10] The Security Council approved the peace deal, including the amnesty clause,[11] qualifying the solution adopted as "the only valid framework for

6 See M. Popkin and N. Roht-Arriaza, "Truth as justice: Investigatory commissions in Latin America", in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1, United States Institute of Peace Press, Washington, 1995, pp. 262 and 283.

7 See D. W. Cassel, "International truth commissions and justice", in *Transitional Justice, ibid.*, pp. 326 and 328. The General Amnesty Law for the Consolidation of Peace of 20 March 1993 (Decree 486) granted full, absolute and unconditional amnesty to all those who participated in any way in the commission of political crimes or common crimes linked to political crimes or crimes in which the number of persons involved exceeded twenty persons.

8 See United Nations, "Report of the Secretary-General on the United Nations Observer Mission in El Salvador", UN Doc. S/25812/Add. 1 of 24 May 1993. The Inter-American Commission on Human Rights (IACHR), however, found the amnesty to be in violation of the American Convention on Human Rights. See IACHR, "Report on the situation of human rights in El Salvador", OEA/Ser.L/V/II.85, Doc. 28 rev., 11 February 1994, at 77. On the reaction to the amnesty in El Salvador, see generally Popkin and Roht-Arriaza, *op. cit.* (note 6), p. 283.

9 Agreement between President Jean-Bertrand Aristide and General Raoul Cédras of 3 July 1993, in Report of the United Nations Secretary-General, "The situation of democracy and human rights in Haiti", UN Doc. A/47/975, S/26063, 12 July 1993, pp. 2-3.

10 M. P. Scharf, "Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti?", *Texas International Law Journal*, Vol. 31, 1996, p. 1. See also I. P. Strotzky, "Haiti: Searching for alternatives", in *Impunity and Human Rights in International Law and Practice, op. cit.* (note 2), p. 188.

11 Paragraph 6 of the Governors Island Agreement granted full amnesty to the leaders and supporters of the military coup for "political human rights violations". See Strotzky, *op. cit.* (note 10), p. 189.

resolving the crisis in Haiti".[12] The amnesty law for the members of the military regime was subsequently enacted by Haiti's parliament on 6 October 1994, but was followed by the establishment of a truth commission, composed of Haitians and international experts, who undertook the task of investigating a number of specific human rights violations.[13]

Furthermore, the United Nations assisted in the conclusion of the Guatemalan Peace Accords,[14] which again contained an amnesty clause. This time the amnesty was limited. It excluded, in particular, the granting of immunity for crimes punishable under international treaties to which Guatemala was a party.[15] Despite the negotiators' visible attempt to avoid conflict with Guatemala's obligations under international law, the amnesty remained controversial.[16] But it was once again accompanied by the creation of a truth commission with the task of identifying the "human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict".[17] Deviating slightly from the model of the United Nations Truth Commission for El Salvador, the

12 Statement of the President of the Security Council of 15 July 1993, Resolutions and Decisions of the Security Council 1993, 48 SCOR, at 126, UN Doc. S/26633 (1993).

13 On the Truth Commission in Haiti, see P. B. Hayner, *Unspeakable Truths, Confronting State Terror and Atrocity*, Routledge, London, 2001, p. 66.

14 On the involvement of the United Nations in the Guatemalan peace process, see generally R. Grote, "The United Nations and the establishment of a new model of governance for Central America: The case of Guatemala", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 239.

15 Agreement on the Basis for the Legal Integration of the *Unidad Revolucionaria Gualtemateca*, UN Doc. A/51/776 – Doc. S/1997/51, Annex II, paras 17 ff. The details of the amnesty were later spelled out in the Law of National Reconciliation, which stated that amnesty shall not extend to the crimes of genocide, torture and forced disappearance. See Art. 8 of the Law of National Reconciliation of 18 December 1996. For a full account, see Grote, *op. cit.* (note 14); p. 266 and M. Popkin, "Guatemala's national reconciliation law: Combating impunity or continuing it?", *Revista Instituto Interamericano de Derechos Humanos*, Vol. 24, 1996, p. 173.

16 See Grote, *op. cit.* (note 14), p. 268.

17 Accord on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer, signed in Oslo on 23 June 1994, UN Doc. A/48/954-S/1994/751 of 1 July 1994. On the work of the Commission, see C. Tomuschat, "Between national and international law: Guatemala's Historical Clarification Commission", in V. Götz (ed.), *Liber amicorum Günther Jaenicke*, Springer, Berlin, 1998, p. 991.

Commission was composed of two national members and one international member, appointed by the UN Secretary-General.

Lastly, in 1999, the United Nations supported the conclusion of the Lusaka Ceasefire Agreement in the Democratic Republic of Congo,[18] which provides that the parties "together with the UN" shall create conditions favourable to the arrest and prosecution of "mass killers", "perpetrators of crimes against humanity" and "other war criminals", while acknowledging that these conditions "may include the granting of amnesty and political asylum, except for genocidaires".[19] The Security Council expressed its support for the agreement on several occasions, pointing out that it "represents the most viable basis for a resolution of the conflict in the Democratic Republic of Congo".[20]

This divergent approach to amnesty-for-peace deals has not been the only characteristic feature of UN practice. A second typical phenomenon has been the more or less stringent dissociation of the international prosecution of crimes from the furtherance of national reconciliation. The United Nations has embarked on one or the other course, but has not combined them. The prosecution of crimes was usually left within the sole authority of the government involved in a peace settlement, and was carried out by the United Nations only when no reasonable alternative appeared to be in reach. If the United Nations decided to act, it was the Security Council which took on this task, opting for the model of a systematic and fully internationalized prosecution of serious crimes.[21] The creation of mixed national-international institutions, acting under the auspices of

18 Lusaka Ceasefire Agreement of 10 July 1999, UN Doc. S/1999/815 of 23 July 1999. The agreement was "witnessed" by the United Nations.

19 See Chapter 9.1 and 9.2 of Annex A to the Ceasefire Agreement of 10 July 1999, UN Doc. S/1999/815.

20 See the preambles to Security Council Resolutions 1273 (1999) of 5 November 1999, UN Doc. S/RES/1273, 1279 (1999) of 30 November 1999, UN Doc. S/RES/1279 (1999) and 1291 (2000) of 24 February 2000, UN Doc. S/RES/1291 (2000).

21 It is worth noting in this context that during negotiation of the Rules of Procedure of the International Criminal Tribunal for the former Yugoslavia (ICTY), the United States submitted a proposal that perpetrators of low-level crimes be given immunity from prosecution in return for their testimony. See "United States proposed Rules of Procedure for the ICTY", in V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, Vol. 2, Irvington-on-Hudson, New York, 1995, pp. 509 and 560. The Tribunal's practice,

the international community, was limited to the area of truth commissions. But their efforts were not seldom hampered by questionable amnesty laws, which were again slowly revised by the jurisprudence of domestic courts.[22]

Contemporary trends in United Nations peace-building

An interesting change of direction in UN practice seems, however, to have taken place within the last two years. The United Nations has first of all invented new forms and mechanisms for the prosecution of serious crimes, acting on the borderline between the national and the international legal order. Moreover, it has also made additional efforts to support and establish combined justice and reconciliation models, treating truth commissions and prosecution as complementary rather than as competing and mutually exclusive mechanisms for dealing with the injustices of the past.

The invention of new mechanisms for the prosecution of international crimes

The growing tendency of the United Nations to explore new avenues in the prosecution of international crimes is particularly manifest in Kosovo and East Timor which, after political conflicts involving serious human rights violations, have both been placed under the transitional administration of the United Nations since

however, has been to reject claims for immunity of low-level perpetrators. In a statement to members of diplomatic missions, the President of the Tribunal noted: "The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be". See United Nations, "Statement by the President made at a briefing to members of diplomatic missions", UN Doc. IT/29, at 5 (1994), reprinted in V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, Vol. 1, Irvington-on-Hudson, New York, 1995, p. 112.

22 Domestic courts in countries such as Argentina, Chile, El Salvador or Honduras have subsequently restricted the scope of amnesty laws by ruling them inapplicable to certain serious human rights violations or insisting on their jurisdiction to determine on a case-by-case basis whether or not the amnesty provisions apply. See on this jurisprudence, N. Roht-Arriaza and L. Gibson, "The developing jurisprudence on amnesty", *Human Rights Quarterly*, Vol. 20, 1998, p. 843.

1999. To restore a functioning legal system, effective and impartial mechanisms for the adjudication of serious human rights violations must be created. The United Nations Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET) have taken up this challenge by entrusting UN-created internationalized court chambers with the prosecution of conflict-related crime. UNTAET has adopted Regulation 2000/15 setting up special panels with exclusive jurisdiction over serious criminal offences, which act under the authority of the District Court of Dili.[23] UNMIK has followed a similar approach by allowing the assignment of international prosecutors and judges to proceedings known to have a politically sensitive or ethnically motivated background.[24] But the internationalized court chambers established within the framework of the UN transitional administrations in Kosovo and East Timor are not the only examples of mixed international-national institutions designed to try serious human rights violations. Cambodia has recently established Extraordinary Court Chambers for the prosecution of crimes committed by the former leaders of the Khmer Rouge,[25] which will be

23 UNTAET Regulation 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences of 6 June 2000, ‹http://www.un.org/peace/etimor/UntaetN.htm›. On the UNTAET panels, see C. Stahn, "The United Nations Transitional Administrations in Kosovo and East Timor: A first analysis", *Max Planck Yearbook of United Nations Law*, Vol. 5, 2001, pp. 105 and 171 (2001) (forthcoming); S. Linton, "Rising from the ashes: The creation of a viable criminal justice system in East Timor", *Melbourne University Law Review*, Vol. 25, 2001, p. 122; M. Othman, "Peacekeeping operations in Asia: Justice and UNTAET", *International Law Forum*, Vol. 3, 2001, p. 118.

24 UNMIK intended to create a Kosovo War and Ethnic Crimes Court for the prosecution of war and ethnically motivated crimes. However, owing to budgetary restraints and the number of cases simultaneously pending before the domestic courts, UNMIK decided to deal with these cases within the existing judicial framework by providing the local courts with international judges and prosecutors. See OSCE Mission in Kosovo, Report on the Criminal Justice System (2000), pp. 71-72, ‹http://www.oesce.org/kosovo›. See also Section 1 of UNMIK Regulation 2000/64 of 15 December 2000.

25 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, ‹http://www.cambodianparliament.org/Legislative.htm›. The Court Chambers will *inter alia* rule on charges of genocide, crimes against humanity and war crimes. See Articles 4, 5 and 6 of the Law. It should be noted, however, that on 8 February 2002 the United Nations withdrew from negotiations for the establishment of the Extraordinary Chambers on the grounds that the Law establishing them would have prevailed over the Articles of Cooperation (the agreement) between the United Nations and

composed of three Cambodian and two internationally appointed judges.[26] Furthermore, the United Nations and the government of Sierra Leone have concluded an agreement on the creation of a mixed international domestic court to prosecute persons responsible for human rights abuses committed in Sierra Leone's civil war.[27] This Special Court is a *sui generis* treaty-based institution of mixed jurisdiction and composition, including *inter alia* judges appointed by the UN Secretary-General in both the Trial and the Appeals Chambers.[28]

An increased reliance on combined accountability and reconciliation mechanisms

The examples of East Timor and Sierra Leone are of special interest here because they are typical of the second of the above-mentioned trends, namely the increasing reliance of the United Nations on combined accountability and reconciliation mechanisms, limiting prosecution to the most serious atrocities while furthering alternative forms of justice in the case of less serious crimes. The United Nations has in both cases not only created mixed national-international judicial bodies for the prosecution of international crimes, but has also actively supported the parallel establishment of

the Government of Cambodia, and that the Chambers, as currently envisaged, would not "guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have". Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, 8 Feburary 2002, ‹http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm›.

26 Art. 9 of the Law, *op. cit.* (note 25).

27 See "Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000", UN Doc. S/2000/915. See generally on the Special Court for Sierra Leone, M. P. Scharf, "The Special Court for Sierra Leone", *ASIL Insights*, October 2000; M. Frulli, "The Special Court for Sierra Leone: Some preliminary comments", *European Journal of International Law*, Vol. 11, 2000, p. 857; R. Cryer, "A 'Special Court' for Sierra Leone?", *International and Comparative Law Quarterly*, Vol. 50, 2001, p. 435; A. Tejan-Cole, "The Special Court for Sierra Leone: Conceptual concerns and alternatives", *African Human Rights Law Journal*, Vol. 1, 2001, p. 107.

28 See Art. 12 of the Draft Statute of the Court, contained in the Report of the Secretary-General, *op. cit.* (note 27), at 25; and Art. 2 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, *ibid.*, at 15.

truth and reconciliation commissions,[29] though without calling into question the principle that there can be no amnesties for serious human rights violations. Some doubts in this respect might have arisen in the case of Sierra Leone, because Article IX of the UN-brokered Lomé Peace Agreement, concluded between the government of Sierra Leone and the Revolutionary Front on 7 July 1999,[30] granted a blanket amnesty ("absolute and free pardon") to all combatants.[31] However, the Special Representative of the Secretary-General for Sierra Leone had appended an oral disclaimer to his signature of the agreement on behalf of the United Nations, stating that the amnesty clause "shall not apply to the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law".[32] Furthermore, last doubts about the applicability of the Lomé amnesty clause to serious crimes have been removed by Article 10 of the Statute of the Special Court for Sierra Leone, which provides that the amnesty does not bar the prosecution of crimes contained in Articles 2 to 4 of the Statute, namely crimes against humanity (Art. 2), violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Art. 3) and other serious violations of international humanitarian law (Art. 4). The prosecution of serious crimes by the Special Court for Sierra Leone is to be complemented by the activities of the Truth and Reconciliation Commission for Sierra Leone,[33] which was established to investigate and report on the causes, nature and extent of human rights violations related to the armed conflict in Sierra Leone and help create "a climate

29 See UNTAET Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor of 13 July 2001. See also Sierra Leone, Truth and Reconciliation Act 2000, ‹http://www.sierra-leone.org/trc.html›.

30 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7 July 1999, UN Doc. S/1999/777, Annex.

31 For a discussion of this, see A. J. McDonald, "Sierra Leone's uneasy peace: The amnesties granted in the Lomé Peace Agreement and the United Nations' dilemma", *Humanitäres Völkerrecht*, Vol. 1, 2000, p. 12.

32 Report of the Secretary-General, *op. cit.* (note 27), para. 23. A reminder of this reservation was later given by the Security Council in the preamble to SC Resolution 1315 (2000) of 14 August 2000, UN Doc. S/RES/1315 (2000).

33 See Truth and Reconciliation Commission Act 2000, *op. cit.* (note 29). On the Commission, see also Hayner, *op. cit.* (note 13), p. 70.

which fosters constructive interchange between victims and perpetrators".[34] The Commission was formally created by the parliament of Sierra Leone, but the United Nations played a significant role in its establishment. The UN High Commissioner for Human Rights endorsed not only the idea of creating the Commission, originally formulated in Article XXVI of the Lomé Peace Agreement, but has also been closely involved in the drafting of its statute.[35] Moreover, in a letter of 12 January 2001, the UN Secretary-General acknowledged the important role of the Truth Commission by underscoring that "the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions".[36] Finally, when evaluating the relationship between the Truth Commission and the Special Court for Sierra Leone, the Security Council pointed out that the Truth Commission will, in particular, have "a major role to play in the case of juvenile offenders".[37]

A similar model has been adopted in East Timor. One year after the creation by UNTAET Regulation 2000/15 of the Panels with exclusive jurisdiction over serious criminal offences, the Secretary-General's Special Representative there passed Regulation 2001/10 establishing a Commission for Reception, Truth and Reconciliation in East Timor designed to "promote national reconciliation and healing following the political conflict in East Timor, and in particular following the atrocities committed in 1999".[38] The Commission is not only vested with a general mandate to establish the truth regarding the commission of human rights violations in East

34 Art. 6 (2) of the Truth and Reconciliation Commission Act 2000, *op. cit.* (note 29).

35 See M. Parlevliet, "Truth Commissions in Africa: The non-case of Namibia and the emerging case of Sierra Leone", *International Law Forum*, Vol. 2, 2000, p. 107, where the author notes that "it is the first time that the UNOHCHR has been so closely involved in setting up a truth commission". On the Commission's creation, see also McDonald, *op. cit.* (note 31), p. 13.

36 Letter dated 12 January 2001 from the Secretary-General to the President of the Security Council, UN Doc. S/2001/40, para. 9.

37 Letter dated 22 December 2000 from the President of the Security Council to the Secretary-General, para. 1, UN Doc. S/2000/1234.

38 See para. (d) of the preamble to UNTAET Regulation 2001/10 of 13 July 2001, ‹http://www.un.org/peace/etimor/UntaetN.htm›.

Timor,[39] but may also conduct individual Community Reconciliation Procedures,[40] allowing participants to gain immunity from criminal and civil responsibility for specific categories of crimes.[41] The remarkable development here is that the fulfilment of obligations undertaken in a reconciliation procedure in no way releases the perpetrator from his or her criminal responsibility for the commission of serious crimes. This is explicitly stated in Section 32.1 of UNTAET Regulation 2001/10, which stipulates that "no immunity conferred by operation of this or any other provision of the present Regulation shall extend to a serious criminal offence". The term "serious criminal offence" is defined in Part 1, section 1(m) of the Regulation. It comprises, in particular, the crimes listed in Sections 4 through 9 of UNTAET Regulation 2000/15, namely genocide, crimes against humanity, war crimes, torture, murder and sexual offences. In concept the East Timorese Truth Commission therefore clearly diverges, for example, from the South African Truth Commission, which was entitled to grant full immunity for all categories of crimes committed within a political context.[42]

The developments in Sierra Leone and East Timor are of considerable significance, because they shed new light on the peace-building activities carried out under the auspices of the United Nations. They not only show increasing UN support for the invention of new mechanisms for the prosecution of grave human rights violations, but also reflect the world organization's ever more critical attitude towards the unlimited granting of amnesties in a process of national reconciliation. The rejection, in the case of East Timor, of immunity for perpetrators of serious crimes is particularly indicative of

39 See generally Part III of UNTAET Regulation 2001/10.

40 See generally Part IV of UNTAET Regulation 2001/10.

41 See Section 32 of UNTAET Regulation 2001/10.

42 In South Africa, amnesty was granted in return for full confession of involvement in politically motivated crimes. In particularly grave cases, the Amnesty Committee of the Truth Commission examined whether there was "proportionality" between the act and the political objective pursued. On the requirement of proportionality for the granting of immunity by the South African Committee on Amnesty, see Art. 20(3)(f) of the Promotion of National Unity and Reconciliation Act of 1995. For the practice of the Committee on Amnesty, see T. Puurunen, *The Committee on Amnesty of the Truth and Reconciliation Commission of South Africa*, Helsinki Forum Iuris, Helsinki, 2000, p. 37.

the changing practice of the United Nations, because in that case the organization has itself determined the legal framework for the restoration of peace and justice in a territory placed under its exclusive administration. Nevertheless, the same conclusion may also be drawn from a statement made by the Secretary-General, in his report on the establishment of the Special Court for Sierra Leone, that amnesty is considered to be "an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict", but "cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law".[43] Finally, the recent practice of the United Nations with regard to Sierra Leone and East Timor challenges the view that truth commissions present an alternative rather than a supplement to the option of prosecution.

Merits of the new justice and reconciliation model

The emerging combined justice and reconciliation model most recently supported by the United Nations has several merits. First of all, it eases the strain on the all too often overburdened Security Council by involving different players in the creation of UN-established prosecution mechanisms. The Special Court for Sierra Leone, for example, was established by means of an agreement negotiated by the Secretary-General between the United Nations and the government of Sierra Leone. The role of the Security Council was confined to a request to the Secretary-General to negotiate the agreement, and some general recommendations concerning the Court's jurisdiction.[44] The Panels with universal jurisdiction in East Timor, on

43 Report of the Secretary-General, *op. cit.* (note 27), para. 22. This view is in line with Principle 7 of the newly established Princeton Principles on Universal Jurisdiction, which express a presumption that amnesties are incompatible with a State's obligation to prevent impunity. Principle 7 reads: "Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle 2(1)". Principle 2(1) lists as serious crimes under international law "(1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture". The Princeton Principles are obtainable at ‹http://www.law.nyu.edu/library/foreign_intl/international.html›.

44 See paras 1-3 of SC Resolution 1315 (2000), *op. cit.* (note 32).

the other hand, were created on the basis of an UNTAET Regulation adopted by the Special Representative of the Secretary-General in East Timor. The authority to adopt UNTAET Regulation 2000/15 derived from the general mandate given to the Special Representative by the Security Council in its Resolution 1272 (1999).[45]

The differentiated approach taken by the United Nations in the cases of Sierra Leone and East Timor is also of particular merit in that it manages to strike a reasonable balance between the conflicting principles of individual criminal responsibility for serious crimes, on the one hand, and national reconciliation. Limited amnesty is the carrot and prosecution the stick. Furthermore, prosecution is targeted.[46] It is confined to cases which are of concern to the international community as whole, while meeting the requirements of international human rights law.[47] At the same time, the combined justice and reconciliation approach leaves room for alternative forms of justice such as truth-telling and individualized amnesty procedures, which have proved to be useful tools in restoring justice to a post-conflict society.[48] Moreover, the compromise formula reflected in the most recent practice of the United Nations addresses the specific needs of a transitional society in which the accumulation of human rights violations usually exceeds by far the capacity of the judicial system.[49]

45 See para. 1 of SC Res. 1272 (1999) of 25 October 1999, endowing UNTAET with "overall reponsibility for the administration of East Timor" and the "exercise of all legislative and executive authority, including the administration of justice".

46 The Security Council suggested in para. 3 of its Resolution 1315 (2000) that the jurisdiction of the Special Court for Sierra Leone be limited to "persons who bear the greatest responsibility". The Secretary-General opted for the term "most responsible". See Art. 1 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, *op. cit.* (note 28), at 15.

47 On the duty to prosecute serious human rights violations, see generally D. F. Orentlicher, "Settling accounts: The duty to prosecute human rights violations of a prior regime", *Yale Law Journal*, Vol. 100, 1991, p. 2537; and C. Edelenbos, "Human rights violations: A duty to prosecute?", *Leiden Journal of International Law*, Vol. 7, 1994, p. 5.

48 For a survey of the practice of truth commissions, see P. B. Hayner, "Fifteen truth commissions — 1974 to 1994: A comparative study", *Human Rights Quarterly*, Vol. 15, 1994, p. 597.

49 See generally on this aspect, J. Widner, "Courts and democracy in postconflict transitions: A social scientist's perspective on the African case", *American Journal of International Law*, Vol. 95, 2001, pp. 64 and 65.

However, the current trend towards a "nationalization" of prosecution under the auspices of the United Nations also has some less convenient implications. The limited involvement of the Security Council, for example, goes hand in hand with a decline in power of the newly established UN prosecution mechanisms. In contrast to the Chapter VII-based ad hoc International Criminal Tribunals,[50] the Special Court for Sierra Leone or the UNTAET Panels do not, in particular, enjoy primacy over national courts of *all* States. The Special Court for Sierra Leone, for instance, has concurrent jurisdiction with and primacy over Sierra Leonean courts, but lacks the power to assert primacy over national courts in third States.[51] The same holds true for the UNTAET Panels. Although established by the United Nations, the Panels are formally integrated into the domestic legal system of East Timor. They are formally part of a domestic court, namely the District Court of Dili.[52] Accordingly, they lack, for example, the power to order the surrender of an accused located in a third State.

However, various arguments support the view that internationalized prosecution bodies such as the Special Court for Sierra Leone or the UNTAET Panels offer a valuable alternative to the ad hoc International Criminal Tribunals. In opting for an internationalized rather than a purely international prosecution body, stronger emphasis is placed on the domestic investigation of the past: prosecution and justice are not primarily in the hands of a foreign institution, but are handled as a national task requiring the involvement and commitment of the country's own citizens. Furthermore, the creation of mixed national-international prosecution bodies operating within, or at least in direct connection with, the judiciary of the territory concerned helps to restore the country's legal system and strengthens local capacity-building, while simultaneously guaranteeing the impartial and neutral conduct of the criminal proceedings. Finally, a combined justice and reconciliation system involving both a truth-telling and a

50 See Article 8 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 9 of the Statute of the ICTY.

51 See Article 8(2) of the Draft Statute of the Special Court for Sierra Leone and the comments by the Secretary-General in his report to the Security Council, *op. cit.* (note 27), para. 10.

52 Section 1.1 of UNTAET Regulation 2000/15.

prosecution component cannot work unless the prosecution mechanism is linked to the domestic legal system in a manner which permits effective cooperation between the two entities. The East Timorese Truth and Reconciliation Commission is an excellent example of this. It is authorized to grant individualized immunities for less serious crimes, after completion of a reconciliation procedure. However, when determining whether a specific act constitutes a less serious crime to be dealt with in a reconciliation procedure, the Commission is entirely dependent on the findings of the judiciary, which is vested with exclusive jurisdiction over serious crimes.[53]

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Résumé

Consolidation de la paix par les Nations Unies, amnisties et formes alternatives de justice : un changement de pratique ?

par CARSTEN STAHN

La pratique des Nations Unies concernant l'amnistie des crimes internationaux s'est fortement développée au cours des vingt dernières années. L'organisation mondiale a d'abord été peu restrictive dans ses efforts de consolidation de la paix, en adhérant à des accords de paix garantissant une amnistie générale. Les commissions de vérité ont cependant complété ces amnisties. L'auteur démontre que les clauses d'amnistie dans les accords de paix deviennent par la suite plus limitées et il discute des exemples récents de Timor-Est et de la Sierra Leone. Ces tribunaux internationalisés semblent indiquer une tendance à limiter la poursuite pénale des crimes les plus abominables d'une part et à renforcer des formes alternatives de justice pour des crimes moins sérieux d'autre part.

53 See Sections 27, 28 and 32 of UNTAET Regulation 2001/10.

The ICRC's privilege not to testify: Confidentiality in action

An explanatory memorandum[1]

Delegates often have the opportunity to explain the unique status of the International Committee of the Red Cross in international law. No element of that status provides a better focal point for explanation of what the ICRC is, what it does and by what authority, than the privilege to decline cooperation with investigative and judicial authorities.[2] An even more compelling reason for consideration of this subject is the very real possibility that at some point a delegate will be confronted with an official demand for information — a demand that will require him or her to walk the fine line between respect for the legitimate expectations of authorities (and, for that matter, of mankind) and the legitimate rights and interests of the ICRC. Therefore the twofold purpose of this document is to provide

- a foundation for discussing the ICRC's international legal status in general and its testimony policy in particular, and
- a context for dealing with demands for cooperation with authorities who seek information about ICRC activities.

Section I of this note describes the unique nature of the ICRC's international legal status, from which its testimonial immunities derive. Section II summarizes the three specific sources in international law for the ICRC's testimonial protection: the *Rules of Procedure and Evidence of the International Criminal Court* (*ICC*); a *decision of the International Criminal Tribunal for the former Yugoslavia* (ICTY); and the *headquarters agreements between the ICRC and its host States*. Section III describes the reasons behind the ICRC's policy on testimony. Section IV shows that the policy is well within the context of commonly accepted principles of judicial procedure. Section V focuses on the implementation of the ICRC's testimony policy in the field.

The international legal status of the ICRC

The ability of individuals, States and organizations to assert legal rights and to shoulder legal responsibilities depends on how, if at all, these entities are recognized under the law. Such recognition is known as "legal personality". The State has been *the* historically recognized entity in international law.

The recognition of organizations in international law generally stems from their association with State structures. Thus the United Nations and its agencies, and other intergovernmental organizations such as the Organization of American States, are deemed to possess international legal personality. On the other hand, organizations that are not composed of States or that have no constituent State participation, i.e., non-governmental organizations (NGOs) such as Amnesty International, do not possess international legal personality despite their international scope of operations. But unlike other organizations with no State component, the ICRC does have international legal personality. The following chart summarizes the status of individuals, States and organizations in both domestic (national) and international law:

Who has legal personality?

	Domestic Law	International Law
Individual	yes	limited
State	yes	yes
Organization	varies depending on laws of the State and nature of organization	yes for ICRC and for intergovernmental organizations; no for non-governmental organizations

1 This memorandum has been prepared for ICRC delegates.

2 The terms "cooperation with investigative or judicial authorities", "providing testimony", "providing evidence" and the like are used interchangeably, although they each may have different implications in specific situations.

Perhaps the ICRC's acknowledged *sui generis* status can best be described as analogous to that of intergovernmental organizations. The following factors contribute to this status:

- The ICRC is the subject of international mandates conferred upon it by the treaties of international humanitarian law.
- The ICRC's international legal status is recognized in its relations with the United Nations, where it enjoys observer status, pursuant to General Assembly Resolution 45/6 adopted on 16 October 1990 by consensus. Moreover, the ICRC delegation in New York meets monthly with the chair of the Security Council and the President of the ICRC meets annually with the whole Security Council.
- While it is independent of affiliation with any State, the ICRC is a component of the International Red Cross and Red Crescent Movement, in whose International Conference — its supreme deliberative body — States participate to determine the ICRC's statutory authority to offer services or otherwise intervene in armed conflict.
- The ICRC's international legal status is implicitly acknowledged in the ICC Rules of Procedure and Evidence, which base recognition of the ICRC's testimonial exemption on respect for the international mandates conferred upon it by international humanitarian law.
- The international legal status of the ICRC is explicitly acknowledged in the decision of 27 July 1999 of the ICTY Trial Chamber, in the case *Prosecutor* v. *Simić et al.*, recognizing the customary international law-based right of the ICRC to decline to provide evidence.
- Many States treat the ICRC as they do intergovernmental organizations such as UNHCR. The ICRC maintains diplomatic relations with States and international organizations, treating with them on a level of coordination rather than subordination. For example, in 1993 the ICRC and Switzerland signed a Status Agreement in which the Swiss Federal Council "recognizes the international juridical personality and the legal capacity" of the ICRC. As of October 2001, the ICRC has such headquarters

agreements acknowledging its diplomatic privileges and immunities in more than 60 States.[3]

This summary of the foundations of the ICRC's international legal personality provides the context in which to view the more specific sources of the ICRC's testimonial privilege.

The legal sources of the ICRC's privileged exemption from providing evidence

There are three sources in international law in which the ICRC's right to refrain from providing evidence is recognized:

1. The *International Criminal Court (ICC) Rules of Procedure and Evidence* were negotiated and adopted by the ICC Preparatory Commission at its June 2000 session. Rule 73 covers privileged communications and information. The portion of the rule that deals with the ICRC is the result of a compromise: the ICRC had advocated a rule giving absolute protection. Several States, however, insisted on a rule whereby the Court would play a part in determining on a case-by-case basis what ICRC information, if any, should be released. Thus the rule requires the ICRC to consult with the Court where information is deemed by the latter to be "of great importance for a particular case". The ICRC nonetheless retains the final say on release of its information.[4]

No other organizations, whether non-governmental, like *Médecins sans Frontières* (MSF), or intergovernmental, like UNHCR, were granted this privilege. The extraordinary treatment accorded to the ICRC reflects the appreciation of States for its unique status and role in the world. Rule 73 of the ICC Rules of Procedure and Evidence is a cornerstone of the ICRC's testimonial immunity for the future.

2. A Trial Chamber of the *International Criminal Tribunal for the former Yugoslavia (ICTY)*, in its Decision of 27 July 1999 in the case

3 The terms "status agreement" and "headquarters agreement" are used interchangeably.

4 Rule 73, paras 4-6. See *Annex 1*. — For more on the negotiating history of Rule 73, see Stéphane Jeannet, "Testimony of ICRC delegates before the International Criminal Court", *IRRC*, No. 840, December 2000, pp. 993-1000.

Prosecutor v. *Simiç et al.*,[5] ruled that as a matter of customary international law, the ICRC enjoys an absolute privilege to withhold its confidential information.

The ICTY Decision concludes that:

- the ICRC is a unique entity and institution, possessing an international legal personality and a special status in international law;
- the ICRC's mandate to protect victims of armed conflict under the Geneva Conventions, the Additional Protocols and the Statutes of the Movement represents a "powerful public interest";
- the ICRC's ability to fulfil that mandate depends on the willingness of warring parties to grant the ICRC access to the victims of such conflict; and that such willingness, in turn, depends upon the ICRC's adherence to its principles of impartiality and neutrality, and rule of confidentiality; and
- the ratification of the Geneva Conventions by 189 States,[6] the recognition by the United Nations General Assembly of the ICRC's special role in international relations, and the historic practice of and official opinions expressed by States in respect of ICRC confidentiality give rise to a rule of customary international law, providing the ICRC with an absolute right to non-disclosure of information relating to its work.[7]

3. *Headquarters agreements* are international treaties. Because they contain a government's explicit consent to respect the ICRC's confidentiality, they are the most directly enforceable means of providing testimonial privileges in domestic proceedings. The ICRC currently has headquarters agreements with more than 60 States.[8] Among other privileges and immunities, these agreements provide varying

5 IT-95-P.

6 As of October 2001.

7 For more on the ICTY Decision, see Stéphane Jeannet, "Recognition of the ICRC's long-standing rule of confidentiality: An important decision by the International Criminal Tribunal for the former Yugoslavia", *IRRC*, No. 838, June 2000, pp. 403-425.

8 It should also be noted that where the ICRC does not have a headquarters agreement, it may nevertheless claim a customary international law-based right to decline to provide evidence. The ICTY Decision may be cited as explicit support for this proposition. The ICC Rule may also be cited as evidence of the legal opinion of the 139 Signatory States which, either through the work of the ICC Preparatory Commission or by their subsequent ratification of the Rome Statute, recognize testimonial protection for the ICRC.

degrees of protection against the requirement to give evidence. Variations result from two circumstances. First, there is no single uniform headquarters agreement; the terms of each one must be negotiated independently with the authorities of the respective State. Secondly, the "state of the art" proposal of the ICRC has changed over time. The standard provisions relating to its status and the giving of evidence, proposed by the ICRC for its headquarters agreements, are contained in *Annex 2*.

The reasons for the ICRC's testimony policy

The reasons behind the ICRC's testimony policy are well understood in the field. The ICTY Decision aptly summarizes the issue. Prior to the Court's ruling that the ICRC's right to absolute confidentiality must be respected in all cases, the Prosecutor sought to introduce testimony from a former ICRC employee. The Prosecutor argued that the decision to either uphold or reject ICRC confidentiality should be made by the Court, on a case-by-case basis. It was claimed that because disclosure would be required only in "the rare case", the ICRC's interest would be adequately protected by a balancing test in which the Court would weigh the importance of the evidence in question against the confidentiality interest of the ICRC.

The Court itself rejected this reasoning. It recognized that the concern was not whether the Court would protect ICRC information in the proper case. Instead, the concern is: would the ICRC be in a position to assure combatants of confidentiality if ultimate authority over its information is placed beyond its control? Clearly, the answer is no. The mere existence of judicial power to overrule ICRC confidentiality, or at the very least the first time that such power was used, would mean the end of the ICRC's long-standing ability to give warring parties the assurances upon which ICRC access to the victims of armed conflict depends. Rather than asking it to "trust the Court," the ICRC should be allowed the discretion to release evidence in exceptional cases in which it determines that any resulting risk to its operations is tolerable. This is the effect of the ICTY Decision, of ICC Rule 73 and of the ICRC's headquarters agreements.

In discussing the ICRC's confidentiality interests with the outside world, it is important to point out that the ICRC's lack of cooperation with criminal tribunals should not be viewed as hostility or indifference to their task. Insofar as the ICRC and the tribunals both have a common goal, namely to ensure respect for international humanitarian law, the ICRC enthusiastically supports the existence of mechanisms for the repression of criminal violations of humanitarian law. However, because the ICRC also has a mandate to assist and protect victims and therefore cannot forego/risk losing its access to them, its role should be seen as complementary, but not identical, to that of the tribunals.

Consistency of the right of non-disclosure with commonly accepted principles of justice

Evidentiary privileges (the right to refuse to give evidence) are generally disfavoured in the law. They run counter to the premise that justice is best served when all relevant evidence is made available. This is particularly true in criminal justice proceedings, and even more compelling in the case of international crimes which are likely to be particularly horrendous and, not coincidentally, to be the context in which ICRC evidence is most often sought. To make matters even more difficult, there may be cases in which ICRC evidence is the only evidence available to convict the guilty or, worse still, is alone able to exonerate the innocent. Nonetheless, evidentiary privileges do exist, in recognition of the fact that the protection of certain interests through respect for confidentiality can, in certain cases, outweigh the interest of full disclosure in a court case. So, for example, many States' laws discourage or even prohibit attorneys, doctors and religious personnel from testifying about confidential communications with clients, patients and penitents, in order to encourage the free and full exchange of such information among them. In these cases, the validity or necessity of the evidence excluded is not a relevant factor.

Evidentiary privileges reflect acceptance of a small risk of imperfect justice, in deference to other important interests. One such interest is the confidentiality that is critical to the ICRC's ability to fulfil its obligations under international humanitarian law to protect

victims of current and future armed conflict. On balance, this concern is greater than the possibility that ICRC information might be relevant, or even crucial, to a prosecution for *past* crimes.

The ICRC's testimony policy in action

Among its personnel, it is commonly understood that "the ICRC *does not* testify". This is often the result of application of the ICRC's policy, but it is not the policy itself. The legal authorities cited in this note are unanimous in their conclusion that "the ICRC *need* not testify". In other words, the rule is that the ICRC may not be *forced* to testify, but the decision to do so (or not) is to be made by the ICRC itself, on a case-by-case basis.

Thus, all demands or requests for cooperation with external investigations or judicial proceedings should be brought to the attention of the head of delegation, who should then consult with headquarters in Geneva. Only in this manner can there be developed a consistent practice focused on the ultimate question: how will our decision enhance or detract from our ability to provide protection and assistance to the victims of conflict?

A word about testimony in relation to the other components of the Movement is also in order. The evidentiary protection accorded to the ICRC does not extend to the International Federation of Red Cross and Red Crescent Societies or to National Societies. Neither the ICC Rules nor any international tribunal have recognized such protection. While the Federation may enjoy such protection by virtue of its headquarters agreements with individual States, National Societies can claim no such benefit. This does not mean, however, that the Federation (where it has no testimonial privilege based on a headquarters agreement) and National Societies have no protection. Insofar as members of their staff are seconded to the ICRC, they too might successfully claim a testimonial privilege. In any case, they can develop practical protective strategies, such as instituting procedures for responding to official requests for cooperation. Such measures, and others, are currently under discussion.

And a *caveat*: Upon reading this memorandum one might be tempted to think that the ICRC's testimonial protection is well

settled and not subject to challenge. In fact, the gains made are not carved in stone. The ICTY decision could be reversed on appeal. The relevant ICC Rule is subject to rejection or revision once the Tribunal comes into being. Headquarters agreements may be terminated by States. Cooperation with judicial mechanisms by other components of the Movement, or even by outside organizations such as UNHCR and MSF, could affect the ICRC's ability to maintain its protected status. Bearing in mind that evidentiary privileges are not easily acquired or maintained, and that their virtue is not readily recognized, we should be cautious in acclaiming and using this benefit.

Conclusion

Justice cannot be administered without the cooperation of those with relevant information. Yet testimonial immunities have long been recognized in support of other values, despite the potential conflict with interests of justice. One of these other values is the work performed by the ICRC — work that could not be accomplished in the absence of guarantees of confidentiality. Without testimonial immunity, there can be no such guarantees.

States have granted the ICRC the mandate to assist and protect the victims of armed conflict. Its status as a subject of international law is acknowledged. From that status, the ICRC derives the ability to claim the need for testimonial immunity. The success of that claim reflects the agreement of States and international tribunals that the international community could not have meant to give the ICRC its mandate without also conceding to it the tools essential for the task.

There is no solution by which the performance of the ICRC's mandate and the interests of justice can both be guaranteed. We must simply acknowledge the conflict between them. To understand the legal basis and practical rationale for the ICRC's testimonial immunity will help us not only to apply it, but also to explain it to others.

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Annex 1

International Criminal Court: Rules of Procedure and Evidence[1]

Rule 73 — *Privileged communications and information*

1. Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:
(a) The person consents in writing to such disclosure; or
(b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.
2. Having regard to rule 63, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that:
(a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
(b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
(c) Recognition of the privilege would further the objectives of the Statute and the Rules.
3. In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall

1 Draft text: UN Doc. PCNICC/2000/Add.1. To be approved by the Assembly of States Parties.

recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.

4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence of, the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:

(a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or

(b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees.

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.

Annex 2

Selected Articles from the Standard Proposed ICRC Headquarters Agreement

Article 1 — *Status of the ICRC*
The status of the ICRC shall be, and its treatment shall in any case be not less favourable than, that of an intergovernmental organization.

Article 2 — *Legal personality*
[Name of the State] recognizes the legal personality of the ICRC, including but not limited to its capacity to contract obligations, institute legal proceedings and acquire rights, and to acquire and dispose of movable and immovable property.

Article 3 — Immunity of the ICRC, its property and assets
The ICRC, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal and administrative process, except insofar as in any particular case the ICRC has expressly waived its immunity.

Article 4 — Inviolability of ICRC premises, property and assets
The premises of the ICRC shall be inviolable. The property and assets of the ICRC, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, judicial, administrative or legislative action.

Article 5 — *Inviolability of ICRC archives*
The ICRC's archives and, in general, all documents belonging to it or held by it, shall be inviolable, wherever located.

(...)

Article 10 — *Status of members of the delegation*

1. Expatriate members of the ICRC delegation, their spouses, other relatives and dependants shall have the same status as that accorded to the members of diplomatic missions.

2. They shall enjoy immunity, even after they have left the service of the delegation, from any form of legal or administrative process, including personal arrest or detention, seizure of their personal baggage, and from being called as a witness or being required to give evidence.

3. Their private residences, vehicles, documents, manuscripts and all other personal effects shall be inviolable.

(...)

10. In addition to the above-mentioned privileges and immunities, the Head of the ICRC delegation, his/her Deputy and their spouses, other relatives and dependants shall benefit from the same status that is accorded under the Vienna Convention on Diplomatic Relations of 16 April 1961 to diplomatic agents.

11. Members of the delegation who are citizens of [Name of the State] or are permanent residents in that country shall not benefit from the immunities, privileges and facilities listed in Article 10, paragraphs 1 to 9 above, except, in respect to acts and/or omissions relating to the exercise of their function, immunity, even after they have left the service of the delegation, from any form of legal or administrative process, including personal arrest or detention, and from being called as a witness or being required to give evidence.

Le suivi de la XXVIIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge

Du 31 octobre au 6 novembre 1999 s'est tenue à Genève la XXVIIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge, « la plus haute instance délibérante du Mouvement de la Croix-Rouge et du Croissant-Rouge »[1]. La Conférence internationale se tient tous les quatre ans et rassemble en son sein les délégations des Sociétés nationales, du Comité international de la Croix-Rouge (CICR), de la Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge (ci-après, la Fédération internationale) et des États parties aux Conventions de Genève[2], qui « délibèrent ensemble des questions humanitaires d'intérêt commun et prennent des décisions à cet égard »[3]. La Conférence de 1999 a adopté un certain nombre de résolutions portant sur l'*Adoption de la Déclaration et du Plan d'Action* (résolution 1), l'*Appel du 12 août 1999* (résolution 2), *les emblèmes* (résolution 3), la *Révision du règlement du Fonds de l'impératrice Shôken* (résolution 4).

La première résolution[4] comprend, d'une part, une déclaration solennelle sur « le pouvoir de l'humanité » et, d'autre part, le Plan d'action pour les années 2000-2003. La déclaration sur « le pouvoir de l'humanité » est une réaffirmation de la nécessité d'agir en faveur des « plus faibles », ceux qui sont les plus atteints par la pérennisation des conflits dans le monde, par les violations persistantes du droit international humanitaire et par des variations climatiques catastrophiques, conjuguées à une demande sociale croissante que les États et les systèmes économiques ont peine à satisfaire. Le Plan d'action quadriennal, thème de la seconde partie de cette résolution, comprend trois chapitres relatifs aux domaines dans lesquels les États et le Mouvement devront s'investir pour respecter leurs engagements :

- La protection des victimes des conflits armés à travers le respect du droit international humanitaire.
- L'action humanitaire lors de conflits armés et d'autres catastrophes.
- Une stratégie de partenariat pour améliorer les conditions de vie des personnes vulnérables.

Le Plan d'action a été complété par une série d'engagements pris par les membres de la Conférence: 378 d'entre eux ont ainsi indiqué vouloir entreprendre des actions spécifiques. Demander aux composantes du Mouvement de la Croix-Rouge et du Croissant-Rouge ainsi qu'aux gouvernements de prendre des engagements concrets dans le cadre de la Conférence était une innovation de taille. Ont répondu à cette demande 163 Sociétés nationales, le CICR, la Fédération internationale, 85 gouvernements et 9 observateurs.

Le Plan d'action et les engagements sont intimement liés car ils abordent des thèmes identiques ou complémentaires. Ils apparaissent comme les pièces maîtresses de la Conférence et une stratégie de suivi a été peu à peu mise en place afin de s'assurer de leur mise en œuvre, complète ou partielle.

Complexité du suivi de la XXVIIe Conférence internationale

Le suivi de la XXVIIe Conférence n'aurait pas pu être mis en place sans une réflexion préalable sur quelques points susceptibles d'en faire une entreprise complexe.

Valeur juridique des instruments en question et nature de la Conférence internationale

Conformément aux Statuts du Mouvement[5], le Plan d'action a été adopté sous forme résolutoire. Quelle valeur juridique doit-

1 Comme le précise l'article 8 des Statuts du Mouvement international de la Croix-Rouge et du Croissant-Rouge adoptés par la XXVe Conférence internationale de la Croix-Rouge à Genève en octobre 1986 (ci-après « les Statuts du Mouvement »), *in Manuel du Mouvement international de la Croix-Rouge et du Croissant-Rouge*, Comité international de la Croix-Rouge, Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge, 13e édition, Genève, mars 1994, p. 439.

2 Article 9 des Statuts du Mouvement, *op. cit.*, p. 439.

3 H. Haug, *Humanité pour tous, le Mouvement international de la Croix-Rouge et du Croissant-Rouge*, Institut Henry-Dunant, Genève, Berne et Haupt, 1993, p. 432.

4 Résolution 1, « Adoption de la Déclaration et du Plan d'Action », XXVIIe Conférence internationale de la Croix-Rouge et du Croissant Rouge, Genève, 31 octobre - 6 novembre 1999, *in RICR*, nº 836, pp. 849-876, disponible également sur le site www.cicr.org

5 Aux termes de l'article 10, chiffre 5 des Statuts du Mouvement, *op. cit.*, p. 440, « la Conférence internationale adopte ses décisions, ses recommandations ou déclarations sous forme de résolutions ».

on, dès lors, accorder à cet instrument? La doctrine n'est pas unanime quant à la valeur juridique des résolutions en droit international. Sur ce point, il est prudent de constater l'absence d'une valeur juridique uniforme[6]. Ainsi, nous pouvons être en présence de résolutions ayant une pertinence juridique indéniable. Certaines, même non obligatoires d'un point de vue juridique, peuvent être politiquement très contraignantes[7]. Cependant, on ne peut conclure à une valeur juridique « prédéfinie ».

À ce titre, il est utile de se pencher plus précisément sur les résolutions de la Conférence internationale qui pourraient revêtir une autre dimension au regard de la spécificité du Mouvement de la Croix-Rouge et du Croissant-Rouge.

Si l'on se réfère aux résolutions, mêmes les plus récentes, qu'ont adoptées les conférences internationales, il apparaît que celles-ci, malgré les particularismes du Mouvement, relèvent du droit international public. La participation diversifiée à la Conférence internationale est l'un des points intéressants, qui peut influer à divers égards sur plusieurs aspects les résolutions de cet organe.

En effet, rappelons ici que les État parties aux Conventions de Genève sont des membres à part entière de la Conférence[8]. Dès lors, on peut se ranger à l'opinion selon laquelle « le vote des États transforme l'acte originairement privé en un acte juridique semi-privé, de caractère mixte: les résolutions de la Conférence affleurent ainsi à la sphère du droit international public en raison de la qualité de leurs auteurs et les obligations éventuelles qu'elles contiennent sont opposables aux États, dans une mesure à préciser ultérieurement »[9].

Précisons également que des obligations différentes peuvent naître en fonction du statut des participants. Ainsi, certaines résolutions pourraient avoir une valeur juridique plus ou moins contraignante selon leur contenu.

6 Jorge Castañeda, « Valeur juridique des résolutions des Nations Unies », *in RCADI*, vol. 129, 1970, p. 212.

7 Nguyen Quoc Dinh, Patrick Daillier et Alain Pellet, *Droit international public*, Librairie générale de droit et de jurisprudence, Paris, 1999, p. 371.

8 Article 9 des Statuts du Mouvement, *op. cit.*, p. 439.

9 Richard Perruchoud, *Les Résolutions des Conférences internationales de la Croix-Rouge*, Genève, Institut Henry-Dunant, 1979, p. 48.

Par ailleurs, toujours selon la même analyse, les résolutions adoptées par la Conférence internationale peuvent être de deux sortes : soit obligatoires, soit exhortatoires[10]. Peut-on considérer que le Plan d'action, tel qu'adopté en novembre 1999, est de nature obligatoire ?

S'il est unanimement reconnu que certaines des résolutions de la Conférence revêtent un tel caractère[11], ne sont visées ici que celles qui ont été adoptées en vertu des compétences attribuées à la Conférence par les Statuts du Mouvement, ou encore des pouvoirs implicites de l'institution :

- résolutions à caractère « constitutionnel » (Règlement du Mouvement international de la Croix-Rouge et du Croissant-Rouge, résolutions relatives à la création d'organes, résolutions concernant la reconnaissance des Sociétés nationales) ;
- résolutions relevant du droit interne de l'institution (règles de procédure, dispositions financières, convocation des Conférences) ;
- résolutions concernant des règles fondamentales régissant le comportement des membres du Mouvement.

Le caractère obligatoire est étroitement lié à la nature des destinataires des résolutions. Il est évident que de telles résolutions ne pourraient lier de la même manière les Sociétés nationales, le CICR, la Fédération internationale et les États signataires des Conventions de Genève. Le Plan d'action s'analyserait plutôt comme une résolution de nature exhortatoire, qui a moins pour objet de poser un certain nombre de règles obligatoires que de définir les lignes directrices au sein du Mouvement pour les quatre ans à venir.

Peut-on pour autant conclure que celui-ci est dénué de tout effet sur le plan juridique ? Rappelons ici l'opinion individuelle du juge Lauterpacht, qui considère qu'une résolution de l'Assemblée générale des Nations Unies recommandant aux États membres une mesure déterminée « crée une certaine obligation juridique qui, si rudimentaire, souple et imparfaite qu'elle soit, est cependant une obli-

10 *Ibid.*

11 Voir en ce sens Richard Perruchoud, *op. cit.*, pp. 91-165; François Bugnion, « Le Droit de la Croix-Rouge », *RICR*, n° 815, septembre-octobre 1995, pp. 535-566.

gation juridique [...]. L'État en question, s'il n'est pas tenu d'accepter la recommandation, est tenu de l'examiner de bonne foi »[12]. Ainsi, une résolution prise par un organe dûment mandaté, tel que la Conférence internationale, comporte un élément juridique opposable aux États membres de cet organe. Dans cette perspective, les États sont tenus d'accepter et d'examiner ces résolutions de bonne foi. Rappelons également que ce type de résolution possède une certaine pertinence sur le plan juridique du fait de son rattachement à d'autres sources du droit[13].

La valeur juridique de cette résolution est renforcée par son mode d'adoption, le consensus, défini en droit international comme « un système de décision sans vote, où le silence général témoigne de l'absence d'objection dirimante de la part des États membres et autorise l'adoption d'un texte »[14]. L'adoption du Plan d'action par consensus démontre que celui-ci porte dans son contenu une convergence de volontés et qu'il est l'expression d'une conviction juridique et d'une volonté d'action des membres de la Conférence. En l'adoptant par consensus, les délégués étatiques, comme tous les autres membres de la Conférence, ont fait la preuve de l'importance qu'ils attachaient au Plan d'action. Ainsi, leur consentement non équivoque atteste l'existence d'une volonté générale effective de s'engager, pour les quatre années suivantes, en faveur de la protection des victimes des conflits armés et des catastrophes en prenant des mesures concrètes.

Si l'on ne peut attribuer au Plan d'action une force obligatoire, il ne faut cependant pas en diminuer l'importance juridique au regard de la démonstration précédente.

Quant aux nombreux engagements pris par les membres de la Conférence, il s'agit de promesses ayant une valeur politique et morale, plus que juridique. Cette analyse serait cependant incomplète si elle omettait la prise en compte des engagements et ce, de par la nature et la fonction de la Conférence internationale. Car, comme nous l'avons déjà mentionné, le rôle prépondérant de la Conférence

12 Cour internationale de justice, Sud-Ouest africain, avis consultatif du 7 juin 1955, opinion individuelle du juge Lauterpacht, C.I.J. *Recueil 1955*, pp. 118-119.

13 François Bugnion, *op. cit.*, p. 562.

14 Nguyen Quoc Dinh, Patrick Daillier et Alain Pellet, *op. cit.*, p. 605.

n'est plus à prouver. Celle-ci est à l'origine des fondements juridiques du Mouvement de la Croix-Rouge et du Croissant-Rouge, dont elle a jeté puis précisé les bases[15]. Mais au-delà de cet aspect juridique, elle donne, de par le caractère permanent de sa structure, des impulsions décisives au sein du Mouvement. Elle dégage les priorités et les lignes directrices pour les actions à mener, toujours au sein du Mouvement, tout en restant « un lieu de dialogue sur la mise en œuvre et le respect du droit humanitaire »[16].

La Conférence est un forum important, qui reste une force de cohésion entre les composantes du Mouvement de la Croix-Rouge et du Croissant-Rouge et les États parties aux Conventions de Genève. Cet aspect ne doit pas être négligé dans l'appréhension du Plan d'action et des engagements.

Caractéristiques du Plan d'action

La particularité du Plan d'action a dû être également prise en compte avant de s'atteler au suivi de la XXVIIe Conférence. Le Plan a été, dans un premier temps, rédigé conjointement par le CICR et la Fédération internationale, sous les auspices de la Commission permanente, puis débattu avec les membres de la XXVIIe Conférence. Le Plan d'action pour les années 2000-2003, tel qu'adopté dans sa forme résolutoire finale, aborde trois thèmes principaux, qui touchent à plusieurs aspects de l'action des différentes composantes du Mouvement international de la Croix-Rouge et du Croissant-Rouge. Dans chaque thème est affirmé un certain nombre d'objectifs finals, assortis de mesures proposées en vue de leur réalisation.

L'adoption d'un Plan d'action est en soi une innovation. Celui-ci répond à un souci d'efficacité puisqu'il définit des objectifs à long terme et fixe des tâches à accomplir – des actions spécifiques – pour les quatre années à venir. Ainsi, le Plan d'action s'analyse plutôt comme un calendrier, une planification des actions à mener, un docu-

15 Rappelons la première Conférence de 1863 dont les résolutions ont été maintes fois qualifiées de « Constitution » du Mouvement. Notons également l'adoption et la modification des Statuts du Mouvement.

16 Philippe Abplanalp, « Les Conférences internationales de la Croix-Rouge, facteur de développement du droit international humanitaire et de cohésion du Mouvement international de la Croix-Rouge et du Croissant-Rouge », *RICR*, n° 815, septembre-octobre 1995, p. 571.

ment concret pour la réalisation des priorités humanitaires définies par la XXVIIe Conférence. Le champ couvert par les trois thèmes est large. Les mesures proposées accompagnant chaque thème sont nombreuses, mais concrètes et clairement définies. Elles prennent en compte les mandats et les moyens de chaque membre de la Conférence, à savoir les gouvernements, les Sociétés nationales, la Fédération internationale et le CICR.

Le Plan d'action n'instaure pas de nouvelles obligations. Il reprend nombre des obligations contractées antérieurement, notamment par la signature des Conventions de Genève de 1949 et de leurs deux Protocoles additionnels. Il entre dans la catégorie des résolutions contenant des règles générales, énonçant des règles déjà reconnues en droit international humanitaire. Cependant, certaines nouveautés sont introduites, mais sous forme non impérative (notamment en ce qui concerne l'âge de recrutement des enfants comme soldats).

Le Plan d'action est donc un instrument complexe, tant dans sa forme que dans son contenu. Cette complexité s'explique, en grande partie, par son caractère négocié et par la volonté des membres de la Conférence d'être – presque – exhaustifs quant aux domaines couverts.

Quelles conclusions s'imposent, au regard des précédentes analyses, pour l'élaboration de la stratégie de suivi de la XXVIIe Conférence?

Du fait de la force juridique des instruments en question, le suivi ne saurait être un mécanisme rigide et contraignant. Il doit rester un processus souple pour pouvoir fonctionner correctement et sur le long terme.

Le suivi doit être conduit de manière à traduire l'assentiment des participants à mettre en œuvre un texte qu'ils ont négocié entre eux. Cela signifie que, dans le cadre de ce suivi, la recherche d'informations ne doit pas se faire exclusivement au CICR ou à la Fédération internationale. Quitte à recueillir une information moins complète, il faut privilégier celle que rapportent les participants. La mise en place d'un processus auquel les participants sont pleinement associés est tout aussi importante, sinon plus, que la somme des informations récoltées.

Mise en place du suivi de la XXVIIe Conférence

En 1986, la XXVe Conférence adopte la résolution V, qui prie les gouvernements de s'acquitter de leur obligation d'adopter ou de compléter la législation pertinente en matière de mise en œuvre du droit humanitaire ainsi que de communiquer les mesures prises à cette fin. Les Sociétés nationales sont, elles, invitées à aider leur gouvernement dans cette tâche. Quant au CICR, il reçoit le mandat « de rassembler et d'évaluer » les informations fournies par les gouvernements et les Sociétés nationales pour en faire rapport lors des conférences internationales.

Un rapport sur le suivi donné aux résolutions de la XXVIe Conférence[17] avait été préparé pour la XXVIIe Conférence. Il avait été rédigé sur la base des informations fournies par les participants après l'envoi d'un questionnaire relatif aux mesures de mise en œuvre des résolutions de la Conférence.

En novembre 1999, la XXVIIe Conférence internationale adopte la résolution 1, qui contient le Plan d'action et la déclaration intitulée « Le pouvoir de l'humanité ». Cette résolution ne se contente pas de demander « instamment à tous les membres de la Conférence de mettre en œuvre les mesures énoncées dans le Plan d'action, dans le cadre de leurs compétences, mandats et capacités respectifs »[18]. Elle charge la Commission permanente de la Croix-Rouge et du Croissant-Rouge « d'encourager et de faciliter la mise en œuvre de la présente résolution [...] en consultant à cet effet les États parties aux Conventions de Genève et d'autres acteurs »[19], le Comité international de la Croix-Rouge et la Fédération internationale, « de présenter un rapport à la XXVIIIe Conférence internationale sur la mise en œuvre du Plan d'action » et, enfin, les membres de la Conférence « de faire rapport à la XXVIIIe Conférence internationale sur le suivi donné aux engagements individuels pris lors de la présente Conférence »[20].

Sont donc impliqués dans « l'après XXVIIe Conférence » :

- les membres de la Conférence, qui doivent mettre en œuvre le Plan d'action, tant individuellement que dans le cadre d'organisations

17 Annexe I du *Recueil de documents*, XXVIIe Conférence internationale, Genève, 31 octobre-6 novembre 1999.

18 Résolution 1, cf. note 4.

19 *Ibid.*

20 *Ibid.*

internationales ou régionales, et faire rapport, lors de la prochaine Conférence, sur la mise en œuvre des engagements;

- la Commission permanente de la Croix-Rouge et du Croissant-Rouge, qui doit faciliter et encourager l'application de cette résolution;
- le CICR et la Fédération internationale, qui doivent faire rapport sur la mise en œuvre du Plan d'action. Les responsabilités sont donc partagées et le suivi des décisions prises lors de la Conférence n'est pas oublié en novembre 1999.

Sont à prendre en considération dans le suivi de la Conférence, au même titre que le Plan d'action, les engagements individuels, non seulement en tant qu'actes politiques et moraux issus de la Conférence, mais aussi en tant qu'actes étroitement liés au Plan d'action car leur mise en œuvre contribuera, pour la plupart d'entre eux, à celle du Plan.

Dans cette perspective, une politique de suivi conjointe a été élaborée par le CICR et la Fédération. Dans un premier temps, le document principal de la Conférence (le Plan d'action et la Déclaration l'accompagnant) a été publié dans plusieurs langues (anglais, arabe, espagnol, français et russe) et distribué aux acteurs concernés[21].

Les délégations du CICR et de la Fédération internationale ont également été mobilisées. Leur contribution s'avère essentielle dans la stratégie de suivi. En effet, par le biais de leurs contacts sur le terrain, elles ont la possibilité d'avoir accès à des informations importantes pour le suivi de la mise en œuvre de la XXVIIe Conférence. Ainsi, certaines délégations vont travailler à attirer l'attention des Sociétés nationales et des gouvernements sur l'importance de la mise en œuvre du Plan d'action et des engagements pris lors de la Conférence.

Une correspondance directe a été établie avec les membres et participants de la Conférence, afin de les informer de la mise en place d'une telle stratégie et de les sensibiliser à l'importance de leur participation à ce processus.

21 Le document est disponible sur le site www.cicr.org ou sur demande au Comité international de la Croix-Rouge.

Le travail de sensibilisation s'est prolongé par des actions de mobilisation dans diverses enceintes. L'importance du Plan d'action, des engagements et de leur mise en œuvre a été rappelée à l'occasion de réunions internationales (par exemple, celle de l'Organisation de l'unité africaine) ou au sein du Mouvement (séminaires régionaux, réunions statutaires telles que le Conseil des Délégués).

Une analyse croisée des thèmes abordés par le Plan d'action et des domaines couverts par les engagements a été effectuée afin de confirmer le constat fait précédemment, à savoir que, dans la majorité des cas, la mise en œuvre des engagements coïncidera avec celle du Plan d'action. Cette analyse a pour but de faciliter l'appréhension de l'ensemble complexe que constituent le Plan d'action et les engagements. Elle vise également la collecte d'informations et la préparation du rapport pour la prochaine Conférence, comme l'exige la résolution 1.

Toujours dans la même optique, un questionnaire reprenant l'analyse croisée du Plan d'action et des engagements a été élaboré afin de recueillir des informations aussi exhaustives que possible sur leur mise en œuvre. La forme du questionnaire est unifiée et a vocation à s'adapter aux différentes catégories de destinataires. Le questionnaire couvre tous les domaines abordés tant par le Plan d'action que par les engagements. Il appartient donc à chaque participant de choisir les sujets sur lesquels il souhaite fournir des informations, en fonction, notamment, des engagements spécifiques auxquels il a souscrit lors de la XXVIIe Conférence.

Enfin, une base de données a été créée sur Internet pour faciliter ce suivi[22]. Elle comporte diverses informations :

- le Plan d'action pour les années 2000-2003, tel qu'adopté par la Conférence internationale en 1999 ;
- les engagements, disponibles soit par type de participant (composantes internationales, gouvernements, Sociétés nationales et observateurs), soit par sujet ;

22 La base de données « Suivi de la XXVIIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge » est disponible à l'adresse suivante : ‹http://www.icrc.org/eng/conf27_followup›.

- la mise en œuvre du Plan d'action et des engagements, disponible non seulement par type de participant et par sujet, mais aussi par « objectif final » (pour regrouper les données selon une structure identique à celle du Plan d'action) et par zone géographique (afin de faciliter le partage d'informations à l'intérieur d'une même région).

À l'heure actuelle, la liste des informations sur la mise en œuvre du Plan d'action et des engagements est loin de constituer un recueil exhaustif des actions entreprises par les participants à la Conférence. C'est dans cette perspective que le questionnaire revêt toute son importance : il est l'outil utilisé pour recueillir des informations pour la base de données puisqu'il a été créé selon le même schéma logique que le Plan. Notons que les participants ont également la possibilité de faire des commentaires « en ligne » sur les informations de mise en œuvre déjà disponibles sur Internet lorsque celles-ci se révèlent inexactes ou incomplètes.

Une présentation de la base de données « Suivi XXVIIe Conférence » et de la stratégie de suivi a été assurée pendant toute la durée du Conseil des Délégués, tenu à Genève, en novembre 2001. Le Conseil des Délégués regroupe les représentants des composantes du Mouvement, qui « se réunissent pour débattre des questions qui concernent le Mouvement dans son ensemble »[23]. À ce titre, il constitue un lieu privilégié pour la sensibilisation à la politique de suivi. Le stand qui a été mis en place à cette occasion pour présenter cet outil a attiré, trois jours durant, un nombre de visiteurs important, le bouche à oreille étant le moyen de promotion le plus efficace. Les interlocuteurs ont fait part de leur satisfaction quant au concept même du suivi organisé.

Pour nombre de délégués de Sociétés nationales, il s'agissait essentiellement de rappeler les engagements particuliers pris par leur Société. Dans ce contexte, la possibilité de voir ces engagements en ligne sur Internet et de les imprimer a été très appréciée. La partie de la base de données intitulée « *implementation* » (mise en œuvre) a particulièrement intéressé les délégués, car y figurent les avancées des participants à la Conférence, du moins celles qu'ils ont signalées au

23 Article 12 des Statuts du Mouvement.

CICR. Pour les Sociétés nationales, il était très important que leur nom y figure, car c'était le gage de leur implication dans ce suivi.

Le « Web », par son attrait incontestable, a donné une tout autre dimension au suivi. En effet, le fait que l'information soit disponible – par le biais d'Internet – n'importe où et pour n'importe qui, a éveillé un immense intérêt pour le suivi de la XXVIIe Conférence, ce dossier influant ainsi directement sur la visibilité des participants à la Conférence, en l'occurrence des Sociétés nationales. L'« impact Web » a également joué en faveur du questionnaire, l'élément clef de la récolte d'informations et, par là même, des données disponibles.

Internet va ainsi assurer au suivi un certaine « couverture médiatique » qui, en général, constitue « un encouragement positif, pour les États, en matière de présentation des rapports »[24]. Cette couverture médiatique et ses implications politiques permettent de contourner en partie les obstacles juridiques du suivi.

L'importance du suivi de la XXVIIe Conférence

Des systèmes de suivi ou d'application plus ou moins formels existent déjà au sein d'organisations internationales ou régionales. À titre d'exemple, nous pouvons mentionner l'Organisation internationale du travail qui, dès sa constitution, a prévu une procédure de contrôle relativement complexe impliquant les gouvernements, une Commission d'experts pour l'application des conventions et recommandations et une Commission pour l'application des normes[25]. Cette procédure permet de suivre l'application des conventions auxquelles les États ont adhéré, et d'envisager des mesures correctrices en cas d'application défaillante. Nombre de traités relatifs au désarmement, de même que le traité d'Ottawa, contiennent des procédures de vérification et/ou de contrôle[26]. Ces exemples sont loin de constituer une liste exhaustive des procédures similaires existant en

24 Elisabeth Kornblum, « Étude comparative de différents systèmes de rapports d'auto-évaluation portant sur le respect, par les États, de leurs obligations internationales », tiré à part, extrait de *RICR*, janvier-février 1995, n° 811, p. 53.

25 Pour une analyse plus complète de cette procédure, voir Elisabeth Kornblum, *op. cit.*, pp. 25-28.

26 *Ibid*, pp. 37-48.

droit international. Plus ou moins efficaces selon les cas, ces procédures ont le mérite de pousser plus loin l'effectivité des normes en droit international.

Si un tel mécanisme, qui est plus un processus de suivi qu'un dispositif formel d'application, ne saurait revêtir la même forme au sein de la Conférence internationale en raison de la valeur juridique des résolutions que celle-ci adopte, il n'est pas pour autant dénué d'intérêt pour le Mouvement.

La XXVIIe Conférence était innovatrice sur plusieurs aspects : adoption d'un Plan d'action constitué d'« objectifs finals » et de « mesures proposées », possibilité d'enregistrer des promesses individuelles pendant toute la Conférence, mise en place d'ateliers en tant que compléments des travaux officiels.

L'innovation s'est prolongée dans la recherche d'une application effective de ces instruments. Adaptation à une évolution de la société internationale, réponse à certains constats des Conférences antérieures ? Ou plutôt, simple moyen de poursuivre toujours les mêmes objectifs (atténuer et prévenir les crises, renforcer le Mouvement et l'aide aux victimes) en préservant le rôle clef de la Conférence au sein du Mouvement ?

La faiblesse de nombreuses conférences ou traités repose souvent sur le manque de mécanismes de suivi ou de mise en œuvre. Comme l'a souligné en 1999 Cornelio Sommaruga, alors Président du CICR, « la substance de trop nombreuses réunions internationales ne dépasse guère une rhétorique vide ». Le suivi de la XXVIIe Conférence répond précisément à ce constat. Dépasser une « rhétorique vide »[27] pour ne pas nuire à la crédibilité de la Conférence figure parmi les objectifs d'un tel suivi en se plaçant dans une autre dynamique, plus volontariste.

Dans le cas du Mouvement, l'importance du succès découle de l'importance de la Conférence elle-même. La Conférence internationale donne des impulsions décisives au développement du droit international humanitaire. De par son rôle, elle revêt une impor-

27 Bilan de la Conférence, Cornelio Sommaruga, « Un pas dans la bonne direction », 19 novembre 1999, disponible sur le site www.cicr.org

tance particulière pour le Mouvement. Le suivi va permettre d'utiliser pleinement la Conférence comme «un lieu de débat et de progrès pour l'action humanitaire et la protection des personnes les plus vulnérables» [28], de potentialiser le forum que représente la Conférence au regard de son mandat. «Ce que l'on peut attendre de ce forum de l'«humanitaire», c'est qu'il mette en relief des situations intolérables, qu'il identifie, par rapport à ces situations, des mesures propres (...) et qu'il prenne, enfin, des engagements fermes quant aux moyens nécessaires à la réalisation de ces mesures»[29].

La Conférence internationale de la Croix-Rouge et du Croissant-Rouge est un lieu unique pour mettre les victimes au cœur des préoccupations de la communauté internationale. Elle permet d'instaurer, entre tous ses membres, un dialogue privilégié autour de la prise de décisions qui ont une portée pour l'ensemble de la communauté internationale. Ce dialogue, notamment avec les États, ne doit pas se limiter à ces quelques jours. Le suivi permet de le maintenir entre chaque Conférence, sur les thèmes choisis. Ainsi, les effets de la Conférence, en tant qu'événement constructif, seront prolongés sur un plus long terme et une plus grande effectivité sera assurée.

Le suivi répond également à un autre souci, celui de mobiliser le public, les gouvernements, les Sociétés nationales. En effet, «la Conférence en elle-même n'est pas mobilisatrice et pourrait même avoir un effet négatif tant il est vrai qu'une certaine lassitude gagne le public face à de grands rassemblements, coûteux, dont on a peine à mesurer l'impact»[30]. Une politique de suivi, couplée à la médiatisation, devrait infirmer cette perception en démontrant le sérieux qui s'attache à la mise en œuvre des décisions prises.

Cependant, comment doit-on envisager le suivi de la XXVIIe Conférence au regard des prochaines Conférences internationales?

Le suivi de la XXVIIe Conférence tient une place relativement importante dans l'organisation de la prochaine Conférence (ci-après, la Conférence de 2003). En effet, il va permettre de présenter

28 Philippe Abplanalp, *op. cit.*, p. 598.

29 Yves Sandoz, «La XXVIe Conférence internationale de la Croix-Rouge et du Croissant-Rouge: mythe et réalité», *RICR*, mars-avril 1995, n° 812, p. 192.

30 *Ibid*, p.148.

concrètement dans quelle mesure le Plan d'action et les engagements ont été suivis d'effet puisque la Conférence de 2003 doit tirer parti des résultats de la XXVIIe Conférence et notamment de la mise en œuvre du Plan d'action. Ce suivi entre dans une logique dynamique car l'« objectif concret ultime de la Conférence de 2003 devrait être l'adoption de résolutions orientées vers l'action, qui s'inscrivent dans le prolongement ou le résultat du Plan d'action 99 » et la Conférence s'attachera à « refléter l'expérience acquise dans la mise en œuvre des propositions du Plan d'action »[31].

L'intérêt d'un suivi pour les prochaines Conférences n'est plus à démontrer et, dans cette optique, le processus a été amorcé. Cependant, n'oublions pas que le suivi n'a de valeur que si les participants et membres de la Conférence décident d'y contribuer pleinement.

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31 Rapport de la Commission permanente de la Croix-Rouge et du Croissant-Rouge sur la Conférence internationale de la Croix-Rouge et du Croissant-Rouge, présenté au Conseil des Délégués, Genève, 11-14 novembre 2001, p. 6.

Faits et documents

Reports and documents

Composition du Comité international de la Croix-Rouge[1]

JAKOB KELLENBERGER, PRÉSIDENT, docteur ès lettres de l'université de Zurich, ancien secrétaire d'État aux affaires étrangères suisses (1999, président depuis 2000).

ANNE PETITPIERRE, VICE-PRÉSIDENTE, docteur en droit, avocate, professeure à la faculté de droit de l'Université de Genève (1987).

JACQUES FORSTER, VICE-PRÉSIDENT PERMANENT, docteur ès sciences économiques, professeur à l'Institut universitaire d'études du développement (IUED) à Genève (1988, vice-président permanent depuis 1er août 1999).

RENÉE GUISAN, secrétaire générale de l'« Institut de la Vie international », directrice d'établissements médico-sociaux, membre de l' *International Association for Volunteer Effort* (1986).

PAOLO BERNASCONI, licencié en droit, avocat, professeur de droit fiscal et de droit pénal économique aux universités de Saint-Gall, Zurich et Milan (Bocconi), ancien procureur général à Lugano (1987).

LISELOTTE KRAUS-GURNY, docteur en droit de l'Université de Zurich (1988).

SUSY BRUSCHWEILER, infirmière, ancienne directrice de l'École supérieure d'enseignement infirmier de la Croix-Rouge suisse à Aarau, CEO S-V Group, restauration de collectivités (1988).

JACQUES MOREILLON, licencié en droit, docteur ès sciences politiques, secrétaire général de l'Organisation mondiale du mouvement scout, ancien directeur général au CICR (1988).

DANIEL THÜRER, docteur en droit, LL.M. (Cambridge), professeur à l'Université de Zurich (1991).

ÉRIC ROETHLISBERGER, docteur ès sciences politiques de l'Institut universitaire de hautes études internationales de Genève (1994, vice-président permanent de 1995 au 31 juillet 1999).

ERNST A. BRUGGER, docteur ès sciences naturelles, conseiller économique, professeur titulaire à l'Université de Zurich (1995).

1 Au 1er janvier 2002.

JEAN-ROGER BONVIN, docteur ès sciences économiques de l'Université de Saint-Gall, ancien président du Centre de développement de l'Organisation de coopération et de développement économiques (OCDE) à Paris (1996).

JAKOB NÜESCH, ingénieur agronome diplômé, docteur ès sciences de l'École polytechnique fédérale de Zurich, professeur en microbiologie à l'Université de Bâle, ancien président de l'École polytechnique fédérale de Zurich (1997).

ANDRÉ VON MOOS, docteur en droit, licencié ès sciences économiques, certificat SMP de la *Harvard Business School*, ancien président du Groupe von Moos, entrepreneur (1998).

OLIVIER VODOZ, licencié en droit, avocat, ancien député au Grand Conseil et ancien président du Conseil d'État de la République et Canton de Genève (1998).

GABRIELLE NANCHEN, licenciée ès sciences sociales de l'École des sciences sociales, Université de Lausanne, ancien membre du Conseil national suisse (1998).

JEAN DE COURTEN, licencié en droit, ancien délégué et ancien directeur des opérations au CICR (1998).

JEAN-PHILIPPE ASSAL, docteur en médecine et professeur de médecine, responsable de la Division d'enseignement thérapeutique pour maladies chroniques à la faculté de médecine de l'Université de Genève (1999).

JEAN ABT, agriculteur, officier instructeur, commandant de corps de l'armée suisse (à disposition) (2001).

Membres honoraires

JEAN PICTET, vice-président d'honneur, PETER ARBENZ, JEAN-FRANÇOIS AUBERT, DENISE BINDSCHEDLER-ROBERT, GEORGES-ANDRÉ CUENDET, MAX DAETWYLER, JOSEF FELDMANN, ATHOS GALLINO, RODOLPHE DE HALLER, HENRY HUGUENIN, PIERRE KELLER, ROBERT KOHLER, PIERRE LANGUETIN, OLIVIER LONG, MARCEL A. NAVILLE, RICHARD PESTALOZZI, FRANCESCA POMETTA, ALAIN ROSSIER, DIETRICH SCHINDLER, CORNELIO SOMMARUGA, HANS PETER TSCHUDI, ALFREDO VANNOTTI

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

Nouveau directeur général du CICR

Lors de son Assemblée du 20 février, le Comité international de la Croix-Rouge (CICR) a nommé Angelo Gnaedinger au poste de directeur général du CICR. M. Gnaedinger prendra ses fonctions le 1er juillet 2002 à la tête de la Direction, organe exécutif du CICR.

Né en 1951, Angelo Gnaedinger est avocat de formation et a travaillé comme juge d'instruction dans le canton de Schaffhouse, avant d'entrer au CICR en 1984. Angelo Gnaedinger a d'abord travaillé sur le terrain au Moyen-Orient et en Afrique, avant d'assumer différentes responsabilités au sein du Département des opérations à Genève. Il a notamment été chef de la Division détention de 1992 à 1994 et délégué général pour l'Europe occidentale, centrale et les Balkans de 1994 à 1998. Depuis 1998, Angelo Gnaedinger est délégué général pour l'Europe, le Moyen-Orient et l'Afrique du Nord.

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

ICRC appoints new Director-General

At its Assembly meeting of 20 February 2002, the International Committee of the Red Cross (ICRC) appointed Mr Angelo Gnaedinger to the post of Director-General. Mr Gnaedinger will take up his responsibilities as head of the Directorate, the ICRC's executive body, on 1 July 2002.

Angelo Gnaedinger was born in 1951. He trained as a lawyer and served as examining magistrate in the Swiss canton of Schaffhausen before joining the ICRC in 1984. Following initial field assignments in the Middle East and Africa he held various posts at the ICRC's Operations Department in Geneva. In particular, he was head of the Detention Division from 1992 to 1994 and Delegate-General for Western and Central Europe and the Balkans from 1994 to 1998. Since 1998 Angelo Gnaedinger has been Delegate-General for Europe, the Middle East and North Africa.

INTERNATIONAL COMMITTEE OF THE RED CROSS

58th Annual Session of the United Nations Commission on Human Rights Geneva, 26 March 2002

Statement by the President of the International Committee of the Red Cross, Jakob Kellenberger

Engaging in an open and critical review of the state of implementation of international humanitarian law is something both necessary and justified. In countless situations of armed conflict around the world men, women and children daily face extreme hardship and violence. The extent to which international humanitarian law is being respected or not has a direct bearing on their plight. I refer here to existing law. Indeed, the more one looks at it, the more it strikes one that the problem is not so much the lack of rules and provisions, but rather lack of respect for those rules and the often lacking political will to apply them.

It is therefore needless to emphasize that the challenge of obtaining better respect for these rules is a question of major concern to the International Committee of the Red Cross. To take only the past decade, the world has witnessed violations of international humanitarian law of the most severe type: from acts of genocide, to ethnic cleansing, from population transfers to indiscriminate attacks against the civilian population. Violations have taken place across all continents. I attach great importance, when discussing the reality of contemporary armed conflicts and their consequences to taking a comprehensive view and to getting the proportions right.

It is stating the obvious to say that international law historically developed as a set of customary law norms, gradually translated into treaties, that regulated relations among states. For centuries, states were indeed the only subjects of international law, to the exclusion of organizations, or individuals, whose interests could only be protected by mediation of their respective countries. The notion that individuals have certain inalienable rights simply by virtue of being human was therefore a novel and remarkable step in the development of international law. It was enabled by an evolution in human consciousness, a realization that the humanity of any society can only be measured by the humanity it accords each and every individual.

In human rights law and refugee law terms, the belief that humanity is a value in itself found expression in treaties protecting individuals from arbitrariness, abuse and persecution by governments. In humanitarian law

terms, it found expression in treaties providing that all persons in enemy hands during armed conflict also have specific rights. While different in circumstances of application, all three bodies of law shared and continue to have the same aim - to protect the life, health and dignity of individuals from arbitrary exercise of power over them.

It has been said that the world will never be the same after the heinous crimes of September 11, 2001, which shocked the world's conscience. The September 11 attacks delivered a blow to the most fundamental values of human society, particularly those at the heart of international humanitarian and human rights law. One should however be careful not to allow these events to overshadow the seriousness of many — often forgotten or neglected — conflict zones around the world. Losing sight of them, neglecting the violations that occur in them, one runs the serious risk of weakening the body of international humanitarian law.

The crisis generated by the attacks has posed a host of questions, some of which I will outline and to which I will attempt to briefly respond.

One line of reasoning appears to suggest that certain individuals are undeserving of the protection of the law because of the heinous nature of their criminal acts. Such assumptions should be rejected. Human beings, by virtue of being human, are entitled to the protection of the law. Just as no state, group or individual can place themselves above the law, so also, no person can be placed outside the law.

It would be misleading to think that recent or present-day international crimes surpass the evils that humans have historically inflicted on humans. Does anyone really believe that the suffering caused by current conflicts around the globe surpasses the ravages of World War II and the atrocities that accompanied it? Can it really be said that the laws devised in response to that very dark time in human history, such as the Geneva Conventions of 1949, are outdated or quaint? I think not.

Another question that has been raised is whether international law in general, and international humanitarian law specifically, are adequate tools for dealing with the post-September 11th reality. My answer to this is that international law, if correctly applied, is one of the strongest tools that the community of nations has at its disposal in the effort to reestablish international order and stability. What we have to be clear about is which body of law is the right tool. It is the rules of the United Nations Charter, and not international humanitarian law, that regulate the use of force in

international relations. The relevant provisions of the UN Charter provide guidance on questions such as legitimate resort to force, the right to self-defense and lawful responses to threats or breaches of international peace and security. It is the UN Charter that allows the international community to pass political and other judgment on the use of force in international relations.

International humanitarian law is, quite distinctly, the body of rules that regulates the protection of persons and conduct of hostilities once an armed conflict has occurred. Its aim is to alleviate the suffering of individuals affected by war regardless of the underlying causes — and therefore regardless of any justification — for the armed conflict. There are no "just" or "unjust" wars in terms of international humanitarian law because civilians, to name just one category of persons protected by its rules, have the right to be spared murder, torture or rape, no matter which side they happen to belong to.

A related doubt that has been raised in the aftermath of September 11 is whether international humanitarian law is applicable to the new security threats posed by acts of terrorism. Several bodies of law, including national and international rules of criminal law, are relevant in the struggle against terrorism. As for international humanitarian law, it is that body of rules that is applicable whenever the fight against terrorism amounts to or includes armed conflict. There is no question that its norms are adequate to deal with security risks in war because its provisions were designed specifically for the exceptional situation of armed conflict. The generations of experts and diplomats who crafted international humanitarian law over the last two centuries were fully aware of the need to balance state security and the preservation of human life, health and dignity. That balance has always been at the very core of the laws of war.

Our belief in the continued validity of existing law should not be taken to mean that international humanitarian law is perfect, for no body of law can lay claim to perfection. What we are suggesting is that any attempt to reevaluate its appropriateness can only take place after it has been determined that it is the law that is lacking, and not the political will to apply it. *Pacta sunt servanda* is an age-old and basic tenet of international law which means that existing international obligations must be fufilled in good faith. This principle requires that attempts to resolve ongoing challenges within an existing legal framework be made before calls for change are issued.

Any other course of action would risk depriving the law of its very raison d'être – which is to facilitate the predictable and orderly conduct of international relations. Care should especially be taken not to amend rules designed to protect individuals in times of crises, because individuals have no other protection from arbitrariness and abuse except implementation of the law.

Contrary to perceptions according to which international humanitarian law is static, this body of norms, like all others, is constantly subject to refinement and change. The very first contemporary international humanitarian law treaty, the Geneva Convention of 1864, aimed at ensuring that wounded soldiers, regardless of which party they belong to, were not left to die on the battlefield, but were protected and cared for. Today, the four Geneva Conventions of 1949 — which have achieved almost universal ratification — and their Additional Protocols of 1977, are the backbone of a complex web of humanitarian law treaties aimed at limiting the effects of violence in armed conflict.

In our view, the fundamental principles of humanity underlying these texts cannot and must not be disturbed. They mandate that the life, health and dignity of all persons not taking, or no longer taking part in hostilities must be respected and that military operations must be conducted so as to minimize the suffering caused by war. The Geneva Conventions and Additional Protocols have since been supplemented by a range of treaties prohibiting or restricting the use of certain weapons, protecting cultural property and, most recently, clarifying the international criminal responsibility of those who violate the laws of war. I refer here to the 1998 treaty establishing a permanent International Criminal Court that is expected to shortly come into force. Another avenue of humanitarian law development are the evolving rules of customary international humanitarian law which the ICRC will present upon completion of its ongoing, comprehensive examination of this issue.

I would, lastly, like to address the fear that the protection afforded individuals by international humanitarian law is an obstacle to justice. The Geneva Conventions and their Additional Protocols do not prevent justice, they only require that the due process of law be applied in dealing with offenders.

Each of the 1949 Geneva Conventions has specific provisions listing acts which are considered grave breaches of their rules, such as the killing, torture and denial of fair trial rights to protected persons. The list

of grave breaches was expanded with the adoption of the 1977 Additional Protocols to criminalize certain other acts, particularly those aimed at harming civilians through the unlawful conduct of hostilities. The Conventions and Protocols not only encourage states to bring perpetrators of war crimes to justice, they demand it, including by means of exercise of universal jurisdiction.

Allow me to conclude with a few words on the role of the International Committee of the Red Cross. As a neutral, independent and impartial humanitarian organization whose history is intimately linked to the creation and development of international humanitarian law, the ICRC has an abiding interest in seeing that humanitarian law norms are observed. Our mandate under the Geneva Conventions and Additional Protocols includes ensuring assistance and protection to all persons affected by war based on the values underlying those treaties — humanity and respect for individual dignity. Together with the other components of the International Red Cross and Red Crescent Movement, we will continue to pursue our mandate with those principles in mind.

Mise en œuvre du droit international humanitaire

Chronique semestrielle de législation et de jurisprudence nationales
juillet – décembre 2001

A) Législation

Brésil

La loi de mise en œuvre de la Convention d'Ottawa sur les mines antipersonnel (*Ley n° 10.300, de 31 de outubro de 2001: Proíbe o emprego, o desenvolvimento, a fabricação, a comercialização, a importação, a exportação, a aquisição, a estocagem, a retenção ou a transferência, direta ou indiretamente, de minas terrestres antipessoal*) a été adoptée le 31 octobre 2001 et est entrée en vigueur le 1er novembre 2001, jour de sa publication dans le *Diário Oficial*. Elle incorpore les interdictions prévues par la Convention et impose la destruction des stocks de mines antipersonnel, à l'exception d'un certain nombre de mines pour la formation des militaires aux techniques de détection, de déminage et de destruction des mines. Les violations de la loi sont punissables d'emprisonnement. Il y a circonstance aggravante lorsque la violation est commise par l'État ou les autorités militaires.

Bosnie-Herzégovine

Le parlement de la Republika Srpska a adopté le 2 octobre 2001 une loi de coopération avec le Tribunal pénal pour l'ex-Yougoslavie, laquelle est entrée en vigueur le 25 octobre 2001 (Gazette officielle n° 52 du 17 octobre 2001). La loi reconnaît la primauté du Tribunal sur les juridictions serbes aux fins de juger les personnes responsables des violations du droit international humanitaire commises en ex-Yougoslavie. Elle règle les modalités de coopération avec le Tribunal, notamment en matière d'enquête, d'arrestation et de remise de personnes, ainsi que d'exécution des peines prononcées par le Tribunal. La loi prévoit en outre que devront être réglées, par des dispositions législatives particulières, les questions d'assistance matérielle aux personnes détenues en relation avec la loi, et de compensation des dommages subis par les personnes qui auraient fait l'objet de procédures se révélant sans fondement. Pour rappel, la République de Bosnie-Herzégovine, l'autre entité de la Fédération de Bosnie-Herzégovine, avait adopté une loi de coopération avec le Tribunal le 6 avril 1995 (Gazette officielle n° 12/95, p. 317).

République de Corée

La loi réglementant l'emploi et le transfert de certaines armes conventionnelles dont les mines, adoptée le 24 mai 2001, est entrée en vigueur le 9 octobre 2001. Son adoption intervient suite à la ratification par la République de Corée, le 9 mai 2001, de la Convention de 1980 sur certaines armes classiques et de son Protocole II tel que modifié le 3 mai 1996. La loi interdit l'emploi et le transfert des mines, pièges et autres dispositifs visés par le Protocole II. Elle impose en outre aux commandants militaires l'obligation de prendre toutes les mesures nécessaires à la protection des personnes civiles et de leurs biens, notamment l'envoi d'avertissements, la signalisation et l'enregistrement des zones minées. Toute personne qui, en violation des interdictions prévues par la loi, provoque des blessures ou la mort d'une personne, est passible de sanctions pénales.

Écosse

La loi de mise en œuvre du Statut de Rome de la Cour pénale internationale (*International Criminal Court (Scotland) Act 2001*) a été sanctionnée le 24 septembre 2001 et est entrée en vigueur le 17 décembre 2001. La loi introduit le crime de génocide, les crimes contre l'humanité ainsi que les crimes de guerre dans le droit écossais et abroge la législation antérieure sur le génocide (*Genocide Act 1969, United Kingdom*). La compétence extraterritoriale pour ces crimes est limitée aux nationaux et résidents du Royaume-Uni. La loi règle les questions relatives aux demandes d'assistance formulée par la Cour: enquêtes, production d'éléments de preuve et de documents, perquisitions et saisies, etc. Elle prévoit également l'exécution en Écosse des peines imposées par la Cour. Pour rappel, une loi de mise en œuvre du Statut de Rome applicable à l'Angleterre, au Pays de Galles et à l'Irlande du Nord avait été adoptée par le Royaume-Uni le 11 mai 2001[1].

Kazakhstan

La loi relative à l'utilisation de l'emblème du croissant rouge par le service médical des forces armées du Kazakhstan a été adoptée le 14 décembre 2001. Elle est entrée en vigueur le 20 décembre 2001, jour de sa publication au journal officiel. La question de l'utilisation par le service médical des forces armées du

1 Voir RICR, vol. 83, n° 843, septembre 2001, p. 854.

double emblème, c'est-à-dire, l'utilisation conjointe des emblèmes de la croix rouge et du croissant rouge, a ainsi été résolue. Une loi spécifique doit encore être adoptée afin de définir les différents usages de l'emblème ainsi que les personnes autorisées à l'utiliser.

Norvège

La loi de mise en œuvre du Statut de Rome de la Cour pénale internationale (*LOV 2001-06 - 15 nr 65: Lov om gjennomføring i norsk rett av Den internasjonale straffedomstols vedtekter 17. juli 1998 (Roma-vedtektene)* a été adoptée le 15 juin 2001. Elle entrera en vigueur le jour de l'entrée en vigueur du Statut de Rome pour la Norvège. La loi règle les questions de remise d'une personne à la Cour, de transit sur le territoire norvégien ainsi que toutes autres demandes de coopération prévues par l'article 93 du Statut. Elle accorde à toute personne suspectée ou accusée d'avoir commis l'un des crimes relevant de la compétence de la Cour le droit d'être assistée d'un avocat et prévoit l'application du principe *ne bis in idem*. Elle permet en outre au gouvernement de consentir à l'exécution en Norvège des peines imposées par la Cour.

Panama

La loi sur la protection et l'usage des emblèmes de la croix rouge et du croissant rouge (*Ley nº 32 Que dicta disposiciones para la protección y el uso del emblema de la Cruz Roja y de la Media Luna Roja*) a été adoptée le 4 juillet 2001 et est entrée en vigueur le 6 juillet, jour de sa publication dans la *Gaceta Oficial* (nº 24.339). La loi a pour objet de protéger l'usage des emblèmes, de déterminer les conditions autorisant leur emploi, les personnes et les institutions habilitées à en faire usage ainsi que les organismes compétents pour réglementer cet usage. Des sanctions financières en cas d'abus sont en outre prévues.

Portugal

La loi constitutionnelle (*Lei Constitucional nº 1/2001*) qui insère à l'article 7 de la Constitution une disposition permettant au Portugal d'accepter la compétence de la Cour pénale internationale a été adoptée par le Parlement le 4 octobre 2001, puis promulguée par le président de la République le 20 novembre 2001 (*Diário da República*, nº 286 du 12 décembre 2001).

Rwanda

Le Rwanda a adopté, le 26 janvier 2001, la Loi organique n° 40/2000 portant création des «Juridictions *Gacaca*» (*J.O.R.R.*, n° 6 du 15 mars 2001; amendée, *J.O.R.R.*, n° 14 du 15 juillet 2001) afin de permettre la tenue des procès des 125 000 personnes toujours détenues en relation avec le génocide de 1994. Le système mis en place est fondé sur les traditions locales en matière de règlement des différends et sur le système pénal régulier. Les accusés seront jugés par des assemblées d'environ 50 citoyens élus au niveau local. Dix-neuf membres de ces assemblées, choisis par celles-ci (le Siège), rendront le verdict et la sentence. Les décisions du Siège sont adoptées par consensus ou, à défaut, à la majorité absolue. Des comités de coordination ont également été prévus.

En tout, près de 10 000 juridictions gacaca sont établies, au niveau de la cellule, du district et de la province. Les juridictions gacaca ont compétence sur les infractions de catégories 2 à 4, suivant la classification établie par la Loi sur la poursuite des infractions constitutives du crime de génocide du 30 août 1996 (*J.O.R.R.*, n° 17 du 1er septembre 1996). Les infractions de la catégorie 1, qui comprennent les infractions commises par les planificateurs et organisateurs du génocide, et les personnes en position d'autorité au niveau national ou local, ainsi que les infractions constituant des tortures sexuelles, demeurent de la compétence des juridictions pénales ordinaires. Les recours en appel des décisions rendues par les sièges sont susceptibles d'appel devant la juridiction gacaca du niveau supérieur.

L'élection des personnes intègres, c'est-à-dire, les membres des organes des juridictions gacaca, s'est déroulée en octobre 2001, suivant les modalités prévues par l'arrêté présidentiel n° 12/01 du 26 juin 2001 (*J.O.R.R.*, n° 14 du 15 juillet 2001).

Suisse

La loi fédérale sur la coopération avec la Cour pénale internationale a été adoptée par l'Assemblée fédérale le 22 juin 2001 (*Feuille fédérale* du 3 juillet 2001, pp. 2748-2767). Elle fixe la procédure à suivre dans les différentes formes de coopération avec la Cour ainsi que pour l'exécution en Suisse des peines imposées par celle-ci. La loi crée au sein de l'Office fédéral de la justice un service central chargé de la coopération avec la Cour, notamment en matière d'arrestation et de remise de personnes, ainsi que de transmission d'éléments de preuve. Le service statue par ailleurs sur l'admissibilité de la coopération avec

la Cour et la compétence de celle-ci. Les décisions relatives au renvoi d'une situation devant la Cour et aux questions d'immunité reviennent toutefois au Conseil fédéral suisse. La loi accorde en outre des garanties judiciaires à toute personne interrogée en vertu de ses dispositions.

Adoptée le même jour, la loi fédérale portant modification du code pénal et du code pénal militaire (*Feuille fédérale* du 3 juillet 2001, pp. 2768-2769) rend applicables à la procédure devant les tribunaux internationaux dont la Suisse reconnaît la compétence obligatoire les dispositions des deux codes relatives aux crimes et délits contre l'administration de la justice.

Turkménistan

La loi relative à la protection et à l'utilisation des emblèmes du croissant rouge et de la croix rouge a été adoptée par le parlement turkmène le 7 juillet 2001. Elle a été publiée au journal officiel en turkmène, en russe et en anglais le 27 juillet 2001. La loi règle les questions relatives à l'usage de l'emblème à titre protecteur et indicatif en temps de paix comme en temps de conflit armé. Les abus de l'emblème sont sanctionnés par l'article 225 du Code pénal du 12 juin 1997.

B) Jurisprudence

Allemagne

Le 21 février 2001, la Cour fédérale de justice a révisé un jugement du Tribunal régional supérieur de Bavière (*Bayerisches Oberlandesgericht*) par lequel l'accusé avait été condamné à l'emprisonnement à vie pour crime de génocide commis en Bosnie-Herzégovine en 1992. La Cour a considéré que, l'intention spécifique du crime de génocide n'ayant pas été établie, l'accusé devait néanmoins être condamné à la même peine pour les six meurtres qu'il avait commis. Renvoyant à un jugement rendu le même jour[2], la Cour a statué que les juridictions allemandes ont, en vertu de l'article 6(9) du Code pénal, compétence en matière d'infractions graves au sens des articles 146 et 147 de la IVe Convention de Genève de 1949 pour des actes commis en dehors du territoire allemand. [*BGH, Beschl. vom 21. Februar 2001 – 3 StR 244/00 – BayObLG*]

2 Voir RICR, vol. 83, n° 843, septembre 2001, p. 857.

Pays-Bas

Dans un jugement du 31 août 2001, la Cour de district de La Haye (division de droit civil) s'est déclarée incompétente pour entendre la demande de libération déposée par l'ancien président de la République fédérale de Yougoslavie, Slobodan Milosevic, détenu par le Tribunal pénal international pour l'ex-Yougoslavie. Se fondant sur les décisions rendues par le Tribunal dans l'affaire *Tadic* (Chambre de première instance II, 10 août 1995 et Chambre d'appel, 2 octobre 1995), la Cour a rejeté les arguments du demandeur relatifs à la légalité du Tribunal. Elle a également rejeté, sur la base de la décision rendue le 4 mai 2000 par la Cour européenne des droits de l'homme dans l'affaire *Naletilic c. Croatie* (Requête n° 51891/99), l'argument relatif au non-respect, par le Tribunal, des conditions d'indépendance et d'impartialité requises par l'article 6 de la Convention européenne des droits de l'homme. Rappelant l'accord de siège entre les Pays-Bas et le Tribunal, ainsi que la primauté du Tribunal sur les juridictions nationales, la Cour a déclaré que seul ce dernier était compétent pour décider de la demande qui lui était présentée.

Suisse

Le Tribunal militaire de cassation a partiellement admis, le 27 avril 2001, le pourvoi introduit contre un jugement du Tribunal militaire 1A du 26 mai 2000[3] condamnant l'ancien bourgmestre d'une communauté rwandaise, pour violation des lois de la guerre, à 14 ans de réclusion et à l'exclusion du territoire suisse pour une durée de 15 ans. En se limitant à annuler la partie du jugement attaqué relative à l'expulsion, le Tribunal militaire de cassation confirme la culpabilité du recourant sur la base de l'article 109 du Code pénal militaire (violations des lois de la guerre), de l'article 3 commun aux Conventions de Genève de 1949 et de l'article 4 du Protocole additionnel II de 1977. Sont aussi réaffirmées, d'une part, la suffisance du lien entre les crimes commis par le recourant et le conflit armé ayant eu cours au Rwanda et, d'autre part, l'application des dispositions précitées à l'ancien bourgmestre en raison de ses attributions et de la manière dont il avait exercé ses fonctions.

3 Voir RICR, vol. 82, n° 839, septembre 2000, pp. 826-827.

Ukraine

Le 11 juillet 2001, la Cour constitutionnelle de l'Ukraine a rendu un avis suite à la requête du président de l'Ukraine aux fins d'examiner la constitutionnalité du Statut de la Cour pénale internationale, signé par l'Ukraine le 20 juin 2000. La Cour a conclu que la majorité des dispositions du Statut sont conformes à la Constitution de l'Ukraine, à l'exception de l'alinéa 10 du préambule et de l'article 1 qui stipulent que «*la Cour pénale internationale [...] est complémentaire des juridictions pénales nationales*». Or, l'article 124 de la Constitution prévoit que la justice ne peut être administrée que par les juridictions nationales et que ces dernières ne peuvent déléguer leurs fonctions à d'autres organes ou fonctionnaires. Compte tenu de l'interdiction prévue par la Constitution de conclure des accords internationaux qui contredisent ses dispositions, la ratification du Statut par l'Ukraine devrait en principe être précédée d'une modification constitutionnelle.

C) Commissions nationales

Cap-Vert

Le Comité des droits de l'homme du Cap-Vert (*Comité Nacional para os Direitos Humanos*) a été créé par le décret-loi n° 19/2001 du 24 septembre 2001, publié le même jour (*B.O.*, Série I, n° 31, p. 472). Organe de coordination et de concertation chargé de formuler et d'exécuter la politique nationale en matière de droits de l'homme et de droit international humanitaire, le Comité est notamment appelé à promouvoir le respect et la diffusion de ces deux branches du droit international. Présidé par le ministre de la Justice, il réunit des représentants des Affaires étrangères, de la Santé, de l'Éducation, de la Culture, de la Communication sociale, de la Jeunesse, des partis politiques représentés à l'Assemblée nationale, de l'Ordre des avocats, de la Société nationale de la Croix-Rouge, d'autres organismes ainsi que de six organisations non gouvernementales.

Colombie

Une Commission interministérielle de mise en œuvre du traité d'Ottawa sur l'interdiction des mines antipersonnel a été créée par le décret présidentiel n° 2113 du 8 octobre 2001 («*Por el cual se crea la Comisión Intersectorial Nacional para la Acción contra las Minas Antipersonal y se dictan otras disposiciones*»), publié dans le *Diario Oficial nº* 44580 du 12 octobre 2001. Sa création vise à assurer la

mise en œuvre des obligations assumées par l'État colombien avec la ratification du traité d'Ottawa de 1997 (*Voir Ley nº 554 de 2000 del Congreso de la República y Sentencia C-991 del 2 de agosto de 2000 de la Corte Constitucional*). Plus particulièrement, la Commission est chargée de proposer les mesures administratives et législatives nécessaires à la prévention et à la répression des activités prohibées par le traité, ainsi que de déterminer le Plan national d'action contre les mines antipersonnel et pour l'assistance aux victimes des mines.

Kenya

La Commission nationale de mise en œuvre du droit international humanitaire du Kenya a été créée le 5 octobre 2001 sur la base d'un mémorandum du procureur général. La Commission regroupe notamment des représentants des Affaires étrangères, de la Défense, de la Justice, du procureur général, de l'Intérieur, de la Santé, des milieux académiques et de la Croix-Rouge du Kenya. Son mandat consiste à promouvoir le respect du droit international humanitaire par l'adoption de mesures législatives et de programmes de diffusion.

Lituanie

La Commission de mise en œuvre du droit international humanitaire de Lituanie a été créée sur la base d'un amendement au règlement du ministère de la Défense du 22 mai 2001 stipulant que ce dernier est responsable de la coordination de la mise en œuvre du droit humanitaire en Lituanie, complété par une ordonnance du ministre de la Défense du 30 août 2001. Outre le ministère de la Défense, sont représentés au sein de la Commission les ministères des Affaires étrangères, de l'Intérieur, de la Culture, de la Santé, le département gouvernemental du droit européen ainsi que la Société nationale de la Croix-Rouge. Organe consultatif du ministère de la Défense, la commission est compétente pour traiter toutes les questions relatives à la mise en œuvre du droit international humanitaire : participation aux traités, proposition de mesures législatives, programmes de formation et de diffusion, etc.

Maurice

Une Commission nationale de droit humanitaire a été créée sur décision du gouvernement le 11 décembre 2001. Présidée par un représentant du premier ministre, la Commission est en outre formée de représentants des Affaires étrangères, du procureur général, des Finances, de la Sécurité sociale,

de l'Éducation, de la Culture, de la Santé et de la Croix-Rouge nationale. Son mandat général consiste à assurer la mise en œuvre effective et l'application des instruments de droit international humanitaire, ainsi que la promotion de leur diffusion au niveau national.

Moldova

L'ordonnance du ministre de la Justice n° 369 du 27 septembre 2001 a établi, au sein de la Commission nationale de mise en œuvre du droit international humanitaire de Moldova, un *groupe de travail* chargé d'étudier la compatibilité de la législation nationale avec le Statut de Rome de la Cour pénale internationale. Créé sous l'égide du premier vice-ministre de la Justice, lequel remplit également les fonctions de secrétaire de la Commission, le groupe de travail examinera la législation nationale et préparera, le cas échéant, les projets de loi visant à assurer la mise en œuvre du Statut.

Paraguay

Le décret présidentiel n° 15926 du 28 décembre 2001 modifie la composition de la Commission interministérielle de mise en œuvre du droit international humanitaire (*Decreto nº 15926 que modifica y amplia el Decreto nº 8802 de fecha 12 de mayo de 1995 «Por el cual se crea una Comisión Interministerial de aplicación del Derecho Internacional Humanitario»*), créée par le décret présidentiel n° 8802 du 12 mai 1995. La Commission ne comprend désormais que des représentants des ministères de la Défense, des Affaires étrangères, de l'Intérieur, et de la Justice et du Travail. La Croix-Rouge paraguayenne y occupe un statut d'observateur. La présidence de la Commission est attribuée au ministère de la Défense et son secrétariat est confié à la Direction des droits de l'homme et du droit international humanitaire au sein de ce même ministère.

Seychelles

Le 23 mai 2001, le Cabinet des Seychelles a approuvé la création d'une Commission nationale pour les affaires humanitaires, chargée d'assister les autorités nationales dans la mise en œuvre du droit international humanitaire et des droits de l'homme. La Commission doit notamment étudier la législation nationale et proposer au gouvernement l'adoption des mesures nécessaires à la mise en œuvre des règles découlant de ces deux branches du droit international, surveiller et coordonner l'application de ces règles, en plus de promouvoir et diffuser ces règles au niveau national. La Commission devrait comprendre des

représentants des Affaires étrangères, du bureau du procureur général, de la Santé, de l'Éducation, de la Défense, de la police, de la Société nationale de la Croix-Rouge, du bureau de l'Ombudsman et de LUNGOS (*Liaison Unit of Non-governmental Organisations*).

Ukraine

Suite à l'avis précité de la Cour constitutionnelle de l'Ukraine, un groupe de travail a été établi sous l'égide du ministère de la Justice afin d'examiner les conséquences juridiques de cet avis et de rédiger des propositions afin de résoudre la contradiction entre la Constitution et le Statut de la Cour pénale internationale. Le groupe comprend des représentants des différentes autorités concernées, notamment du procureur général, de la Cour suprême et du ministère de la Justice.

SERVICES CONSULTATIFS EN DROIT
INTERNATIONAL HUMANITAIRE, CICR

Second Review Conference of the Convention on Certain Conventional Weapons

For only the second time since it was adopted in 1980, States gathered to review the status and operation of the Convention on Certain Conventional Weapons (CCW).[1] The Review Conference of States Parties, which was held in Geneva from 11 to 21 December 2001, provided an important opportunity to strengthen international humanitarian law and consider new regulations on weapons which may cause superfluous injury or have indiscriminate effects.

The Review Conference took several major decisions. First and foremost, States Parties extended the scope of application of the CCW to non-international armed conflict. In addition, the Review Conference set up a Group of Government Experts to address the issue of "explosive remnants of war". More informally, the meeting encouraged States Parties to continue efforts to limit the wounding potential of small-calibre weapon systems and to establish a mechanism to monitor compliance with the CCW. The Conference also adopted a Final Declaration which makes reference to multipurpose explosive bullets, legal reviews for new weapons, means or methods of warfare and blinding laser weapons.

These decisions are the result of a one-year preparatory process during which three formal preparatory meetings and one informal intersessional meeting were held.[2] Prior to this, the ICRC also organized informal consultations with governments on the problem of explosive remnants of war. The results of the Conference are an indication that the Convention can respond to developments in the nature and conduct of modern armed conflict. The main decisions adopted by the meeting are summarized below.[3]

Extension of the CCW's scope of application

The principal legal norm adopted by the Review Conference was the extension of the CCW's scope of application to non-international armed conflict. Previously, only the Convention's amended Protocol II (on the use of mines, booby-traps and other devices) applied to such situations. Protocol I (which prohibits weapons causing injury by means of fragments not detectable by X-rays), Protocol III (which restricts the use of incendiary

weapons) and Protocol IV (which prohibits the use and transfer of blinding laser weapons) applied only to international armed conflict.

On the basis of a proposal by the United States, States Parties agreed to amend Article 1 of the CCW framework Convention. The new version of Article 1 (see Annex below) will make existing protocols applicable to non-international armed conflict once the amendment enters into force, namely after its ratification by 20 States. The nature of the armed conflicts to which future protocols will apply will be determined on a case-by-case basis as each new protocol is negotiated. Protocols adopted after 1 January 2002 may apply, exclude or modify this new scope of application. Unlike the first Review Conference, which took place in 1995 and 1996, there was no opposition to this extension. On the contrary, it was recognized by all States Parties as an important and necessary development of international humanitarian law.

Explosive remnants of war

An issue that has received considerable attention in recent years is the impact of explosive munitions which were laid or delivered during an armed conflict but remain in an armed yet unexploded state after they no longer serve a military purpose. While the international community has taken significant steps to end the death, injury and suffering caused by anti-personnel landmines, large numbers of civilians are killed or injured each year by other explosive munitions. Such weapons include anti-vehicle mines, submunitions from airborne cluster bombs or land-based systems, artillery shells, hand-grenades, rockets and other similar ordnance. Like anti-personnel mines, these "explosive remnants of war" are often a direct danger to life and limb and an obstacle to the delivery of humanitarian aid, the cultivation of agricultural land and the post-conflict reconstruction of a war-torn country.

1 The full title is the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. It was adopted in 1980 and entered into force in 1983. At 1 January 2002, there were 88 States Parties. The first Review Conference was held in 1995 and 1996.

2 Preparatory meetings were held in Geneva on 14 December 2000, 2-6 April 2001 and 24-28 September 2001. An informal preparatory session also took place on 27-31 August 2001.

3 Further information on explosive remnants of war, the need for legal reviews of new weapons and the papers submitted and statements made by the ICRC during the Review Conference can be found on the ICRC website (‹http://www.icrc.org›).

Three proposals to address the problems caused by explosive remnants of war were submitted to the Conference for consideration. Switzerland proposed the adoption of a new protocol laying down technical specifications to prevent cluster bombs and other submunitions from becoming explosive remnants of war. This proposal would require all submunitions to have a 98% reliability through a combination of the primary fusing mechanism and a back-up self-destruct feature, thereby ensuring that *if the weapon does fail to explode as intended when launched against a military target, it would self-destruct soon after.*

The United States called for a new protocol to reduce the impact of anti-vehicle mines. Its proposal would build upon existing obligations contained in the CCW's amended Protocol II (mines, booby-traps and other devices). All anti-vehicle mines would have to be detectable by commonly available mine detectors and only remotely delivered anti-vehicle mines would be required to contain self-destruct or self-neutralization features. Like the requirements proposed by Switzerland for submunitions, these characteristics would help ensure that anti-vehicle mines no longer pose a threat once the military purpose for the weapons has ended.

The ICRC also suggested ways to reduce the human and social costs of explosive remnants of war. It, however, proposed a complementary but less weapon-specific approach. In its view, measures to reduce the consequences of such remnants should cover all types of explosive munitions which threaten civilian populations in a post-conflict environment. The main emphasis in addressing the problem would be placed on general rules to ensure rapid and safe clearance, plus warnings to civilian populations living in affected areas. Specifically, the ICRC proposed that States adopt a new protocol to the CCW which would:

- establish the responsibility for users of explosive munitions to clear those which remain after the end of hostilities or to provide the technical and material assistance needed to ensure such clearance;
- require rapid provision of technical information to the UN and demining agencies to facilitate swift clearance and minimize risks to clearance personnel;
- require users of munitions likely to have long-term effects to inform organizations conducting mine/unexploded ordnance-awareness campaigns and give the civilian population effective advance warning of the delivery of such munitions.

Such general obligations could be supported by technical requirements, for instance detectability specifications and self-destruct mechanisms, to prevent unexploded munitions from becoming a threat in the first place.

In its proposal the ICRC also included a specific restriction on the use of cluster bombs and other submunitions: it called for a prohibition on the use of submunitions against any military objective situated within a concentration of civilians. The reason for this rule is that not only do large numbers of submunitions fail to explode as intended after they are dropped or launched (an estimated average of 10%-20%), but because of their devastating area-wide impact these weapons have indiscriminate effects in civilian areas even when they function properly.

By design, submunitions are area weapons. Once delivered by cluster bomb, rocket or other means, they are dispersed over a large area up to, and sometimes exceeding, one hundred thousand square metres. When targeting is imprecise or a mistake is made, the effects of missing the target in a civilian area can be far greater than with traditional ordnance. Large numbers of civilians may be caught in a submunition attack when such weapons are used against nearby military objectives. Moreover, submunitions can be affected by weather (wind and air density), causing them to land far from the intended target.

In order to examine these proposals in greater detail, the Review Conference established a Group of Government Experts (GGE) which will meet for a total of five weeks during 2002.[4] Since many governments regard the problem of anti-vehicle mines as being different from that of other explosive remnants of war, proposals on anti-vehicle mines will be discussed separately. From a technical viewpoint, such mines are a problem not because they fail to explode as intended, but because they do exactly what they are designed to do, namely to remain live and lie in wait once laid. The Group will examine the problem of anti-vehicle mines and consider tighter restrictions on their use and design.

For other explosive remnants of war, the Group of Government Experts is specifically asked to examine (1) the types of munitions that become explosive remnants of war; (2) features which could prevent munitions from becoming explosive remnants of war in the first place; (3) technical, legal and

4 The GGE will meet in Geneva 20-24 May, 8-19 July or 22 July-2 August and 2-10 December 2002.

other measures which could facilitate their rapid and safe clearance and warnings to civilian populations where a threat exists; (4) the adequacy of existing international humanitarian law in minimizing the post-conflict risks of explosive remnants of war; and (5) issues related to assistance and cooperation. New proposals and approaches may also be considered.

The Group of Government Experts will report back to a meeting of States Parties to be convened on 12 and 13 December 2002. One of the essential tasks of this meeting will be to decide on whether to begin negotiations in 2003 on new legal instruments. The ICRC considers the launching of negotiations in 2003 to be a crucial step in the development of a credible process to address the immense humanitarian problem of explosive remnants of war.

Other issues

The Conference also encouraged States to continue efforts on small-calibre weapon systems, an issue which Switzerland has been working on for a number of years. Its purpose is to update the prohibition on expanding bullets (also called "dum-dum" bullets) which was established in the Hague Declaration of 1899. The cause for concern is small-calibre ammunition which does not correspond to the narrow technical definitions found in the Declaration but which nonetheless produces similar wounds, owing to a high initial deposit of energy when it enters the human body. During the preparatory process for the Review Conference, Switzerland called for the adoption of a new protocol which would limit the energy deposit of such ammunition and prohibit the use of small-calibre weapon systems which go beyond specified thresholds.

Although Switzerland has organized several expert meetings on this issue, a number of States Parties were not yet sufficiently familiar with it for the Review Conference to start work on formulating a new protocol. The Conference did, however, endorse further — informal — efforts to examine the subject, specifically inviting interested States Parties to convene experts to discuss it and examine its military, technical, medical, legal and financial implications. While it was decided that such efforts would be an independent initiative and not part of the mandate of the Group of Government Experts, States were nonetheless also invited to report back to the other States Parties on their work.

Proposals were also submitted for setting up a mechanism to monitor compliance with the Convention. During the preparatory process, the United States proposed a new protocol which would allow States Parties to convene compliance meetings and fact-finding missions to investigate violations of the rules on the use of mines, booby traps and other devices found in amended Protocol II. The European Union advocated a broader approach which included more frequent meetings of States Parties and fact-finding missions, if necessary, to settle disputes related to all existing and future CCW protocols. South Africa also supported measures covering the CCW and all its Protocols, but preferred a "lighter" option focusing on regular meetings of States Parties, the submission of annual reports to the depositary and national measures to prevent and suppress violations of the Convention and Protocols.

None of these proposals garnered the consensus required to begin negotiations. Although many States spoke in favour of the establishment of some form of compliance mechanism, not all supported work on the issue at this time. The Review Conference decided, however, that the Chairman-designate of the December 2002 meeting of States Parties (Ambassador Rakesh Sood of India) would consult governments on the possible options to promote compliance and, following his consultations, submit a report to States Parties.

These decisions and others taken by the Conference are contained in the Final Declaration adopted at its close. In addition to the areas of work outlined above, other issues of international humanitarian law and its implementation were raised. These include: (1) concerns of the ICRC about the proliferation of "multipurpose" explosive bullets and its implications for the 1868 St Petersburg Declaration;[5] (2) the need to pursue a total prohibition of blinding laser weapons and monitor relevant technical developments in this field; and (3) the importance of conducting legal reviews of weapons, means and methods of warfare. While these subjects were primarily discussed informally during the Conference, important statements on them are included in the Final Declaration.

5 See "Ensuring respect for the 1868 St Petersburg Declaration prohibiting the use of certain explosive projectiles", Report of the International Committee of the Red Cross submitted to the Third Meeting of the Preparatory Committee for the Second Review Conference of the CCW, 18 September 2001. UN Doc. CCW/CONF.II/PC.3/WP.6.

Concluding comments

The Review Conference of the Convention on Certain Conventional Weapons was a distinct milestone for the CCW and produced significant results. The extension of the Convention's scope of application is a substantial development of international humanitarian law and helps ensure that its fundamental rules apply in all situations of armed conflict. As most conflicts today are of an internal nature, it is vital that the various forms of protection afforded to civilians and combatants in international conflict apply equally in non-international armed conflicts.

Furthermore, the willingness of States Parties to address new issues, such as explosive remnants of war, anti-vehicle mines and other weapons, highlights the key role that the Convention can play in ensuring that the law remains up to date and responsive to developments in the nature and conduct of warfare. Importantly, none of the polarization which has hindered discussions in other multilateral fora, such as the Review Conference of the Biological Weapons Convention, were present in the CCW context. The Second Review Conference of the CCW has shown that the treaty can remain a dynamic regime through which new issues related to conventional weapons can be examined and rules developed if necessary. Whether this potential is fulfilled will depend on speedy ratification by States Parties of the extended scope of application, and intensive efforts in the coming years by governments, the ICRC, National Red Cross and Red Crescent Societies and non-governmental organizations to ensure the negotiation and adoption of a new protocol on explosive remnants of war.

The next Review Conference of States Parties will take place no later than 2006.

LOUIS MARESCA
Legal Adviser at the ICRC
Legal Division

Annex

Article 1 of the CCW
(as amended on 21 December 2001)

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.

2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

4. Nothing in this Convention or its annexed Protocols shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

5. Nothing in this Convention or its annexed Protocols shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

6. The application of the provisions of this Convention and its annexed Protocols to parties to a conflict which are not High Contracting Parties that have accepted this Convention or its annexed Protocols, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

7. The provisions of paragraphs 2-6 of this Article shall not prejudice additional Protocols adopted after 1 January 2002, which may apply, exclude or modify the scope of their application in relation to this Article.

Council of Delegates of the International Red Cross and Red Crescent Movement
Geneva, 11-14 november 2001

Resolutions

Resolution 1 Work of the Standing Commission of the Red Cross and Red Crescent

Resolution 2 Implementation of the Seville Agreement and Conduct of International Relief Operations

Resolution 3 Strategy for the International Red Cross and Red Crescent Movement

Resolution 4 Movement Action in Favour of Refugees and Internally Displaced Persons

Resolution 5 International Disaster Response Law

Resolution 6 Emblem

Resolution 7 Respect of the Emblem in Situations of Armed Conflict or Other Situations of Violence

Resolution 8 The United Nations Convention on Certain Conventional Weapons: Explosive Remnants of War and Non-international Armed Conflicts

Resolution 9 Involvement of Red Cross and Red Crescent Workers in Proceedings related to Violations of International Humanitarian Law

Resolution 10	International Conference of the Red Cross and Red Crescent (December 2003)
Resolution 11	Protection of Cultural Property in the Event of Armed Conflict
Resolution 12	Strengthening Humanitarian Values across Religious, Political and Ethnic Lines
Resolution 13	Statement by the Council of Delegates concerning the Terrorist Attacks of 11 September 2001 and their Repercussions

For reasons of consistency, the names of the Standing Commission of the Red Cross and Red Crescent and the components of the Movement (the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and the National Societies of the Red Cross and Red Crescent) will appear in full the first time they are mentioned in the resolutions, with their abbreviation or acronym in parentheses. Thereafter they will be referred to in their shortened form, e.g. Standing Commission, ICRC, International Federation and National Societies.

Resolution 1

Work of the Standing Commission of the Red Cross and Red Crescent

The Council of Delegates,

having taken note of the report submitted by the Standing Commission of the Red Cross and Red Crescent (Standing Commission) on its work since December 1999,

commending the Standing Commission and its five working groups for actively promoting cooperation among the components of the Movement, greater information sharing and developing practical measures to enable its members to carry out their important work for the Movement,

reaffirming previous recommendations that the Standing Commission associate personalities from National Red Cross and Red Crescent Societies (National Societies), participating in a personal capacity, in the preparation of the Council of Delegates and the International Conference,

reaffirming previous recommendations that the Standing Commission organises structured consultations with National Societies on all Movement matters taking advantage of regional and other meetings organised within the Movement,

1. *encourages* the Standing Commission to continue its established working methods of including personalities from National Societies and set up such working groups as it deems necessary;
2. *urges* the Standing Commission to maintain its Working Groups on the Council of Delegates and the International Conference;
3. *encourages* the Standing Commission to pursue its efforts to further develop its communications and consultations with the Movement's components, i.e., through participation in regional and other meetings organised within the Movement;
4. *reaffirms* 1997 Council of Delegates Resolution I that the financial implications of paragraphs 1 and 2 shall be the joint responsibility of the International Federation of Red Cross and Red Crescent Societies (International Federation), the International Committee of the Red Cross (ICRC) and the National Societies, on the basis of 25% from

the ICRC, 25% from the International Federation and 50% through voluntary contributions of National Societies.

Resolution 2

Implementation of the Seville Agreement and Conduct of International Relief Operations

The Council of Delegates,

taking note of the report on the implementation of the Agreement on the Organisation of the International Activities of the Components of the International Red Cross and Red Crescent Movement (Seville Agreement) for the years 2000 and 2001, submitted to the Standing Commission of the Red Cross and the Red Crescent (Standing Commission) by the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (International Federation),

further taking note of the Report of the Ad Hoc Group on the conduct of international relief operations pursuant to Resolution 5 of the 1999 Council of Delegates, and agreeing with its recommendations,

stressing that the implementation of the Seville Agreement requires complementarity of activities, functional co-operation, support, mutual respect and trust among the components of the Movement,

noting with satisfaction that the Secretariat of the International Federation and the ICRC have started harmonizing their systems and procedures,

recognising that these harmonizing efforts will contribute to strengthening the operational capacity of National Red Cross and Red Crescent Societies (National Societies),

1. *urges* all components of the International Red Cross and Red Crescent Movement to implement the recommendations made by the Ad Hoc Group on the conduct of international relief operations

annexed herewith and commit to the Seville process, abide by its provisions and provide resources for that purpose;
2. *requests* all National Societies to inform the International Federation and the ICRC of the steps taken in this respect;
3. *further requests* the International Federation and the ICRC to report on this matter in their annual report on the implementation of the Seville Agreement.

Annex to Resolution 2

Recommendations of the Ad Hoc Group on the Conduct of International Relief Operations

The Group, bearing in mind its mandate, based on its analysis of recent operational experience and its evaluation by external experts, recommends:

Improved consultation

The ICRC and the International Federation Secretariat should establish transparent processes of consultation, involving relevant National Societies, specifically designed to improve the effectiveness of the Movement as a whole in planning and executing relief operations in areas of natural or technical disasters, or of armed conflict, such processes enabling the parties to:

- share information on possible emergencies and the capacities of components of the Movement to deal with them;
- cooperate in the strengthening of National Societies' capacities in emergency response;
- develop contingency plans to deal with various levels and types of emergency;
- make explicit the decision-making mechanism, used to determine the particular organisational model to be employed in complex emergency situations as they arise, and the criteria to be applied in arriving at such decisions;

- monitor the progress of harmonization of systems and procedures associated with relief operations.

Preparedness, including funding

The ICRC and the International Federation Secretariat, in consultation with National Societies should:

- develop a strategy for strengthening capacity of emergency response of National Societies for both conflicts and natural, technical and other disasters;
- improve the quality of and access to information on vulnerable countries identifying their vulnerabilities and capacities to respond to emergencies;
- improve the quality of and access to information on resources available within the Movement for emergency response;
- develop, at the appropriate level, contingency plans for disaster relief (at national, regional and international levels);
- develop alternative appeal systems and funding, tailored to meet specific needs of certain types of emergencies;
- build adequate reserve funds, enabling immediate action before an appeal is launched;
- ensure the implementation of policies on post-emergency rehabilitation, disaster preparedness, co-operation and capacity building;
- train delegates, staff and volunteers on requirements and responsibilities for action including in the field of security. Nobody should be allowed in the field without having undergone a Basic Training Course (BTC);
- clarify the issue of security when the International Federation is the Lead Agency;
- encourage the Operating National Society (ONS) to follow strictly the security rules and procedures established by the Lead Agency.

Organisation and management

The ICRC and the International Federation Secretariat, in consultation with National Societies should:

- in situations not covered by the Seville Agreement decide on the modus operandi for the emergency in question;

- establish emergency operations rooms in each headquarters, as recommended in the Balkans evaluation report, only one of these to be used in a joint operation;
- identify responsibilities and adequate authority at each level, with swift and clear lines of communication between levels;
- delegate on-the-ground leadership from Geneva to one Director of field operations, who is responsible for operational management of all components of the Movement and media relationships during the emergency phase, with authority respected by all participants;
- identify and train representatives from the ICRC, the International Federation and National Societies capable of handling delegated authority in the field, ready to be moved into place at short notice to assume local command.

The Group further recommends that:

- where there is a requirement for a needs assessment beyond that conducted initially by the ONS, the Lead Agency is to organise a further needs assessment, involving ONS, which must be respected by all components;
- the Lead Agency should make effective use of resources of National Societies from the region (for example, personnel, logistics, fund-raising), involve the ONS in decision-making, and use the emergency to enhance ONS capacity building;
- the Lead Agency is to set up a Coordination Centre for National Societies during the emergency phase, to advise all participants of the state of events and their responsibilities;
- special attention should be paid to the transfer of the Lead Agency role from one component to the other as the situation changes.

Compatibility

The ICRC and the International Federation Secretariat should be encouraged to pursue their efforts relating to the compatibility of their management systems and the National Societies should seek to develop their own work interfaces with these systems. The areas affecting operational effectiveness include:

- human resources;
- logistics and relief;
- information technology;
- evaluation;
- quality control;
- statistical reporting:
- field monitoring;
- financial reporting.

Information and image

The Group recommends that:

- a single image of the Red Cross and Red Crescent should be projected to the world from the field whilst retaining separate identities for particular audiences;
- the Lead Agency employs a media management system that provides clear messages as well as opportunities for improved National Society recognition.

Culture and behaviour

The Group further recommends that:

- operations should be guided above all by solidarity between the components in the interest of the victims and not by individual or competitive humanitarian action;
- all participants should avoid actions or statements which may either jeopardise the ICRC mandate as specified by the Geneva Conventions and the Statutes of the Movement, or diminish respect for any component of the Movement;
- rules of engagement must be respected by all participants, and deviations followed up with offenders;
- uncooperative individuals should be disciplined by their own Movement component.

Resolution 3

Strategy for the International Red Cross and Red Crescent Movement

The Council of Delegates,

recalling Resolutions 1 and 5 of the 1999 Council of Delegates, in which it requested the Standing Commission of the Red Cross and Red Crescent (Standing Commission) to establish a Working Group to develop a proposal for an overall Strategy for the Movement,

taking note of the Report of the Working Group on the Strategy for the Movement,

appreciating the intensive consultation process by the Working Group in developing the Strategy,

1. *adopts* the Strategy for the International Red Cross and Red Crescent Movement;
2. *calls upon* all National Red Cross and Red Crescent Societies (National Societies), the International Federation of Red Cross and Red Crescent Societies (International Federation) and the International Committee of the Red Cross (ICRC) to

a) promote knowledge and understanding of this Strategy at all levels of their respective organisations;

b) implement the actions outlined in this Strategy as part of their strategies and plans at national, regional and international levels, and allocate the requested resources to carry them out;

3. *invites* the Standing Commission to establish a task force of experts from National Societies, the International Federation and the ICRC, to develop procedures for monitoring, evaluation and analysis of progress made by all components regarding the implementation of this Strategy;
4. *requests* National Societies to submit reports on the implementation of this Strategy to the International Federation Secretary General as part of the existing reporting mechanisms;
5. *calls upon* the International Federation, the ICRC and the Standing Commission to jointly analyse these reports with the task force of experts and to submit a consolidated report on the implementation of

this Strategy by the components of the Movement to the Council of Delegates;
6. *decides* to review and, if necessary, amend this Strategy at its next meeting.

Resolution 4

Movement Action in favour of Refugees and Internally Displaced Persons

The Council of Delegates,

expressing its deep concern about the need to improve protection and assistance to the tens of millions of persons who have been forcibly uprooted and displaced by armed conflict, violations of international humanitarian law and human rights and natural or other human-induced disasters,

welcoming the document prepared by the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (International Federation) entitled Movement Action in Favour of Refugees and Internally Displaced Persons (Document CD2001/6/1),

recalling and *reaffirming* the resolutions adopted by the International Conference of the Red Cross and Red Crescent (Resolution XXI, Manila 1981; Resolution XVII, Geneva 1986, Resolution 4A, Geneva 1995 and Goal 2.3 of the Plan of Action of the 27th International Conference, Geneva 1999) as well as the Resolutions adopted by the Council of Delegates (Resolution 9, Budapest 1991 and Resolution 7, Birmingham 1993),

recalling that in situations of armed conflict refugees and internally displaced persons are protected by international humanitarian law, recalling also the protection afforded by refugee law, human rights law and national law and encouraging all components of the Movement, in accordance with their mandates, to take appropriate measures to ensure that States are aware of their responsibilities under

international humanitarian law, refugee law, human rights law as well as national law applicable to refugees and internally displaced persons,

emphasising the importance of respect for international humanitarian law for the prevention of displacement,

noting the need for the components of the Movement to agree upon and implement a coherent strategy for ensuring a predictable response to the needs of refugees and internally displaced persons, while retaining a global approach based on a response to needs rather than on categories of persons,

noting further the requirements that all activities carried out by the components of the Movement in favour of refugees and internally displaced persons be in accordance with their respective mandates as outlined in the Statutes of the Movement and the Seville Agreement and in respect of the Fundamental Principles of the Movement,

Movement response to the needs of refugees and internally displaced persons

1. *calls upon* the ICRC, the International Federation and National Red Cross and Red Crescent Societies (National Societies), in accordance with their respective mandates, to seek to ensure at all times that the Movement's response adopts a global approach, addressing both the needs of refugees and internally displaced persons — whenever possible, by appropriately addressing all stages of displacement, from prevention to return — and also the needs of the resident population in order to ensure respect for the Principle of Impartiality at all times. In particular, such a response should take into account:

- the need for protection, assistance, tracing, family reunification and durable solutions such as return, local settlement, or resettlement in a third country;
- the specific needs of different groups within populations of refugees and internally displaced persons, as well as their different needs at different stages of displacement;
- the need for short-term interventions and long-term solutions;
- the need to involve refugees and internally displaced persons in planning and implementing programmes for their own benefit;

- the needs of host and local communities;
- the need for burden sharing within the Movement to assist National Societies where responding to displacement is beyond their individual capacities;
- the need to develop a strong advocacy platform with common Movement positions;

Coordination and cooperation within the Movement

2. *requests* the ICRC and the International Federation to develop a strategy to address the issues and challenges identified in Section VI of the above-mentioned document (CD 2001/6/1) by means of a regular and efficient exchange of information between the various components of the Movement as well as between the headquarters and the field;

3. *recognises* that there may be circumstances in which the ICRC, as the Lead Agency in situations of armed conflict must focus on the priority needs of refugees and internally displaced persons who find themselves closest to areas of conflict, while there may be displaced persons located at a distance from the theatre of hostilities who may also be in dire need of assistance, and urges the ICRC, in consultation with the International Federation and National Societies, to develop, within the framework of the Seville Agreement, operational solutions to such situations;

4. *calls on* National Societies to support ICRC and/or International Federation programmes in favour of refugees and internally displaced persons mobilising public as well as government support and coordinating their action with the Lead Agency to ensure the most effective Movement response;

Coordination and cooperation with other humanitarian actors

5. *requests* the ICRC, the International Federation and National Societies jointly and individually, in accordance with their respective mandates, to continue to closely co-ordinate their activities in this area and promote real coordination with other humanitarian actors, aiming to achieve a coherent approach by the components of the Movement

in their relations with other humanitarian actors to achieve greater complementarity in their activities;

6. *urges* National Societies to ensure that their activities in favour of refugees and internally displaced persons are carried out in respect of the Fundamental Principles of the Movement and existing policy at all times, and particularly when they are acting as implementing partners for other humanitarian actors;

7. *reminds* National Societies of their obligation to inform the International Federation and/or the ICRC of any negotiations likely to lead to a formal agreement between them and any agency of the United Nations or any other international organisation. The International Federation and/or the ICRC will assist National Societies in negotiations likely to lead to an agreement with United Nations High Commissioner for Refugees (UNHCR) and must concur with the terms of any such agreement in order to ensure coherence and complementarity;

8. *requests* that the ICRC and the International Federation jointly initiate a process of consultation with the UNHCR with a view to clarifying the terms upon which the components of the Movement engage in cooperation with UNHCR, and to report thereon to the next Council of Delegates;

Development of Movement Strategy

9. *calls upon* the ICRC and the International Federation to further develop proposals for Movement strategy on refugees and internally displaced persons, in consultation with National Societies, and to report to the next Council of Delegates;

10. *further calls upon* the International Federation, in consultation with National Societies to develop proposals for a plan of action on other aspects of population movement. This plan of action will address, inter alia, migration and resultant vulnerability, migrants in irregular situations, and action to address discrimination and xenophobia. The International Federation will report thereon to the next session of its General Assembly.

Resolution 5

International Disaster Response Law

The Council of Delegates,

recalling Resolution VI of the 23rd International Conference of the Red Cross, Bucharest 1977 and the recommendations drawn up in its Annex "Measures to expedite international relief",

bearing in mind the Principles and Rules for Red Cross and Red Crescent Disaster Relief as taken note of by the 26th International Conference of the Red Cross and Red Crescent (International Conference), Geneva 1995,

recalling the significance for all humanitarian actors of the obligations listed in the Code of Conduct for the Movement and NGOs in Disaster Relief as endorsed by the Council of Delegates, Birmingham 1993,

noting Strategy 2010 as adopted by the General Assembly of the International Federation of Red Cross and Red Crescent Societies (International Federation) 1999,

recalling Final goal 2.2 , paragraph 7 of the Plan of Action adopted at the 27th International Conference of the Red Cross and Red Crescent, Geneva 1999,

noting the significance of the work now under way in the UN on the development of rules relating to international urban search and rescue,

acknowledging the concept of International Disaster Response Law (IDRL) as outlined in the background document CD 2001/7/1,

underlining that the full application of International Humanitarian Law in situations of armed conflict and complex humanitarian disasters should be preserved,

1. *welcomes* the International Federation's initiative to advocate for the development and, where applicable, the improvement and faithful application of International Disaster Response Law in particular, but not limited to, through the compilation and publication of existing

international laws and regulations, and the evaluation of their actual effectiveness in humanitarian operations;
2. *encourages* the International Federation, with the support of all concerned National Red Cross and Red Crescent Societies (National Societies), to engage or, where applicable, continue the dialogue with governments and promote appropriate disaster response laws and regulations, allowing relief actors to meet the needs of the disaster victims in the most effective way;
3. *encourages* the International Federation to continue its work and invites it to report to the Council of Delegates and the International Conference in 2003;
4. *requests* National Societies and, as appropriate, the International Committee of the Red Cross (ICRC) to support the International Federation in the implementation of this resolution through contributions to the work plan and advocacy;
5. *invites* National Societies to encourage their respective governments to become parties to the Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations of 18 June 1998 as an important contribution to enhancing International Disaster Response Law.

Resolution 6

Emblem

The Council of Delegates,

having taken note of the report presented by the Standing Commission of the Red Cross and Red Crescent (Standing Commission) on the follow-up given to Resolution 2 of the Council of Delegates convened in Geneva on 29 and 30 October 1999 and Resolution 3 of the 27th International Conference of the Red Cross and Red Crescent,
1. *commends* the efforts made by the joint working group on the emblems, which was set up by the Standing Commission with a

view to finding a comprehensive solution to the question of the emblem and is composed of representatives of the Movement and of States;

2. *recalls* the Fundamental Principles of the International Red Cross and Red Crescent Movement, in particular the Principle of the Universality of the Movement;

3. *confirms* its objective of finding, as rapidly as possible, a comprehensive solution to the emblem issue which is acceptable to all parties in terms of substance and procedure;

4. *recognizes* the legal and protective value of the emblems used by the International Red Cross and Red Crescent Movement, which, by virtue of their inclusion in the 1949 Geneva Conventions and continuous practice for over a century, have become universally recognized symbols of impartial and neutral aid and protection to the victims of war, natural disasters and other catastrophes;

5. *notes* that the adoption of an additional emblem which is devoid of any political, national or religious connotation whatsoever will be conducive to strengthening the protection of the victims of war and other situations of violence;

6. *notes* that the draft third protocol additional to the Geneva Conventions, which was drawn up by the International Committee of the Red Cross (ICRC) in consultation with the International Federation of Red Cross and Red Crescent Societies (International Federation) and was circulated on 12 October 2000 by Switzerland in its capacity as the depositary of the Geneva Conventions, constitutes an acceptable working basis for the resumption of negotiations when circumstances permit;

7. *sincerely regrets* the fact that developments in the Middle East in September 2000 created a situation which compelled Switzerland to postpone the Diplomatic Conference which was to be convened with a view to examining and, if possible, adopting the third protocol;

8. *expresses* the wish that the Diplomatic Conference can meet as soon as circumstances suggest favourable prospects for reaching an agreement;

9. *invites* the International Federation and the ICRC to take all possible initiatives with a view to pursuing cooperation – in particular in

the operational field – with the National Societies which are not yet recognised;

10. *requests* the Standing Commission to continue consultations with a view to finding a comprehensive solution to the question of the emblem on the basis of the work already carried out and to report on the implementation of the present resolution at the next Council of Delegates and the 28th International Conference of the Red Cross and Red Crescent.

Resolution 7

Respect of the Emblem in Situations of Armed Conflict or Other Situations of Violence

The Council of Delegates,

deeply concerned by deliberate or accidental attacks in situations of armed conflict or other situations of violence against relief workers, hospitals, buildings or vehicles belonging to the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (International Federation) or National Red Cross and Red Crescent Societies (National Societies), or the civilian or military medical services,

urges the parties to any armed conflict or other situation of violence to recognise and respect the protective value of the emblems of the International Red Cross and Red Crescent Movement.

Resolution 8

The United Nations Convention on Certain Conventional Weapons: Explosive Remnants of War and Non-International Armed Conflicts

The Council of Delegates,

alarmed by the widespread and preventable death and injury caused during and after armed conflict by explosive remnants

(unexploded ordnance/UXO) of war — which no longer serve any military purpose,

deeply concerned by the long-term consequences for civilian populations of unexploded ordnance, particularly their role in preventing the return of refugees and internally displaced persons, blocking the delivery of humanitarian aid and other services to vulnerable populations, and hindering reconstruction and economic development,

stressing the need for the provisions of international humanitarian law governing specific weapons to apply in all situations of armed conflict,

noting that the second Review Conference of the United Nations Convention on Certain Conventional Weapons will take place from 11 to 21 December 2001,

recalling the Movement Strategy on Landmines adopted by Resolution 10 of the Council of Delegates in October 1999,

1. *welcomes* the proposal made by the International Committe of the Red Cross (ICRC) for consideration by the Review Conference on explosive remnants of war;
2. *further* welcomes the proposals made by the ICRC on the extension of the Convention's scope of application to non-international armed conflicts;
3. *urges* all States party to the Convention to participate in the Review Conference;
4. *calls upon* the Review Conference to initiate negotiations, beginning in early 2002, on a new protocol to address the problems caused by explosive remnants of war;
5. *calls upon* States party to the Convention to reach agreement as quickly as possible on extending the Convention's scope of application;
6. *urges* all States which have not yet done so to adhere to the Convention as soon as possible and to participate in the Review Conference;
7. *reaffirms* the Movement's commitment to the Movement Strategy on Landmines, and to continuing its efforts in the fields of care and rehabilitation of victims of landmines and UXO, mine and UXO

awareness, and the promotion of adherence to and implementation of the relevant treaties of international humanitarian law;
8. *encourages* all components of the Movement to raise public and governmental awareness of the human cost of explosive remnants of war and to promote the negotiation of an effective new protocol to the United Nations Convention on Certain Conventional Weapons to address this problem;
9. *requests* the ICRC to report on the progress made on explosive remnants of war and the extension of the scope of application of the United Nations Convention on Certain Conventional Weapons to the 2003 session of the Council of Delegates.

Resolution 9

Involvement of Red Cross and Red Crescent Workers in Proceedings related to Violations of International Humanitarian Law

The Council of Delegates,

recalling the obligations of States to suppress and repress violations of international humanitarian law,

noting with great satisfaction the current national and international developments for more effective repression of breaches of international humanitarian law,

taking note of the efforts of National Red Cross and Red Crescent Societies (National Societies) in promoting international humanitarian law in their countries and encouraging their governments to adopt appropriate national legislation for the punishment of violations of international humanitarian law,

recalling further the Principles of Neutrality and Impartiality as essential conditions for the fulfilment of the humanitarian mandate of the Movement, especially for the activities of the International Committee of the Red Cross (ICRC),

expressing appreciation for the recognition of the testimonial privilege of the ICRC in the jurisprudence of the International

Criminal Tribunal for the former Yugoslavia and in the Draft Rules of Procedure and Evidence of the International Criminal Court,

being aware of the potential dangers for the future work of the Movement if representatives of any of the components are called upon to give evidence in proceedings for the punishment of violations of international humanitarian law,

stressing the great importance of a concerted approach of the components of the Movement on this issue,

1. *takes note* of the work and consultations of National Societies, the International Federation of Red Cross and Red Crescent Societies (International Federation) and the ICRC, regarding the involvement of individual components of the Movement in proceedings for the punishment of violations of international humanitarian law;
2. *invites* the National Societies, together with the International Federation and the ICRC, to continue their efforts to raise awareness of this issue within the Movement and with relevant public authorities, explaining the potential risk to the humanitarian action of all components of the Red Cross/Red Crescent involvement in proceedings on violations of international humanitarian law;
3. *requests* the ICRC and the International Federation, together with the National Societies, to develop appropriate briefing on this issue and to elaborate practical measures to introduce the issue into the training of Red Cross/Red Crescent workers and delegates;
4. *further invites* the National Societies and the International Federation to review and promote standard clauses in the contracts of Red Cross/Crescent workers in order to ensure appropriate actions when asked for co-operation;
5. *suggests* that National Societies, when their delegates or staff are asked for information obtained during their missions to be used in national or international procedures for the punishment of violations related to crimes under international humanitarian law, inform the International Federation and the ICRC for advice prior to taking further action;
6. *encourages* States, when ratifying the Statute of the International Criminal Court, not to make the declaration provided for in Article 124 of this Statute;

7. *requests* the ICRC and the International Federation to report to the 2003 session of the Council of Delegates on the progress made.

Resolution 10

International Conference of the Red Cross and Red Crescent (December 2003)

The Council of Delegates,

acknowledges the reports of the Standing Commission of the Red Cross and Red Crescent (Standing Commission) on the implementation of the Plan of Action adopted by the 27th International Conference of the Red Cross and Red Crescent (International Conference) and the preparation of the 2003 International Conference,

takes note with appreciation of these reports and its suggestions, and requests the Standing Commission to take into account the comments made during the Council of Delegates, as well as those to be formulated through further consultations with governments, when deciding on the format and theme for the 2003 International Conference,

1. *urges* all components of the Movement and governments to dedicate renewed efforts to the implementation of the 1999 Plan of Action and related pledges, and to report on the measures they have taken in this respect to the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, thus enabling them to constantly update the database established to present the overall result of this implementation at the 2003 International Conference;
2. *encourages* all components of the Movement to be active in preparing and promoting the International Conference, and to commit adequate resources to this task, and to urge governments to do likewise.

Resolution 11

Protection of Cultural Property In the Event of Armed Conflict

The Council of Delegates,

deeply alarmed at the destruction of monuments, works of art, manuscripts and books and other objects of cultural property during armed conflicts,

recognising that cultural property, monuments and cultural heritage are essential elements of the identity of peoples, the importance of their preservation as part of the cultural heritage of the world and as part of promoting mutual understanding and peace, and the protection afforded to cultural property under criminal law,

noting that protection of cultural property during armed conflicts is enhanced by adherence to the relevant rules of international humanitarian law, in particular, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999,

recalling the Plan of Action of the 27th International Conference of the Red Cross and Red Crescent and relevant resolutions of earlier International Conferences which call upon States to consider becoming party to relevant treaties concluded since the adoption of the 1949 Geneva Conventions to enhance the universal character of international humanitarian law,

recognising that many of the rules contained in the 1954 Hague Convention and its two Protocols of 1954 and 1999 require implementation in peacetime in order to be effective during situations of armed conflict,

recalling the special role of the International Committee of the Red Cross (ICRC) and of National Red Cross and Red Crescent Societies (National Societies) in the promotion, dissemination and implementation of international humanitarian law,

1. *notes* with appreciation the increasing role of the ICRC, in co-operation with UNESCO, in encouraging ratification and implementation of the Hague Convention and its Protocols;

2. *encourages* National Societies to include the Hague Convention and its Protocols in their activities to promote, disseminate and implement international humanitarian law, either on their own initiative or in co-operation with their governments;
3. *invites* the States that have not yet done so to become party to the relevant treaties concluded since the 1949 Geneva Conventions, in particular the 1954 Hague Convention and its two Protocols, with a view to strengthening the universality of international humanitarian law.

Resolution 12

Strengthening Humanitarian Values across Religious, Political and Ethnic Lines

The Council of Delegates,

having received the decision of the International Federation's General Assembly, entitled Strengthening Humanitarian Values across Religious, Political and Ethnic Lines (see annex),

endorses this decision and requests the National Red Cross and Red Crescent Societies to act upon it with the support of the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.

Annex to Resolution 12

Decision of the General Assembly of the International Federation of Red Cross and Red Crescent Societies

The General Assembly,

taking into account discussions in the Assembly and its Working Groups on the subject,

welcomes the attached decision of the Governing Board, and

invites the Secretary General to bring it to the attention of the Council of Delegates,

requests all National Societies to take the measures outlined in this decision,

requests the Secretary General to continue development of action to support the National Societies' initiative in this field,

further requests the Federation Governing Board to review action in follow-up to this decision at its next meeting.

* * * * *

The Governing Board,

recognising that acts against humanity create conditions in which millions of people are placed in fear of their lives and in which their economic and social well-being is jeopardised,

further recognising that the Red Cross and Red Crescent Movement, and especially the National Societies, can play a pivotal role in restoring and strengthening humanitarian values across religious, political and ethnic lines,

recalling, in this context, the commitment by National Societies and States to cooperate and, as appropriate, take initiatives to promote tolerance, non-violence in the community and cultural diversity, as stated in the International Plan of Action adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent,

invites National Societies to establish or further develop partnership arrangements with other National Societies to strengthen their work to combat discrimination and violence;

recalls that in keeping with Red Cross and Red Crescent Principles, these partnerships should ignore ethnic, religious or political boundaries;

requests all National Societies to enhance their dialogue with governments to promote tolerance and understanding globally as well as in their communities;

requests all National Societies to commit themselves to advocate actively to protect the basic rights of groups and individuals at risk in their countries and, where necessary, to work with partners, including government agencies, to create conditions of safety for persons endangered by violence or discrimination;

requests the Secretariat to further develop, in close consultation with National Societies and the ICRC, an advocacy programme for tolerance, non violence and cultural diversity;

welcomes the solidarity expressed by National Societies and all components of the Movement with the victims of the devastating acts of 11 September 2001 and their aftermath;

recalls the role of the Red Cross and Red Crescent Movement as an effective mobilizer of assistance to all victims of violence, including terrorism and all forms of conflict;

invites the President to draw this decision to the attention of the General Assembly at its forthcoming Session.

Resolution 13

Statement by the Council of Delegates concerning the Terrorist Attacks of 11 September 2001 and their Repercussions

The terrorist attacks of 11 September 2001 delivered a blow to the most fundamental values of human societies, particularly those at the heart of International Humanitarian Law and Human Rights Law. The International Red Cross and Red Crescent Movement condemns such acts, which negate the most elementary principles of humanity, in the strongest possible terms.

The attacks have thrown thousands of families of different nationalities into a state of grief and mourning, and since then the population of Afghanistan has been plunged into the misery of another war. They have also forced us to sharpen our awareness of the threats that surround us, particularly those associated with weapons of mass destruction. Amidst this climate of crisis, the Movement also notes

with concern an increase of intolerance, and an upsurge in the number of xenophobic and racist acts.

These challenges underscore the validity and appropriateness of the principles of humanity, non-discrimination, tolerance, solidarity, neutrality and independence, which have inspired the work of our International Movement for more than a century. Accordingly, the International Red Cross and Red Crescent Movement, enriched by the diversity of cultures of the National Societies that comprise it, is determined to intensify its action to reject exclusion in all its forms, and to promote a culture of tolerance, justice and peace across all civilizations.

In response to these events, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies with the support of the National Red Cross and Red Crescent Societies, have launched international operations to provide relief without discrimination to populations who have fallen victim to the conflict in Afghanistan, both inside and outside the country.

The extreme seriousness of the crisis caused by the 11 September attacks and their intensive coverage by the media must not lead anyone to forget the countless victims of other conflicts in Africa, Asia, the Middle East, Europe and Latin America. For these victims also require assistance that is in keeping with the magnitude of their suffering.

On behalf of all victims, the International Red Cross and Red Crescent Movement, at its Council of Delegates meeting in Geneva on 11-14 November 2001, appeals urgently to governments and leaders of international political organizations to do their utmost to ensure that the 1949 Geneva Conventions are fully respected within the context of all these conflicts, and that humanitarian organizations are guaranteed access to the victims.

Conventions de Genève du 12 août 1949 et Protocoles additionnels du 8 juin 1977

ratifications, adhésions et successions

au 31 décembre 2001

1. Abréviations

R/A/S Ratification /Adhésion / Déclaration de succession
R/D Réserve / Déclaration
D90 Déclaration prévue par l'article 90 du Protocole I

2. Dates

Les dates indiquées sont celles du jour de réception par le dépositaire de l'acte officiel transmis par l'État qui ratifie, adhère, succède ou fait la déclaration selon l'article 90 du Protocole I.

3. Entrée en vigueur

Les Conventions et les Protocoles entrent en vigueur pour chaque État six mois après la date indiquée; pour les États faisant une déclaration de succession, l'entrée en vigueur intervient rétroactivement au jour de l'accession à l'indépendance.

Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977

ratifications, accessions and successions

as at 31 December 2001

1. Abbreviations

R/A/S Ratification/Accession/ Declaration of succession
R/D Reservation/Declaration
D90 Declaration under Article 90 of Protocol I

2. Dates

The dates indicated are those on which the depositary received the official instrument from the State which ratified, acceded to or succeeded to a treaty or made the declaration under Article 90 of Protocol I.

3. Entry into force

The Conventions and the Protocols enter into force for States six months after the date given in the present document; for States which have made a declaration of succession, entry into force takes place retroactively, on the day of their accession to independence.

Les Conventions de Genève sont entrées en vigueur le 21 octobre 1950. Les Protocoles additionnels sont entrés en vigueur le 7 décembre 1978.

4. Noms des pays

Le nom figurant dans la liste peut être différent du nom officiel de l'État concerné.

5. Modifications apportées depuis le 1er janvier 2001

Ratifications, adhésions ou successions aux Conventions de Genève de 1949

Yougoslavie	16.10.2001

Ratifications, adhésions ou successions au Protocole I

France	11. 4.2001
Trinité-et-Tobago	20. 7.2001
Yougoslavie	16.10.2001

Ratifications, adhésions et successions au Protocole II

Trinité-et-Tobago	20. 7.2001
Yougoslavie	16.10.2001

Déclaration prévue par l'article 90 (Protocole I)

Trinité-et-Tobago	20. 7.2001
Yougoslavie	16.10.2001

6. Note

Palestine: en date du 21 juin 1989, le Département fédéral suisse des Affaires étrangères a reçu de l'Observateur

The 1949 Geneva Conventions entered into force on 21 October 1950. The 1977 Additional Protocols entered into force on 7 December 1978.

4. Names of countries

The name of a State given in the list may differ from its official name.

5. Changes since 1 January 2001

Ratifications, accessions or successions to the Geneva Conventions

Yougoslavia	16.10.2001

Ratifications, accessions or successions to the Protocol I

France	11. 4.2001
Trinidad and Tobago	20. 7.2001
Yougoslavia	16.10.2001

Ratifications, accessions or successions to the Protocol II

Trinidad and Tobago	20. 7.2001
Yougoslavia	16.10.2001

Declaration under Article 90 (Protocol I)

Trinidad and Tobago	20. 7.2001
Yougoslavia	16.10.2001

6. Note

Palestine: On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the

permanent de la Palestine auprès de l'Office des Nations Unies à Genève une lettre informant le Conseil fédéral suisse que «le Comité exécutif de l'Organisation de Libération de la Palestine, chargé d'exercer les fonctions de Gouvernement de l'État de Palestine par décision du Conseil National Palestinien, a décidé en date du 4 mai 1989, d'adhérer aux quatre Conventions de Genève du 12 août 1949 et à leurs deux Protocoles additionnels». Le 13 septembre 1989, le Conseil fédéral suisse a informé les États qu'il n'était pas en mesure de trancher le point de savoir s'il s'agissait d'un instrument d'adhésion, «en raison de l'incertitude au sein de la communauté internationale quant à l'existence ou non d'un État de Palestine».

Permanent Observer of Palestine to the United Nations Office in Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto". On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".

7. Totaux

États parties aux **Conventions de Genève**	189
États parties au **Protocole additionnel I**	159
États parties au **Protocole additionnel II**	151
États ayant fait la déclaration prévue par l'article 90 (Protocole I)	60
États membres des Nations Unies	189

7. Totals

States party to the **Geneva Conventions**	189
States party to **Additional Protocol I**	159
States party to **Additional Protocol II**	151
States having made the declaration under Article 90	60
Member States of the United Nations	189

États membres de l'ONU ou parties au Statut de la Cour internationale de Justice qui ne sont pas parties aux Conventions de Genève de 1949: Îles Marshall, Nauru.
(Liste ci-dessous en anglais seulement.)

UN member States or States party to the Statute of the International Court of Justice which are not party to the 1949 Geneva Conventions: the Marshall Islands, Nauru.

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	**R/D**	**R/A/S**	**R/D**	**D90**	**R/A/S**	**R/D**
Afghanistan	26 09 1956	R					
Albania	27 05 1957	R X	16 07 1993	A		16 07 1993	A
Algeria	20 06 1960						
	03 07 1962	A	16 08 1989	A X	16 08 1989	16 08 1989	A
Andorra	17 09 1993	A					
Angola	20 09 1984	A X	20 09 1984	A X			
Antigua and Barbuda	06 10 1986	S	06 10 1986	A		06 10 1986	A
Argentina	18 09 1956	R	26 11 1986	A X	11 10 1996	26 11 1986	A X
Armenia	07 06 1993	A	07 06 1993	A		07 06 1993	A
Australia	14 10 1958	R X	21 06 1991	R X	23 09 1992	21 06 1991	R
Austria	27 08 1953	R	13 08 1982	R X	13 08 1982	13 08 1982	R X
Azerbaijan	01 06 1993	A					
Bahamas	11 07 1975	S	10 04 1980	A		10 04 1980	A
Bahrain	30 11 1971	A	30 10 1986	A		30 10 1986	A
Bangladesh	04 04 1972	S	08 09 1980	A		08 09 1980	A
Barbados	10 09 1968	S X	19 02 1990	A		19 02 1990	A
Belarus	03 08 1954	R X	23 10 1989	R	23 10 1989	23 10 1989	R
Belgium	03 09 1952	R	20 05 1986	R X	27 03 1987	20 05 1986	R
Belize	29 06 1984	A	29 06 1984	A		29 06 1984	A
Benin	14 12 1961	S	28 05 1986	A		28 05 1986	A
Bhutan	10 01 1991	A					
Bolivia	10 12 1976	R	08 12 1983	A	10 08 1992	08 12 1983	A
Bosnia and Herzegovina	31 12 1992	S	31 12 1992	S	31 12 1992	31 12 1992	S
Botswana	29 03 1968	A	23 05 1979	A		23 05 1979	A
Brazil	29 06 1957	R	05 05 1992	A	23 11 1993	05 05 1992	A
Brunei Darussalam	14 10 1991	A	14 10 1991	A		14 10 1991	A
Bulgaria	22 07 1954	R	26 09 1989	R	09 05 1994	26 09 1989	R
Burkina Faso	07 11 1961	S	20 10 1987	R		20 10 1987	R

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	**R/D**	**R/A/S**	**R/D**	**D90**	**R/A/S**	**R/D**
Burundi	27 12 1971	S	10 06 1993	A		10 06 1993	A
Cambodia	08 12 1958	A	14 01 1998	A		14 01 1998	A
Cameroon	16 09 1963	S	16 03 1984	A		16 03 1984	A
Canada	14 05 1965	R	20 11 1990	R X	20 11 1990	20 11 1990	R X
Cape Verde	11 05 1984	A	16 03 1995	A	16 03 1995	16 03 1995	A
Central African Republic	01 08 1966	S	17 07 1984	A		17 07 1984	A
Chad	05 08 1970	A	17 01 1997	A		17 01 1997	A
Chile	12 10 1950	R	24 04 1991	R	24 04 1991	24 04 1991	R
China	28 12 1956	R X	14 09 1983	A X		14 09 1983	A
Colombia	08 11 1961	R	01 09 1993	A	17 04 1996	14 08 1995	A
Comoros	21 11 1985	A	21 11 1985	A		21 11 1985	A
Congo	04 02 1967	S	10 11 1983	A		10 11 1983	A
Congo (Dem. Rep.)	24 02 1961	S	03 06 1982	A			
Costa Rica	15 10 1969	A	15 12 1983	A	02 12 1999	15 12 1983	A
Côte d'Ivoire	28 12 1961	S	20 09 1989	R		20 09 1989	R
Croatia	11 05 1992	S	11 05 1992	S	11 05 1992	11 05 1992	S
Cuba	15 04 1954	R	25 11 1982	A		23 12 1999	A
Cyprus	23 05 1962	A	01 06 1979	R		18 03 1996	A
Czech Republic	05 02 1993	S X	05 02 1993	S	02 05 1995	05 02 1993	S
Denmark	27 06 1951	R	17 06 1982	R X	17 06 1982	17 06 1982	R
Djibouti	06 03 1978	S	08 04 1991	A		08 04 1991	A
Dominica	28 09 1981	S	25 04 1996	A		25 04 1996	A
Dominican Republic	22 01 1958	A	26 05 1994	A		26 05 1994	A
Ecuador	11 08 1954	R	10 04 1979	R		10 04 1979	R
Egypt	10 11 1952	R	09 10 1992	R X		09 10 1992	R X
El Salvador	17 06 1953	R	23 11 1978	R		23 11 1978	R
Equatorial Guinea	24 07 1986	A	24 07 1986	A		24 07 1986	A
Eritrea	14 08 2000	A					
Estonia	18 01 1993	A	18 01 1993	A		18 01 1993	A
Ethiopia	02 10 1969	R	08 04 1994	A		08 04 1994	A
Fiji	09 08 1971	S					
Finland	22 02 1955	R	07 08 1980	R X	07 08 1980	07 08 1980	R
France	28 06 1951	R	11 04 2001	A X		24 02 1984	A X
Gabon	26 02 1965	S	08 04 1980	A		08 04 1980	A
Gambia	20 10 1966	S	12 01 1989	A		12 01 1989	A
Georgia	14 09 1993	A	14 09 1993	A		14 09 1993	A

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	**R/D**	**R/A/S**	**R/D**	**D90**	**R/A/S**	**R/D**
Germany	03 09 1954	A X	14 02 1991	R X	14 02 1991	14 02 1991	R X
Ghana	02 08 1958	A	28 02 1978	R		28 02 1978	R
Greece	05 06 1956	R	31 03 1989	R	04 02 1998	15 02 1993	A
Grenada	13 04 1981	S	23 09 1998	A		23 09 1998	A
Guatemala	14 05 1952	R	19 10 1987	R		19 10 1987	R
Guinea	11 07 1984	A	11 07 1984	A	20 12 1993	11 07 1984	A
Guinea-Bissau	21 02 1974	A X	21 10 1986	A		21 10 1986	A
Guyana	22 07 1968	S	18 01 1988	A		18 01 1988	A
Haiti	11 04 1957	A					
Holy See	22 02 1951	R	21 11 1985	R X		21 11 1985	R X
Honduras	31 12 1965	A	16 02 1995	R		16 02 1995	R
Hungary	03 08 1954	R X	12 04 1989	R	23 09 1991	12 04 1989	R
Iceland	10 08 1965	A	10 04 1987	R X	10 04 1987	10 04 1987	R
India	09 11 1950	R					
Indonesia	30 09 1958	A					
Iran (Islamic Rep. of)	20 02 1957	R X					
Iraq	14 02 1956	A					
Ireland	27 09 1962	R	19 05 1999	R X	19 05 1999	19 05 1999	R X
Israel	06 07 1951	R X					
Italy	17 12 1951	R	27 02 1986	R X	27 02 1986	27 02 1986	R
Jamaica	20 07 1964	S	29 07 1986	A		29 07 1986	A
Japan	21 04 1953	A					
Jordan	29 05 1951	A	01 05 1979	R		01 05 1979	R
Kazakhstan	05 05 1992	S	05 05 1992	S		05 05 1992	S
Kenya	20 09 1966	A	23 02 1999	A		23 02 1999	A
Kiribati	05 01 1989	S					
Korea (Dem. People's Rep.)	27 08 1957	A X				09 03 1988	A
Korea (Republic of)	16 08 1966	A X	15 01 1982	R X		15 01 1982	R
Kuwait	02 09 1967	A X	17 01 1985	A		17 01 1985	A
Kyrgyzstan	18 09 1992	S	18 09 1992	S		18 09 1992	S
Lao People's Dem.Rep.	29 10 1956	A	18 11 1980	R	30 01 1998	18 11 1980	R
Latvia	24 12 1991	A	24 12 1991	A		24 12 1991	A
Lebanon	10 04 1951	R	23 07 1997	A		23 07 1997	A
Lesotho	20 05 1968	S	20 05 1994	A		20 05 1994	A
Liberia	29 03 1954	A	30 06 1988	A		30 06 1988	A
Libyan Arab Jamahiriya	22 05 1956	A	07 06 1978	A		07 06 1978	A

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	**R/D**	**R/A/S**	**R/D**	**D90**	**R/A/S**	**R/D**
Liechtenstein	21 09 1950	R	10 08 1989	R X	10 08 1989	10 08 1989	R X
Lithuania	03 10 1996	A	13 07 2000	A	13 07 2000	13 07 2000	A
Luxembourg	01 07 1953	R	29 08 1989	R	12 05 1993	29 08 1989	R
Macedonia	01 09 1993	S X	01 09 1993	S X	01 09 1993	01 09 1993	S
Madagascar	18 07 1963	S	08 05 1992	R	27 07 1993	08 05 1992	R
Malawi	05 01 1968	A	07 10 1991	A		07 10 1991	A
Malaysia	24 08 1962	A					
Maldives	18 06 1991	A	03 09 1991	A		03 09 1991	A
Mali	24 05 1965	A	08 02 1989	A		08 02 1989	A
Malta	22 08 1968	S	17 04 1989	A X	17 04 1989	17 04 1989	A X
Mauritania	30 10 1962	S	14 03 1980	A		14 03 1980	A
Mauritius	18 08 1970	S	22 03 1982	A		22 03 1982	A
Mexico	29 10 1952	R	10 03 1983	A			
Micronesia	19 09 1995	A	19 09 1995	A		19 09 1995	A
Moldova (Republic of)	24 05 1993	A	24 05 1993	A		24 05 1993	A
Monaco	05 07 1950	R	07 01 2000	A		07 01 2000	A
Mongolia	20 12 1958	A	06 12 1995	R X	06 12 1995	06 12 1995	R
Morocco	26 07 1956	A					
Mozambique	14 03 1983	A	14 03 1983	A			
Myanmar	25 08 1992	A					
Namibia	22 08 1991	S	17 06 1994	A	21 07 1994	17 06 1994	A
Nepal	07 02 1964	A					
Netherlands	03 08 1954	R	26 06 1987	R X	26 06 1987	26 06 1987	R
New Zealand	02 05 1959	R X	08 02 1988	R X	08 02 1988	08 02 1988	R
Nicaragua	17 12 1953	R	19 07 1999	R		19 07 1999	R
Niger	21 04 1964	S	08 06 1979	R		08 06 1979	R
Nigeria	20 06 1961	S	10 10 1988	A		10 10 1988	A
Norway	03 08 1951	R	14 12 1981	R	14 12 1981	14 12 1981	R
Oman	31 01 1974	A	29 03 1984	A X		29 03 1984	A X
Pakistan	12 06 1951	R X					
Palau	25 06 1996	A	25 06 1996	A		25 06 1996	A
Panama	10 02 1956	A	18 09 1995	R	26 10 1999	18 09 1995	R
Papua New Guinea	26 05 1976	S					
Paraguay	23 10 1961	R	30 11 1990	A	30 01 1998	30 11 1990	A
Peru	15 02 1956	R	14 07 1989	R		14 07 1989	R
Philippines	06 10 1952	R				11 12 1986	A

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	**R/D**	**R/A/S**	**R/D**	**D90**	**R/A/S**	**R/D**
Poland	26 11 1954	R X	23 10 1991	R	02 10 1992	23 10 1991	R
Portugal	14 03 1961	R X	27 05 1992	R	01 07 1994	27 05 1992	R
Qatar	15 10 1975	A	05 04 1988	A X	24 09 1991		
Romania	01 06 1954	R X	21 06 1990	R	31 05 1995	21 06 1990	R
Russian Federation	10 05 1954	R X	29 09 1989	R X	29 09 1989	29 09 1989	R X
Rwanda	05 05 1964	S	19 11 1984	A	08 07 1993	19 11 1984	A
Saint Kitts and Nevis	14 02 1986	S	14 02 1986	A		14 02 1986	A
Saint Lucia	18 09 1981	S	07 10 1982	A		07 10 1982	A
Saint Vincent Grenadines	01 04 1981	A	08 04 1983	A		08 04 1983	A
Samoa	23 08 1984	S	23 08 1984	A		23 08 1984	A
San Marino	29 08 1953	A	05 04 1994	R		05 04 1994	R
Sao Tome and Principe	21 05 1976	A	05 07 1996	A		05 07 1996	A
Saudi Arabia	18 05 1963	A	21 08 1987	A X			
Senegal	18 05 1963	S	07 05 1985	R		07 05 1985	R
Seychelles	08 11 1984	A	08 11 1984	A	22 05 1992	08 11 1984	A
Sierra Leone	10 06 1965	S	21 10 1986	A		21 10 1986	A
Singapore	27 04 1973	A					
Slovakia	02 04 1993	S X	02 04 1993	S	13 03 1995	02 04 1993	S
Slovenia	26 03 1992	S	26 03 1992	S	26 03 1992	26 03 1992	S
Solomon Islands	06 07 1981	S	19 09 1988	A		19 09 1988	A
Somalia	12 07 1962	A					
South Africa	31 03 1952	A	21 11 1995	A		21 11 1995	A
Spain	04 08 1952	R	21 04 1989	R X	21 04 1989	21 04 1989	R
Sri Lanka	28 02 1959	R					
Sudan	23 09 1957	A					
Suriname	13 10 1976	S X	16 12 1985	A		16 12 1985	A
Swaziland	28 06 1973	A	02 11 1995	A		02 11 1995	A
Sweden	28 12 1953	R	31 08 1979	R X	31 08 1979	31 08 1979	R
Switzerland	31 03 1950	R	17 02 1982	R X	17 02 1982	17 02 1982	R
Syrian Arab Republic	02 11 1953	R	14 11 1983	A X			
Tajikistan	13 01 1993	S	13 01 1993	S	10 09 1997	13 01 1993	S
Tanzania (United Rep of)	12 12 1962	S	15 02 1983	A		15 02 1983	A
Thailand	29 12 1954	A					
Togo	06 01 1962	S	21 06 1984	R	21 11 1991	21 06 1984	R
Tonga	13 04 1978	S					
Trinidad and Tobago	24 09 1963	A	20 07 2001	A	20 07 2001		

Country	Geneva Conventions		Protocol I			Protocol II	
	R/A/S	**R/D**	**R/A/S**	**R/D**	**D90**	**R/A/S**	**R/D**
Tunisia	04 05 1957	A	09 08 1979	R		09 08 1979	R
Turkey	10 02 1954	R					
Turkmenistan	10 04 1992	S	10 04 1992	S		10 04 1992	S
Tuvalu	19 02 1981	S					
Uganda	18 05 1964	A	13 03 1991	A		13 03 1991	A
Ukraine	03 08 1954	R X	25 01 1990	R	25 01 1990	25 01 1990	R
United Arab Emirates	10 05 1972	A	09 03 1983	A X	06 03 1992	09 03 1983	A X
United Kingdom	23 09 1957	R X	28 01 1998	R X	17 05 1999	28 01 1998	R
United States of America	02 08 1955	R X					
Uruguay	05 03 1969	R X	13 12 1985	A	17 07 1990	13 12 1985	A
Uzbekistan	08 10 1993	A	08 10 1993	A		08 10 1993	A
Vanuatu	27 10 1982	A	28 02 1985	A		28 02 1985	A
Venezuela	13 02 1956	R	23 07 1998	A		23 07 1998	A
Viet Nam	28 06 1957	A X	19 10 1981	R			
Yemen	16 07 1970	A X	17 04 1990	R		17 04 1990	R
Yugoslavia	16 10 2001	A	16 10 2001	A	16 10 2001	16 10 2001	A
Zambia	19 10 1966	A	04 05 1995	A		04 05 1995	A
Zimbabwe	07 03 1983	A	19 10 1992	A		19 10 1992	A

See/voir: www.cicr.org/dih – www.cicr.org/dih

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Livres et revues

Books and reviews

Dieter Fleck (ed.)

The Handbook of the Law of Visiting Forces

Oxford, Oxford University Press, 2001, 625 pages

Divers experts ont apporté leur contribution à cet important et volumineux ouvrage de 550 pages, complété par de nombreuses annexes. Il a été rédigé sous la supervision de Dieter Fleck, directeur des traités et de la politique au sein du ministère allemand de la Défense. D'une part, ce manuel traite des problèmes juridiques soulevés par le déploiement, sur le territoire d'un État hôte, de forces armées d'un ou de plusieurs États, par exemple suite à des accords de coopération militaire ou dans le cadre du déploiement d'une force de maintien de la paix. Les cas de la présence de représentants d'organismes internationaux, de forces ou de commandements multinationaux sont également examinés.

D'autre part, les divers accords qui peuvent être conclus pour régler de tels problèmes sont analysés et commentés. Ces accords – qu'il s'agisse de la Convention entre les États parties au Traité de l'Atlantique-Nord sur le statut de leurs forces (appelée la SOFA de l'OTAN), d'accords de siège ou de protocoles d'accord, diffèrent entre eux mais tous garantissent un degré variable d'immunité par rapport à la législation de l'État hôte et de dérogations, par exemple en matière de détention d'armes à feu ou d'exemptions fiscales.

L'approche choisie, qui se veut avant tout pratique, est reflétée par le titre de l'ouvrage et par le choix des nombreux auteurs : responsables juridiques des ministères de la Défense et des Affaires étrangères, conseillers juridiques militaires et universitaires experts en la matière. Ils ont puisé dans leur expérience acquise au cours des dernières années, notamment lors des opérations de maintien et d'imposition de la paix. Il s'agit donc bien d'un manuel pour les spécialistes concernés par l'étude de ces problèmes et la rédaction d'instruments juridiques relatifs à la présence de troupes déployées hors de leurs

frontières. Dans sa partie finale, l'ouvrage présente d'ailleurs une véritable «liste de contrôle» chronologique des points devant faire l'objet d'évaluation, de négociations, etc. Les accords types élaborés par l'OTAN et les Nations Unies figurent en annexe.

L'analyse de fond n'est toutefois pas absente puisque sont notamment posées les questions relatives au processus de ratification éventuelle des accords par les autorités compétentes et à la conformité de ces accords avec les obligations internationales de l'État hôte, notamment la Convention européenne des droits de l'homme. Celle-ci, qui impose aux États parties des obligations envers toutes les personnes qui se trouvent sous sa juridiction, pourrait par exemple empêcher l'État hôte de concéder, en matière pénale, certains abandons de juridiction au profit d'un autre État si les garanties exigées par la Convention européenne des droits de l'homme n'étaient pas atteintes dans ce dernier.

La première partie de l'ouvrage est consacrée à des cas de figure historiques pour lesquels ces problèmes se sont initialement posés: le déploiement de soldats américains sur le sol britannique durant la Seconde Guerre mondiale et l'évolution qui a conduit aux modèles types d'accords conclus par les forces de l'Organisation du Traité de l'Atlantique Nord (OTAN) et du Pacte de Varsovie.

Des exemples particuliers comme le cas de l'Allemagne (sur le territoire de laquelle des forces étrangères ont stationné pendant plusieurs décennies), celui du Japon (qui est différent en ce qu'il ne représente qu'une relation bilatérale entre ce pays et les États-Unis d'Amérique), la présence de troupes russes dans la Communauté des États indépendants, ou le cas de la Corée du Sud sont ensuite commentés.

Une large section présente des illustrations et cas concrets. La SOFA de l'OTAN occupe une large place de l'étude, qui reflète que cette convention est devenue un outil de base dans de nombreux contextes et qu'elle constitue un bon compromis entre la souveraineté de l'État hôte et la loi du pavillon. Les diverses notions clés de cet instrument – telles que la qualification des personnes couvertes (qu'elles soient militaires ou civiles), les conditions pour leur séjour et leurs obligations envers les lois nationales du pays d'accueil, la validité des

permis de conduire et l'immatriculation de véhicules, etc. – sont commentées avec beaucoup de détails.

Plusieurs chapitres sont ensuite réservés à l'étude de la présence sur le territoire d'un État de forces de maintien ou d'imposition de la paix. Sont envisagés, d'une part, le cas de forces sous le contrôle et le commandement des Nations Unies et, d'autre part, le cas de forces multinationales intervenant dans le cadre d'un mandat conféré par le Conseil de sécurité.

Ces opérations, qu'elles appartiennent à l'une ou l'autre de ces catégories, sont devenues de plus en plus complexes et nécessitent parfois des cadres juridiques très élaborés. Si certaines ressemblances existent avec les cas de présence militaire décrits dans les chapitres précédents, le mandat qui leur est conféré par les Nations Unies apporte une spécificité qui est reflétée dans le statut particulier de ces troupes et, le cas échéant, des SOFAs conclus avec les États hôtes.

En ce qui concerne les forces de maintien de la paix sous commandement et sous contrôle de l'ONU, l'impact de l'article 105 de la Charte des Nations Unies, de la Convention de 1946 sur les privilèges et immunités des Nations Unies, et de la Convention de 1994 sur la protection du personnel des Nations Unies et du personnel associé est souligné. L'étude tente également de faire le point sur le statut juridique des contingents opérant sous le commandement de l'ONU. Certaines des questions analysées – notamment le fait de savoir si seule l'Organisation des Nations Unies assume les obligations nées de la présence de ces troupes ou que ces obligations existent également pour les États contributeurs – sont toujours controversées. À cet égard, l'ouvrage apporte des réponses qui ne sont pas partagées par tous les auteurs[1].

L'étude se penche enfin sur des cas particuliers, comme les accords de siège conclus entre le Comité international de la Croix-Rouge et les pays dans lesquels il mène des activités.

1 Cf. notamment Luigi Condorelli, « Le statut des forces de l'ONU et le droit international humanitaire », *Rivista di Diritto Internazionale*, Anno LXXVIII Fasc. 4 – 1995 (p. 882 et suiv.).

En conclusion, cet ouvrage se veut en particulier un outil à l'intention des conseillers juridiques militaires et des juristes des Nations Unies, qui sont de plus en plus confrontés à des situations complexes relevant d'un corps de droit qualifié ici de « droit des opérations ». Ce manuel est sans aucun doute un instrument de travail très utile pour tous les juristes devant traiter cet ensemble des normes pertinentes pour une armée en campagne, allant bien au-delà du droit classique des conflits armés. Il est aussi une source riche en informations et analyse divers problèmes connexes de droit international public et de droit international humanitaire.

ALEXANDRE FAITE
Juriste au CICR

Pierre Marqués

La Croix-Rouge pendant la Guerre d'Espagne (1936-1939) : Les missionnaires de l'humanitaire

L'Harmattan, Paris et Montréal, 2000, 452 pages

Le coup d'État du 18 juillet 1936, fomenté par les généraux Franco et Mola, allait plonger l'Espagne dans une guerre civile d'une rare violence. Victorieuse en Navarre, en Vieille-Castille, en Andalousie et au Maroc espagnol, l'insurrection échoue en Nouvelle-Castille, au Pays basque, en Catalogne et au Levant, ainsi que dans les grands centres industriels – Barcelone, Madrid, Bilbao, Séville – laissant le pays totalement divisé. La ligne de fracture n'est pas seulement géographique, elle va diviser toute la société espagnole. Du côté de l'insurrection, l'aristocratie, le haut clergé, l'armée, une partie de la bourgeoisie, ainsi que l'ensemble des milieux traditionalistes regroupés au sein du parti phalangiste; de l'autre, la grande masse du prolétariat agricole ou urbain, les syndicats, le bas clergé, les petits fonctionnaires et les partis de gauche.

D'un côté comme de l'autre, le coup d'État va libérer les tensions et les haines accumulées depuis des générations dans une société espagnole qui restait prisonnière de ses traditions et du souvenir de son glorieux passé, mais qui n'avait pas réussi à évoluer vers la modernité et la société industrielle. De part et d'autre, les combattants ont fait preuve d'une abnégation et d'un esprit de sacrifice exceptionnel, mais aussi du plus total mépris de la vie d'autrui. Les massacres, les prises d'otages, les tortures et les exécutions furent innombrables, dans un pays où la vie humaine avait soudainement cessé de compter.

Face à cette guerre civile d'une violence inouïe, quelles furent les possibilités d'action du Comité international de la Croix-Rouge?

En vérité, le CICR se trouvait singulièrement démuni. S'il pouvait s'appuyer sur une pratique opérationnelle, développée au cours de la Première Guerre mondiale, celle-ci ne s'appliquait qu'aux conflits entre États; il n'avait pu mener qu'une action étroitement limitée au cours de la guerre civile russe et lors de la révolution hongroise

du printemps 1919. Lorsqu'éclate la guerre civile espagnole, le CICR ne dispose ni d'un appareil administratif ni d'un corps de délégués expérimentés. En outre, les bases juridiques sur lesquelles il pourrait ancrer son action sont extrêmement ténues. Les Conventions de Genève et de La Haye sur lesquelles il avait appuyé son action par le passé ne s'appliquent qu'aux conflits entre États et les adversaires espagnols, malgré quelques professions de foi initiales, refuseront de se reconnaître liés par ces traités, comme ils refuseront obstinément de mettre en œuvre le mécanisme classique de la reconnaissance de belligérance, qui aurait permis l'application de la plus grande partie du droit de la guerre et dont les circonstances matérielles du conflit auraient pleinement justifié la mise en place. Le CICR ne peut donc appuyer son action que sur la résolution XIV de la Xe Conférence internationale de la Croix-Rouge, réunie à Genève en 1921. Toutefois, si cette résolution, intitulée « *La Croix-Rouge et la guerre civile* », l'autorise à offrir ses services aux parties au conflit, elle n'est pas une source d'obligations pour les belligérants.

Enfin, les principes d'humanité, d'impartialité et de neutralité, sur lesquels le CICR fondait traditionnellement son action, sont rejetés par les belligérants. Le gouvernement républicain n'accepte pas d'être placé sur le même pied que les insurgés, alors que ceux-ci ne comprennent pas que le CICR traite avec les autorités républicaines, auxquelles ils dénient toute légitimité. Si les traditions humanistes dont se réclament les principaux dirigeants de la République, notamment le président Azana et le premier ministre Largo Caballero, les rendent réceptifs au message humanitaire du CICR, ce n'est en revanche le cas ni des partis d'extrême gauche, qui accaparent l'essentiel du pouvoir en zone républicaine dès le coup d'État du 18 juillet, ni surtout des dirigeants de l'Espagne nationaliste, pour qui on ne saurait mettre sur le même plan la vie d'un « *caballero* » et celle d'un « *bandit rouge* ». Le mépris de l'adversaire est partie intégrante de l'idéologie fasciste dont se réclament les généraux factieux et les dirigeants de la Phalange.

En dépit de ces obstacles, le CICR prend contact avec la Croix-Rouge espagnole dans les jours qui suivent le coup d'État. Ne recevant pas de réponse et les affrontements se prolongeant, il décide

d'offrir ses services aux autorités espagnoles. Toutefois, une question essentielle se pose dès cette première prise de contact: le CICR offrira-t-il ses services au seul gouvernement reconnu sur le plan international, celui de la République espagnole, au risque de s'interdire toute action dans la zone contrôlée par les insurgés? Offrira-t-il ses services aux deux belligérants, au risque de s'aliéner le gouvernement de la République? Devant la division de fait de l'Espagne en deux zones séparées par un front continu, décision est prise d'envoyer un délégué de part et d'autre du front, si possible avec l'accord du gouvernement républicain, à défaut sans cet accord. Le docteur Marcel Junod, qui vient de rentrer d'une longue mission en Éthiopie, est aussitôt désigné.

Le Dr Junod se rend à Madrid, puis à Burgos. Ayant obtenu l'accord des autorités républicaines et celui de la Junte nationaliste, le CICR envoie des délégués de part et d'autre de la ligne de front: à Madrid, Barcelone, Valence, Bilbao et Santander, du côté républicain; à Burgos et Saint-Sébastien, dans la zone contrôlée par les nationalistes, tandis qu'une délégation est établie à Saint-Jean-de-Luz, en Pays basque français, pour faciliter les échanges et assurer la coordination de l'ensemble. Au total, une quinzaine de délégués – tous en première mission, à l'exception du Dr Junod – seront à l'œuvre en Espagne durant les trente mois que durera la guerre civile.

Quelle sera leur activité ? La première préoccupation est d'assurer la protection des blessés, du personnel de santé et des installations sanitaires, le respect de l'emblème de la croix rouge et de la Convention de Genève. Mais c'est bientôt le sort des prisonniers qui va mobiliser l'attention des délégués. En effet, comme le relève l'un d'eux, en raison des représailles exercées de part et d'autre sur une large échelle, « *les prisonniers sont exposés à des risques plus grands que ceux que courent les combattants* » (p. 276). Pour tenter d'améliorer leur sort, les délégués vont multiplier les visites dans les lieux de détention, dans des conditions précaires, car les entretiens sans témoin avec les captifs ne sont pas autorisés; mettre sur pied d'importants programmes de secours dans les prisons, afin de suppléer aux carences des autorités pénitentiaires, et conduire tout au long de la guerre d'interminables négociations en vue de l'échange de captifs et de leur libération, au

demeurant, avec des résultats fort décevants. Enfin, comme la guerre frappe les civils innocents tout autant que les combattants, le CICR va intervenir en faveur des populations civiles, à travers des programmes de secours, à travers un réseau d'échange de messages familiaux qui sera l'une des principales innovations de la guerre, à travers des projets de zones neutralisées et d'évacuation des civils résidant dans les régions les plus exposées, et surtout à travers son manifeste du 3 novembre 1936 au sujet de la prise d'otages et son appel du 30 mai 1938 contre les bombardements aériens.

Ce sont ces différentes initiatives, ces tâtonnements, ces succès et ces échecs dont témoigne l'ouvrage de Pierre Marqués, en suivant au plus près l'activité des délégués.

Mais surtout, c'est le sort des victimes de la guerre civile espagnole qui retient l'attention de l'auteur. Celui-ci utilise les rapports des délégués, leurs témoignages et ceux d'autres acteurs pour dresser la «*carte humanitaire*» de la guerre. Dans ce sens, cet ouvrage comble une lacune. En effet, comme le relève Pierre Marqués, dans l'immense littérature consacrée à la guerre civile espagnole, le sort des victimes – si l'on excepte l'utilisation que la propagande en a faite de part et d'autre – est à peine pris en compte. Or, les victimes sont au cœur de tout conflit armé, notamment de toute guerre civile, dont elles sont à la fois la conséquence et l'enjeu.

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war and accountability

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