

The Enforcement of International Criminal Law



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Aegis Trust

Aegis was established in 2000. The word Aegis means 'Shield' or 'Protection', reflecting the need to protect people against genocide and crimes against humanity. Aegis activities include: research, policy, education, remembrance, awareness of genocide issues in the media and humanitarian support for victims of genocide.

It works to:

- Research, advocate and campaign for policy reform to prevent genocide and crimes against humanity
- Tackle the root causes of genocide and crimes against humanity by educating young people about the consequences of racism and exclusion
- Support survivors, especially orphans and widows, by helping to rebuild individual lives and communities damaged by genocide

The Aegis Trust is based at the UK Holocaust Centre, in Laxton, Nottinghamshire, where it runs education programmes for young people and professionals. It is also responsible for Education and Memorial Centres in Rwanda, which commemorate the 1994 genocide and play a vital role in educating a new generation about the dangers of ethnic division.

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FOREWORD

Justice Richard Goldstone¹

This is a very timely collection of essays. I commend the thoughtful piece written by Nick Donovan that is too modestly called an "Introduction". It calls attention to some of the key issues facing international criminal justice today.

The theme that runs through all the contributions is the importance of the politics of international criminal justice. International courts, like other international bodies, require the cooperation of states to make them function efficiently and, in some cases, at all. If the political will is absent they will founder.

The topics covered demonstrate how rapidly international criminal justice has developed in the past 15 years since the establishment by the Security Council of the UN Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone. Adopting the terminology of Nick Donovan, the architecture and plumbing of the International Criminal Court (ICC) is taking shape and becoming effective. However, the main structure has to be consistently and efficiently maintained, supported and improved. That will require political will on the part of the major nations that support the Court.

The role of the United States has been a complex one. Without its political and economic power, the UN tribunals would not have been established and would not have succeeded to the extent to which they did. That support continued throughout the Bush Administration. It is highly unlikely that Kofi Annan, the then UN Secretary-General, would have called the Rome diplomatic conference of 1998 without strong US support. Shortly before the conference began, a change in US policy towards the ICC became apparent. It is important to recognize that the ICC has made important strides and is now operating impressively notwithstanding the best efforts, during the early years of the Bush Administration, to strangle it at birth. I am optimistic that the policy of the US has already changed with offers from the Department of State to assist the Prosecutor in areas consistent with US interests. I am optimistic that such cooperation will increase as the new Obama Administration comes into office.

The record of the African states to the ICC is a mixed one. More members of the African states have ratified the Rome Statute than any other region. Three of the four situations accepted by the ICC were referred to the Court by governments. Yet, when an arrest warrant is sought against an African head of state, President Omar Al-Bashir of Sudan, leading African states, with the support of the African Union, have been seeking an order from the Security Council, under Article 16 of the Rome Treaty, to suspend the proceedings relating to the situation in Darfur. Fortunately, in the face of opposition from the US and from major European nations, that appears unlikely to happen. The African Union, some two years ago, requested Senegal to prosecute the Chadian dictator, Hissène Habré. That notwithstanding, the Senegalese authorities appear to have taken no action to do so yet.

It is a matter for regret that only one member of the Arab League, Jordan, has ratified the Rome Treaty. And, there are too few from Asia. The most populous democracy, India, is notably absent. There are still important political hurdles to be overcome and much work remains to be done.

NGOs are entitled to claim credit for many of the successes of international criminal justice. In particular they played a key role at the Rome conference and many important provisions in the Rome Treaty resulted from their lobbying. They continue to actively support the ICC. Their pressure on governments cannot be over-emphasized. Some of the directions for future efforts emerge from this collection of essays.

I salute the Aegis Trust for its continuing support for human rights and international justice. It has played an important role in withdrawing impunity from war criminals and bringing justice and acknowledgement to victims.

1. Justice Richard J. Goldstone is a former Chief Prosecutor of the International Criminal Tribunals for Rwanda and the former Yugoslavia, and was the Chair of the Commission of Inquiry Regarding Public Violence and Intimidation in South Africa.

INTRODUCTION: ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW

Nick Donovan,¹
Aegis Trust

Introduction

In December 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. The sixty year anniversary provides an opportunity to focus on the *punishment** of genocide and other mass atrocities.

Until recently, the emphasis of the international community has been on developing the ‘architecture’ of international law: treaties and tribunals, conventions and courts. By contrast, the ‘plumbing’, those unfashionable tasks of training militaries and judges, police work, apprehension and enforcement, has been neglected. The result is a reasonably comprehensive set of international penal codes, a nascent system of courts and tribunals, but relatively few convictions.

One might ask: few convictions relative to what? How many suspected war criminals and *génocidaires* are there? A definitive answer is impossible. Yet some rough, back-of-an-envelope calculations are available. One estimate of the numbers of perpetrators in the Rwandan genocide was 200,000.² Perhaps 20,000 janjaweed militiamen and military personnel were involved in the killings in Darfur.³ The late 2008 crisis in the eastern Democratic Republic of Congo (DRC) featured an estimated 6,000 members of General Nkunda’s CNDP militia, 6,000-7,000 FDLR Hutu-extremist militia members, approximately 3,500 pro-government Mai-Mai militia, and thousands of DRC government troops.⁴ When these numbers are considered alongside those involved in brutal conflicts such as those in Algeria, Sri Lanka, northern Uganda, Angola, southern Sudan and the former Yugoslavia; the torturers of Burma, Chile and Argentina; and the *génocidaires* and camp guards of Iraq, Guatemala and Cambodia, it is clear that the numbers of those suspected of war crimes and crimes against humanity could run into the hundreds of thousands. Perhaps more importantly, those in positions of command responsibility could, at least, number several thousand.

By contrast, the International Criminal Tribunals for Rwanda and the former Yugoslavia, the Special Court for Sierra Leone, the International Criminal Court and national governments have dealt with a few hundred suspects between them.⁵

This matters. Trials are important for several reasons, as Caroline Flintoft and Nick Grono note in Chapter 2, “The goals of justice include the impact on perpetrators – specifically, their incapacitation and delegitimation, as well as retribution for victims, truth-telling for the affected population as a whole, institutionalisation of human rights norms more broadly and deterrence.”⁶ The failure of enforcement undermines progress

towards each of these goals. Take one example: deterring future perpetrators. In the standard theory of deterrence, derived from studies of national criminal justice systems, three elements, when combined, are expected to deter future criminals: the probability of arrest, the probability of conviction, and the severity of punishment. The studies suggest that the perception of a high chance of getting caught weighs more heavily on a potential criminal’s mind than the severity of the punishment.⁷ This is not just a theoretical proposition: there is some evidence that trials can deter future violations. Statistical analysis of domestic prosecutions of state officials for human rights violations in times of transition and civil war in a wide number of countries has found that trials have a positive effect on human rights outcomes.⁸ For international criminal law to have any deterrent effect, or for it to achieve any of the other goals of justice, far more attention needs to be paid to enforcement.

What is to be done?

Improving the rate of conviction of suspected war criminals is a decades-long task which will require effort in the following areas:

First, further reforms to the legal *architecture* including:

- Further broadening the **conceptual coverage** of international customary and treaty law regarding atrocity crimes, immunities and extra-territorial jurisdiction;
- Expanding the **geographical coverage** of international criminal law; including, but not limited to, ratification and implementation of the Rome Statute of the International Criminal Court (ICC);
- Extending the effective **temporal coverage** of the law through retrospective application of the jurisdiction of tribunals and national courts over acts which were illegal under customary international law at the time.

Second, improvements to the *plumbing* of the international criminal justice system, including:

* Genocide *prevention* can, depending upon the circumstances, require a judicious blend of political deal-making, power-sharing constitutional reforms, diplomatic interventions, mechanisms to promote justice and accountability, sanctions to restrict conflict financing and deter future perpetrators, and, where appropriate, military deterrence to prevent further crimes or peace support operations. A rich and full interpretation of the ‘Responsibility to Protect’ would encompass all these efforts and more. Unfortunately, a full appraisal of the success or failure of the UN and its member states in the prevention of genocide is beyond the scope of the present volume.

- Improvements in the **ability** of national judicial systems to investigate and try suspected war criminals, including by the establishment of specialist war crimes units and judicial chambers;
- An ever-increasing role for the ICC as a catalyst for domestic trials through pursuing a doctrine of **proactive complementarity**;
- Pooled **financing** of national prosecutions of international criminals, to reduce 'free-rider' problems;
- Improved **state cooperation** over the arrest of suspects in the following circumstances:
 - o after crises where the suspects belong to the losing 'side' and have dispersed e.g. suspects from the Rwandan or Nazi regimes. Here, traditional policing methods are often appropriate.
 - o during and after crises when the perpetrators or their allies may still be in positions of power. Here, traditional policing methods are rarely appropriate: the UN Security Council is more often involved than Interpol. In such circumstances, the international community may use:
 - **physical force**. In some crises multi-national forces have been mandated to arrest suspects (e.g. NATO in former Yugoslavia, UNMIL in Liberia).
 - **moral suasion coupled with political and economic pressure**, such as aid conditionality, sanctions or withholding 'club membership' to lever reluctant states to enforce an arrest warrant (e.g. Serbia with Milosevic, Nigeria with Charles Taylor).

And finally, **sustained political will** is required. The preceding list risks reducing the enforcement of international criminal law to a technocratic exercise. It is not. It is an intensely political enterprise. Technical reforms need to be underpinned by a political will strong enough to withstand the strong headwinds created by tight budgets and an increasingly multi-polar world, in which energy security and other narrowly-conceived national interests usually trump human rights as national priorities. The concomitant duty of those arguing for international justice is to be politically savvy when pushing for reforms.

Architecture

Expanding the *effective* conceptual coverage of international law

The Genocide Convention had significant weaknesses...

The strength of the Genocide Convention was that it captured in legal terms, more or less, the horror of the Nazi actions before and during the Second World War. Its weaknesses flow from the very specificity of the Nazi crimes. This limited the Convention's practical use as a definition of a crime which can be used to prosecute individuals suspected of orchestrating other mass

atrocities. First, the Convention linked mass killings to the concept of a few protected identity groups: leading to sixty years of muddle about the inclusion or exclusion of social and political groups; and even to detailed discussions about, for example, whether Hutus and Tutsis were sufficiently well defined as racial or ethnic groups to warrant particular protection. Second, the Convention stressed that the crime had to be committed with the "intent to destroy, in whole or in part,"⁹ the protected group. This has led to protracted debates about how to infer intent from patterns of events, and confusion over whether intent is the same as motive. Such arguments have been almost entirely counter-productive: diverting attention from the more important questions of how to prevent the atrocities and punish the perpetrators. The Genocide Convention's focus on intent and protected groups limits its applicability. In Chapter 3, Leila Sadat notes that "of the more than 100 million civilians killed in the past seventy years, only six to eight million have been within the reach of the [Genocide] Convention, as applied by international courts and tribunals."

...making the adoption of laws against 'crimes against humanity' critically important

Shortcomings in the legal definition of genocide matter less when states are prepared to enforce laws against crimes against humanity. Crimes against humanity are defined in the Rome Statute of the International Criminal Court as a wide range of prohibited acts such as murder, rape, torture and deportation "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."¹⁰ By arguing for a new international convention on crimes against humanity, Leila Sadat recognizes the importance of the concept in creating a legal framework in which mass murderers and rapists can be fairly tried, where prosecutors and defence lawyers can rely upon arguments related to culpability for the acts, rather than inferences about the alleged intent of the suspect, or legal contortions related to definitions of protected groups.

The wider use of extra-territorial jurisdiction is an important part of any strategy aimed at improving the enforcement of international law

It cannot be right that international crimes as serious as genocide or crimes against humanity committed on one side of the border cease to be punishable once the perpetrator steps across an imaginary line, whether drawn by colonial administrators, long-dead kings or the vagaries of a river. In the absence of states enthusiastically pursuing their own citizens and extraditing others, extra-territorial jurisdiction will play an increasingly important part in effectively enforcing international criminal law.

While describing the need for an optional protocol to the Genocide Convention in Chapter four, Sudhanshu Swaroop writes: "There remains a tension in the final text of the Convention. It is not easy to reconcile the general obligation imposed on States by Article I 'to prevent and to punish' genocide with the (arguably) limiting provisions of Article VI." That article states that "Persons charged with genocide or any of the other acts enumerated in article III **shall be tried** by a

competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

During the drafting of the Convention, the Iranian delegation attempted to insert an amendment which would allow the exercise of extra-territorial jurisdiction. Suspects “may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request had been made for their extradition”. The proposal was rejected by, among others, the United States, whose representative described the principle of universal jurisdiction as “one of the most dangerous and unacceptable of principles.”¹¹

Recently, as described in Chapter 7, the US has begun to move beyond that position. The Genocide Accountability Act of 2007 establishes that federal prosecutors can bring charges against individuals in the United States who are alleged to have committed genocide anywhere in the world. Diane Orentlicher proposes that the US Congress should take this one stage further, introducing legislation which allows American courts to try people suspected of crimes against humanity committed overseas who are subsequently found on US territory. In a similar vein, in Chapter 8, Anna Macdonald argues that the UK, which already has extra-territorial jurisdiction for torture and war crimes committed in international armed conflicts, should tighten several loopholes to allow anyone found on British soil (i.e. including visitors and not just residents) to be prosecuted for genocide, war crimes and crimes against humanity.

Both case law and new initiatives such as an optional protocol to the Genocide Convention, the Princeton Principles,¹² and, perhaps, the proposed convention on crimes against humanity will provide some impetus to the spread of extra-territorial jurisdiction. However, both the theory and practice of such jurisdiction are sometimes controversial. Recent arrest warrants for current Rwandan government and military officials issued by France and Spanish investigating judges may, in turn, spark arrest warrants for French nationals by Rwandan judges. The response of the African Union has been to issue a declaration condemning the abuse of the principle of universal jurisdiction.¹³ More such cases, and the accompanying political controversies, seem likely to follow.

Such controversies will be particularly acute when arrest warrants for atrocity crimes are issued for sitting heads of state and senior Government ministers, as occurred in Belgium from 1999 to 2002, when a controversial law allowed cases to be pursued by non-residents against, amongst others, sitting heads of states. Cases followed against Palestinian Authority President Yasser Arafat, Cuban President Fidel Castro, Israeli Prime Minister Ariel Sharon, US President George W Bush and American General Tommy Franks.

Certain immunities exist in customary international law for sitting heads of states and other public officials, even with regard to atrocity crimes

Following the *Pinochet* ruling, former heads of state and other public officials can no longer be said to have immunity from

criminal prosecution in the courts of another country for acts such as torture and genocide committed while in office. (However, this interpretation of customary international law has since been muddied by the International Court of Justice (ICJ) arrest warrant ruling, discussed below). Since the House of Lord’s decision, actions have followed against other former heads of state, including Hissène Habré of Chad (proceedings are to be held in Senegal) and Alberto Fujimori of Peru (extradited from Chile).

What about *sitting* heads of states?

In some treaties, such as the Genocide Convention, the treaties establishing the international tribunals for Rwanda and the former Yugoslavia, and the Rome Statute, immunities against prosecution for serving heads of states and public officials are specifically ruled out for the tribunals envisaged in those statutes.

The erosion of immunities enjoyed by former heads of states has already placed a strain on the international diplomatic order (witness the controversies in the UK over the Pinochet case and in the African Union over the Habré case). The removal of immunities from *sitting* heads of states places the international system under even greater strain. Applications for arrest warrants made by international tribunals, for example for Slobodan Milosevic and Charles Taylor, have a particular legitimacy derived from treaty law. When the arrest warrants are issued for sitting heads of states by the courts of another country, they can run up against customary international law: immunities* can cover acts performed in the exercise of their official function by sitting heads of state, certain Government ministers and diplomats.¹⁴

Do these immunities cover war crimes, crimes against humanity and genocide when courts from one country seek to exercise extra-territorial jurisdiction over the incumbent head of state of another?

The ICJ, in the 2002 *DR Congo v Belgium* ‘arrest warrant’ case, ruled that the incumbent Congolese Foreign Minister was immune from prosecution by Belgian courts seeking to exercise universal jurisdiction over alleged breaches of international humanitarian law.¹⁵ They found that “the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances”:

- Firstly, in the courts of the Minister’s own country;
- Secondly, if the state which the minister represents waives immunity;
- “Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period

* This discussion is, for the sake of brevity, rather over-simplified. For an introduction to sovereign immunities, the Act of State doctrine, the doctrine of *forum non conveniens*, the Vienna Convention on Diplomatic Relations 1961 and a variety of national immunities given to government officials, ministers and Parliamentarians, see Brigitte Stern, “Immunities for Heads of States: Where do We Stand?” in (eds) Mark Lattimer and Philippe Sands QC, *Justice for Crimes Against Humanity*, Hart, 2003.

of office, as well as in respect of acts committed during that period of office in a private capacity.”

- Fourthly, in certain international criminal courts and tribunals, where they have jurisdiction.¹⁶

This ruling has led to judgments by national courts which have interpreted the ICJ ruling so that the circle of immunity which surrounds the sitting head of state includes other ministers. British magistrates have interpreted the ICJ ruling to find that incumbent defence¹⁷ and trade¹⁸ ministers have immunity for alleged war crimes, whilst the German federal prosecutor applied the principle to the vice-president of a regional government – Chechnya, a region of Russia.¹⁹

In the third exception listed in the ICJ ruling, the judges also maintained that *former* foreign ministers (and, by extension, former heads of state) have immunity for acts carried out in their official capacity during their time in office. The ICJ ruling has been used by the German federal prosecutor to refuse to pursue a case against a former head of state.²⁰ One effect of the ICJ arrest warrant case has been confusion: the suggestion by the ICJ that only *private* acts made by former foreign ministers during their time in office could be prosecuted in the courts of other states is simply not consonant with the idea that atrocity crimes cannot be an official act and therefore do not attract immunity from jurisdiction – as established in *Pinochet*.

Care must be taken that the methods used to chip away at these immunities should not undermine the wider goal of enforcing international justice

If one wishes to deter mass atrocities through international criminal law, it will be necessary to keep pushing, through treaty, strategic litigation and pressure on states’ policies, towards the creation of a new norm in customary international law which gradually restricts, and eventually removes, the immunities enjoyed by sitting heads of states and other government ministers.

In the absence of action by the perpetrator’s own state, a tribunal or the ICC, it may fall to a state exercising extra-territorial jurisdiction to initiate proceedings against serving ministers and even heads of state. The consequent strain placed upon diplomatic relations is the necessary price of establishing a new norm in the use of international criminal law to deter mass atrocities.

However, moves towards the eventual aim of an end to impunity must be sustainable: they must not jeopardize the wider project of international justice through provoking a backlash against the exercise of enforcement. Neither the principle of extra-territorial jurisdiction, nor the International Criminal Court and concomitant system of complementarity, have bedded down sufficiently in the international system. Safeguards will be needed to reduce such strain to a minimum, and the creation of a new norm of customary international law needs to be carefully pursued.

Those who oppose extra-territorial jurisdiction and the removal of immunities, even in the case of mass atrocities, put forward several arguments: some relate to the comity of

nations, some to narrowly-defined national interests, while others are founded on the potentially damaging effect on peace negotiations of premature prosecutions.²¹ The latter arguments are discussed sensitively in Chapter 2, by people who care about peace, justice and the establishment of international human rights’ norms. Caroline Flintoft and Nick Grono recognize that, on occasion, “prosecutions will stand as a barrier to realising crucial gains in peace.” In the case of the ICC, this can, as a last resort, justify the use of Article 16 of the Rome Statute to defer a prosecution. In cases where the national courts of one country are seeking the prosecution of a citizen of another, there may also be times when proceeding is not in the public interest: to advance peace, or for reasons of national security.

For these reasons, and for the tactical purpose of allowing the principles and practice of international justice to embed themselves in the international ‘system’, there should be safeguards in place when states (as opposed to international tribunals) combine extra-territorial jurisdiction with the removal of immunities for incumbent heads of states and other ministers or officials. Some of these broader safeguards, relating to double jeopardy, due process norms, settlement of international disputes at the ICJ, and refusing to extradite if there is a risk of torture or the death penalty, are set out in the Princeton Principles on universal jurisdiction (see annex). For the foreseeable future, it would be wise to go slightly further, with three additional safeguards in cases relating to atrocity crimes:

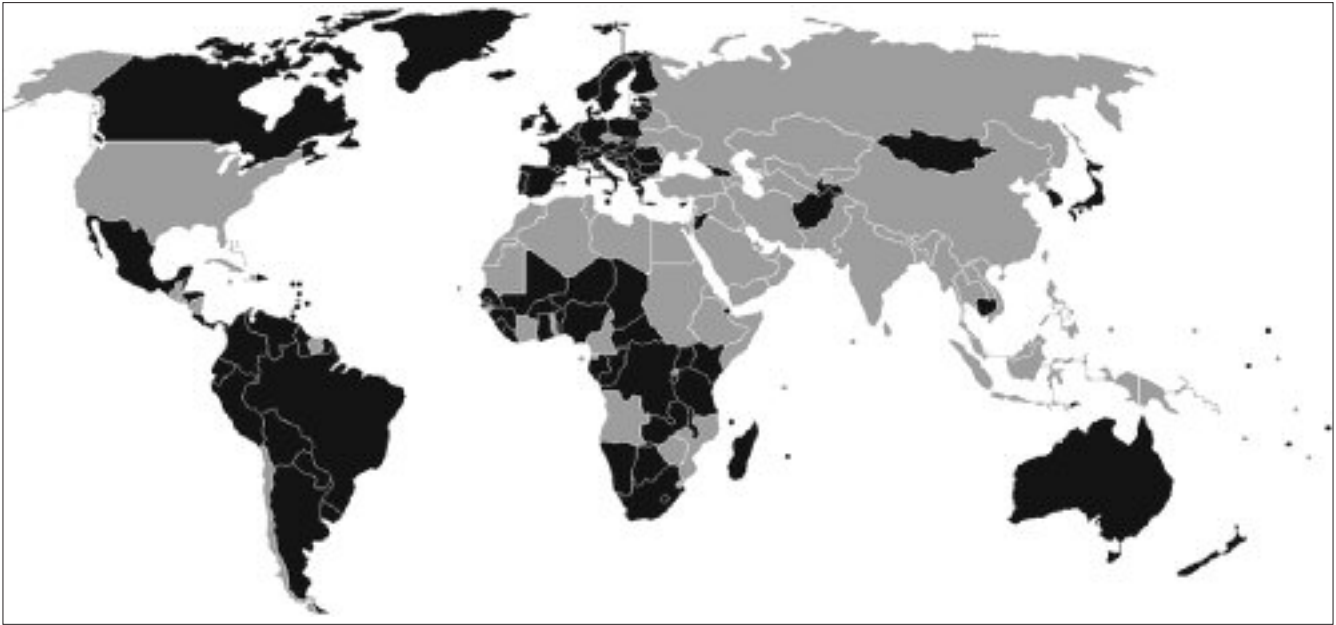
1. Territoriality. There should be a general requirement that the suspect be physically present, or just about to arrive, in a jurisdiction.²²
2. Public interest test. Any prosecution should be subject to a narrowly defined public interest test, limited to concerns of peace and national security, made by an appropriate person.* To ensure that the inevitable political interference is kept to a minimum, this test should be subject to independent judicial review.
3. Extradition where possible, prosecution where necessary. For the purposes of deterrence, truth telling and access to justice, it is preferable that a suspect be tried in the country where the crime occurred. However, when a state is unable or unwilling to prosecute, or where there are serious concerns about the ability of the accused to receive a fair trial, then prosecution should proceed in the jurisdiction where the suspect was found.²³

It is desirable that future cases build a favourable series of precedents which make good case law relating to both extra-territorial jurisdiction and immunities. For example, in the immediate future there is a need to:

- ensure that the hard-won precedent from *Pinochet* that *former* heads of states and ministers no longer enjoy immunities for acts such as torture is not eroded; and

* For example, in the UK this would be the Attorney General; in Belgium the State Prosecutor. It is worth noting that the proposed test would be wider than that performed by the ICC prosecutor, who is limited to assessing whether pursuing a prosecution is in the ‘interests of justice’.

States Parties to the Rome Statute of the International Criminal Court²⁶



- ensure that the circle of immunity around an *incumbent* head of state is not progressively widened by national courts. The British magistrate ruling on an application for an arrest warrant against a sitting defence minister found that, "I would think it very unlikely that ministerial appointments such as Home Secretary, Employment Minister, Environment Minister, Culture Media and Sports Minister would automatically acquire a label of [S]tate immunity. However, I do believe the Defence Minister may be a different matter..."²⁴

With goals such as these in mind, proponents of 'strategic litigation' rightly argue for lawyers and NGOs to choose cases carefully when considering bringing cases in states with extra-territorial jurisdiction. Proposed criteria include: the active support of civil society in the territorial state; legal and practical capacity to prosecute in the state in which the suspect is present; the evidence should be strong and accessible; there are no immunities which would defeat prosecution; and there is broad political consensus (left/right, north/south) that universal jurisdiction is appropriate in the particular case.²⁵ One waits in vain for North Korean leaders to holiday in Spain.

Extending the *effective* geographical coverage of international law

In the realm of rhetoric, there is cause for hope: at the time of writing 139 countries have signed, and 108 countries have become States Parties to, the Rome Statute of the ICC, while 146 countries have ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These are sometimes complemented by domestic laws against atrocity crimes. However, in reality there is just a small archipelago of states with the political will, legal systems and financial resources to enforce international criminal law in any meaningful way. Intense political efforts are needed to ensure universal and effective adoption of domestic laws against atrocity crimes.

The impetus provided by the ratification and implementation of the Rome Statute will not affect all states. Several states may be sympathetic to the adoption of laws against atrocity crimes, but oppose the pooling of sovereignty implied by the Rome Statute. For such states, one eminently sensible way forward is described by Leila Sadat in Chapter three: "Ratification of the proposed convention [on crimes against humanity] could also serve as an interim step to ICC ratification for states such as the United States that support the substantive law of the ICC but are wary of its adjudicative mechanism."

But ratifying and implementing international treaties is only the first step. Trials do not necessarily follow treaties. Even states such as Canada and the US, which are, relatively speaking, able to pursue prosecutions are sometimes reluctant to do so. Sometimes this is for good reasons such as practicability,²⁷ but more usually because of financial pressures or a lack of political will. Effective use of such laws is a political project, requiring intelligent pressure from politicians, NGOs and lawyers.

Expanding the *effective* temporal jurisdiction of international law

Retrospective application of jurisdiction through reference to customary international law is a key part of any strategy to fill in the gaps in the legal architecture

The principle that there should be no crime without a corresponding law (*nullem crimen sine lege*) helps to protect us from the arbitrary whims of our rulers. It has been incorporated into international human rights law including the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).

The principle of non-retrospectivity was used in the UK House of Lords' ruling on the extradition of General Pinochet. A minority of the Lords argued that as torture was a crime in customary international law, acts of torture were illegal in UK

law even before a specific law was enacted. However, the majority of the Law Lords ruled that acts of torture committed in Chile were not illegal in UK law unless committed after 29 September 1988 (the date of British legislation on torture). Therefore, the double criminality rule²⁸ was not satisfied for the majority of charges: “the decision reduced the number of charges for which Senator Pinochet could be extradited to Spain from many thousands to a single substantive charge of torture and an associated conspiracy charge.”²⁹

If every lawmaker took a similar view on non-retrospectivity, then there would be thousands of suspected war criminals and torturers who could travel with impunity to many jurisdictions. Indeed, as Anna Macdonald describes in Chapter eight, there is a reasonable chance that suspected Rwandan *génocidaires* who have been found in the UK may fall into just such an impunity gap. As their alleged crimes were committed in 1994, they could not be prosecuted, for UK law only provides for limited extra-territorial jurisdiction for acts of genocide committed after 2001.

For precisely this reason, the framers of both the ECHR and ICCPR drafted clauses to allow for the retrospective application of jurisdiction relating to war crimes, crimes against humanity, genocide and other similar crimes, so long as they were recognized as such by customary international law at the time of the offence.³⁰ These clauses have been used by several governments to enact laws with an element of retrospectivity: Senegal,³¹ New Zealand,³² Norway,³³ and the UK.³⁴

Moderate reforms involving retrospective extensions of jurisdiction over war crimes, crimes against humanity and genocide, such as those proposed in the final chapter by Anna Macdonald for the UK, seem a sensible way forward in limiting the impunity enjoyed by *génocidaires*, while keeping in harmony with both the letter of international human rights law and the spirit of the *nullem crimen sine lege* principle.

Plumbing

State cooperation to secure arrests and trials

Cooperation takes two major forms. First: logistical, technical and financial cooperation. Second: international diplomatic support for international justice, including economic pressure and, in narrowly defined circumstances, the use of military forces to support arrests.³⁵

Technical and logistical cooperation is necessary to secure fair trials

Neither national courts seeking to exercise extra-territorial jurisdiction abroad, nor the ICC and international tribunals, have enforcement bodies which can be used to secure arrests. They depend upon cooperation from other states and international organisations. Indeed, in order to ensure a fair trial, this cooperation is not simply limited to arrests and transfers or extradition. Tracey Gurd, in her chapter “Arresting the Big Fish” lists the following forms of logistical and technical cooperation, many of which are applicable to the ICC and national courts alike:

Apart from arrests and transfers, “cooperation” has been defined more broadly by the international courts to include a raft of logistical and practical support during the investigative and prosecution stages of a case. For the ICC, cooperation includes: (1) identifying and disclosing the whereabouts of wanted persons; (2) taking and producing evidence (including expert opinions and reports); (3) questioning any person being investigated or prosecuted; (4) serving documents; (5) facilitating the voluntary appearance of witnesses and experts before the court; (6) temporarily transferring persons; (7) examining places or sites (including the exhumation and examination of grave sites); (8) executing searches and seizures; (9) providing records and documents (including official ones); (10) protecting victims and witnesses and preserving evidence; (11) identifying, tracing and freezing proceeds, property, and assets for the purpose of eventual forfeiture; and (12) any other type of assistance which helps facilitate investigations or prosecutions by the ICC.

In cases where the suspect is on the losing ‘side’ and has absconded, this cooperation is often (relatively) forthcoming. Suspected Rwandan *génocidaires* found in the UK, Germany, Canada, Belgium and France fit into this category. Often, standard police work, together with assistance from Interpol and the state in which the suspect committed the alleged crimes, is sufficient to apprehend and prosecute or extradite the suspect. However, national police forces and prosecutors sometimes raise three interlinked concerns: capacity, cost and political will.

Capacity: the establishment of specialist war crimes units should help to build up the skills and expertise to investigate and prosecute such crimes

Investigations into atrocity crimes, particularly those committed in another jurisdiction, are more complex and resource-intensive than those focused on domestic crimes. The lack of expertise and the resources needed to investigate and prosecute such crimes, committed abroad and sometimes long ago, can be a significant hurdle. The answer chosen by several countries is to establish specialized war crimes units to investigate and, sometimes, also to prosecute such cases. As noted by Jürgen Schurr in Chapter 6, all except two extra-territorial prosecutions have been pursued by countries with specialist units.

Jürgen Schurr also notes that the development of procedural law and practice relating to carrying out investigations abroad lags behind the development of substantive international criminal law: a clear case of the plumbing needing to catch up with the architecture. To help the investigations of extra-territorial crimes, he calls for common procedural standards, in particular around the protection of witnesses, and for cooperation between immigration and police forces.

Cost: funding is a high hurdle in many countries. A pooled fund for international criminal justice should be explored

International criminal justice can be expensive. The British trial of Faryadi Zardad, an Afghan warlord, is reported to have cost £1m (c. €1.15m),³⁷ while Senegal has recently submitted a budget of €28m (a figure widely criticized as being based on invalid assumptions) for the trial of Hissène Habré, the former dictator of Chad.³⁸ Sweden's war crimes investigations unit costs 9m SEK per annum (€960,000m).³⁹

Within national criminal justice budgets, the costs of investigating and prosecuting war crimes are often in direct competition with other priorities, such as terrorism, drugs and domestic organized crime. In developed nations which are willing and able to pursue war crimes trials, such as Canada (which has had a well developed war crimes programme since 1998), the political reality of this competition for funding is that immigration action is much preferred, and trials are a last resort.⁴⁰ In states which are able but less willing to pursue suspects, the result is more likely to be that cases are quietly postponed, or even dropped, in favour of more immediate concerns. In lower-income countries, such as Senegal, the problem becomes even more acute.

These concerns are becoming ever more pressing as the international tribunals wind up their operations. The completion strategies of the International Criminal Tribunals for Rwanda and the former Yugoslavia depend upon being able to transfer cases to national prosecuting authorities.⁴¹ After closure of the ICTR, the costs of prosecuting *génocidaires* will fall upon Rwanda itself, and those states in which the suspects are found.

We term certain acts crimes against *humanity*, yet most of 'humanity' depends upon the willingness of others to pay for international justice. This is a collective action problem: many states are 'free-riders', happy to see such extra-territorial trials go ahead, but unwilling to contribute to the costs if others will do so.

The long-term solution could be some form of pooled funding. The Senegalese prosecution of Hissène Habré is the first example of international financing for an extra-territorial trial held by a nation state (rather than an international tribunal). The next stage could be some shared financing of trials for Rwandan suspects found in the European Union. This could be accessed by those countries who receive cases from the ICTR. The final stage could be to expand the list of donor nations beyond the EU, and the list of eligible cases beyond Rwanda. In future, problems may arise over vexatious arrest warrants issued to further diplomatic disputes. This could perhaps be addressed by setting up a small board of international judges, mandated to decide whether a case was of sufficient gravity and the prosecution had sufficient evidence, to merit the release of funds.

Political will: the ICC may be able to play a role by pursuing 'proactive complementarity'

For Rome Statute signatories, *effective* implementation of the Statute means actively embracing the consequences of its stress on complementarity* by prosecuting suspects who are found on their territory. States cannot rely upon the ICC to end impunity for at least three reasons. First, the ICC is prospective: it cannot prosecute crimes that were committed before 1 July 2002. Second, it can only pursue suspects from States Parties and from any countries in cases which have been referred to the court by the UN Security Council (and nationals from non-States Parties if the crimes were committed on the territory of a State Party – where all other admissibility concerns have been satisfied). Third, even where the ICC has decided to act, its capacity is currently restricted. It currently only has plans to conduct two or three trials per year and a handful of investigations. The ICC was designed to focus on a few strategically chosen cases, potentially leaving many suspects at large.⁴²

The answer, according to some analysts,⁴³ is for the ICC to take on an ever-greater role in acting as a catalyst for domestic war crimes trials: sometimes termed 'proactive' or 'positive' complementarity.

How might this work in practice, with regard to, say, people suspected of crimes in Darfur, Sudan? As of December 2008, arrest warrants have been sought for six individuals in relation to alleged crimes committed in Darfur: the President, one minister, one militia leader and three rebel commanders. Yet thousands of people were needed to carry out the mass atrocities in Darfur. Indeed, in the application for the arrest warrant for President al-Bashir, the ICC prosecutor named at least 20 other senior government ministers and militia leaders who also played a part in the alleged conspiracy.⁴⁴ In an ideal world, these and other mid- and low-level suspects would be subject to some form of transitional justice mechanism by a future Sudanese government. In practice, in the event of a change of regime, many suspects will flee to other states – some have already been found in the UK.⁴⁵ The ICC could monitor their movements and press governments to bring charges against them. Other roles for the ICC could include helping national judiciaries prepare for domestic trials, and providing technical assistance in the adoption of national laws and procedures. Such pressure from the ICC would create a counter-balance to the forces of inertia which are present in every state.

State cooperation in 'hard cases'

In many cases, securing an arrest is difficult because the perpetrator or their allies remain in power. The lack of any formal enforcement mechanism is frequently described as the 'Achilles' heel' of international justice, including the International Criminal Court.⁴⁶ For instance, at one point, 67 publicly indicted war criminals were at large in the former Yugoslavia, threatening the credibility of the ICTY.⁴⁷

* The ICC is designed to complement national justice systems by only acting where states are unwilling or unable to act themselves. See Articles 1 and 17, Rome Statute of the International Criminal Court.

As Tracey Gurd describes so well in Chapter five, “Arresting the Big Fish,” these situations require other forms of state cooperation – in which the UN Security Council is more often called upon than Interpol. The tools available include political pressure, sanctions, conditionality and the use of military force to apprehend suspects.

Using soft power is a necessary, but usually not sufficient, condition to ensure the surrender of suspects from recalcitrant states

“Where states have failed to cooperate with the ICTY’s requests to arrest indicted persons, to produce documents and to lend assistance in the protection of witnesses, the cumbersome remedy of reporting state non-cooperation to the Security Council and having to rely on that body to formulate responses calculated to achieve the expeditious conduct of investigations and trials has been futile.”⁴⁸ This was true in 2004 when reflecting upon the experience of the ICTY, and is as true today as the ICC seeks the arrest of government officials from Sudan for their alleged role in atrocities in Darfur. However, the process of securing non-binding Presidential Statements and legally binding UNSC resolutions is a necessary first step in building political consensus that further measures are necessary.

Further measures, such as sanctions and conditionality relating to aid and club membership, are often necessary to secure arrests

The chances of surrender of a suspect are greatest when external events (such as losing a war or losing elections) combine with an internal challenge to the authority of a suspected war criminal. These internal challenges can, on occasion, be enhanced by damage to the economic and political interests of the small elite surrounding the suspect, caused by well designed sanctions or conditionality linked to aid or club membership.

Where the case involves terrorism, the state harbouring the suspects has no powerful friends, or where one of the great powers spends a lot of political capital, the UNSC can on occasion be persuaded to use Chapter VII authority to impose sanctions linked to the extradition of the suspects.⁴⁹ However, where the suspect is accused of crimes against humanity rather than terrorism, it has been the US and European Union who have most effectively gained sufficient leverage to ensure the surrender of the perpetrator.

Aid conditionality played a key role in the surrender of Milosevic

In the US the McConnell-Leahy law,⁵⁰ which governed US foreign aid, combined with the *War Crimes Prosecution Facilitation Act of 1996*⁵¹ to introduce conditionality to US aid to the countries of former Yugoslavia.[†] The effectiveness of

conditionality can be seen by examining the sequence of events. The *McConnell-Leahy law* initially imposed 31 March 2001 as the deadline for Yugoslavia for cooperation with the ICTY. On 1 April 2001, Milosevic was arrested. In June 2001, and only after the successful transfer of Milosević to The Hague, more than \$1.28 billion (USD) was pledged by the United States and its European allies to the former Yugoslavia. There were many other factors (Serbian elections, allegations of corruption, a legacy of lost wars) in Milosević’s loss of power, but conditionality played an important role in his arrest and subsequent surrender to the ICTY.

There may be a place for aid conditionality in the future. However, it should be recalled that the Balkan states were middle-income countries, with few other sources of external revenue. The ending of military aid to a particular country may be relatively uncontroversial, while linking humanitarian aid to arrests would almost always be inappropriate, but what of other forms of aid? Careful consideration would need to be given to the linking of development projects or budget support to arrests, particularly in the case of low-income and oil-exporting countries:

- effectiveness. Will conditionality work if other sources of hard currency (such as oil exports or ‘no-strings-attached’ aid from China) are available? Will conditionality work if the targeted state needs the cooperation of neighbouring countries and other organizations?
- unwanted outcomes. What would be the effect on the recipients of such aid? Would adverse effects outweigh the potential gains from removing a particular figure from a position of power or apprehending a suspect in hiding? Here the long-term outcomes may differ from the short-term effects. Conditionality may bring short-term economic hardship, but would the long-term effect of removing indicted leaders from office be increased investment and growth, or might it provoke further political uncertainty?

Conditionality related to ‘club membership’ was effective in the Balkans

One of the conditions some European Union members have set for Balkan states to accede to the EU is full cooperation with the ICTY. This has been an important factor in securing the arrest of many suspects including, most recently, former Bosnian Serb leader Radovan Karadzic. Until 2006, NATO also conditioned membership of its ‘Partnership for Peace’ upon cooperation with the ICTY.

Given that many clubs are open to all in a geographic area, such conditionality will be of limited applicability in the future. However, there may be some scope in the future to link membership of the Commonwealth and, perhaps, NATO, to the enforcement of international criminal law. Both the Commonwealth (Fiji, Pakistan) and the African Union (Mauritania, Guinea) have suspended members following *coups d’état*. Suspension may be a tactic which proves effective in the future.

† Humanitarian aid was unaffected.

Targeted sanctions can play a role in a wider strategy

In response to the bombing of Pan Am flight 103 over Lockerbie, Scotland, the UNSC first passed resolution 748 in 1992. This urged the Libyan Government to extradite two suspects, failing which sanctions would be imposed that embargoed Libya's civil aviation and military procurement efforts, and required all states to reduce Libya's diplomatic presence. UNSCR 883, adopted in November 1993, imposed further sanctions against Libya for its continued refusal to comply with UN Security Council demands. UNSCR 883 included a limited assets freeze and an oil technology ban, and it also strengthened existing sanctions.⁵² Eventually, when combined with other developments, these sanctions played a role in the surrender of the two suspects.

Targeted sanctions, such as travel bans and asset freezes, can be an appropriate response to states which refuse to surrender suspects, so long as they are part of a wider strategy. Sanctions can be interpreted by their targets as a weapon of strength or of weakness. In order to maximize their effectiveness:

- Sanctions should be designed to change policy, not effect regime change. Sanctions need a clear policy objective. This can be to deter a state from carrying out a certain action or to compel a state to follow another course.
- Sanctions should have a dual impact – both an economic effect and also sending a strong political signal.
- Following from this, sanctions should be part of a wider strategic framework of incentives. Both carrots and sticks must be offered; other measures (legal, military, political and diplomatic) must be employed, and those involved must have the ability to escalate (and de-escalate).
- Sanctions should have multilateral support – both to buttress the political signal and to improve their enforcement.

It has even been suggested that an international task force, consisting of UN member states, elements of the international tribunals, UN bodies and the international financial institutions (IFI), be set up to investigate, track and make recommendations about the seizure of assets of suspects and their key allies.⁵³ For example, there is a strong case for the forensic investigation of, and imposition of sanctions on, those individuals and businesses which sustain the small elite surrounding those indicted by the ICC for alleged crimes in Darfur.⁵⁴

On occasion it is necessary to mandate the use of military force to capture suspects

Where a UN Transitional Administration is established, these bodies have typically been authorized to arrest and detain war criminals (alongside performing other criminal justice functions). The administrations are endowed with broad enforcement powers, since they temporarily replace local

authorities, as in East Timor (UNTAET) and in Kosovo (UNMIK/KFOR). In some instances, UN peacekeeping missions and regional organizations such as NATO have also been mandated to effect the arrest of suspected war criminals (see box). The chequered relationship between NATO and the ICTY led to several proposals for reform such as a UN constabulary,⁵⁵ or the establishment of an international arresting team made up of gendarmes rather than military personnel.⁵⁶

International military involvement in apprehension

UNOSOM II in Somalia

In 1993, the Security Council, following attacks by Somali militiamen against UN personnel, authorized all necessary measures against those responsible for the armed attacks, including their 'arrest and detention for prosecution, trial and punishment'.⁵⁷ Eighteen American soldiers and many Somali civilians were killed during an abortive mission to detain a General Aidid, a militia leader. In 1994, the UNSC revised UNOSOM II's mandate to exclude the use of coercive methods. Aidid was never arrested.⁵⁸

NATO and the ICTY in former Yugoslavia

For many months after the establishment of the ICTY, only one detainee, Dusko Tadic, was in custody. This was due to open hostility from the Serbian Government and Bosnian statelet of Republika Srpska and only fitful cooperation from Bosnian- and Croat-controlled areas. The lack of enforcement seemed to threaten the credibility of the court.⁵⁹ The arrival of the NATO-led IFOR robust peacekeeping force did not initially change the situation. While the Geneva Conventions, Security Council resolutions 827 and 1031, the Dayton Peace Agreement and even the Genocide Convention provided legal cover for cooperation with the ICTY, including arrests, little was done on the ground.⁶⁰ The North Atlantic Council (NATO's political body) adopted a policy that instructed troops only to detain suspects if they encountered them in the execution of its assigned tasks. They did not. This was due to fears about the repercussions of arrests and of mission creep. (This was at a time when memories of the deaths of American soldiers in Mogadishu were still fresh in people's minds.⁶¹) It was not until the coming to power of a new government in the UK, and journalists and NGOs pointing out that NATO troops were turning a blind eye to the presence of suspects sitting openly in cafes, that the situation changed.⁶² The growing use of sealed indictments provided a degree of operational secrecy, and the success of the UN administration of eastern Slavonia in 1997 in arresting one suspect without any public order or political repercussions, emboldened NATO leaders. More arrests in Bosnia followed, executed by SFOR (IFOR's successor).

UNMIL in Liberia, Sierra Leone and the Special Court for Sierra Leone

In 2005, UN Security Council resolution 1638 explicitly mandated UNMIL, the UN peacekeeping force, to arrest

former President Charles Taylor, if he should return to Liberia from exile in Nigeria.⁶³ The eventual arrest of Charles Taylor was enabled by many other factors, not solely the use of military force. However, the explicit authorization of the use of force by a UN peacekeeping operation helped to keep this politically-delicate manoeuvre at arms-length from the newly elected Liberian administration of Ellen Johnson-Sirleaf. In 2006, she requested Taylor's return to Liberia. He was detained by the Nigerian Government and transferred to Liberia, where he was arrested by UNMIL forces and then taken by helicopter to Freetown and placed in the custody of the Special Court for Sierra Leone.

In the future, it will remain rare to mandate peace support operations (PSO) with the task of detaining suspects. Many PSOs are not in secure control of their zones of operation; instead they co-exist with a range of rebel and government forces, and attempt to achieve a wide range of tasks, many of which are both more important and urgent than the apprehension of suspects. Indeed, the mere suggestion that the peace support operation would be tasked with such a mission may jeopardize its deployment, potentially affecting related humanitarian and political functions. Unless the force has the consent of forces on the ground (Liberia), or an overwhelming military advantage (Bosnia), it will simply be counter-productive to assign it the task of arresting suspects.

Extra-territorial abductions should have no place in enforcing international justice

There have, on occasion, been proposals for the use of force to effect arrests, including actions outside of the normal bounds of state cooperation on extradition or transfer to a tribunal. Such proposals include: state-sanctioned abductions of war criminals,⁶⁴ or even the use of private individuals acting as bounty hunters.⁶⁵ This is not a theoretical concern:

- in 1960 Israeli agents kidnapped Adolf Eichmann from Argentina to stand trial in Jerusalem;
- in 2000 unknown men, whom some allege to have been bounty hunters, kidnapped Dragan Nikolic from Serbia and deposited him with S-FOR soldiers in Bosnia. He was then transferred to stand trial at the ICTY;⁶⁶
- in 1999, Abdullah Öcalan, the leader of the Kurdish PKK, was abducted in Kenya and transferred to Turkey.
- since the 2001 attacks on the World Trade Centre in New York, the issue of extraordinary rendition of terrorist suspects has been the subject of intense public and legal debate.

On several of these occasions, including in the Eichmann and Nikolic trials, judges have chosen not to rule on potentially

* Where courts are prepared to hear criminal proceedings without regard to the circumstances in which the defendant was produced for prosecution. Any irregularities occurring outside the jurisdiction were considered irrelevant to the power of the court to try an offender lawfully arrested within the jurisdiction.

illegal acts outside their jurisdiction, resorting to the '*male captus, bene detentus* rule'.^{*} Indeed, the ICTY Appeals Chamber explicitly ruled that the danger of injustice through not enforcing international criminal law was greater than the damage to the sovereignty of other states:

"...the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved."⁶⁷

Other judges have found that abduction violates the suspect's due process rights and brings the criminal justice system into disrepute. Others argue that abduction is incompatible with human rights law, as represented by the ECHR and ICCPR.⁶⁸ Judges have sought to balance the wider need to enforce the law with a range of narrower considerations about the particular case: did the abduction involve violence to the suspect amounting to cruel or inhumane treatment? How grave were the offences allegedly committed by the suspect? What was the opinion of the state in which the suspect was abducted (offended e.g. Argentina in the case of Eichmann, or indifferent e.g. Kenya in the case of Öcalan)?

Finally, it must be added that resorting to abduction, whether by state agents or bounty hunters, is simply bad *strategy*. It was acceptable – just – when Eichmann's abduction was the exception to the rule. It may be acceptable if the injured state does not object. But if abduction becomes the rule rather than the exception, then the political environment will change rapidly. How are advocates of international justice supposed to persuade China, India, Russia or the USA to cooperate or even sign and ratify the Rome Statute of the International Criminal Court if there is a risk that suspects might be abducted from their territory? Even if only for this reason, judges at the ICC and elsewhere would do well to make clear that the *male captus, bene detentus* rule has little or no role in the enforcement of international criminal law.

Conclusion

International justice may be entering a more hostile political environment. First, an 'axis of sovereignty' – India, China, the USA and Russia – steadfastly resist what they characterize as external interference in their own affairs. On occasion, this impulse extends to defending the sovereignty of countries which host suspected *génocidaires* and war criminals. Second, the search for energy security will increasingly affect

international relations, joining other narrowly defined national interests in drowning out calls to respect human rights. Third, the global financial crisis and ensuing recession will put pressure on domestic budgets. Prosecuting foreign war criminals will not be high on the list of priorities of many national governments.

International criminal justice needs to be seen as a political project: advancing on too many fronts at once may lead to failure. Simultaneously arguing for greater financing, extra-territorial jurisdiction, erosion of head of state immunities, domestic law reform, widespread use of the *male captus, bene detentus* rule, inserting justice demands into complicated peace negotiations, retrospective application of jurisdiction, and introducing conditionality into overseas aid risks creating an unholy coalition of opponents, ranging from peace negotiators, aid workers, and international diplomats to taxpayers, peacekeepers and international jurists, in addition to the expected opposition from tyrants and Henry Kissinger. International justice advocates need a strategy which prioritises the many necessary reforms.

The purpose of this overview has been to highlight some of the reforms (such as pooled financing, specialist units, a new treaty on crimes against humanity, an optional protocol to the Genocide Convention, and an increased role for the ICC in catalyzing domestic convictions) which could improve the enforcement of international justice. The 'plumbing' of international justice requires much more work than the 'architecture'. But work on both will need to be undertaken by politicians who are convinced of the worth of international justice, and reassured that safeguards are in place to mitigate some of the perceived risks.

Notes

1. Nick Donovan is Head of Campaigns, Policy and Research at the Aegis Trust. I am grateful for the valuable comments on an earlier draft from Diane Orentlicher, Susan Kemp, Caroline Flintoft, Nick Grono and Gabriël Oosthuizen. All errors of fact, judgment and interpretation remain my own.
2. Scott Straus, "How many perpetrators were there in the Rwandan genocide? An estimate," *Journal of Genocide Research*, 6(1), March 2004, pp. 85–98.
<http://www.polisci.wisc.edu/users/straus/Straus%20JGR%202004.pdf> (last accessed December 2008).
3. Human Rights Watch, Sudan: Janjaweed Camps Still Active, <http://www.hrw.org/english/docs/2004/08/27/darfur9268.htm> (last accessed December 2008).
4. BBC News, Plea to halt DR Congo atrocities, <http://news.bbc.co.uk/1/hi/world/africa/7737013.stm> (last accessed December 2008).
5. As of December 2008, the International Criminal Tribunal for the former Yugoslavia (ICTY) has, in some way, dealt with 133 cases; the International Criminal Tribunal for Rwanda has dealt with 73 (2 released after indictment was withdrawn); the Special Court For Sierra Leone 11 (including Foday Sankoh, who was arrested but died before a case could be made) and the Extraordinary Chambers of the Courts of Cambodia 5. In chapter 6, Jürgen Schurr refers to at least twenty extra-territorial convictions by, mostly European, states for serious international crimes, including torture. Human Rights Watch report that, as of October 2006, the special war crimes chambers in Bosnia had issued 18 indictments covering 32 suspects, "Narrowing the Impunity Gap," Human Rights Watch, February 2007.
6. Mark Lattimer and Philippe Sands list eight justifications for international criminal justice: providing justice for victims, establishing truth for reconciliation, providing an alternative to vengeance, distinguishing individual from group responsibility, removing criminals from power, deterring future crimes, supporting the rule of law, and filling the enforcement gap created by the advance of human rights and humanitarian norms. See Introduction, in (eds) Mark Lattimer and Philippe Sands QC, *Justice for Crimes Against Humanity*, Hart, 2003.
7. For a recent description of the debate, see Silvia M. Mendes, "Certainty, Severity, and Their Relative Deterrent Effects: Questioning the Implications of the Role of Risk in Criminal Deterrence Policy," *Policy Studies Journal*, Vol. 32, 2004.
8. Hunjoon Kim and Kathryn Sikkink, "Do Human Rights Trials Make A Difference?" <http://www.polisci.umn.edu/~mirc/paper2007-08/fall/Kim&Sikkink.pdf> (last accessed Jan 2009).
9. Article 2, Genocide Convention.
10. See Article 7, Rome Statute.
11. John Maktos, US representative to the Ad Hoc Committee of the ECOSOC (which played a key role in the drafting of the Genocide Convention).
12. See (ed.) Stephen Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, Penn, 2004.
13. See <http://www.africa-union.org/root/UA/Newsletter/Summit%20Assembly%20decisions%20English.pdf> (last accessed December 2008).
14. For example, see Lord Steyn's opinion in Pinochet, 25 November 1998: "It is common ground that a head of state in office has an absolute immunity against civil and criminal proceedings in the English courts."
15. *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (International Court of Justice, General List No 121, 14 Feb 2002).
16. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium, Paragraph 61. <http://www.icj-cij.org/docket/files/121/8126.pdf> (last downloaded January 2009).
17. Israeli Defence Minister Shaul Mofaz. Colin Warbrick, "Public International Law: immunity and International Crimes in English Law," *International and Comparative Law Quarterly*, 53:769-774, Cambridge University Press, 2004.
18. Bo Xilai, the Chinese Trade Minister. See "Universal jurisdiction in Europe: The State of the Art," Human Rights Watch, 2006, p. 27 <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf> (last accessed November 2008).
19. Amnesty, Germany, "End Impunity through Universal Jurisdiction," 2008, p. 103.
20. Amnesty, Germany, "End Impunity through Universal Jurisdiction," 2008.
21. Henry Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny," *Foreign Affairs*, July / August, 2001.
22. This is consistent with, but more restrictive than, Principle 1 (2): "...provided the person is present before such judicial body." See "Commentary, Princeton Principles," in (ed) Stephen Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, Penn, 2004.
23. In the Princeton Principles, no formal ranking is given when considering which jurisdiction should take precedence.
24. Israeli Defence Minister Shaul Mofaz. Colin Warbrick, "Public International Law: immunity and International Crimes in English Law," *International and Comparative Law Quarterly*, 53:769-774, Cambridge University Press, 2004.

25. See Reed Brody, "Using Universal Jurisdiction to Combat Impunity," in (eds) Mark Lattimer and Philippe Sands QC, *Justice for Crimes Against Humanity*, Hart, 2003, and "Belgium Curtails Anti-Atrocity Law Under US Pressure," ACLU International Civil Liberties Report, at http://www.sdshh.com/ICLR/ICLR_2003/12_Brody.pdf (last accessed 1 December 2008).
26. Correct as of January 2009, Wikimedia commons.
27. Terry M Beitner, "Canada's approach to file review in the context of war crimes cases," Paper given at Forum for International Criminal and Humanitarian Law, International Peace Research Institute 2008.
28. In UK extradition cases, the crime has to be an offence in both jurisdictions.
29. Clare Montgomery, "Criminal Responsibility in the UK for International Crimes, Beyond Pinochet," in (eds) Mark Lattimer and Philippe Sands QC, *Justice for Crimes Against Humanity*, Hart, 2003.
30. See Article 7 (2), ECHR. "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."
31. Senegal amended its constitution to permit retrospective application of jurisdiction: "The constitutional amendment says that the principle of the non-retroactivity of criminal law does not bar the prosecution of acts 'which, when they were committed, were criminal according to the rules of international law relating to genocide, crimes against humanity and war crimes.'" Human Rights Watch press release 22 July 2008, <http://www.hrw.org/en/news/2008/07/22/senegal-government-amends-constitution-pave-way-hiss-ne-habr-trial> (last accessed 4 December 2008).
32. "The offences came into force on 1 October 2000, with genocide and crimes against humanity being given limited retrospective application." Juliet Hay, "Implementing the ICC Statute in New Zealand," *Journal of International Criminal Justice*, pp. 191–210, 2004.
33. As reported in "Redress and African Rights, Extraditing Genocide Suspects From Europe to Rwanda: Issues and Challenges," (last accessed 2 December 2008) http://www.redress.org/documents/Extradition_Report_Final_Version_Sept_08.pdf
34. War Crimes Act 1991, which retrospectively gave UK courts jurisdiction over war crimes committed in Nazi-occupied Europe.
35. See Tracey Gurd, Chapter 5.
36. See Beitner op cit and Sir Ken Macdonald QC, "Our Haven for War Criminals," *Guardian*, 8 November 2008, <http://www.guardian.co.uk/commentisfree/2008/nov/08/comment-and-debate-war-crimes> (last accessed December 2008).
37. Reported by a participant in Chatham House event, November 2008, see http://www.chathamhouse.org.uk/files/12483_il091008.pdf (last accessed December 2008).
38. Human Rights Watch Q&A on the trial, <http://www.hrw.org/en/news/2008/09/01/q-and-hiss-ne-habr-case> (last accessed December 2008).
39. *Redress, EU Update on International Crimes*, Issue 4, summer 2008. <http://www.redress.org/publications/EU%20Report%20Vol%204%20July%202008.pdf> (last accessed December 2008).
40. See Beitner, op cit.
41. Erik Møse, "The ICTR's Completion Strategy – Challenges and Possible Solutions," *Journal of International Criminal Justice* 6(4): 667-679, 2008.
42. See <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081023/text/81023w0015.htm#08102335004247> (last accessed December 2008).
43. William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice," Public Law and Legal Theory Research Paper Series, Research Paper No. #07-08.
44. See <http://www.icc-cpi.int/library/cases/ICC-02-05-157-AnxA-ENG.pdf> (last accessed December 2008).
45. "We burnt their homes and killed all the men, women and children," *The Times*, 16 October 2006, <http://www.timesonline.co.uk/tol/news/world/article604278.ece> (last accessed December 2008).
46. See, for example, Han-Ru Zhou, "The Enforcement of Arrest Warrants by International Forces, From the ICTY to the ICC," *Journal of International Criminal Justice* 4, 2006, pp. 202-218; and Richard Dicker, speech given on the occasion of the 10th Anniversary of the Rome Statute of the International Criminal Court, Human Rights Watch, July 2008. Accessed on 30 November 2008 http://www.iccnw.org/documents/Dicker_speech_10th_anniversary_of_the_Rome_Statute_07.03.08.pdf
47. Richard Goldstone et al, *Making Justice Work*, Twentieth Century Fund, 1998, p.25.
48. Mark B. Harmon and Fergal Gaynor, "Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings," *Journal of International Criminal Justice* 2(2), 2004, pp. 403-426.
49. See Annalisa Ciampi, "Current and Future Scenarios for Arrest and Surrender to the ICC," Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2006, (last accessed 2 December 2008) http://www.zaoerv.de/66_2006/66_2006_3_a_719_736.pdf: For Libya: see UNSCRs 748, 883; for Sudan: UNSCRs 1044, 1054; and for Afghanistan: UNSCRs 1267 and 1333.
50. Section 594 of the Foreign Operations Appropriations Act 2001, see Tracey Gurd, chapter 5.
51. Known informally as the "Lautenberg provisions", see Tracey Gurd, chapter 5.
52. Annalisa Ciampi, "Current and Future Scenarios for Arrest and Surrender to the ICC," Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2006, (last accessed 2 December 2008) http://www.zaoerv.de/66_2006/66_2006_3_a_719_736.pdf
53. Harpinder Collacott, "International Criminal Tribunals and State Cooperation," 2007, p.59. Private paper for Open Society Justice Initiative. Copy on file with author.
54. International Crisis Group: <http://www.crisisgroup.org/home/index.cfm?id=3060&l=1> (last accessed 2 December 2008).
55. S. Mendlovitz and J. Fousek, "A UN Constabulary to Enforce the Law on Genocide and Crimes against Humanity," in (ed.) N. Riemer, *Protection Against Genocide: Mission Impossible?* Westport, CT: Praeger, 2000, pp. 105-122.
56. See MMLA Hendrickx, "An Operational Blueprint for Arresting War Criminals; a Low Risk and a High Risk Scenario," and Dick A. Leurdijk, "Arresting War Criminals: the Establishment of an International Arresting Team: Fiction, Reality, or Both?" in (eds) WAM van Dijk and JI Hovens, *Arresting War Criminals*, Royal Dutch Constabulary, 2001.
57. United Nations SC Res. 837, 6 June 1993.
58. Micaela Frulli, "A Turning Point in International Efforts to Apprehend War Criminals: The UN Mandates Taylor's Arrest in Liberia," *Journal of International Criminal Justice*, 2006, pp 351-361.

59. Gavin Ruxton, "Present and future record of arresting war criminals: the view of the Public Prosecutor of ICTY," in (eds) WAM van Dijk and JI Hovens, *Arresting War Criminals*, Royal Dutch Constabulary, 2001.
60. For a description of the legal framework in which arrests could be made, see Diane Orentlicher, "Responsibilities of States Participating in Multilateral Operations with Respect to People Indicted for War Crimes," in Richard Goldstone et al, *Making Justice Work*, Twentieth Century Fund, 1998.
61. Charles Trueheart, "A new kind of justice," *The Atlantic Monthly*, Apr 2000.
62. See (eds) WAM van Dijk and JI Hovens, *Arresting War Criminals*, Royal Dutch Constabulary, 2001; The Coalition for International Justice Whereabouts List, reproduced in Richard Goldstone et al, *Making Justice Work*, Twentieth Century Fund, 1998, Appendix 12; and Chuck Sudetic, "The reluctant gendarme," *The Atlantic Monthly*, Apr 2000.
63. Micaela Frulli, "A Turning Point in International Efforts to Apprehend War Criminals: The UN Mandates Taylor's Arrest in Liberia," *Journal of International Criminal Justice* 4, 2006, pp 351-361.
64. See Beverley Izes, "Drawing Lines in the Sand: When State-sanctioned Abductions of War Criminals Should Be Permitted," 32 *Columbia Journal of Law and Social Problems* 1, 1997, pp. 14-15; and Gregory S. McNeal, and Brian Field, "Snatch-and-Grab Ops: Justifying Extraterritorial Abduction," Case Legal Studies Research Paper No. 07-03, *Transnational Law & Contemporary Problems*, Vol. 16, No. 2, 2007.
65. Christopher M Supernor, "International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice," *Air Force Law Review* 50, 2001, pp. 215-223.
66. See Prosecutor v. Dragan Nikolic: Decision on Defense Motion on Illegal Capture (5 June 2003), ICTY. It is similarly alleged that, in 1998, Stevan Todorovic was abducted within Serbia and transferred to SFOR forces in Bosnia.
67. Cited in Robert J Currie, "Abducted Fugitives Before The International Criminal Court: Problems and Prospects," *Criminal Law Forum* 18, 2007, pp. 349-393.
68. See, for instance, *United States v. Toscanino*, 500 F.2d 267 (Ct. App. 2nd Circ., 1974), p. 274 and Louise Arbour, "In our Name and On our Behalf," speech given to Chatham House, 2006: "The entire system of abductions, extra-legal transfers and secret detentions is thus a complete repudiation of the law and of the justice system. No State resting its very identity on the rule of law should have recourse or even be a passive accomplice to such practices." http://www.chathamhouse.org.uk/files/3375_ilparbour.pdf (last accessed December 2008).

THE POLITICS OF ENDING IMPUNITY

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Introduction

The pursuit of international justice for perpetrators of atrocity crimes necessarily has political implications – from shifting the balance of power within a country, to requiring other states to cooperate when doing so may adversely affect their own interests, to confronting both international and domestic actors with the undesirable task of weighing the benefits of peace against the costs of impunity. Not all of these issues are present in every case, but few, if any, international prosecutions escape controversy. And the more closely international investigations and indictments follow on the heels of atrocities, the more likely they are to generate political challenges.

Yet this more swift international justice is also what we are starting to see more often, particularly with the work of the International Criminal Court (ICC). Instead of delaying justice for years after the end of deadly conflict, or allowing impunity to prevail permanently, the ICC can inject criminal accountability into the equation immediately. This is true both for the situations into which the Court has already opened formal investigations and for those that could end up in that category. But prioritising justice in this way still leaves a lot to be done to actually achieve it. The political dilemmas it can raise, as we have seen most starkly in Sudan and Uganda, are substantial.

Thus, it is important to understand how the pursuit of international justice can affect situations of ongoing (or recent) conflict and to have a framework for addressing the difficult issue of determining when, in the case of a true clash between peace and justice, the latter should give way. This paper aims to outline these issues, looking in particular at certain situations in which the ICC has been active.²

Pursuing justice and advancing peace

When mass atrocities have been committed, or are underway, one of the most important tools the international community has to try to stop or contain them is the threat that the individuals responsible will be prosecuted and spend the rest of their lives in prison. The effectiveness of this tool depends primarily on its credibility, and then on a host of other, often context-specific considerations that influence the calculations of the actors involved.

Effectiveness also depends in part on what you are hoping to achieve. Beyond the ultimate prize of bringing a sustainable end to deadly conflict – a complex and resource-intensive task, which requires much more than justice alone – international prosecution can have a range of shorter-term impacts. Any attempt to draw up a comprehensive list of these will, of course, fall short, as the situations are too diverse and the number of international prosecutions to date too limited. Yet there are a few notable examples of how the ICC's unwavering pursuit of those most responsible for atrocities can advance peace.

Getting perpetrators to the table and justice on the agenda

The ICC's prosecution of the leadership of the Lord's Resistance Army (LRA) has played a positive role in helping to transform the conflict in northern Uganda.³ While the impact should not be overstated, the four-year-old investigations appear to have encouraged and reinforced a series of regional developments that by early 2008 had produced a significantly improved security situation and a robust peace process. While those security gains are not guaranteed – as demonstrated by a wave of attacks in late 2008 in north-eastern Congo and elsewhere in the region by reported LRA rebels – and the possibility of a final peace deal has been fading since the LRA's elusive and paranoid leader Joseph Kony repeatedly failed to sign the final agreement, the changes on the ground in northern Uganda are remarkable.

For the previous 20 years, the people of northern Uganda suffered tremendously because of the vicious actions of the LRA rebels and brutal response of the Ugandan Government.⁴ Yet in the last two years, a sustained peace process between the LRA and Ugandan Government, mediated by the Government of Southern Sudan, took hold and the humanitarian situation has improved considerably. A landmark cessation of hostilities agreement in August 2006 removed most LRA combatants from Uganda, allowing hundreds of thousands of war-weary civilians to begin the process of resettlement and redevelopment. By June 2008, around 900,000 of the total estimated population of 1.8 million displaced had returned to their original villages, while another 460,000 had left the camps for transit sites.⁵ The LRA has largely abandoned northern Uganda as a field of operation (though it was reported to be engaged in a frightening escalation of atrocities in neighbouring countries in late 2008, and the armies of Uganda, DRC and South Sudan launched a joint offensive against the rebels in December).⁶

The progress from 2006 to 2008 followed the announcement in January 2004 that the Ugandan Government had made the first state party referral to the ICC, and the unsealing in October 2005 of the Court's first arrest warrants – for five leaders of the LRA, including Kony.⁷ The ICC's intervention in northern Uganda has been the subject of intense and sustained criticism. Academics, international NGOs, mediators and some northern Ugandans argued that the prosecutions would obliterate the LRA's incentive to negotiate, undermine local peace initiatives and traditional reconciliation efforts, and ultimately prolong the conflict.⁸

But that analysis largely proved to be incorrect and it overlooked ways in which the ICC prosecutions might interact with other factors to advance peace. As it turned out, various political and military developments in the region – most notably the signing of Sudan's Comprehensive Peace Agreement in 2005 and improved performance by the Ugandan army – increased the costs of continued conflict in

northern Uganda for the LRA. These shifts reduced the rebels' room for tactical and strategic manoeuvre and compelled the LRA leadership to explore a negotiated settlement more vigorously than in the past. Even though the LRA has continued to insist that the ICC warrants are the ultimate barrier to a final deal (an assertion that must be viewed in the context of the serious safety and security concerns that the leadership would confront in northern Uganda if they came out of the bush under any circumstances), they clearly were not a barrier to crucial intermediate steps.

In fact, the threat of prosecution helped make those steps possible. This is largely because the ICC efforts seriously rattled and isolated the LRA military leadership, pushing them to the negotiating table and giving them an incentive to reach a deal. They may ultimately have given them an excuse to walk away as well, but they did not do so until the process had developed a momentum of its own and the LRA had effectively withdrawn from Uganda. The prosecutions also helped create that momentum by raising awareness and focusing the attention of the international community, which in turn provided a crucial broad base of regional and international support for the fledgling peace process.

Finally, the ICC's efforts to hold the LRA leadership criminally responsible for its atrocities in northern Uganda embedded accountability and victims' interests in the structure and vocabulary of the peace process. As a result, Uganda now has a war crimes chamber in the High Court and traditional justice mechanisms to address accountability. While the modalities of these structures are still unclear, and important issues such as investigation and prosecution of atrocities committed by the Ugandan army need to be resolved, their existence severely limits (if not completely eliminates) the LRA's ability to negotiate its way out of accountability. This is the case in part because of the continued pressure from the ICC.

The final stages in the long war in northern Uganda are still in progress. Many of the benefits of the peace process have already taken hold and every day become harder to reverse. Others will have to wait to see whether the LRA can be convinced to commit to a final deal. If they cannot, and instead choose to remain a threat to Sudan, Congo and Central African Republic – possibly provoking a military response, as occurred in December 2008 – things may again get worse in northern Uganda before they get better. If they can, a very strict set of conditions will have to be imposed on them (and some limited safety and security guarantees given) to ensure demobilisation and an end to their crimes. Only then might a deferral of the ICC prosecutions by the UN Security Council under Article 16 of the Rome Statute, discussed further below, be warranted – and only under the condition that Kony and his fellow ICC indictees would have to comply with the new domestic accountability processes.

Creating pressure for political reform

The complex conflicts throughout Sudan and the ICC's work in Darfur are vastly different than Uganda, but there is similarly a possibility that international efforts to prosecute those most responsible for atrocity crimes in Darfur may positively influence the overall situation. The ICC Prosecutor's application in July for a warrant for President Bashir, in addition to warrants

already outstanding against a Janjaweed commander and a government minister,⁹ certainly created some risk that the regime in Khartoum would only harden its stance and step up its campaign of violence and intimidation to maintain its hold on power.

This is, of course, the same regime that has conducted a systematic campaign of destruction in Darfur over the past five years, resulting in the deaths of hundreds of thousands and displacement of millions.¹⁰ It has also repeatedly flouted UN Security Council's resolutions on Darfur for everything from deployment of the hybrid AU/UN peacekeeping mission to cooperation with the ICC, and delayed implementation of key provisions of the 2005 Comprehensive Peace Agreement (CPA) that ended the country's separate twenty-year war between its North and South. The international community's utter failure to devise a comprehensive, coordinated strategy toward Sudan – instead pursuing multiple agendas (oil for some, purported cooperation on counterterrorism for others) that have allowed Khartoum to play actors against each other – has only emboldened the regime.

Yet, despite this impressive record of defiance, the ICC prosecutions may be one of the most effective points of leverage available in Sudan. Since the Prosecutor's July application, which is still under consideration by the ICC judges with a decision now expected early in 2009, we have already seen movement. There have been a flurry of announcements of renewed peace initiatives and yet another ceasefire declaration by Bashir. While significant and certainly headline-grabbing, they fall far short of an overall shift in the conflict dynamic – the security and humanitarian situation in Darfur is worse than it has been in years. But they also represent trends that should be encouraged with maximum pressure behind the ICC. If Khartoum in fact makes substantial progress on a range of issues, which include improved security, genuine peace talks and full implementation of the CPA, the UN Security Council should consider a twelve-month deferral of the ICC prosecutions under Article 16 of the Rome Statute. Yet all parties must recognise that meaningful progress on the necessary benchmarks will take considerable time, and require undivided support from the international community, including Sudan's neighbours. And, given Khartoum's past unwillingness to make any genuine concessions to peace, even in the face of the ICC threat, it appears very unlikely that there will be a credible case for a deferral any time soon.

Another potential effect of the ICC prosecutions in Sudan, and particularly the prosecution of Bashir, is the possibility that it may lend support to existing domestic currents of reform in Khartoum. The observable evidence of this at present is limited, and the internal dynamics of the ruling party (NCP) are under any circumstances extremely difficult to judge. However, the singling out of Bashir by the Court does appear to have given other Sudanese players a glimpse of the possibility of opening political space in Sudan. Some senior members of the NCP are seriously questioning the wisdom of the regime's unrelenting and aggressively confrontational approach to the international community. This development holds out the potential for fundamental change across Sudan's many conflict cycles, but only if pressure in support of the prosecutions is high and sustained, and the independence and credibility of the Court itself are beyond reproach.

Setting the terms for conflict resolution

The ICC also took action twice in 2008 in response to new outbreaks of hostilities. Kenya experienced its worst political crisis since independence in the aftermath of the contested presidential election at the end of December 2007. Following the announcement of results giving a second term to Mwai Kibaki, over 1,000 were killed and 300,000 were displaced in violence with inflammatory ethnic undertones. Then, in August, war broke out between Georgia and Russia over Georgia's breakaway regions: with a Georgian assault on South Ossetia's capital Tskhinvali and a massive Russian counter-offensive spreading also to Abkhazia and Georgia's heartland. Hundreds were killed and thousands displaced – though the numbers are still unconfirmed and disputed – and war crimes were allegedly committed by Georgians, Russians and South Ossetian militias.

In both of these instances, the ICC Prosecutor made public statements advising that the Court's jurisdiction extends to both Kenya and Georgia, as signatories of the Rome Statute, and warning that alleged atrocity crimes were being analysed. While any deterrent impact of these statements is difficult to evaluate – substantial international efforts were mobilised (and needed) to end and contain the violence in both of these crises – they are notable also for helping to inform the conflict resolution efforts that have followed, highlighting the importance of having an accurate record of what occurred and devising appropriate accountability and reconciliation mechanisms.

The need for credible threats of ICC prosecution and international support

For ICC prosecutions to continue to have any of these or other positive impacts in situations of ongoing or recent conflict, it is absolutely essential that the threat of prosecution is of sufficient credibility to influence the calculations of the warring parties. This is exceptionally challenging when the subject of prosecution is an individual still in office, as in the case of President Bashir. Prosecution increases the incentive to cling to power at all costs. But, as discussed above, it may also give some parties an incentive to negotiate and others a reason to resist further consolidation of power. The challenge is different for other subjects, such as certain rebel groups, where incentives appear to be much more about short-term security and well-being than long-term power dynamics. What is critical to remember in all of these instances is, first, that each is different and needs to be analysed separately, and, secondly, that despite these differences credibility of the threat of ICC prosecution is critical.

To ensure that credibility, the ICC Prosecutor needs to continue to pursue the most serious crimes within the ICC's jurisdiction, and secure convictions. With multiple defendants now in custody in its DRC investigation, along with former Congolese Vice President Jean-Pierre Bemba in the CAR investigation, trials and convictions are finally in sight. But concerted effort is needed to avoid difficulties such as those already encountered in the prosecution of DRC rebel leader Thomas Lubanga.¹¹ It will also be much more challenging to secure arrests in the Darfur and Uganda cases, with absolutely no cooperation in the former and twenty years of eluding the Ugandan army in the latter.

The other essential component to ensure the ICC's credibility is strong and unwavering support from the international community. This means insisting that all states comply with their obligations under the Rome Statute and UN Security Council resolutions to cooperate with the ICC. It also means applying pressure to make sure that happens. In Sudan in particular, much greater political will than the international community has been able to muster over the last five years, is needed. This must be applied equally to support all of the ICC prosecutions in Darfur (including the recent announcement of a pending application for warrants against certain rebels) and a comprehensive strategy to promote a sustainable resolution to Sudan's multiple conflicts.

The fact that both Sudan and Uganda are cases in which the suspects have requested deferral of the prosecutions by the UN Security Council under Article 16 of the Rome Statute, which permits deferrals for twelve-months renewable indefinitely,¹² only increases this need for international support for the ICC. The Court's mandate is to promote justice in all cases – not to decide whether the prospects of an uncertain peace should trump justice. That is a fundamentally political decision and one appropriately allocated to the Security Council. Thus, to maintain this critical balance of political and judicial responsibilities under the Statute, the entire international community – including those who believe a deferral may be appropriate in the future – must support prosecutions that are under way, unless and until the Security Council decides that the politics of peace require a limitation on justice.

Where the price of peace is a limitation on justice

When and how the Security Council should take any decision under Article 16 is a more difficult question. But some basic principles provide guidance.

Only as a last resort

Perhaps the most critical decision point in weighing peace and justice is determining whether the two are truly irreconcilable, such that one must give way to the other. As we have seen in Uganda and now in Sudan, prosecutions can often proceed in parallel to peace efforts and even bolster them. The immediate reaction of any warring party confronted with an indictment will be to claim that it removes all incentives to negotiate and leaves no choice but to continue fighting. This is rarely true at the outset of a prosecution, as there are plenty of other factors in play – the whole range of financial, political and personal costs and benefits of continued conflict. And it may not hold even at the end of a peace process if the means and incentives for violence can be neutralised through negotiations and transitional processes.

But there will be situations where that is not possible, and prosecutions will stand as a barrier to realising crucial gains in peace. Before the Security Council even considers an Article 16 deferral, it is incumbent on it to ensure that all alternatives have been exhausted and a limitation on justice is truly a last option.

The potential costs of indiscriminate exercise of this power are high. If granted to suspects who have *not* made substantial advances toward peace, it risks undermining the ICC itself, as well as broader efforts to institutionalise international human rights norms. Halting an ICC prosecution when not necessary to achieve peace and when the costs of doing so are so high could not only hamper the Court's ability to conduct ongoing investigations and prosecutions, but also seriously limit the deterrent impact it may have on future perpetrators.

Moreover, if and when the Security Council does grant an Article 16 deferral, it will set a significant precedent and create a risk that deferral will become the default option for ICC prosecutions. Thus, it is crucial that the Security Council intervene only in exceptional cases, after determining, first, that deferral is a last resort and, secondly, that the benefits of peace outweigh the costs of allowing a measure of impunity.

Only when the benefits of peace clearly outweigh the harms of limiting justice

Weighing these benefits and costs is difficult and will always be situation-specific. If deferral is truly a last resort (e.g., without it, the warring parties have incentive and capacity to continue fighting; and with it, substantial improvements in peace and security that have already been made can be further guaranteed), the value of peace is straightforward. For the society subject to the conflict, it means an end to killing and suffering and the removal of an overwhelming obstacle to development. For those not yet victim to the conflict, it eliminates the risk of becoming so. These benefits are immediate, and to the extent peace is sustained, they are long-term. For the international community, and particularly neighbouring regions, peace brings an end to actual or threatened destabilisation and decreases the likelihood of state failure and related dangers. These benefits too are short- and long-term.

The value of justice is also substantial, though it can serve a greater range of goals. Broad assertions that justice is a moral imperative or a prerequisite for sustainable peace do not outright trump the immediate alleviation of human suffering, or necessarily hold up against the historical record. But justice does serve important public policy goals, which can be weighed against the value of an end to a particular conflict. While this will always require Solomon-like judgement, a better understanding of the range of competing goals should lead to better decision-making when an Article 16 deferral is being considered, once a suspect has made significant efforts to achieve peace.

The goals of justice include the impact on perpetrators – specifically, their incapacitation, and delegitimisation, as well as retribution for victims, truth-telling for the affected population as a whole, institutionalisation of human rights norms more broadly and deterrence.¹³ While the impact on all of these should be considered carefully when the possibility of deferring an ICC prosecution is on the table, deterrence, delegitimisation and institutionalisation of human rights norms deserve special attention. They, more than the others, concern not only the situation at hand, but also the overall international legal and political architecture that may help prevent atrocity crimes in the future.

There is no clear-cut answer when considering the effect of a potential deferral on these factors. Deterrence itself is difficult to prove – as with all efforts to prevent something from occurring, it is hard to demonstrate when they work because nothing happens. But we know that prosecutions weigh on the minds of warring parties and authoritarian leaders, who often take the time to denounce them publicly, and we have better evidence to see how delegitimisation positively impacts conflict dynamics. Because these are such crucial and potentially powerful tools, the Security Council needs to consider them carefully. It should refrain from putting a prosecution on hold, even at the price of continued conflict, where doing so is likely to significantly undercut the impact of the Court in terms of delegitimising perpetrators, deterring future atrocity crimes and reinforcing norms designed to prevent them.

Never without conditions

Finally, in those cases in which the Security Council determines that the benefits of peace clearly outweigh the damage that may be done in terms of deterrence and other policy goals of justice, it must set out clearly the conditions that justify the deferral for the initial twelve-month period, and those that will be required for any extension. Each review must be detailed and made with sufficient information to evaluate whether the suspect has acted in a way that is consistent with a continued limitation on international justice.

The benchmarks the Security Council sets, for the first deferral and any thereafter, must be high enough and monitored closely enough to drive sustainable change in the conflict dynamics. When a suspect fails to meet them, the deferral of prosecution should not be renewed and the individual should have to face the ICC Prosecutor's charges. This rigorous approach to Article 16 is warranted by the clear division of responsibilities under the Rome Statute and the UN Charter. It is also the best way to minimise the negative impact a deferral of ICC prosecution may have on efforts to bring an end, once and for all, to atrocity crimes.

Notes

1. Nick Grono is Deputy President (Operations) and Caroline Flintoft is Director of Research and Publications at the International Crisis Group
2. The situations currently being investigated by the Prosecutor of the ICC are the Democratic Republic of Congo (opened in June 2004), Uganda (July 2004), Darfur (June 2005) and the Central African Republic (May 2007). Additionally, the Office of the Prosecutor has disclosed that it is analysing the situations in Afghanistan, Chad, Côte d'Ivoire, Colombia, Kenya and Georgia. "ICC Prosecutor confirms situation in Georgia under analysis", press release, Office of the Prosecutor, 20 August 2008.
3. An earlier version of this discussion of the role of the ICC in northern Uganda appears in Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes" in *Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society, Nicholas Waddell and Phil Clark (eds.), March 2008.
4. The LRA's leaders, headed by the mystic Joseph Kony, claimed to be on a spiritual mission to cleanse northern Uganda (a region inhabited predominantly by Acholi people) and rule the country

according to the Ten Commandments. They later tried to recast themselves as freedom fighters for the politically and economically marginalised region. Whatever their motivations, the LRA killed and mutilated indiscriminately, and abducted tens of thousands of children and adults, turning them into rebel soldiers, porters and sex slaves. The Government's response was to herd over a million of the north's inhabitants into squalid, insecure camps – condemning them to a life of disease and malnutrition, removed from their fertile land. For background, see Crisis Group Africa Briefing N°46, *Northern Uganda Peace Process: The Need to Maintain Momentum*, 14 September 2007, and Crisis Group Africa Report N°124, *Northern Uganda: Seizing the Opportunity for Peace*, 26 April 2007.

5. "From Emergency to Recovery: Rescuing northern Uganda's transition", Oxfam Briefing Paper no 118, 10 September 2008, p. 7.
6. In June 2008, the LRA reportedly attacked the DRC-South Sudan military outpost of Nabanga, killing 24 people, including nine Sudan People's Liberation Army (SPLA) soldiers and the commander of the garrison. Several attacks in mid-September on the SPLA military position of Sakure and on a number of Congolese villages near the town of Dungu resulted in the abduction of up to 90 women and children and burning of churches, houses, schools and grain stores. Reported LRA attacks near Dungu continued in early November. In the Central African Republic, the UN reported raids in early March 2008, with some 150 abducted.
7. In addition to Joseph Kony, the LRA commanders indicted by the ICC are Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen. "Warrant of Arrest unsealed against five LRA Commanders", press release, Office of the Prosecutor, 14 October 2005. The Court terminated proceedings against Raska Lukwiya in July 2007 following confirmation that he had been killed in August 2006. The death of Vincent Otti, on 8 October 2007, has also been confirmed.
8. For example, J. Volqvartz, "ICC Under Fire Over Uganda Probe", CNN.com, 23 February 2005; K. Southwick, "When Peace and Justice Clash", *International Herald Tribune*, 14 October 2005; "Not a Crime to Talk: Give Peace a Chance in Northern Uganda", joint statement by Refugee Law Center and Human Rights Focus (HURIFO) on the Juba Peace Talks, July 2006; H. Cobban, "Uganda: When International Justice and Internal Peace are at Odds", *Christian Science Monitor*, 24 August 2006; Z. Lomo, "Why the International Criminal Court must withdraw Indictments against the Top LRA Leaders: A Legal Perspective", Kampala: Refugee Law Project, August 2006.
9. On 20 November 2008, the ICC Prosecutor presented evidence to the judges in a third case in Darfur, against rebel commanders allegedly responsible for an attack on African Union peacekeepers in the Haskanita camp in September 2007, in which 12 were killed and eight injured. "Attacks on peacekeepers will not be tolerated", press release, Office of the Prosecutor, 20 November 2008.
10. According to Oxfam, as of October 2008 there were 2.7 million IDPs in Darfur (up from 2.5 million in mid-2008) plus another 2 million in need of humanitarian assistance. Only 65 per cent of the affected population was accessible, down from 70 per cent for most of 2008. In the first nine months of 2008, 11 humanitarian aide workers were killed in Darfur and 170 temporarily abducted (with 41 still missing).
11. Lubanga, the leader of the Union of Congolese Patriots (UPC) in the Ituri region of the DRC, was arrested and transferred to The Hague in March 2006 to face charges of enlisting, conscripting and using children in armed conflict. In June and July 2008, the trial chamber stayed the proceedings and then ordered him released, because the prosecution was not able to disclose to the defence certain potentially exculpatory materials obtained under confidentiality agreements. The appeals chamber remanded the

decision for reconsideration in October, and the trial chamber lifted the stay in November, indicating the reasons for it had "fallen away". "Stay of proceedings in the Lubanga case is lifted – trial provisionally scheduled for 26 January 2009", press release, International Criminal Court, 18 November 2008.

12. Article 16 provides: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."
13. These objectives have been discussed by a number of experts in the field, including Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, 2000); Paul R. Williams and Michael P. Scharf, *Peace with Justice?* (Maryland, 2000); and Juan Mendez, "Accountability for Past Abuses", *Human Rights Quarterly* 19 (1997), 255-282. International criminal law has increasingly constrained the freedom of parties to grant amnesties for atrocity crimes. While the ICC will defer to states willing and able genuinely to prosecute their own, it will generally not be bound by amnesties or efforts to give impunity to those most responsible for atrocity crimes. For further discussion, see Nick Grono, "The Role of International Justice in Preventing and Resolving Deadly Conflict", presentation to the Oxford Transitional Justice Research Programme, 13 October 2008.

THE CRIMES AGAINST HUMANITY INITIATIVE

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Why the Crimes Against Humanity Initiative is Needed

Since the indictment and judgment of the International Military Tribunal at Nuremberg, there has been no specialized convention on “Crimes Against Humanity”. The Nuremberg Charter identified three heads of crimes: Crimes Against Peace (the waging of a war of aggression), War Crimes and Crimes Against Humanity. The four Geneva Conventions of 1949 addressed the issue of war crimes, and the Genocide Convention of 1948 addressed the intentional effort to exterminate, in whole or in part, a particular racial, national, ethnic or religious group, which is one form of a crime against humanity, and indeed, specifically criminalized the Nazis’ “final solution.”

Yet neither aggression nor crimes against humanity were made the subject of a comprehensive international criminal law convention after the war. Indeed, with the exception of the Rome Statute establishing the International Criminal Court (ICC), there has been no focused attention on developing an international criminal law treaty for the prosecution of crimes against humanity, although treaties on particular forms of crimes against humanity – such as apartheid or enforced disappearances – have been elaborated.

The Washington University Crimes Against Humanity Initiative is intended to fill that gap.* The 1948 Convention for the Prevention and Punishment of the Crime of Genocide, although important, is inadequate. Limited by its drafters to intentional extermination of only four groups – racial, ethnic, national and religious – the Genocide Convention fails to cover killings based upon social and political groupings. Further definitional limitations, most notably the requirement of specific genocidal intent (*dolus specialis*), exclude other atrocities such as ethnic cleansing, at least insofar as the International Criminal Tribunal for the Former Yugoslavia has held until now. Hopes that the scope of the Genocide Convention might be expanded remain unrealized, as both scholars and international courts have interpreted the Convention narrowly. Indeed, of the more than 100 million civilians killed in the past seventy years, only six to eight million have been within the reach of the Convention, as applied by international courts and tribunals. The adoption of the Genocide Convention was a considerable achievement in 1948, and stands as a testament to the horror of the Holocaust; but it gives little solace to the victims of modern-day atrocities.

Groups denied the label “genocide” for the sufferings they have endured, such as the Bosnians, Cambodians and Armenians, mount political campaigns to force either the aggressor entity, international political constituencies or other entities to acknowledge that their losses amounted to the “crime of crimes”. Given that crimes against humanity were committed in each of these situations, the debate regarding whether or not an atrocity amounts to genocide has supplanted the more important question of who bears responsibility for either preventing or punishing the atrocities, and who (or what State) is therefore accountable. Indeed, most of the charges brought before ad hoc international criminal tribunals and the ICC have been for crimes against humanity.

Although “crimes against humanity” have been proscribed in positive law ever since their inclusion in Article 6(c) of the Nuremberg Charter, there remains a need for a comprehensive convention on the subject. These crimes were incorporated into the Statutes of the ad hoc international criminal tribunals created during the last fifteen years and codified in the Rome Statute for the International Criminal Court. The definitions are different in each of these legal instruments, however, and debate continues concerning the elements of the crime and its application to particular circumstances. The jurisprudence of the ad hoc tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone, as well as decisions of national courts, have contributed significantly to our understanding of the material and jurisdictional elements of the crime, including what acts are included within its ambit, and what amnesties, immunities and statutes of limitations apply. The project will take stock of these developments in framing a convention suitable for the twenty-first century.

This project is intended to augment the work of the International Criminal Court and build upon the negotiations that led to the inclusion of crimes against humanity in the Rome Statute in 1998. The ICC Statute provides a definition of

* The outcomes of the project will be fourfold:

- a. A **Draft Comprehensive Convention** on Crimes Against Humanity;
- b. A **Commentary to the Draft Convention**;
- c. A **Collection** in book form of the working papers presented at the Experts’ Meeting; and
- d. The project will activate constituencies, including academics, NGOs and the United Nations with a view to calling a **Treaty Conference** to draft and adopt a Draft Convention on Crimes Against Humanity.

“crimes against humanity” and provides for the investigation and prosecution of individual offenders. However, not all States are parties to the Rome Statute, and the Court can only prosecute a very limited number of offenders, given its size and statutory mandate. Like the Rome Statute, a comprehensive convention will provide enforcement mechanisms to address serious violations of international law. However, the proposed convention would address them quite differently. The Rome Statute defines crimes against humanity for the purpose of adjudication before an international court and sets out an enforcement regime for cooperation with that court. In contrast, the proposed convention will encourage the incorporation and adjudication of such crimes under domestic law and provide mechanisms for interstate cooperation in the investigation and punishment of perpetrators of such crimes. Considering the different underlying objectives of the Rome Statute and the proposed initiative, it is thus both necessary and appropriate to have a separate treaty on the matter. Indeed, just as the adoption of the Rome Statute did not obviate the continued need for and central importance of the Geneva Conventions and the Genocide Convention, a Crimes Against Humanity treaty will complement and reinforce, not detract from the mission of the ICC.

Ratification of the proposed convention could also serve as an interim step to ICC ratification for States such as the United States that support the substantive law of the ICC but are wary of its adjudicative mechanism. Finally, the Rome Statute does not provide for State responsibility in the case that a State either commits or fails to prevent the commission of crimes against humanity. A multilateral convention could do so.

The discussions leading to the Draft Convention are also closely linked to the further development of the emerging doctrine of “responsibility to protect”.² Under international law, States are presently required to refrain from committing certain of the most serious international crimes and to prosecute those responsible. The Responsibility to Protect requires that they also affirmatively intervene to protect vulnerable populations from nascent or continuing international crimes. A necessary condition precedent to the invocation of the Responsibility to Protect doctrine is a clear definition of the event which triggers that responsibility. A comprehensive convention which sets out the contours of crimes against humanity will provide such a definition.

Conclusion

One hopes that the timing of this project is propitious. The Rome Statute provides the conference with a good starting definition of crimes against humanity. Furthermore, the United States Congress is considering a Crimes Against Humanity Accountability Act, which would criminalize these acts under U.S. domestic law. This evidences a broad and growing international consensus for criminal accountability among ICC party and non-party States. While it may not be possible to envisage the adoption of a major new international criminal law convention so soon after the coming into force of the Rome Statute, the opposite may in fact be true – that the existence of the Rome Statute Court may act as a catalyst for both domestic and international initiatives designed to end impunity for the commission of atrocities on a terrible scale.

Notes

1. Leila Sadat is Henry H. Oerschelp Professor of Law and Director of the Harris World Law Institute at the Washington University Law School
2. See, e.g., *In Larger Freedom: Toward Development, Security and Human Rights for All*, 2005 Annual Report of the U.N. Secretary-General, U.N. Doc. A/59/2005 (Mar. 21, 2005).

GENOCIDE AND UNIVERSAL JURISDICTION: A PROPOSAL

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The proposal

The Convention on the Prevention and Punishment of the Crime of Genocide² (“the Genocide Convention”) was the first human rights convention adopted by the United Nations. It does not expressly address the issue of universal jurisdiction, i.e. whether States have the right (or obligation) to investigate and prosecute the crime of genocide, wherever it may have occurred.

The proposal is for an Optional Protocol in the form of the draft attached, in order to remedy this lacuna. The language and substance of the draft mirror the universal jurisdiction provisions of the 1984 Torture Convention. The detail of the draft may require further refinement.

The effect would be to impose an obligation on States, where a genocide suspect is present on their territory, either to extradite or prosecute. There is no proposal for universal jurisdiction to be exercised in the absence of the suspect.

The revision is needed, not only in order to combat impunity, but also for the sake of clarity, consistency and principle.

The 1948 Genocide Convention

During the drafting of the Genocide Convention, universal jurisdiction was proposed but not adopted.³ The Secretariat’s first draft provided for universal jurisdiction.⁴ The Secretary-General and experts considered that without such a provision the Convention would fail. The Secretariat’s draft was submitted to an *ad hoc* drafting committee, which abandoned the principle of universal jurisdiction and instead proposed what in substance became Article VI (as set out below).

Iran proposed to amend the *ad hoc* committee’s draft by incorporating a form of universal jurisdiction into the Convention.⁵ Iran’s amendment was supported by Australia, Brazil, Denmark, Haiti, India, the Philippines and Venezuela. However, the Iranian amendment was opposed by the great powers and did not succeed. The United States called the principle of universal jurisdiction “one of the most dangerous and unacceptable of principles”.

As a result, the Genocide Convention does not expressly provide for universal jurisdiction. Instead, it states:

“Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” (emphasis added)

There remains a tension in the final text of the Convention. It is not easy to reconcile the general obligation imposed on States by Article I “to prevent and to punish” genocide with the (arguably) limiting provisions of Article VI.

Subsequent Developments

Since 1948, there have been at least three developments of significance.

(1) Other Conventions

Since the 1948 Genocide Convention, there have been nearly thirty other conventions which provide for some form of universal jurisdiction. These include the Geneva Conventions (1949), the Convention for the Protection of Cultural Property in the event of Armed Conflict (1954), the Convention for the Suppression of Unlawful Seizure of Aircraft (1970), the Apartheid Convention (1973), the Convention on the Law of the Sea (1982) and the Torture Convention (1984).

The form of universal jurisdiction adopted in the Torture Convention⁶ was “*aut dedere aut judicare*”: the State is obliged either to extradite or to prosecute any individual who is alleged to have committed the relevant offence and who is present on the territory of the State.

During the drafting of the Torture Convention, the United States, China and the Soviet Union changed the position on universal jurisdiction that they had taken in relation to the Genocide Convention.⁷ The United States positively advocated universal jurisdiction, stating that:

“such jurisdiction was intended primarily to deal with situations where torture is a State policy and, therefore, the State in question does not, by definition, prosecute its officials who conduct torture. For the international community to leave enforcement of the convention to such a State would be essentially a formula for doing nothing. Therefore in such cases universal jurisdiction would be the most effective weapon against

torture which could be brought to bear. It could be utilized against official torturers who travel to other States, a situation which was not at all hypothetical. It could also be used against torturers fleeing from a change in government in their States if, for legal or other reasons, extradition was not possible” (emphasis added)

In the well known case of *Ex Parte Pinochet*,⁹ Lord Browne-Wilkinson summarised the purpose of the Torture Convention as follows:

*“What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another. The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal – the torturer – could find no safe haven.”*¹⁰

(2) State Practice

A number of States have adopted legislation which provides in one form or another for universal jurisdiction in relation to genocide, in other words which allows the State in question to prosecute a non-national for the crime of genocide committed against another non-national outside the territory of the State, at least where the non-national is found to be present on the territory of the State. These countries include Spain, France, Finland, Italy, Latvia, Luxembourg, the Netherlands, Russia, the Slovak Republic, the Czech Republic, Hungary and Germany.¹¹

In 1993, Belgium went further than other countries and passed a law allowing it to exercise universal jurisdiction “*in absentia*”, i.e. even where the accused was not present on Belgian territory. This led to a number of lawsuits, one of which was challenged in the International Court of Justice in the ‘*Arrest Warrant Case*’. In 2003, Belgium amended its universal jurisdiction law, making it more restrictive.¹²

Most recently, both Senegal and the United States have changed their laws to allow the prosecution of suspected *génocidaires* present on their territory.

In February 2007, Senegal passed legislation permitting it to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when they are committed abroad. In July 2008, Senegal amended its constitution so that the principle of non-retroactivity would not bar the prosecution of such acts.¹³ The reform is intended to allow Senegalese courts to try Chadian ex-dictator Hissène Habré for crimes committed between 1982 and 1990. Habré fled to Senegal after his regime was overthrown.

The United States passed the Genocide Accountability Act of 2007.¹⁴ This followed the identification of non-US nationals who were suspected of participation in the Rwandan and Bosnian genocides, but who were now living in the United States under false pretences.¹⁵

(3) The International Criminal Court and Ad Hoc Tribunals

The two ad hoc tribunals for the former Yugoslavia (“the ICTY”) and for Rwanda (“the ICTR”) were created in 1993 and 1994 respectively. On 1 July 2002 the International Criminal Court (“the ICC”) came into being. The three statutes which create these Courts all contain provisions that make genocide a crime.

However, they do not remedy the universal jurisdiction lacuna in the Genocide Convention. The jurisdiction of the ICTY and the ICTR is territorial and extends only to crimes committed within the territories of the former Yugoslavia and Rwanda. The jurisdiction of the ICC is limited (broadly speaking to where the accused is a national of a State Party and to certain other situations¹⁶). In any event, the ICC (by reason of the “complementarity principle”¹⁷) considers that the primary role in investigating and prosecuting the crimes within its jurisdiction should be played by national courts. The proposal discussed herein will serve to further the complementarity principle.

Universal Jurisdiction and Genocide: The Existing Position

At least three different views exist.

(1) The Genocide Convention Excludes Universal Jurisdiction

This view is based on the language of Article VI of the Convention, which appears to prescribe that persons “*shall be tried*” either “*by a competent tribunal of the State in the territory of which the act was committed*,” or “*by such international penal tribunal as may have jurisdiction*”. This form of words, taken together with the drafting history of the Convention, tends to support the view that the Convention specifically excludes universal jurisdiction.¹⁸ This view has been taken by of Judge Kreca¹⁹ in the International Court of Justice and the French Courts.²⁰ and is shared by certain academics.²¹

(2) The Genocide Convention Permits Universal Jurisdiction

A second view is that the Genocide Convention, on its own, authorises States to exercise universal jurisdiction in respect of genocide. Sir Elihu Lauterpacht QC, sitting as an ad hoc judge of the International Court of Justice, has stated that the purpose of Article I of the Convention is “*to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide*”²²

(3) Customary International Law Permits Universal Jurisdiction for Genocide

A third view is that the exercise of universal jurisdiction for the crime of genocide is, or may be, permitted under customary international law.

This was the position of some, but not all, of the Judges of the International Court of Justice in *The Arrest Warrant Case*.²³ In *Prosecutor v Tadic*, the Appeals Chamber of the ICTY stated that “*universal jurisdiction [is] nowadays acknowledged in the*

case of international crimes".²⁴ In *Prosecutor v Furundzija* the Trial Chamber echoed this view.²⁵

In *Attorney-General v Eichmann*²⁶ the Supreme Court of Israel concluded that the scale and international character of the atrocities of which the accused²⁷ had been convicted justified the application of the doctrine of universal jurisdiction. In *Demanjuk v Petrovsky*,²⁸ in the context of an extradition request by the State of Israel, a United States Court accepted Israel's right to try an individual charged with murder in the concentration camps of Eastern Europe during the Second World War. It considered that the crimes were crimes of universal jurisdiction:

*"International law provides that certain offences may be punished by any state because the offenders are enemies of all mankind and all nations have an equal interest in their apprehension and punishment."*²⁹ (emphasis added)

In *Ex Parte Pinochet*³⁰ at least two of the Law Lords³¹ thought that customary international law allows states to exercise universal jurisdiction in respect of genocide, although another Law Lord, Lord Phillips, felt that this was still "*an open question*".³²

Domestic courts in Germany and Spain have concluded that their domestic universal jurisdiction legislation does not infringe international law.³³ In *Jorgic v Germany* the European Court of Human Rights held that the conclusion of the German courts, that international law did not preclude them from exercising universal jurisdiction in relation to genocide, was at the very least "*reasonable*".³⁴

The Case for Change

The case to amend the Genocide Convention, as proposed, is compelling:

Clarity: The current confusion surrounding the issue of universal jurisdiction and genocide does little credit to international law. There has to be *some* revision of the Genocide Convention in order to clarify the position.

Consistency: It remains entirely unclear why there should be express universal jurisdiction provisions in almost thirty other conventions, but not in the Genocide Convention. Why should there be an "*aut dedere aut judicare*" provision in the Torture Convention, but not in the Genocide Convention?

Principle: The prohibition of genocide has the status of *ius cogens*, a norm of international law which cannot be derogated from by treaty. Furthermore, those who commit genocide are the "enemies of all mankind" and all nations have an equal interest in their apprehension and punishment.

The Prevention and Punishment of Genocide: Those who have committed genocide should not be allowed to find a safe haven, *anywhere, ever*.

APPENDIX: THE DRAFT OPTIONAL PROTOCOL

Article 1

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Articles 3 and 5 of the Genocide Convention in the following cases:
 - (1) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (2) When the alleged offender is a national of that State;
 - (3) When the victim was a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 2

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in articles 3 and 5 of the Genocide Convention is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 1, paragraph 1 of this Optional Protocol, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said State and shall indicate whether it intends to exercise jurisdiction.

Article 3

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in articles 3 and 5 of the Genocide

Convention is found, shall in the cases contemplated in article 1 of this Optional Protocol, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 1 paragraph 2 of this Optional Protocol, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 1 paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in articles 3 and 5 of the Genocide Convention shall be guaranteed fair treatment at all stages of the proceedings."

Notes

1. Sudhanshu Swaroop is a barrister at 20 Essex Street Chambers
2. New York, 9 December 1948; 78 UNTS 277.
3. See generally Luc Reydamans "Universal Jurisdiction" (2003) at pp. 47-52.
4. Article VII provided: "The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed."
5. The Iranian amendment provided that persons charged with genocide or any of the other acts set out in the draft Convention "may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request had been made for their extradition".
6. And in most of the other post-1970 Conventions, see Reydamans at p.68.
7. The United Kingdom remained unenthusiastic, see Reydamans at p.66.
8. Reydamans, pp. 66-67.
9. *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [2000] 1 AC 147.
10. At p.199.
11. *Jorgic v Germany* Application no 74613/01, Judgment of the European Court of Human Rights, 12 July 2007 at paragraph 53.
12. Now Belgium may only exercise jurisdiction for genocide if (1) the accused is a Belgian national or has his primary residence in Belgium or (2) if the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed or (3) if Belgium is required by treaty to exercise jurisdiction over the case: <http://www.hrw.org/press/2003/08/belgium080103.htm>
13. <http://hrw.org/english/docs/2008/07/23/senega19438.htm>
14. For further information, see: <http://www.globalsolutions.org/issues/HR2489>; <http://srebrenica-genocide.blogspot.com/2007/10/list-of-suspects-getting-away-with.html> ; <http://srebrenica-genocide.blogspot.com/2008/01/us-genocide-accountability-act-for.html>; <http://jurist.law.pitt.edu/hotline/2007/12/genocide-accountability-act-will-aid-us.php>
15. See the discussion of the GAA by Professor Diane Orentlicher at: <http://jurist.law.pitt.edu/hotline/2007/12/genocide-accountability-act-will-aid-us.php>
16. The Court can assert jurisdiction over nationals of non-Party States where: (1) there is a referral to the ICC by the Security Council under Chapter VII (Rome Statute Article 13(b)); (2) the crime has been committed in the territory of a State Party (Article 12(2)(a)) or (3) the non-party has consented to the exercise of jurisdiction (Article 12(3)).
17. See Rome Statute, Article 17.
18. See above under heading "The 1948 Genocide Convention".
19. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1993, 325, two ad hoc judges considered the issue briefly. Judge Kreca held that the Convention "does not contain the principle of universal repression. It has firmly opted for the territorial principle of the obligation of prevention." (ibid, p.464).
20. See cases cited in Reydamans at pp.135-140.
21. See William Schabas "Genocide in International Law" (2000) pp.353-360 and Reydamans at pp.47-53.
22. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1993, 325, 443. However, as Reydamans has pointed out, in his discussion Judge Lauterpacht did not refer to Article VI of the Convention, see Reydamans, p. 52.
23. (2002) 41 Int'l L Materials 536; See, for example, Judges Higgins, Buergenthal, Koojijmans, Van den Wyngaert; cf Judge Guillaume.
24. No. IT-94-1, para 62.
25. It stated: "[it] has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, 'it is the universal character of the crimes in question . . . which vests in every State the authority to try and punish those who participated in their commission.'"; para 156.
26. (1962) 36 I.L.R 5.
27. During World War 2, Eichmann had been a senior member of the Department responsible for the implementation of the Final Solution. Accordingly, his crimes had been committed outside the territory of Israel and before the State of Israel was founded. The means by which he was brought to Israel (abduction from Argentina) has been criticised, but Israel's right to assert jurisdiction has not been seriously challenged.
28. (1985) 603 F Supp. 1468 aff'd. 776 F.2d. 571.
29. Ibid.
30. *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [2000] 1 AC 147.
31. Lord Browne-Wilkinson thought so at least implicitly, based on the *ius cogens* nature of certain international crimes (p8); Lord Millet thought so, but only if the crimes in question were such as to "infringe a *ius cogens*" and "so serious and on such a scale that they can justly be regarded as an attack on the international legal order", p. 60.
32. Ibid, p. 69.
33. See generally Reydamans at pp141-158 and 183-193.
34. Application no 74613/01, Judgment 12 July 2007.

ARRESTING THE “BIG FISH”: LESSONS ON STATE COOPERATION FOR THE INTERNATIONAL CRIMINAL COURT

Tracey Gurd¹

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Introduction

On March 29, 2006, thousands of Sierra Leoneans scrambled up on rooftops around the Special Court for Sierra Leone (SCSL), trying to get a glimpse of former Liberian President Charles Ghankay Taylor, as he flew into the nation's capital.² Taylor, who created the war that plunged Sierra Leone into a devastating, eleven-year conflict, finally emerged from a United Nations Mission in Liberia (UNMIL) helicopter that evening, shackled in handcuffs. He was taken into the SCSL's custody in Freetown after years of being sheltered from justice in neighboring Nigeria. He is now being prosecuted by the SCSL on 11 counts of crimes against humanity, war crimes, and other serious violations of international humanitarian law³ in a courtroom in The Hague – a feat which would have been impossible without the active cooperation of states including Nigeria, Liberia, the United States, and other United Nations Security Council members that worked to secure his arrest and transfer to The Hague for trial.

The story behind his arrest, told in greater detail below, highlights the key challenge facing all international war crimes courts: how to prosecute individuals charged with the worst crimes when these courts do not have their own police force to round up suspects. As international justice expert Richard Dicker has put it, arrests have proven to be “the ‘Achilles’ heel’ of enforcement that highlights the broader limitations of a still fledgling system of international criminal justice.”⁴

These limitations are particularly pronounced when international courts set their sights on the “big fish” like Taylor: sitting heads of state with powerful political support both inside and outside their countries. The International Criminal Court (ICC) is feeling its limits now after its prosecutor, Luis Moreno Ocampo, announced on July 14, 2008 that he was seeking an arrest warrant for Sudanese President Omar al Bashir on charges of genocide and crimes against humanity for his alleged role in the slaughter in Darfur, Sudan.

Arresting Bashir will not be easy. If the warrant is issued by the ICC judges, it will be Sudan's responsibility – at least in theory – to arrest its own president. An arrest inside Sudan seems unlikely: Sudan is not a party to the Rome Statute and had no choice in the ICC's taking the case – the conflict was referred to Moreno Ocampo for investigation by the United

Nations Security Council on March 31, 2005.⁵ Sudanese Government officials have consistently rejected the ICC's jurisdiction over the Darfur conflict⁶ and refused to hand over two individuals for whom arrest warrants have already been issued by the ICC.⁷ Even if Bashir travels to other countries – including to those supportive of the ICC's mission – political will and technical capacity will be needed to arrest a sitting head of state, both of which may be difficult to ensure in practice.⁸

Capturing Bashir, if a warrant is issued, will require an intense and multi-faceted cooperation strategy which has buy-in from key states, international organizations, and civil society. Moreno Ocampo knows this. As he told an audience at the Council on Foreign Relations in New York in October 2008, “innovative, strong, and consistent diplomatic and political action”⁹ is needed from states and multilateral institutions (such as the African Union, the European Union and the United Nations) “to create the conditions to implement arrest warrants.”¹⁰

Such diplomatic and political action is all the more necessary – and all the more difficult to achieve – in the wake of an intense international backlash against the prosecutor's efforts to have Bashir arrested. China, South Africa, and others on the U.N. Security Council expressed fears that an arrest warrant may damage prospects for the stalled peace process in the war torn region of Darfur.¹¹ Soon after Moreno Ocampo announced his warrant request, Security Council members proposed a deal to suspend the ICC's work on the Bashir case.¹² In an effort to shore up this push for suspension, Sudan asked Russia, China, and members of the Arab League and the African Union to help it pursue a Security Council resolution.¹³ African and Arab leaders used the United Nations General Assembly (GA) meeting in New York in September 2008 as a forum to denounce the request for an arrest warrant.¹⁴ This move was interpreted as part of a strategy to demonstrate that an overwhelming majority of states supported a suspension, which would increase pressure on the Security Council to act. Despite some negative statements in the plenary session, this overwhelming majority never emerged, but nor did Moreno Ocampo escape unscathed. That such an organized, systematic, and coordinated campaign was developed and executed within weeks of Moreno Ocampo's announcement points to his challenge in garnering state cooperation – particularly in Africa where all his cases to date have arisen.¹⁵

With this in mind, the International Criminal Court would be wise to look to the examples of successful cooperation strategies which led to the arrests of three “big fish”: Slobodan Milosevic (former president of the Federal Republic of Yugoslavia), Bosnian Serb leader Radovan Karadzic, and Charles Taylor (former Liberian president). Each arrest demonstrates the possibilities that exist to shore up the enforcement of international criminal justice. Each highlights the intensity, determination, and creativity needed by courts, states, and civil society to make state cooperation happen even when the chances of success look slim. As can be seen in these three examples, cooperation leading to arrest is possible with the right mix of conditionality, alliances, and persistence.

What is Cooperation?

International Justice is built on the notion that heinous international crimes, such as genocide and crimes against humanity, harm all of us. Therefore, we all have an obligation to prevent such crimes and punish those responsible for them. In practice, this translates to an obligation on states to cooperate with international justice mechanisms whose mandate is to prosecute individuals most responsible for international crimes. Under the Rome Statute, for example, state parties have a general obligation to “cooperate fully” with the court in its investigation and prosecution of crimes. The statute’s preamble affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”¹⁶

Cooperation takes two major forms: (1) international diplomatic and financial support and (2) logistical and technical cooperation at a domestic level.

1. Diplomatic and Financial Support

Diplomatic support is both a precondition to, and necessary component of, state cooperation. At its most basic, this requires states to create and build an atmosphere of respect for international justice mechanisms, including making statements of support at international gatherings (e.g. the UN General Assembly, the UN Security Council, the African Union summit, and the annual meeting of the ICC’s Assembly of States Parties to the Rome Statute). Support can also be demonstrated in using diplomatic capital to sway states reluctant to cooperate with the courts. As will be discussed with regard to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone, cooperation is often achieved through the willingness of individual states (such as the United States) to condition aid packages to countries – or the willingness of international bodies such as the European Union to condition membership to its ranks – based on cooperation with the tribunal.

Direct financial support for international justice mechanisms is also a component of cooperation. Each year, the parties to the Rome Statute gather to determine their annual budgetary contributions to the ICC. Meanwhile, a small number of states voluntarily shoulder the financial costs of hybrid (mixed international and domestic) courts such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. These financial backers often have

the greatest incentive to ensure that other, more reluctant, states cooperate with the courts’ requests.

2. Logistical and Technical Support

Lacking a standing police force or other enforcement body, the ICC – like other international courts – must rely on domestic authorities and international forces (such as peacekeeping troops) to execute arrest warrants. External enforcement bodies, however, need appropriate legal authority to enable them to provide the support requested by the courts. This often requires changes to national legislation or to the mandates of international bodies (including the Security Council resolution which, as discussed below, was needed for UNMIL to arrest Charles Taylor).

Apart from arrests and transfers, “cooperation” has been defined more broadly by the international courts to include a raft of logistical and practical support during the investigative and prosecution stages of a case. For the ICC, cooperation includes: (1) identifying and disclosing the whereabouts of wanted persons; (2) taking and producing evidence (including expert opinions and reports); (3) questioning any person being investigated or prosecuted; (4) serving documents; (5) facilitating the voluntary appearance of witnesses and experts before the court; (6) temporarily transferring persons; (7) examining places or sites (including the exhumation and examination of grave sites); (8) executing searches and seizures; (9) providing records and documents (including official ones); (10) protecting victims and witnesses and preserving evidence; (11) identifying, tracing and freezing proceeds, property, and assets for the purpose of eventual forfeiture; and (12) any other type of assistance which helps facilitate investigations or prosecutions by the ICC.¹⁷ For states to undertake these tasks effectively, the provisions of the Rome Statute must be implemented in national legislation.

States also have a role to play in enforcing the sentences passed down by the ICC. States must indicate a “willingness to accept sentenced persons”¹⁸ and enforce any fines or forfeiture measures ordered by the court.¹⁹

International tribunals have succeeded in eliciting arrests by combining diplomatic support, political pressure, financial leverage, and technical support into an integrated strategy to facilitate cooperation (these techniques are also discussed in the Introduction of this volume). Drawing upon lessons from these arrests could be fruitful for the ICC as it faces one of its biggest challenges to date: the possibility of an arrest warrant being issued for Bashir.

Arresting the “Big Fish”: Slobodan Milosevic, Radovan Karadzic and Charles Taylor

The Arrest of Slobodan Milosevic, former President of Serbia

Perhaps the defining feature of Serbian President Slobodan Milosevic’s arrest was the willingness of the United States, particularly the U.S. Congress, to apply consistent, creative, and financial pressure on Serbia to get Milosevic out of Belgrade and into The Hague. The work of a dedicated civil society in the former Yugoslavia and elsewhere, concerned congressional staffers, and sympathetic journalists combined to push the U.S.

executive branch to lever cooperation from a recalcitrant state – a state where the arrest of a former president seemed close to impossible.

On May 22, 1999, Slobodan Milosevic became the first sitting head of state to be charged by an international court. The ICTY indicted him on four counts of crimes against humanity and war crimes for his alleged role in atrocities in Kosovo that same year.²⁰ At the time, ICTY Prosecutor Louise Arbour said she was concerned that the tribunal had no mechanism to arrest Slobodan Milosevic and his cohorts, and feared the suspects might “put themselves out of reach”. Meanwhile, Yugoslav officials refused to recognize the ICTY’s jurisdiction.²¹

After this indictment, pressure started to build inside Serbia to oust Milosevic from his presidential position. This internal pressure provided a crucial foundation for action by external actors. In the initial elections in September 2000, presidential challenger Vojislav Kostunica was widely viewed as having won the popular vote but Milosevic refused to step down. In response, thousands of citizens took to the streets in Belgrade, burning the federal parliament building along with the state television and radio center as part of a widespread protest against Milosevic’s continued rule.²² On October 6, 2000, Milosevic conceded defeat. In the days after Milosevic’s concession, and even while his successor, Kostunica, vowed not to hand Milosevic over to the ICTY, international justice proponents outside Serbia started to identify ways to push for his arrest and transfer to the international tribunal.²³ These proponents had succeeded in forcing the arrests of dozens of other indicted persons who were protected by their governments and who would not have been transferred absent outside pressure.

Among the leading proponents of Milosevic’s arrest were congressional staffers who worked for U.S. senators committed to international justice. They were frustrated that the U.S. Government had moved so quickly to remove the “Dole sanctions” against Serbia – including a long list of standards governing debt and rule of law cooperation issues – after Milosevic stepped down.²⁴ A small group of congressional staff and civil society representatives drafted a new set of conditions, which became Section 594 (known as the *McConnell-Leahy law*) of the *Foreign Operations Appropriations Act of 2001*, which governed U.S. foreign aid. The *McConnell-Leahy law* combined with the *War Crimes Prosecution Facilitation Act of 1996* (known informally as the “Lautenberg provisions” and designed to ensure that no U.S. tax dollars intended for reconstruction efforts were given to any country which failed “to take necessary and significant steps to apprehend and transfer to the Tribunal [ICTY] all persons who have been publicly indicted by the Tribunal”) to create an even more powerful conditionality dynamic between the U.S and the Balkan states.²⁵

The *McConnell-Leahy law* initially imposed March 31, 2001 as the deadline for Yugoslavia to meet three conditions in order to qualify for continued aid and U.S. assistance in obtaining help from international financial institutions. One of these three conditions was Serbia’s cooperation with ICTY, including access for investigators, provision of documents, and the surrender and transfer of indictees or Serbia’s assistance in their apprehension. The U.S. Secretary of State had to certify that Serbia was cooperating with the ICTY before reconstruction money would be released. The new Ko%otunica

Government in Belgrade tested the U.S. by arranging the voluntary surrender of two Bosnian Serbs, Milomir Stakic and Blagoje Simic, right before the deadline – but did not produce Milosevic. Worried that the surrender of Stakic and Simic might satisfy the U.S. ambassador in Belgrade, the authors of the *McConnell-Leahy law*, U.S. Senators Mitch McConnell and Patrick Leahy, (together with supportive civil society members and editorial writers) protested that cooperation had to mean the arrest and transfer of Milosevic to the ICTY by the March 31 deadline.²⁶

On April 1, 2001, Milosevic was arrested in Belgrade after Serbian law enforcement officials ended a 36-hour stand-off in which they surrounded the former leader’s villa. He faced questioning by a Serbian investigating judge on charges of financial corruption and abuse of power but it was still unclear whether the Serbian authorities were prepared to extradite him to The Hague for trial.²⁷

While news of Milosevic’s largely unexpected arrest drew praise in most capitals, many were ambivalent about pressing the new government in Belgrade to transfer the former president to The Hague for trial. McConnell and Leahy, whose law created the March 31 conditionality deadline thought to have provoked the arrest, were not content, however, with the good news of his arrest alone.²⁸ On June 7, 2001, they wrote to then Secretary of State Colin Powell, urging a U.S. boycott of the international donors’ conference for Serbia, scheduled for June 29, 2001, unless Milosevic was in The Hague.²⁹ Powell agreed and reiterated that message to both Serbian President Vojislav Kostunica and Prime Minister Zoran Djindjic.

Milosevic was secretly transferred to the ICTY on June 28, 2001, although Djindjic feared that the army (controlled by Kostunica, who was against Milosevic’s transfer), would try to block Milosevic’s departure. To guard against obstruction, Djindjic used “tactics to confuse”, including sending three cars (one of which held Milosevic) to three different airports. He also arranged for a small plane to arrive from Montenegro as a decoy transport aircraft, but then whisked Milosevic out of Belgrade by helicopter.³⁰ After the successful transfer, Djindjic told the press that “he was prepared to take any drop in his own popularity in the interests of securing international good will and aid.”³¹ Two days later, after the successful transfer, more than \$1.28 billion (USD) was pledged by the United States and its European allies to the FRY.

Milosevic’s trial at the ICTY saw 295 witnesses testify over 466 hearings before he died on March 11, 2006 of a heart attack in his jail cell – without a verdict on his guilt or innocence being reached.

The death of Milosevic, however, should not diminish the extraordinary events which led to his arrest. Indeed, his arrest and transfer should be understood as a product of the broader cooperation effort undertaken by governments supportive of the ICTY, civil society, and NATO forces over several years. Their sustained and coordinated focus on arrests made the ICTY’s work possible.

The Arrest of Radovan Karadzic

The clamor for Milosevic’s arrest was echoed in July 2008, when European Union pressure led to the arrest of former Bosnian Serb leader Radovan Karadzic. The arrest stemmed in part

from the EU's conditioning Serbia's accession to the Union on full cooperation with the ICTY. While there has always been substantial ambivalence within the EU regarding the use of conditionality to encourage cooperation with the ICTY, the use of the accession process as a lure has become an important factor in procuring arrests.

Karadzic was initially indicted by the ICTY in July 1995 and remained one of the world's most wanted fugitives for 13 years. He is currently charged by the ICTY with 11 counts of genocide, crimes against humanity, and war crimes, including his alleged responsibility for the Srebrenica massacre in which more than 7,500 Muslim men and boys were killed and dumped in mass graves in July 1995.³²

On July 22, 2008, Karadzic was arrested on a bus in a Belgrade suburb by Serbian security officers who, after receiving a tip from a foreign intelligence service, had reportedly kept him under surveillance for weeks.³³ It soon emerged that Karadzic had been living in disguise, but freely, in Belgrade. After his arrest, he appeared before the Serbian War Crimes Chamber in Belgrade before he was transferred to the international tribunal in The Hague for his initial appearance on July 30, 2008. ICTY Prosecutor Serge Brammertz hailed Karadzic's arrest as "a major achievement in Serbia's cooperation with the Tribunal".

There is much debate regarding why the Karadzic arrest occurred when it did and who within the new Government of President Boris Tadic was responsible, but the election of a more pro-Western Government the month before Karadzic's arrest is assumed to have been a major factor in creating the environment for the arrest. The Tadic Government was elected after the EU signalled to Serbia's electorate that some of the benefits of the accession process would flow if it rejected the more nationalistic candidates. Most of the EU members were prepared to reward Serbia with financial and trade benefits immediately, but the Dutch Government, to its enormous credit, has steadfastly insisted that the EU enforce its own previously announced conditionality standard: no more progress through the accession stages until and unless Karadzic's colleague and former wartime military commander, Ratko Mladic, is arrested and brought to The Hague for trial. Despite enormous pressure on the Dutch, (because EU decisions of this kind must be unanimous), the Dutch insist on the arrest of Mladic as the standard to be maintained.

The Serbian Government on November 14, 2008 renewed its offer of \$1.25 million USD for information leading to the arrest of Mladic. It is not surprising this renewal was announced in advance of the ICTY prosecutor's December 2008 report to the Security Council regarding Serbia's cooperation with the tribunal. Brammertz's report may influence EU decision-making on Serbia's membership bid.³⁵ Whether the EU will apply its own lessons from the Karadzic arrest and use conditionality to maintain pressure for Mladic's arrest remains to be seen.

The Arrest of Former Liberian President Charles Taylor

On June 4, 2003, the Special Court for Sierra Leone unsealed its initial indictment against Taylor while he was in Accra, Ghana, attending peace talks intended to end the civil conflict in

Liberia. The indictment became public just after Taylor, bowing to Nigerian, South African, and Ghanaian pressure, announced he would step down as Liberian president at the end of 2003. Taylor abruptly left the peace talks and flew home to Liberia, fearing arrest by Ghanaian authorities.³⁶ In August 2003, with Liberian rebels closing in on Monrovia, Nigeria agreed to take in Taylor, with officials announcing that a U.S. brokered deal had been struck with the United Nations, the United States, the African Union, and ECOWAS (the Economic Community of West African States) to get Taylor out of Liberia.³⁷

Taylor settled into exile in Nigeria and international political will to bring him to justice waned. That the issue remained in the public consciousness at all was due to the work of NGOs, U.S. congressmen and the European Parliament.³⁸ Also significant were legal efforts in Abuja by two Nigerian businessmen, David Anyaele and Emmanuel Egbuna, whose limbs were allegedly amputated by Taylor's forces in Liberia. Anyaele and Egbuna challenged Taylor's asylum in Nigeria and sought to have him extradited to the Special Court for Sierra Leone to face justice.³⁹ But despite these efforts to keep Taylor on the agenda, movement was slow and at times hard to see.

Eventually, political dynamics began to change in West Africa, particularly with the election of former World Bank official Ellen Johnson-Sirleaf to the Liberian presidency in October 2005, making her Africa's first female head of state.⁴⁰ After Johnson-Sirleaf took up the presidency, the possibility of Taylor's returning to Liberia and destabilizing a promising new government changed the political calculations of key governments in their approach to Liberia and Taylor. The U.S. Congress reacted to Nigeria's harboring of Taylor by adopting conditionality standards similar to those it had used regarding Milosevic. With the help of NGOs, the U.S. Congress pushed the executive branch to pressure Nigeria to transfer Taylor to the Special Court. Congressman Edward Royce published an op-ed in the *New York Times* on May 5, 2005 – the day George W. Bush and Nigerian President Olusegun Obasanjo were set to meet in Washington – arguing that Bush must press Obasanjo to ensure that Taylor face justice at the SCSL.⁴¹ Obasanjo, however, maintained that he would only send Taylor back to Liberia if asked to do so by a democratically elected Liberian Government,⁴² a position backed by the U.S. administration. As explained by U.S. Assistant Secretary of State for Africa Jendayi Frazer, "There is an agreement between Nigeria and Liberia for Nigeria to hand Taylor over to a duly elected government of Liberia once that government makes the request."⁴³

On March 5, 2006, Liberian President Johnson-Sirleaf formally requested the return of Taylor to Liberia.⁴⁴ Twenty days later, on March 25, 2006, Obasanjo informed Johnson-Sirleaf that Liberia was "free to take former President Charles Taylor into its custody".⁴⁵ Within 48 hours, Taylor went missing from his seaside villa in Nigeria. Nigerian officials raised the alarm and ordered his arrest.⁴⁶ Taylor was caught by Nigerian authorities on March 29, 2006 as he tried to cross the Cameroon border in a Range Rover stuffed with sacks of European and U.S. currency. After Obasanjo issued an order to repatriate him to Liberia, Taylor was placed in a Nigerian Government jet with military guard and flown to Monrovia.⁴⁷ On his arrival there, he was greeted by dozens of Jordanian and Nepalese military police officers (part of the then 15,000 strong UN peacekeeping force to Liberia) on the tarmac, while Irish

troops in white UN tanks manned the corners of the runway and two helicopters patrolled overhead.⁴⁸ That the peacekeepers could secure his arrest and transfer to the SCSL was due to UN Security Council resolution 1638, passed on November 11, 2005, which gave UNMIL the powers to “apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone.”⁴⁹ Taylor emerged from the Nigerian jet, was read his rights, arrested, and put aboard a UN helicopter headed for Freetown, where he was handed over to the Special Court for Sierra Leone.⁵⁰

Meanwhile, Nigerian President Obasanjo had arrived in Washington on March 28, 2006, amid news that Taylor had disappeared from his Nigerian villa. Obasanjo was preparing for a meeting with U.S. President George W. Bush scheduled for the next morning. Under pressure from U.S. Congress and fearing Nigeria would allow Taylor to escape, the White House had suggested that the meeting might be cancelled if Obasanjo did not have answers about Taylor’s disappearance. By March 29, Taylor had been captured. The meeting went ahead as scheduled and Bush congratulated Obasanjo on the arrest.⁵¹

But the international cooperation in support of Taylor’s arrest did not end there. Citing fears over instability in Liberia if Taylor were tried in neighboring Sierra Leone, Sirleaf-Johnson backed a bid to have Taylor’s trial moved to The Hague. The Dutch Government asked for a Security Council resolution to authorize the transfer,⁵² and said it would host Taylor’s trial on the condition that another country agreed in advance to take Taylor after his trial finished.⁵³ The Security Council resolution was drafted by the United Kingdom, which also agreed to imprison Taylor if he were convicted.⁵⁴ Security Council Resolution 1688 was passed unanimously on June 16, 2006, paving the way for Taylor to be tried by the Special Court on the premises of the International Criminal Court in The Hague. Resolution 1688 also requested “all States to cooperate to this end, in particular to ensure the appearance of former President Taylor in the Netherlands for purposes of his trial by the Special Court, and encourages all States as well to ensure that any evidence or witnesses are, upon the request of the Special Court, promptly made available to the Special Court for this purpose.”⁵⁵ After procedural delays, Taylor’s trial began in earnest on January 7, 2008 in The Hague.

Conclusion

The examples of Milosevic, Karadzic, and Taylor demonstrate that arrests do not happen without consistent, imaginative, and informed pressure on states to cooperate. To be effective, this pressure needs to come from multiple sources, including the tribunals themselves, civil society, and supportive states. These arrests also show that it is possible to achieve cooperation – even in seemingly hopeless cases – when an effective strategy, adaptive to changing political and economic circumstances, is implemented by tribunals and a powerful and diverse set of allies.

Of the strategies available for forging cooperation, conditionality – on aid, group membership, or trade benefits – has been most successful in securing arrests. Tribunals have benefited from the willingness of some states to use political

and financial capital to secure cooperation. Tribunals have also benefited from civil society supporters who have tracked compliance and helped to generate support for maintaining conditionality over periods of years, even when the political appetite for it was waning. Similarly, publicity and shaming tactics, including the strategic use of high-visibility political meetings (such as between Obasanjo and Bush), have helped to further cooperation.

Cooperation has also emerged when tribunals have recognized that recalcitrant governments are not necessarily monolithic and that elements within the government can be swayed by the dangling carrot of economic or other benefits. Identifying allies within governments who can help change the dynamic around arrests and cooperation can be critical, as we saw when Prime Minister Djindjic cooperated in the Milosevic arrest. The ICC would do well to identify Bashir’s internal enemies and those individuals hoping to benefit politically from his removal, and devise creative ways to capitalize on the splits. The cleavages within the Sudanese state structure may not be immediately apparent, but they are worth trying to identify and work with, if efforts with Milosevic and Taylor are any guide.

The passage of time has also been a useful friend in tribunals’ efforts to win cooperation from recalcitrant governments. Internal dynamics can and do change? and efforts by the tribunals and their allies can be a potent catalyst in such transformations. Milosevic, for example, was still powerful at the time of his indictment and enjoyed the support of his entrenched former appointees and security services. Similarly, after his indictment, Taylor retained strong support from powerful quarters within Liberia and more broadly in Africa. But arrest warrants and indictments can play a significant role in delegitimizing and undermining local support for indictees, as was the case with Milosevic, Karadzic, and Taylor. Scope can often exist, then, to capitalize on schisms and evolving public and political opinions, paving the way for an effective cooperation campaign which may ultimately lead to arrests.

The International Criminal Court has already demonstrated that it has learned some lessons from other tribunals. The arrest in May 2008 of Jean-Pierre Bemba, the former presidential candidate in the Democratic Republic of Congo charged with war crimes and crimes against humanity for his alleged role in the Central African Republic conflict, highlighted the cooperative relationship the ICC has engendered with Belgium and Portugal. In this case, Bemba had fled to Portugal in April 2007 and acquired a home in Brussels, where he was arrested on May 25, 2008, one day after the International Criminal Court issued an arrest warrant for him. Press reports indicate that the arrest warrant was hastily issued on Friday, May 24, 2008 after court officials learned he would be in Belgium. The fact of the arrest warrant was kept secret, however, until his capture. Belgian authorities were notified on Saturday morning and Bemba was arrested 13 hours later. He appeared in front of a Belgian judge as part of the process leading to his transfer to The Hague.⁵⁶ He arrived at the ICC on July 3, 2008.

This European example is a great precedent for the ICC’s effective cooperation with other states. However, the backlash against the request for an arrest warrant for Bashir demonstrates the importance of developing stronger

relationships in Africa to shore up political support for the ICC's work. This should include a more engaged relationship with the African Union, including a more active presence in Addis Ababa. But a presence at Addis will not by itself garner cooperation if other groundwork is not laid. Diligent work in Africa with government ministers, supportive parliamentarians and their staffs, and with legal advisors in the justice and foreign ministries will be critical in creating a new dynamic around cooperation with the ICC, including on arrests. The same effort is needed with other regional organizations and political blocs, including the Organization of American States, the League of Arab States, the Organization of the Islamic Conference, and the Non-Aligned Movement.

Finally, while civil society may not seem an obvious actor in facilitating state cooperation, it has proven critical in making progress on other 'hard arrest' cases. Cultivating civil society allies by engaging regularly with them, keeping them informed, and consulting with them on advocacy and political strategies, can add a powerful tool to the ICC's cooperation arsenal. Civil society often has access to victims' groups that can shame recalcitrant governments harboring alleged war criminals. Non-governmental groups frequently have high-level links to governments or to other sources of decision-making power and can say and push for things which are impossible for the tribunals and states to do themselves.

If the Bashir arrest warrant is granted, garnering state cooperation to secure his apprehension will be a long, hard road. But the struggles and successes of other courts which have faced similarly tough challenges have paved a smoother path for the ICC to follow.

Notes

- Tracey Gurd is Associate Legal Officer, International Justice Program, Open Society Justice Initiative. This paper draws on interviews and analysis conducted between 2006 and 2008 by Justice Initiative consultants Nina Bang-Jensen and Harpinder Collacott. The paper greatly benefits from and acknowledges their insights, but any errors or flaws are the responsibility of the author.
- See comments by Prosecutor Stephen Rapp of the Special Court for Sierra Leone at the Second International Law Dialogues, Chautauqua, New York, August 26, 2008, available at <http://www.enoughproject.org/node/1079>.
- See Second Amended Indictment against Charles Ghankay Taylor, filed with the Special Court for Sierra Leone on May 29, 2007, available at <http://www.sc-sl.org/Documents/Taylor/SCSL-03-01-PT-263.pdf>.
- Richard Dicker, *The Urgent Need for Cooperation with the Court: Getting it Right*, Tenth Anniversary of the Rome Statute of the International Criminal Court, July 3, 2008, The Hague, available at http://www.icc-cpi.int/asp/documentation/doc_7thsession&l=en.html.
- See Security Council Resolution 1593 (2005) U.N. Doc S/RES/1593 (2005), March 31, 2005, available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>. Under Article 13(b) of the Rome Statute, "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." See the *Rome Statute of the International Criminal Court*, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf (hereafter "Rome Statute").
- See, for example, quotes by Sudanese presidential advisor Mustafa Osman Ismail in Opheera McDoom, "Sudan Rules Out Deal with ICC Over Bashir Warrant," Reuters, July 17, 2008, available at <http://www.alertnet.org/thenews/newsdesk/L1735882.htm>: "There will be no direct cooperation with the International Criminal Court and no sending any Sudanese citizens to The Hague" (hereafter "Sudan Rules Out Deal").
- The ICC has issued arrest warrants for Janjaweed militia leader Ali Kushayb and Sudanese Government minister Ahmad Harun. See "Warrant of Arrest for Ali Kushayb," International Criminal Court, issued April 27, 2007, available at http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3_English.pdf; and "Warrant of Arrest for Ahmad Harun," International Criminal Court, issued April 27, 2007, available at http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf.
- According to a press release issued by the International Bar Association, "IBA says all states parties to the ICC must adopt implementing legislation as a matter of urgency," November 14, 2008, "Out of the 108 countries that have ratified the Rome Statute, less than half have satisfactorily adopted ICC implementing legislation." As the IBA notes, "This potentially makes cooperation requests made by the ICC to governments which have not adopted implementing legislation difficult to execute." As states address domestic implementing legislation, one key issue will be how they deal with Article 98(1) of the Rome Statute, above n.5, which states "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity." This provision may make it difficult for any state to respond to an arrest warrant for a head of state such as Bashir if its diplomatic immunity agreements with Sudan, or other international law obligations, do not allow it to secure arrests of diplomatically protected persons at the request of the ICC.
- Luis Moreno Ocampo, "The Darfur Case," Keynote Address, Council for Foreign Relations Symposium, New York, October 17, 2008, p.3, available at <http://www.icc-cpi.int/library/organs/otp/CFRS-2008.pdf>.
- Ibid.
- See "Sudan Rules Out Deal," above n.6.
- Under the Rome Statute, above n.5, Article 16 states that "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." A deal to drop the arrest warrant in exchange for the surrender of two previously indicted Sudanese individuals, Ali Kushayb and Ahmad Harun, was rejected by the Sudanese Government in mid-July 2008: see "Sudan Rules Out Deal," above n.6.
- "Sudan Rules Out Deal," above n.6.
- See Neil MacFarquhar, "Accusations Against Leader of Sudan Fuel Debate," *New York Times*, September 29, 2008, available at <http://www.nytimes.com/2008/09/30/world/africa/30nations.html?partner=rssnyt&emc=rss>.
- The ICC Prosecutor is currently investigating four situations: Darfur, Sudan; the Central African Republic; Uganda; and the Democratic Republic of Congo.
- See Preamble, *Rome Statute*, above n. 5. The ad hoc tribunals for

- Rwanda and the former Yugoslavia are provided with Chapter VII authority with which to request cooperation from states. This means that at least in theory, the Security Council can force compliance with the cooperation requests and states are obliged to comply. The hybrid courts cannot rely on Chapter VII authority when making cooperation requests, making enforcement all the more difficult and less secure.
17. See Article 87, Rome Statute, above n.5.
 18. See Article 103, *ibid.*
 19. See Article 109, *ibid.*
 20. See *Initial Indictment (Kosovo), Prosecutor against Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, and Vljako Stojiljkovic*, filed with the International Criminal Tribunal for the former Yugoslavia on 22 May 1999, available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>.
 21. See "Milosevic Indictment Makes History," CNN, May 27, 1999, available at <http://www.cnn.com/WORLD/europe/9905/27/kosovo.milosevic.04/>.
 22. For an overview, see Steven Erlanger, "Yugoslavs Claim Belgrade for New Leader," *New York Times*, October 6, 2000, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE0DE143CF935A35753C1A9669C8B63>.
 23. See, for example, Michael Ignatieff, "The Right Trial for Milosevic," *New York Times*, October 10, 2000, available at <http://query.nytimes.com/gst/fullpage.html?res=9902E1DD113CF933A25753C1A9669C8B63>. See also "Major Rights Groups Oppose Immunity for Milosevic," Human Rights Watch website, October 5, 2000, available at <http://www.hrw.org/english/docs/2000/10/05/serbia690.htm>.
 24. Nina Bang-Jensen, *What May Supporters of Tribunals Learn from the Fourteen Year Effort to Ensure that Persons Indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) Are Transferred for Trial*, February 2008, p.7 (copy on file with author).
 25. *Ibid.*
 26. *Ibid* pp.7-8.
 27. See "Milosevic Arrested," BBC News, April 1, 2001, available at <http://news.bbc.co.uk/2/hi/europe/1254263.stm>.
 28. See, for example, Leahy's comments as reported in the days after Milosevic's arrest: "A good administration policy would be to say, 'You adhere to international law or you don't get the money,'" as quoted in Jane Perlez, "Milosevic Should Face Trial by Hague Tribunal, Bush Says," *New York Times*, April 2, 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9901E6DC113FF931A35753C0A9679C8B63&sec=&spon=&pagewanted=1>.
 29. See International Crisis Group, "A Fair Exchange: Aid to Yugoslavia for Regional Stability," *ICG Balkans Report* 112, June 15, 2001, providing the context for the Leahy-McConnell letter. The letter is referred to explicitly in footnote 1, "On 7 June, Senators Leahy and McConnell, the authors of the bill behind the 31 March deadline, wrote to Secretary of State Colin Powell, urging a U.S. boycott of the donors' conference unless the FRY's cooperation with ICTY improves."
 30. See Carlotta Gall, "Serbian Tells of Spiritng Milosevic Away," *New York Times*, July 1, 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9C06EFD1339F932A35754C0A9679C8B63>.
 31. *Ibid.*
 32. On September 22, 2008, the ICTY's prosecution office submitted a revised and pared-down indictment against Karadzic in an effort to speed up the trial against him. The revised indictment is available at <http://www.un.org/icty/indictment/english/kar-mai080922e.pdf>. For a basic overview of the changes, see "Prosecutors Refine Indictment Against Karadzic," Radio Netherlands Worldwide, September 23, 2008, available at <http://www.rnw.nl/internationaljustice/tribunals/ICTY/080923-karadzic-indictment>. His original indictment for crimes allegedly committed in Bosnia and Herzegovina was issued on July 24, 1995, available at <http://www.un.org/icty/indictment/english/kar-ii950724e.htm>; and for crimes committed in Srebrenica on November 16, 1995 available at <http://www.un.org/icty/indictment/english/kar-ii951116e.htm>.
 33. "Serbia Captures Fugitive Karadzic," BBC News, July 22, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7518543.stm>.
 34. ICTY Office of the Prosecutor Press Statement, "Prosecutor Serge Brammertz Statement on the Transfer of Radovan Karadzic," July 30, 2008, available at <http://www.un.org/icty/latest-e/pressindex.htm>.
 35. "Serbia Ready to Pay \$1.25m for Info on Mladic," Reuters, November 14, 2008, available at <http://www.alertnet.org/thenews/newsdesk/LE664098.htm>. Serbian Minister Rasim Ljajic is quoted as saying that "The reward demonstrates Belgrade's dedication to fulfil the rest of its obligations towards the tribunal as soon as possible... By this we are showing also that there is a political will for extraditing Mladic."
 36. See Felicity Barringer and Somini Sengupta, "War Crimes Indictment of Liberian President Is Disclosed," *New York Times*, June 5, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9C00E4DD1E30F936A35755C0A9659C8B63&sec=&spon=&pagewanted=print>.
 37. See comments by Nigerian governor, Donald Duke, in "Nigeria Defends Taylor Exile," BBC News, August 12, 2003, available at <http://news.bbc.co.uk/2/hi/africa/3142659.stm>.
 38. On February 24, 2005 the European Parliament unanimously passed a resolution calling for Nigeria to transfer Charles Taylor to the Special Court for Sierra Leone. On May 4, 2005 the U.S. House of Representatives passed a Resolution, 421-1, calling for Nigeria to transfer Charles Taylor to the Special Court for Sierra Leone. On May 11, 2005 the U.S. Senate passed the May 4, 2005 House Resolution by unanimous consent, joining the call for Nigeria to transfer Charles Taylor to the Special Court for Sierra Leone. On June 30, 2005 a coalition of up to 300 African and international civil society groups sent a declaration to the African Union (AU) demanding that Nigeria surrender Charles Taylor to the Special Court for Sierra Leone. Press conferences were held in 14 countries throughout Africa announcing the declaration.
 39. See "Nigerians Challenge Taylor's Asylum," BBC News, July 14, 2004, available at <http://news.bbc.co.uk/2/hi/africa/3892225.stm>. On May 13, 2004, Emmanuel Egbuna and David Anyaele, two survivors of war-time amputations allegedly at the hands of Charles Taylor-supported rebels in war-time Sierra Leone, initiated judicial review proceedings before Nigeria's Federal High Court in Abuja, seeking the lifting of asylum granted to Taylor by Nigeria's president. In the suit, the two applicants argued that as a person indicted for war crimes and crimes against humanity before an international court, Taylor was not eligible for the asylum status that provided him with immunity from lawsuits. Taylor declined to appear in court or contest the suit. In response to the proceedings, Nigeria's federal government filed a formal objection to the standing of the two amputees to initiate the case. Both the Justice Initiative and Amnesty International, having been granted leave to intervene, subsequently filed formal briefs of appearance and argument in the case. On November 1, 2005, the Federal High Court ruled that the case should proceed, finding that so long as the government's grant of asylum raised an obstacle to the plaintiffs' claims against Taylor, they had standing to challenge Taylor's asylum status. On November 4, the Nigerian Government filed an appeal with Nigeria's Federal Court of Appeals against the High Court's decision. It followed this appeal with an application to the High Court for a stay of proceedings on the remedies phase of the High Court case. Hearings were pending at the time of Taylor's arrest

- and transfer to Sierra Leone on March 29, 2006. On April 13, 2006, after Taylor's arrest, the High Court declared the case mooted.
40. On July 25, 2005 the Mano River Union issued a communiqué in Sierra Leone declaring: "the Summit agreed to suggest to the Government of the Federal Republic of Nigeria that there may now be need for a review of the terms of the temporary stay granted to Charles Taylor or a referral by the Government of the Federal Republic of Nigeria of the matter to ECOWAS Heads of State for further consideration"
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 43. U.S. House of Representatives Africa Subcommittee Hearing, February 8, 2006.
 44. "Statement by the Federal Government of Nigeria – Former President Charles Taylor to be transferred to the custody of the Government of Liberia," March 25, 2006, accessible on the Nigerian State House official website, <http://www.nigeriafirst.org/cgi-bin/artman/exec/view.cgi?archive=1&num=5687>.
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 48. Craig Timberg, "Liberia's Taylor Found and Arrested," *Washington Post*, March 30, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/29/AR2006032900879.html>.
 49. *Security Council Resolution 1638 (2005)*, U.N. Doc S/RES/1638 (2005), November 11, 2005, available at <http://www.un.org/News/Press/docs/2005/sc8554.doc.htm>.
 50. See "Former Liberian President Is Arrested in Nigeria and Flown Home, Officials Say," *International Herald Tribune*, March 29, 2006, available at <http://www.ihf.com/articles/2006/03/29/news/web.0329taylor10.php>, and Craig Timberg, "Liberia's Taylor Found and Arrested," *Washington Post*, March 30, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/29/AR2006032900879.html>.
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 53. "Dutch Government Searching for Government to Detain Charles Taylor after Trial," *Associated Press*, March 31, 2006, available at <http://www.highbeam.com/doc/1P1-120965972.html>.
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 56. For the details of his arrest, see "Jean-Pierre Bemba, Former Congo Warlord, Arrested in Belgium," *International Herald Tribune*, May 25, 2008, available at <http://www.ihf.com/articles/ap/2008/05/25/europe/EU-GEN-War-Crimes-Bemba.php>.

ENDING THE CULTURE OF IMPUNITY: THE ESTABLISHMENT OF SPECIALIZED 'WAR CRIMES' UNITS¹

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The past decade underlined the key role of national immigration, police and prosecution authorities in enforcing international criminal law and the fight against impunity for genocide, crimes against humanity, war crimes and torture (serious international crimes). Increasingly, States conduct extraterritorial investigations and prosecutions to ensure that they comply with their obligations under international law and that they do not provide a safe haven to perpetrators of serious international crimes.

Rather than outlining the legal basis and *raison d'être* of universal jurisdiction, this paper focuses on State practice relating to the enforcement of international criminal law.³ It examines how domestic authorities in some countries have overcome the challenges of investigating and prosecuting serious international crimes through the establishment of 'specialized war crimes units'. The article examines the practical arrangements in place in these countries, and concludes by arguing that although important challenges remain, a committed and institutionalized national approach to serious international crimes is necessary to contribute to an end of the culture of impunity.

Introduction

Perpetrators of serious international crimes regularly find refuge in other countries, in particular in the aftermath of an armed conflict and a change of government. In addition, suspects of such crimes who benefit from impunity in their home countries may travel abroad, for instance to receive medical treatment or to attend conferences, thereby providing an opportunity for their arrest and an investigation into their alleged crimes.⁴

The European Union (EU), in *Council Framework Decision of 8 May 2003 on the "investigation and prosecution of genocide, crimes against humanity and war crimes"*, stated that "*Member States are being confronted on a regular basis with persons who were involved in such crimes and who are trying to enter and reside in the European Union*".⁵ The EU, its Member States and affiliated countries thus have an important role to play to ensure that Europe is not a safe haven for perpetrators of serious international crimes.

This important role remains even in the presence of international courts and tribunals, as their limited geographical and temporal mandates, as well as limited resources, prevent them from prosecuting all perpetrators. Indeed, the Office of the Prosecutor of the International Criminal Court (ICC)

indicated a "risk of an impunity gap unless national authorities, the international community and the ICC work together to ensure that all appropriate means for bringing other perpetrators to justice are used".⁶ The investigation and prosecution of such crimes therefore remains the responsibility of national authorities.⁷

The increasing awareness of that responsibility is reflected by a series of prosecutions of serious international crimes that have been initiated by national authorities on the basis of universal and extraterritorial jurisdiction since 2001. National authorities in countries including Belgium, Canada, Denmark, France, Finland, Sweden, Germany, the United Kingdom, the Netherlands, Norway, Senegal, Spain and the United States, have initiated proceedings against suspects for war crimes, torture, crimes against humanity or genocide committed in Afghanistan, Iraq, Mauritania, Uganda, Rwanda, Sierra Leone, Democratic Republic of Congo, Chad, Argentina and the former Yugoslavia. In addition, victims, relying on the principle of universal jurisdiction, have filed complaints against suspects from China, the United States, Rwanda, Chad, France, Israel, Algeria and Tunisia.⁸

The proceedings since 2001 have resulted in at least 20 convictions, 5 acquittals, the issuance of several arrest warrants and at least 50 charges, rendering a substantial contribution to ending the culture of impunity.⁹

Challenges and responses. The extraterritorial investigation and prosecution of serious international crimes on the national level

The experiences of national authorities in these cases underline that the investigation of serious international crimes is far from easy. The cases are more complex, more time-consuming and more resource-intensive than most ordinary criminal cases. They confront authorities with a number of challenges, starting with the reporting of the crimes.

Alerting national law enforcement authorities about serious international crimes

The crimes in most cases have been committed years ago in foreign geo-political contexts. They are not usually brought to the attention of police authorities through a victim reporting to the local police station. National authorities, therefore, are often not aware of the presence of victims and alleged

perpetrators on their countries' territory. This is particularly true with respect to low- and mid- level suspects who attract less 'international attention'. Similarly, victims may not know about the possibility of submitting a complaint abroad. The bulk of cases that resulted in investigations or proceeded to trial in Canada, Belgium, France, the Netherlands, Denmark and the United Kingdom involved victims, suspects and perpetrators who entered the countries as asylum applicants. In some instances, victims recognised the perpetrators in grocery stores and on the streets in their new-found country of refuge.¹⁰

Immigration authorities can thus play a crucial role in alerting relevant authorities about the presence of a suspect of serious international crimes on their territory. They are in a unique position to obtain relevant information as they are often the first to interview applicants. Equally, immigration authorities can review visa applications, thereby already preventing the arrival of suspects on their territory. They can further make victims aware of the possibilities at their disposal, such as the existence of specialized war crimes units within the police and prosecution authorities, not only in their country but elsewhere. This can have the added benefit for police and prosecution authorities of locating potential witnesses more easily, provided that they have access to relevant information within the immigration authorities.

The Council of the EU has identified this potential and urged Member States to "take the necessary measures to ensure that the relevant national law enforcement and immigration authorities are able to exchange information, which they require in order to carry out their tasks effectively."¹¹ Several countries have heeded this recommendation and established specialized war crimes units within their immigration authorities with a view to ensuring that they do not provide a safe haven to suspects of serious international crimes.¹²

The British Home Office in February 2002 stated, "Government must be prepared to use their full range of powers, including the selective use of immigration and nationality provisions, to make clear that those who are suspected of involvement in atrocities are not welcome in a civilized society."¹³ Accordingly, in 2004, the Border and Immigration Agency War Crimes Team (WCT) was set up within the UK Border Agency. The WCT operates under the framework of Article 1F of the 1951 Geneva Convention Relating to the Status of Refugees. This indicates permissible grounds for denying someone the protection afforded to refugees by the Convention: where there are "serious reasons" to believe that "he has committed a crime against peace, a war crime or a crime against humanity".¹⁴ The team is composed of 14 analysts with international legal and country expertise who work with and train colleagues from other departments of the Agency to recognize and identify potential war criminals. Once case workers from other departments refer a case to the team, the team will carry out research and investigate and analyze a case with a view to making recommendations to their colleagues as to how to proceed with a case.¹⁵ The emphasis is on seeking to exclude an applicant from protection under the Convention and to remove the relevant applicant from the UK where there are serious reasons to believe that he or she has committed an international crime.¹⁶ Apart from removal, other possibilities to consider include extradition and domestic prosecution. Of the 1,863 cases which the unit screened in the last four years,

criminal investigation is deemed not feasible in the majority of cases: the team has referred 22 cases to domestic law enforcement authorities.¹⁷

In The Netherlands, a special 1F unit was created in late 1997, after media reported widely about a victim who met his torturer on the street in a Dutch city. The unit is currently composed of 29 analysts with expertise in international humanitarian law, 1 researcher and 1 policy advisor. The unit provides advice to immigration officers, who apply specific screening procedures of asylum and visa applicants, including interviewing applicants about their previous employment, which might disclose a potential involvement in international crimes. Where there are serious reasons to believe that an applicant may fall within the 1F exception, the file is forwarded to the 1F unit, which cooperates closely with the Dutch prosecution services. Should the specialist unit confirm that a case meets the criteria of Article 1F, the application is automatically rejected and transferred to the office of the prosecutor.¹⁸ This has led to the conviction, in 2005, of two Afghan nationals, after immigration authorities had enquired about their previous employment in the Afghan army.¹⁹ A trial against a Rwandan genocide suspect who was discovered by the immigration authorities is currently ongoing.²⁰ However, not all cases necessarily lead to an investigation by law enforcement authorities: where possible, the applicant is deported to his or her country of origin. In the period from 1998-2008 'Article 1F' was applied in 700 cases, with 350 cases where the address of the applicant is not known and 350 cases of suspects known to be living in The Netherlands.

Although no formal unit exists within the Danish immigration authorities, a centralized approach is applied and since 2002, all '1F cases' are transferred to the national prosecution services.²¹ Applicants are screened against a list of suspects issued by international tribunals or Interpol. This led to the arrest of a Rwandan genocide suspect in Denmark in September 2006.²² The Danish authorities, in collaboration with the Red Cross, distribute leaflets that inform asylum seekers in six languages about the existence and contact details of a 'Specialized International Crimes Office', encouraging victims, witnesses and others to come forward with potential information about a suspect of such crimes who might be living in Denmark.²³

State practice in these and other countries suggests that formalized cooperation between law enforcement and immigration authorities diminishes the risk of inadvertently providing a safe haven to perpetrators of such crimes.

However, one reason for concern is the creation of a 'legal limbo' in 1F cases. This can arise where there is not sufficient evidence for their investigation on the basis of extraterritorial/universal jurisdiction (or where such a legal basis does not even exist), but where deportation is not possible due to States' obligations under the European Convention for Human Rights and the International Covenant for Civil and Political Rights.²⁴ In The Netherlands, of the 350 suspects found in the country from 1998-2008, concerns about the risk of torture on return prevented the deportation of the applicant in 40 cases. So far, three applicants have been convicted, one was acquitted and another is currently facing charges.²⁵ Sometimes, in such cases, the applicant is 'tolerated'. In the United Kingdom, for instance, applicants are then placed on 'discretionary leave' for a period of six months,

and their status is regularly reviewed “until removal becomes a viable option”. Since October 1997, 19 applicants have been refused asylum under Article 1F, of whom three have been granted discretionary leave.²⁶

Establishing investigative and prosecutorial expertise

Domestic law enforcement agencies which ordinarily deal with localized crimes may lack familiarity with the specific nature and context of serious international crimes. Expertise in international law is usually necessary to prove elements of internationalized crimes such as genocide, crimes against humanity, war crimes or torture. Investigators, investigative judges and prosecutors further need to understand the specific historical and political context in which crimes have been committed in order to collect evidence, take witness statements and to successfully present the evidence to the court. Massive crimes, such as the 1994 genocide in Rwanda, typically involve a great number of perpetrators, traumatized victims and witnesses with a different cultural background and language. The challenges may easily seem to be daunting and may lead national authorities to (prematurely) conclude that such investigations are not feasible.

Recognizing the complexity of investigations and prosecutions of such crimes led to the *Council Framework Decision of 8 May 2003*, which urges Member States to consider the “need to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question”.²⁷ Similarly, the Canadian Department of Justice recognized “that the research required to investigate and prepare such cases for prosecution is highly specialized and intensive”.²⁸

An increasing number of countries have responded to the challenges involved in establishing units within police and prosecution authorities that specialize in the investigation and prosecution of serious international crimes. Belgium, Canada, Denmark, The Netherlands, Norway and also recently Sweden have created specialized units within their police and/or prosecution authorities to investigate and, where possible, prosecute international crimes cases.²⁹ The following examples illustrate that although the composition, mandate and budget of these units may vary from country to country, they all share a common objective: to ensure that their country does not provide a safe haven to perpetrators of serious international crimes.

Denmark³⁰

The Danish Government established the ‘Special International Crimes Office’ (SICO) in 2002 by Ministerial Order in order to “ensure that Denmark does not provide a safe haven for perpetrators of crimes” such as “genocide, crimes against humanity, war crimes, acts of terror and other serious crimes committed abroad” such as homicide, torture, deprivation of liberty, rape, bombing and arson.³¹ The unit brings together both investigators and prosecutors, thereby combining investigative and legal expertise. It is composed of nine

investigators with international experience, four prosecutors and one historian. So far, the unit has received 165 cases, with 17 cases currently ongoing and one successful prosecution. The majority of cases received had to be dismissed as there was no basis for prosecution in Denmark, for instance, because the suspect was no longer in the country. However, the responsibility of the unit goes beyond achieving prosecutions and a vital aspect of its work is assessing whether potential perpetrators of serious international crimes committed abroad are currently living in Denmark.³²

Norway³³

Once SICO in Denmark was up and running, there was a fear that all the people investigated in Denmark for war crimes and other similar crimes would leave Denmark for Norway. In addition, the Norwegian media started to report about alleged perpetrators who had found a safe haven in Norway. This caused Parliament to enquire about the establishment of a specialized unit, eventually resulting in its establishment in 2005 within Norway’s National Criminal Investigation Service (NCIS). At the outset of the establishment of the unit, no extra money was provided for these types of investigation and it was only over time and due to careful selection of cases – for instance, cases where the authorities believed that an indictment and a conviction were likely – that the budget of the unit was increased. The unit today includes 12 investigators with a mandate to investigate genocide, war crimes and crimes against humanity. It is complemented by a separate prosecution office, where three prosecutors work exclusively on serious international crimes. The unit’s work is further promoted by legislative changes introduced in March 2008, providing for universal jurisdiction over genocide, crimes against humanity and war crimes with retrospective effect.

Close collaboration with their colleagues from SICO enabled the unit and the prosecution office to accomplish the conviction of a Bosnian perpetrator on 1 December 2008, for war crimes committed during the war in the former Yugoslavia.³⁴ Further investigations of suspects from Rwanda are currently ongoing, while other cases concerning suspects from Iraq, Afghanistan, other African countries and the Balkans are being examined.³⁵

Sweden³⁶

Following the ratification of the Rome Statute of the International Criminal Court on 28 June 2000, one officer within the National Criminal Police was appointed as a national contact point and as coordinator for ICC crimes, while any investigations and prosecutions of such crimes would fall within the responsibility of regional police and prosecution authorities. Once more potential serious international crimes cases started to be brought to the attention of the Swedish authorities, the police, prosecution and immigration officials decided in 2006 to put together a working group with the task of reviewing the activities in this field so far. In 2007, the working group suggested the establishment of a specialized war crimes unit within the National Criminal Police, as well as centralizing prosecutors within the International Public

Prosecution Office in Stockholm. After consulting with their colleagues from SICO in Denmark and the Dutch war crimes unit, the National Police Board decided on 5 September 2008 that such a police unit was to be established, with an initial composition of one detective superintendent, one detective inspector for the gathering of intelligence, six detective inspectors for the investigation of these crimes, one analyst and one administrative assistant. The police unit became officially operational on 1 March 2008 and has an initial budget of approximately 1,727,000 Euros in 2008 and 2009, taken from the budget of the national police. Its mandate covers genocide, crimes against humanity, war crimes and torture. The police unit is complemented by four prosecutors within the International Public Prosecution Office in Stockholm.

Approximately 50 cases have been referred to the unit so far, with 70% of all cases coming from the immigration authorities. In the majority of these cases, there was not sufficient evidence available to initiate an investigation. Fifteen cases are currently ongoing, with a focus on crimes committed in the former Yugoslavia and Iraq.

Belgium

Following an increase in complaints based on universal jurisdiction, particularly concerning alleged perpetrators of the genocide in Rwanda,³⁷ the Belgian Government in 1998 decided to establish a specialized unit: the "*Bureau Droit Humanitaire*". The unit is part of the judicial police of the "*arrondissement judiciaire Bruxelles*"³⁸ and currently includes five investigators. It is complemented by two prosecutors within the federal prosecution service, who have exclusive competence over serious international crimes cases.³⁹ Legislative changes are under way to centralize trials within the jurisdiction of a team of investigative judges, enabling them to specialize and gain experience in extra-territorial investigations. This 'judicial/law enforcement' framework is complemented by an administrative/political structure, including contact points within the Ministry of Justice, Foreign Affairs and Interior, in charge of coordinating information exchange and mutual legal assistance requests.

Belgian authorities have, to date, investigated international crimes committed in Rwanda, Chad, Guatemala and Burma. At the time of writing, Belgium has investigated and prosecuted seven Rwandan perpetrators for their role in the 1994 genocide, resulting in convictions in 2001, 2005 and 2007 and prison sentences ranging from 9 to 20 years.⁴⁰

The unit and the domestic framework have not only been established with a view to prosecuting perpetrators of serious international crimes, but also to enable authorities to comply swiftly with requests for cooperation and assistance of the ad hoc tribunals and the International Criminal Court (ICC). In May 2008, Belgian police arrested Jean- Pierre Bemba, a former Congolese warlord and ex-presidential candidate, only 13 hours after an arrest warrant was issued by the ICC for crimes against humanity and war crimes which he allegedly committed in the Central African Republic.⁴¹

The Netherlands

With the establishment of the ICTY in The Hague and alleged perpetrators from the former Yugoslavia seeking refuge in The Netherlands, the Dutch Government in 1997 decided to set up a specialized war crimes team focusing on the former Yugoslavia. This mandate was expanded in 1998 to include serious international crimes committed elsewhere. The special unit is located within the National Police Squad. It has a staff of 35, including investigators, intelligence officers and administrative staff, working exclusively on serious international crimes cases. Experts such as historians and anthropologists are consulted when needed. The police unit is complemented by a specialized team within the Federal Prosecution Services (the *Landelijk Parket* in Rotterdam), where four prosecutors work exclusively on serious international crimes. Trials are centralized in The Hague District and Appeals court, where an investigative judge is leading probes into serious international crimes.

Both units are operating in a framework of support from the Ministry of Justice, in charge of mutual legal assistance requests when extraterritorial investigations have to be carried out, and the Ministry of Foreign Affairs, providing the 'diplomatic framework'. The units further cooperate closely with universities and NGOs who provide expertise on specific conflicts.

The unit has carried out extraterritorial investigations in a variety of cases and regions, including Afghanistan, Congo, Sierra Leone, Rwanda and Iraq. To date, 32 cases are in progress and 6 cases have been brought to justice since 2002, including the conviction of a perpetrator of torture committed in the former Zaire, two torturers from Afghanistan, and the conviction of a Dutch national for complicity in war crimes committed in Iraq. Two cases led to the acquittal of the accused, while the trial of a Rwandan genocide suspect is currently ongoing.⁴²

Canada⁴³

The Canadian Government in 1998 decided to set up a 'Program on crimes against humanity and war crimes' (the Program), to have a comprehensive and consistent policy with effective remedies, ensuring that Canada does comply with its obligations under international law and does not provide a safe haven to perpetrators of the worst crimes. These remedies can include exclusion, deportation, extradition, as well as criminal prosecutions for the most serious cases. Accordingly, the Program includes a variety of governmental agencies, such as the Canada Border Services Agency (CBSA), Citizenship and Immigration Canada (CIC), the Department of Justice and the Royal Canadian Mounted Police (RCMP). The Program receives 8,970,000 Euros per year. Since the main source of cases is the immigration/asylum authorities, which make up 95% of cases, the Canadian authorities take that into account when looking at potential remedies. Accordingly, since the setting up of the Program, Canada has prevented approximately 2,000 people from entering Canada by refusing them overseas, while removing 150 in the same time period after they had entered Canada. Similarly, the Program ensures that the extradition of suspects from Canada is an option.

Currently, the section within the RCMP includes 11 investigators working in geographic teams. The section investigates according to referrals from the CIC/CBSA and based on allegations from witnesses, foreign governments, community groups, non-governmental organizations and open source information. Due to limited resources available, the option for criminal investigation and prosecution is only adhered to in the most serious cases. Allegations will, accordingly, only be examined where they disclose a personal involvement or command responsibility, and where the evidence provided can be corroborated and obtained in a “reasonably uncomplicated and rapid fashion”. In 2005-2006, there were about 60 files being considered by the RCMP.⁴⁴ Currently, one case is ongoing: Désiré Munyaneza was charged with genocide, war crimes and crimes against humanity for his alleged involvement in the genocide committed in Butare, Rwanda, in 1994.⁴⁵

The ‘State practice’ of the last few years raises several questions

The success of specialized units depends upon a range of practical factors, which go beyond the legal framework providing units with the legal basis to operate, or questions of budget and the need for political support. Police and prosecution units will need to ensure a balanced investigation of the case, which respects the rights of victims as well as the accused, which is particularly challenging in extraterritorial investigations.⁴⁶ Collecting evidence abroad in post- or actual conflict situations and transporting such evidence to a court situated thousands of miles away, without diminishing the credibility of such evidence, will remain challenging. Best practices need to be developed to ensure that the evidence (in particular witness testimonies) can be presented effectively to judges and juries, who may not be familiar with the cultural and political context in which the crimes were committed. This, in turn, may require judges to go abroad to see the territorial state and the ‘crime scenes’ for themselves. At a minimum, it requires training of all the authorities involved: immigration, police, prosecution and judiciary.⁴⁷ Furthermore, while substantial criminal laws might reflect international treaty obligations, national procedural laws often have not been adapted and can render the collection of evidence abroad a cumbersome exercise. A global procedural framework could address this challenge, as could common procedural standards agreed upon by those states primarily involved in investigations and prosecutions of these crimes. The protection of witnesses and victims, in particular after domestic authorities have completed their investigation and left the territorial state, will need to be addressed, as only an effective witness protection system will see witnesses come forward and testify. This is particularly important in serious international crimes cases which, in the absence of documentary evidence, largely depend on witness testimonies. ***How could States and multi-lateral institutions most usefully foster procedural cooperation, particularly regarding witness protection?***

The information collected by national immigration services may have considerable potential to assist specialized units globally in their investigation. For instance, some witnesses live outside the territorial state. Establishing a ‘database’ of

witnesses living abroad in certain cases could assist investigations and prosecutions, yet at the same time bear a potential risk to the safety of the witnesses. Indeed, domestic laws on the confidentiality of such information may prevent its availability to law enforcement authorities. ***How can the need to protect witnesses be balanced with the desire to share information and protect the integrity of an individual state’s asylum system?***

The preference for removal/exclusion and deportation is not primarily concerned with an effective fight against impunity but with the prevention of creating safe havens. While this seems legitimate from the point of view of each individual state, it is short-sighted if specialized units want to effectively contribute to ending the culture of impunity. Simply returning suspects to their country of origin is neither a form of justice nor of accountability. Countries may consider only deporting an applicant where there is a guarantee that an investigation of the deported applicant’s alleged crimes will be conducted in his or her country of origin.⁴⁸ ***Could the member states of the European Union forge a common approach – collectively deciding against immigration action if there is no prospect of a fair trial following their removal?***

Conclusion

The creation of specialized units suggests a political willingness of governments to fight impunity and to take their obligations under international law seriously. It allows national authorities to develop expertise in the investigation and prosecution of serious international crimes. Investigators, prosecutors and investigative judges can tackle the complexities of such cases, rather than working on these cases on an ad hoc basis. This, in turn, can shorten investigations and prosecutions, rendering them more efficient.

Where no such units are created and no institutional arrangements have been made along the lines outlined above, the investigation and prosecution of serious international crimes appears to be only possible on an ad hoc basis, or not possible at all. Where provided for by domestic law, victims may fill the gap by filing complaints as private parties, thereby forcing national authorities to act. However, not many legal systems provide for this possibility and even where they do, investigative judges and police officers need to receive the relevant operational support in order to carry out effective investigations. Although victims in France succeeded in the cases of Ely Ould Dah, a Mauritanian national who, in 2005, was sentenced *in absentia* to ten years’ imprisonment, and Khaled Ben Said, a Tunisian national sentenced *in absentia* to 8 years’ imprisonment, these cases are the rare exception.⁴⁹ Victims of the genocide in Rwanda in 1994 filed complaints before French courts as early as 1995 and in at least 12 cases, yet not one of these cases has been tried to date.⁵⁰ Recognizing the country’s potential risk of becoming an attractive hiding place for perpetrators of genocide, crimes against humanity, war crimes and torture, the French Government is considering establishing a ‘specialized war crimes unit’.⁵¹ Where victims do not have the possibility to file private complaints and where no specialized units exist, the prospect for investigations of serious international crimes cases, with all the challenges involved, are minimal.

This is also reflected by past practice. With the exception of two cases where private parties played a leading role,⁵²

specialized units/task forces successfully investigated and prosecuted all serious international crimes cases leading to a conviction since 2001.⁵³

Establishing specialized units within the different national authorities involved, and embedding them in a structural framework that enables the sharing of information and coordination of national and international activities, therefore appears to be an effective response to address the myriad challenges of handling serious international crimes at a national level. Furthermore, specialist units can respond quickly to cooperation requests from international tribunals, courts and other states, including carrying out arrests, as well as investigating nationals who may have been involved in committing serious international crimes.

The establishment of units thus sends a strong signal to perpetrators that their actions may have consequences; that hiding from accountability abroad is no longer an option where such units exist; and that the culture of tolerating impunity for crimes committed far away and against non-nationals is coming to an end.

Notes

1. This paper focuses on criminal prosecutions on the basis of extraterritorial and universal jurisdiction and, due to developments over recent years, primarily on European countries and Canada as it is there that specialized war crimes units have been established and investigations/prosecutions on this basis have been carried out.
2. Jürgen Schurr is Project Coordinator of a joint Project on Universal Jurisdiction at REDRESS and the Fédération Internationale des ligues des Droits de l'Homme (FIDH).
3. For a discussion on universal jurisdiction, see, *inter alia*, Claus Krefß, "Universal Jurisdiction over International Crimes and the Institut de Droit international", *Journal of International Criminal Justice*, 2006, 1 of 25; Bruce Broomhall, "Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law", 2001, *New England Law Review* [Vol.35:2], pp. 399-420; Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review*, 1988.
4. See for instance the case of Zokirjon Almatov, accused of crimes against humanity in Uzbekistan, who travelled to Germany in October 2005 to receive medical treatment, at Human Rights Watch, "Uzbek Security Chief Accused of Crimes Against Humanity – Suit Filed in Germany Against Uzbek Minister Zokirjon Almatov", 15 December 2005, at <http://hrw.org/english/docs/2005/12/15/german12280.htm>. His visit to Germany was followed by a visit of Rustam Inoyatov, Uzbekistan's Security Chief, to Germany from 23-25 October 2008, despite serious concerns about his responsibility for the Andijan massacre in Uzbekistan in May 2005, see "Germany extends EU welcome to Uzbek spy chief", 27 October 2008, at <http://euobserver.com/9/26995>
5. Council Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14.05.2003, available online at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_118/l_11820030514en00120014.pdf.
6. Paper on Some Policy Issues Before the Office of the Prosecutor, ICC, September 2003, p.3, available online at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.
7. The Preamble of the Framework Decision of 8 May 2003 states, "The investigation and prosecution of, and exchange of information on, genocide, crimes against humanity and war crimes is to remain the responsibility of national authorities, except as affected by international law," supra n.4. The preamble of the Rome Statute of the ICC states that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", see http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.
8. See below for further details in some of these cases. For an overview of prosecutions based on universal and extraterritorial jurisdiction see, *inter alia*, FIDH & REDRESS, "Developments in the field of international criminal justice – August 2007-July 2008", available online at http://www.fidh.org/IMG/pdf/UJ_developments_Aug07-July08.pdf; Joseph Rikhof, "Fewer Places to Hide? The impact of domestic war crimes prosecutions on international law, Conference Paper 2008, available online at <http://www.isrcl.org/Papers/2008/Rikhof.pdf>; FIDH & REDRESS, "EU Update on Serious International Crimes", all four editions (from June 2006 to July 2008) available online at http://www.redress.org/journals_newsletters.html; Human Rights Watch, "Universal Jurisdiction in Europe: The State of the Art", available online at <http://hrw.org/reports/2006/ij0606>; FIDH and REDRESS, "Legal Remedies for Victims of "International Crimes" – Fostering an EU approach to Extraterritorial Jurisdiction," September 2004, available online at <http://www.redress.org/publications/LegalRemediesFinal.pdf> (English) and <http://www.fidh.org/IMG/pdf/LegalRemedies-Final-french.pdf> (French); REDRESS, "Universal Jurisdiction in Europe, Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide," 30 June 1999, available online at www.redress.org/publications/UJEurope.pdf;
9. See Joseph Rikhof, "Fewer Places to Hide? The impact of domestic war crimes prosecutions on international law," Conference Paper 2008, available online at <http://www.isrcl.org/Papers/2008/Rikhof.pdf>
10. Victims of the 1994 genocide in Rwanda encountered alleged perpetrators in Belgium, France and The Netherlands.
11. Council Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14.05.2003, available online at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_118/l_11820030514en00120014.pdf.
12. These include Belgium, Canada, Denmark, Norway, the Netherlands, the United Kingdom, the United States. For more information on the Belgian unit see REDRESS & African Rights, "Extradition of Rwandese Genocide Suspects from Europe to Rwanda, Conference Report, September 2008", at page 15, available online at http://www.redress.org/documents/Extradition_Report_Final_Versi on_Sept_08.pdf; for further information on the programme of the Canadian Border Services Agency and the Citizenship and Immigration Centre see <http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html#activities>
13. Secure Borders, Safe Haven: Integration with Diversity in Modern Britain, February 2002, at page 103, available online at <http://www.archive2.official-documents.co.uk/document/cm53/5387/cm5387.pdf>
14. Convention relating to the Status of Refugees, adopted on 28 July 1951, entry into force 22 April 1954, available at http://www.unhcr.ch/html/menu3/b/o_c_ref.htm
15. On the role of the WCT, see UK Border Agency, "Identifying, Handling and Considering Asylum Claims made by Suspected War Criminals and Perpetrators of Crimes Against Humanity, including Genocide," March 2007.

16. This includes applicants who have already been convicted and punished for an offence, see Point 7.3: "Where Article 1F applies, the person concerned cannot be a refugee... The fact that a person has been convicted and punished for an offence does not mean that Article 1F does not apply."
17. http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/81126w0002.htm#81126w0002.htm_spnw10
18. On the specialized unit within the Dutch prosecution services, see below.
19. The Hague Court of Appeal described the immigration procedure at length in the appeal judgment against Heshamuddin Hesam and Habibullah Jalalzoy, http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&earchtype=ljn&ljn=AZ9366&u_ljn=AZ9366 (Hesam) and http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&earchtype=ljn&ljn=AZ9365&u_ljn=AZ9365 (Jalalzoy).
20. See TRIAL for further information on the case of Joseph Mpambara, at http://www.trial-ch.org/en/trial-watch/profile/db/facts/joseph_mpambara_757.html
21. Eva Singer, Immigration Services, Denmark, at the FIDH & REDRESS conference, "Strategies for an effective investigation and prosecution of perpetrators of serious international crimes – Setting up specialized war crimes units", which took place in Brussels on 3-4 November 2008.
22. See Rwandagateway, "Genocide Suspect held in Denmark", 8 September 2006, available at http://www.rwandagateway.org/article.php3?id_article=2850
23. Available online at http://www.sico.anl.dk/media/sico_001.pdf
24. Article 3 of the European Convention of Human Rights.
25. See further below, pp. 10-11.
26. UK Border Agency, *Supra*, n.14, para. 7.7. Figure from letter from Phil Woolas MP, Minister of State, Home Office to John Bercow MP, 9 December 2008, copy placed in House of Commons library.
27. Council Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal L 118/12, 14.05.2003, Article 4, available online at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_118/l_11820030514en00120014.pdf.
28. Department of Justice, Canada, Canada's Crimes against Humanity and War Crimes Program, available at <http://canada.justice.gc.ca/eng/pi/wc-cg/hist.html>. Similarly, the Rome Statute of the ICC states that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level."
29. Special war crimes units also exist in post-conflict countries such as Serbia and Bosnia-Herzegovina and valuable experience has been acquired in these countries, but the present paper will focus on countries that set up such units in order to overcome the challenges of extraterritorial investigations and prosecutions, carried out on the basis of extraterritorial or universal jurisdiction.
30. Based on the presentation of Birgitte Vestberg, Director of the Special International Crimes Office (SICO), at the FIDH & REDRESS conference, "Strategies for an effective investigation and prosecution of perpetrators of serious international crimes – Setting up specialized war crimes units", which took place in Brussels on 3-4 November 2008; website of SICO at www.sico.anl.dk
31. See SICO's website at <http://www.sico.anl.dk/page26.aspx>
32. *Ibid.*
33. Based on the presentation of Siri Frigaard, Prosecutor and Director of the unit, at the FIDH & REDRESS conference, "Strategies for an effective investigation and prosecution of perpetrators of serious international crimes – Setting up specialized war crimes units," which took place in Brussels on 3-4 November 2008.
34. See *International Herald Tribune*, "Bosnian-born man sentenced in Norway on war crimes," 2 December 2008, at <http://www.iht.com/articles/ap/2008/12/02/europe/EU-Norway-Bosnia-War-Crimes.php>.
35. See Human Rights Watch, "Universal Jurisdiction in Europe – The State of the Art," July 2006.
36. The information is based on a presentation given by Ingemar Isaksson, Head of the Swedish War Crimes Unit, at the FIDH & REDRESS conference, "Strategies for an effective investigation and prosecution of perpetrators of serious international crimes – Setting up specialized war crimes units," which took place in Brussels on 3-4 November 2008; a presentation given by Lars Hedvall, Prosecutor of the Republic, Stockholm Office, at the same conference; FIDH & REDRESS interview with Ingemar Isaksson in July 2008 for their newsletter, EU Update on Serious International Crimes, vol. 4, Summer 2008, available online at http://www.redress.org/journals_newsletters.html.
37. See Damien Vandermeersch, "Prosecuting International Crimes in Belgium," *Journal of International Criminal Justice* 3 (2005), pp. 400-421.
38. See Human Rights Watch, "Universal Jurisdiction in Europe ? The State of the Art," p. 40.
39. Interview with Belgian official, Brussels, November 2008.
40. The Rwanda cases before Belgian courts were the 'Butare Four' case in 2001: La Cour d'Assises de Bruxelles, verdict of 8 June 2001; see "Genocide survivors welcome Belgian verdict," at www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/655dbe9da551e5fec1256a69004272e7?OpenDocument (last accessed August 2008); the 'Kibungu' case in 2005: La Cour d'Assises de Bruxelles, verdict of 29 June 2005; see <http://news.bbc.co.uk/2/hi/africa/4635637.stm> (last accessed August 2008); the case of Bernard Ntuyahaga: La Cour d'Assises de Bruxelles, see "Avocats sans Frontières, Les Assises Rwanda 2007, Le Procès de Bernard Ntuyahaga," at http://www.asf.be/publications/Publications_rwanda_assises_2007_fiche_08_05.pdf (last accessed August 2008).
41. *International Herald Tribune*, "Jean-Pierre Bemba, former Congo warlord, arrested in Belgium," 25 May 2008, available online at <http://www.iht.com/articles/ap/2008/05/25/europe/EU-GEN-War-Crimes-Bemba.php>.
42. *Supra*, n. 7, Joseph Rikhof, "Fewer Places to Hide? The impact of domestic war crimes prosecutions on international law," Conference Paper 2008, available online at <http://www.isrcl.org/Papers/2008/Rikhof.pdf>, pp. 20-22.
43. The following information is based on a conference paper entitled "No safe haven – war criminals are not welcome here – The policy and practice of the Canadian Government," prepared by Joseph Rikhof, Senior Counsel, Crimes against humanity and war crimes section, Department of Justice, Canada, for the FIDH & REDRESS conference, "Strategies for an effective investigation and prosecution of perpetrators of serious international crimes – Setting up specialized war crimes units," which took place in Brussels on 3-4 November 2008. Further information is available on the website of Canada's Department of Justice at <http://www.justice.gc.ca/eng/pi/wc-cg/index.html>
44. For further information, see the website of Canada's Border Services Agency, 'Canada's Program on Crimes Against Humanity and War Crimes,' Ninth Annual Report 2005-2006, available at <http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html#activities>.
45. For further information, see TRIAL, at http://www.trial-ch.org/en/trial-watch/profil/db/facts/desire_munyaneza_423.html

46. See, for instance, Human Rights Watch, "Universal Jurisdiction in Europe: The State of the Art," pp. 17-19, available online at <http://hrw.org/reports/2006/ij0606>
47. See, for instance, the Institute for International Criminal Investigations at <http://www.iici.info/pages/index.php>.
48. In Europe, the 'serious reasons to believe cases' are entered into the 'Schengen System', enabling other countries using the database to know about potential cases.
49. On 1 July 2005, a French criminal court in Nimes convicted Mauritanian officer Ely Ould Dah *in absentia* to ten years' imprisonment for torture. See "Ely Ould Dah convicted after six years of proceedings," FIDH, 2 July 2005, available online at http://www.fidh.org/article.php3?id_article=1809; on 15 November 2008, a French court in Strasbourg convicted Khaled Ben Said *in absentia* to 8 years' imprisonment for torture committed in Tunisia, see FIDH, "L'ancien vice-consul tunisien en France, Khaled Ben Saïd, condamné par la Cour d'assises du Bas Rhin," 16 November 2008, at <http://www.fidh.org/spip.php?article6163>
50. See the website of the Collectif des Parties Civiles pour le Rwanda, <http://www.collectifpartiescivilesrwanda.fr/>
51. FIDH & REDRESS, EU Update on Serious International Crimes, Issue 4, Summer 2008, p. 4, available online at <http://www.redress.org/publications/EU%20Report%20Vol%204%20July%202008.pdf>.
52. On 19 April 2005, the Spanish National Court convicted Alfredo Scilingo to 640 years' imprisonment for crimes against humanity. See "Dirty war' officer found guilty," BBC News, 19 April 2005, available online at <http://news.bbc.co.uk/2/hi/europe/4460871.stm>
On 1 July 2005, a French criminal court in Nimes convicted Mauritanian officer Ely Ould Dah *in absentia* to ten years' imprisonment for torture. See "Ely Ould Dah convicted after six years of proceedings," FIDH, 2 July 2005, available online at http://www.fidh.org/article.php3?id_article=1809.
53. The general consensus among practitioners with experience in the investigation and prosecution of serious international crimes, who were present at the FIDH & REDRESS conference, seemed to be that extraterritorial investigations are necessary for a successful investigation and prosecution.

CRIMES AGAINST HUMANITY: A LEGISLATIVE AGENDA FOR THE UNITED STATES

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The case for a treaty outlawing crimes against humanity derives in part from many States' reluctance to prosecute this offense, long established as a crime under customary international law, in the absence of positive law even when they are willing in principle to do so. But while a new treaty on crimes against humanity could help narrow the resulting gap in enforcement by defining crimes against humanity and requiring States Parties to incorporate them in their penal laws, States already have a compelling moral imperative (as well as a sound foundation in international law) for doing so.

With the advent of the International Criminal Court (ICC), States now have further incentive to ensure that crimes against humanity can be prosecuted in their national courts. In accordance with the principle of complementarity embodied in the Rome Statute of the International Criminal Court ("Rome Statute"), the ICC can exercise its jurisdiction only when States are unable or unwilling genuinely to investigate or prosecute crimes committed to the ICC's jurisdiction, which include crimes against humanity. To ensure that they can prevent the ICC from exercising jurisdiction over crimes committed in their territory or by their nationals, some States have in recent years enacted legislation ensuring that they can prosecute all Rome Statute offenses in their own courts.

Beyond these pragmatic calculations, States that have joined the Rome Statute system for combating impunity may be especially inclined to ensure that they can play their own part in prosecuting perpetrators of crimes against humanity whom the ICC, with its finite capacity, simply cannot prosecute. The Rome Statute recognizes the central importance of national prosecutions in achieving its own aims, affirming in its preamble "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level," and "[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

Although the United States is not a party to the Rome Statute, it, too, has a compelling interest in domesticating *crimes against humanity* and ensuring that those responsible can be prosecuted in the United States when they are in its jurisdiction. The United States has provided global leadership in ensuring that crimes against universal conscience are prosecuted before international and hybrid courts, starting with the Nuremberg Tribunal, as well as in national courts in countries like Bosnia-Herzegovina and Serbia.

In recent years, the U.S. Congress has made important strides toward ensuring that the federal criminal code keeps pace with the country's historic leadership in ensuring prosecution of those who breach the basic code of humanity. The Genocide Accountability Act of 2007 and the Child Soldiers Act of 2008 establish, respectively, that federal prosecutors can bring charges against individuals in the United States who are alleged to have committed genocide or to have recruited child soldiers anywhere in the world.

Building on its members' leadership in introducing these two laws, the Senate Judiciary's Subcommittee on Human Rights and the Law held hearings in June 2008 on crimes against humanity. Drawing upon my testimony at that hearing,² this essay argues that it is past time for the United States to ensure that crimes against humanity are a federal offense – and that perpetrators can be prosecuted if they are present in the United States, regardless of their nationality or where they committed their crimes.

Crimes against Humanity

Along with genocide and war crimes, crimes against humanity are among the most serious crimes under international law. In brief, crimes against humanity consist of certain inhumane acts, such as enslavement, extermination, rape and other forms of torture, *when committed as part of a widespread or systematic attack against a civilian population*. Usually this last requirement is met when there has been a protracted attack against civilians, such as the three-and-one-half year campaign of ethnic violence in Bosnia-Herzegovina during the 1990s. But those who perished in the World Trade Center on a single day in September 2001 were also victims of a crime against humanity.

Although they were linked to a context of interstate war in the charter of the Nuremberg Tribunal, crimes against humanity can be committed in peacetime as well as during armed conflict. When the Nuremberg Tribunal rendered judgment against major Nazi war criminals, the offenses we most associate with the Holocaust were judged to constitute crimes against humanity.

While a genocide such as that which occurred in Rwanda in 1994 would also entail the commission of crimes against humanity, the reverse is not necessarily true. Under the authoritative definition set forth in the 1948 Convention for the

Prevention and Punishment of the Crime of Genocide, *genocide* is narrowly defined as certain acts, such as killing members of a protected group, when committed with the specific intent of destroying, in whole or in substantial part,³ a national, ethnic, racial or religious group as such. Atrocities committed without this intent do not qualify as genocide, no matter how brutal or extensive.

The specific intent requirement of group destruction is dauntingly difficult to establish. As the International Court of Justice noted in a 2007 judgment, “It is not enough to establish, for instance . . . that deliberate unlawful killings of members of [a protected] group have occurred” – even, I would add, when they have occurred on a heart-stopping scale. It is not even enough, the Court continued, “that the members of the group are targeted because they belong to that group” Instead, the acts that potentially qualify as acts of genocide “must be done with intent to destroy the group as such in whole or in part”⁴ to constitute genocide. Thus, mass atrocities that target members of, say, a religious group and claim even thousands of victims do not qualify as genocide unless committed with the specific aim of destroying at least a substantial part of the group “as such.”

Crimes against Humanity and American Leadership

The United States played a leading role in ensuring that crimes against humanity committed by the Nazis could be punished. The phrase had been used before Nuremberg but the crime was not prosecuted until the Allies used this charge against Nazi war criminals.⁵ How this crime entered the lexicon of postwar justice is instructive, for it demonstrates that if crimes against humanity did not already exist as a punishable offense, we would discover that we had no choice but to establish and enforce this crime when faced with extraordinary depravity.

In 1944, Henry Stimson, then United States Secretary of War, asked Colonel Murray Bernays to prepare a memorandum on how to punish Nazi criminals after the Second World War ended. In his memorandum, Colonel Bernays wrote that many of the worst atrocities committed by Nazi Germany could not be classified as war crimes. And yet, he wrote, it would be intolerable “to let these brutalities go unpunished”⁶ That same year, the United States representative to the Legal Committee of the United Nations War Crimes Commission – a body constituted by the Allied nations in 1943 – raised the atrocities then under way. He argued that Nazi crimes against German Jews and Catholics demanded application of the “laws of humanity” and urged that “crimes committed against stateless persons or against any persons because of their race or religion” represented “crimes against humanity” that were “justiciable by the United Nations or their agencies as war crimes”⁷

In June 1945, Justice Jackson, the chief U.S. prosecutor at Nuremberg, proposed in a report to the President that the Nuremberg Charter include a charge of “Atrocities and offences, including atrocities and persecutions on racial or religious grounds . . .”⁸ The final text of this crime evolved somewhat, so that the Nuremberg Charter defined crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions

on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”⁹

Crimes against Humanity

The name of this crime is richly evocative of its meaning – and of the moral responsibility that crimes against humanity engage everywhere when they occur anywhere.¹⁰ A postwar judgment by a U.S. military tribunal in Nuremberg made the point eloquently. In a case concerning the *Einsatzgruppen* – the Nazis’ mobile extermination units – the American tribunal noted that the defendants before it were charged with crimes against humanity: “Not crimes against any specified country, but against humanity.” The tribunal continued: “Those who are indicted . . . are answering to humanity itself,” and, it warned, “the court of humanity . . . will never adjourn.”¹¹

The Jerusalem District Court sounded a similar note when it explained in its 1961 judgment why it possessed legal authority to try Adolf Eichmann for his role in organizing the transport of Jews to death camps during World War II. Eichmann had been charged with, among other offenses, crimes against humanity, which were made punishable by an Israeli law enacted in 1950. The Israeli Court noted that “[t]he abhorrent crimes defined in this Law . . . , which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself . . .”¹²

It is important to emphasize that crimes against humanity are *crimes*. The United States and other Allied nations that convened the Nuremberg tribunal believed that our ability to prevent future atrocities of staggering scope turned in part on our ability to ensure that those who violate the basic code of humanity face the bar of justice. Perhaps Sir Hartley Shawcross said it best in his closing argument at Nuremberg: “The Charter of this Tribunal,” Sir Hartley told the judges, “gives warning for the future – I say, and repeat again, gives warning for the future, to dictators and tyrants masquerading as a State that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the International Law of mankind.”¹³

Contemporary Crimes against Humanity

Crimes against humanity have in recent years once again figured prominently in efforts to bring to justice those responsible for crimes of exceptional savagery and scale. This crime was included in the statutes of two tribunals created in the early 1990s with strong United States leadership, the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R), respectively. More recently, it has been included in the jurisdiction of other international or hybrid courts established to respond to atrocities so barbaric and extensive as to warrant the creation of a special tribunal, such as the court created to try those who bear major responsibility for atrocities committed in Sierra Leone’s infamously savage civil war. Indeed, the highest charge leveled by the Special Court for Sierra Leone against Liberia’s former leader – Charles Taylor – for notorious atrocities committed in Sierra Leone is crimes against humanity.

Some infamous episodes of violence prosecuted before these tribunals either were not charged as, or were not judged to be, genocide; instead, the charge that best fit the nature of the crimes was that of crimes against humanity. For example, Stanislav Galic, who received the highest sentence possible for his leadership role in the three-and-one-half-years-long siege of Sarajevo in the 1990s,¹⁴ was convicted by the ICTY of crimes against humanity and war crimes. Despite the extreme nature of his crimes, Galic was not even charged with genocide. When an ICTY Trial Chamber convicted Bosnian Serb leader Momcilo Krajisnik – one of the most senior defendants convicted by the ICTY – for his leading role in the campaign of “ethnic cleansing” that raged across and ravaged Bosnia-Herzegovina during the same period, it found him guilty of crimes against humanity but not genocide (although in his case the prosecutors charged genocide).

These cases remind us how challenging it can be to prove a charge of genocide even when members of an ethnic or religious group are targeted for atrocious crimes on a massive scale. For example, in the *Krajisnik* case an ICTY Trial Chamber found the defendant responsible for “the killing, through murder or extermination, of approximately 3,000 Bosnian Muslims and Bosnian Croats” in 30 Bosnian municipalities during the period of the indictment.¹⁵ It even found that “the perpetrators of the killings chose their victims on the basis of their Muslim and Croat identity.”¹⁶ Yet it did not find that the prosecutor had met the heavy burden of proving beyond a reasonable doubt that “any of these acts were committed with the intent to destroy, in part, the Bosnian-Muslim or Bosnian-Croat ethnic group, as such.”¹⁷ These crimes were, however, judged to be among the most serious crimes known to humankind: crimes against humanity.

Some of the signal achievements of the ICTY in rendering justice for victims of sexual violence have centered on the charge of crimes against humanity. A landmark judgment rendered by an ICTY Trial Chamber in February 2001 found two of the defendants guilty of the crime against humanity of enslavement because they had held young women captive for several months, repeatedly raped the victims during this period and in other ways exercised powers of ownership over the captive women. Underscoring the victims’ debasing treatment as human chattel, one of the defendants sold two women who had already been held captive as sexual slaves to Montenegrin soldiers for 500 Deutschmarks each (and, according to one witness, for a truckload of washing powder).¹⁸

These examples reflect a broader point: when we look back on the trials that have taken place in contemporary war crimes tribunals, the charge that has been central to most of these cases—with the exception of those prosecuted before the ICTR—has been that of crimes against humanity.¹⁹ This pattern reminds us that when we confront radical evil, the offense that best captures the depravity of the criminal conduct may well be – and often has been – crimes against humanity.

Crimes against Humanity and U.S. law

Today, crimes against humanity can be prosecuted in many countries, not just before international courts. Yet despite the United States’ leading role in ensuring that this crime could be prosecuted before the Nuremberg and other international

tribunals, United States law does not yet proscribe crimes against humanity as such in its criminal code.

Many Americans would be astonished if they knew this and understood what it means. What it means is that some of the most horrific atrocities we have witnessed in recent decades – crimes that cry out for justice – could not be prosecuted properly, if at all, in the United States if the perpetrators were found in U.S. territory.

If asked to identify the worst atrocities committed in the second half of the twentieth century, most would include in their short list the crimes committed under the murderous regime of the Khmer Rouge. During its reign, perhaps a fifth of Cambodia’s population – one and a half million people – are thought to have been executed outright or to have died as a result of Khmer Rouge policies that made survival impossible. In the popular imagination, the only word capable of capturing this violence is *genocide*. Yet the prosecutors of a special court created to bring surviving leaders of the Khmer Rouge to justice – the Extraordinary Chambers in the Courts of Cambodia (ECCC) – have not yet filed genocide charges against the five suspects they have already charged, even though those charged include some of the most notorious Khmer Rouge leaders who are still alive. Instead, the most serious charge laid against the five suspects is that of crimes against humanity. This might change as the prosecutors in Cambodia continue their investigations and add further charges. Even so, the fact that they did not believe they could support genocide charges in their historic first indictments indicates how rarely the charge of genocide fits crimes even as surpassing in cruelty and scale as those committed by the Khmer Rouge.

While surviving leaders of the Khmer Rouge now face charges before the ECCC, no international or hybrid court has jurisdiction over those responsible for notorious crimes committed in two other Asian countries: Myanmar and North Korea. Neither country is a party to the Rome Statute, nor is there an ad hoc international or hybrid court with jurisdiction over crimes committed in these countries. Still governed by highly repressive leaders, it goes without saying that neither country is willing to prosecute its own nationals for these offenses.

However atrocious, the mind-numbing crimes endured by North Koreans and citizens of Myanmar are not easily charged as genocide. Instead, the label that most nearly captures their nature is crimes against humanity.²⁰

Conclusion

Particularly in view of its historic role in ensuring that crimes against the basic code of humanity can be punished appropriately, the United States should be in a position to institute criminal proceedings if someone responsible for a crime of exceptional magnitude and cruelty were in its territory and could not be prosecuted in a more appropriate jurisdiction. By convening a hearing on crimes against humanity in June 2008, the Senate Judiciary Committee’s Subcommittee on Human Rights and the Law has laid the foundation for legislation that would enable the United States to prosecute such crimes not only when they occur in U.S. territory, as happened on 9/11, but also when crimes against humanity occur abroad and the perpetrators seek haven in the United States.

In this way, the United States would, to paraphrase Sir Hartley Shawcross, give warning for the future to those who would debase the sanctity of humanity that they act at their peril. And for victims of surpassing evil, the United States would be in a position to secure some measure of justice for the nearly unfathomable suffering they endured.

Notes

1. Diane Orentlicher is co-director, Center for Human Rights and Humanitarian Law, American University College of Law
2. Testimony of Diane F. Orentlicher, Hearing before the Senate Judiciary Committee Subcommittee on Human Rights and the Law, "From Nuremberg to Darfur: Accountability for Crimes against Humanity," June 24, 2008, available at https://www.aaainc.org/fileadmin/aaainc/images/PR_-_2008/June-July/Witness_Testimony_-_Diane_Orentlicher_-_Darfur_Hearings.pdf.
3. Although the Convention uses the phrase "in whole or in part," the words "in part" have been interpreted to mean "in substantial part." See, for example, Prosecutor v. Radislav Krstic, Case No. IT-98-33-A, Appeal Judgment, ¶ 8, April 19, 2004.
4. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ¶187, Feb. 26, 2007.
5. In May 1915, the French, British and Russian Governments made a declaration denouncing Turkey's massacres of Armenians at the beginning of the First World War as "crimes against humanity and civilization" for which members of the Turkish Government would be held responsible, together with its agents implicated in the massacres. *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 35 (1948). But while the first peace treaty with Turkey included a provision contemplating such prosecutions, it was not ratified and was replaced by a treaty that made no provision for punishment; to the contrary, it was accompanied by a Declaration of Amnesty. *Id.*, p. 45.
6. Antonio Cassese, *Violence and Law in the Modern Age*, pp. 108-09 (1988).
7. *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 175 (1948).
8. Quoted in Egon Schwelb, "Crimes Against Humanity," 23 *Brit. Y.B. Int'l L.* 178, p. 207 (1946).
9. Charter of the International Military Tribunal, art. 6(c), concluded at London, Aug. 8, 1945; entered into force, Aug. 8, 1945; 8 UNTS 279
10. Beyond this, *crimes against humanity* captures the assault on basic principles of humane behavior that the crime entails. An important source of inspiration for the term *crimes against humanity* was the Martens clause, which was included in the preambles to both the 1899 and 1907 Hague Conventions. The version appearing in the 1907 convention provides:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerent remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

(Hague) Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex Regulations, Oct. 18, 1907; 36 Stat. 2277; TS 539; 1 Bevans 631. As a leading scholar (and current U.S. judge on the ICTY) has noted, the aim of this clause "is to substitute

principles of humanity for the unlimited discretion of the military commander" in situations not yet covered by the codified laws of war. Theodor Meron, "Francis Lieber's Code and Principles of Humanity," *Colum. J. Transnat'l L.* 269, p. 281 (1977).

11. United States v. Otto Ohlendorf et al., IV Trials of War Criminals before Nuremberg Military Tribunals under Control Council Law No. 10, 411, pp. 497-499 (1950).
12. Attorney Gen. of Israel v. Eichmann, reprinted in 36 I.L.R. 18, ¶ 12 (at p. 26) (Isr. Dist. Ct.—Jerusalem 1961), aff'd, 36 I.L.R. 277 (Isr. Sup. Ct. 1962).
13. Speeches of the Chief Prosecutors at the close of the case against the individual defendants, published under the authority of H.M. Attorney-General by H.M. Stationery Office (CMD. 6964), p. 63.
14. Galic commanded the Bosnian Serb army unit responsible for the Sarajevo siege for two of the three and one-half years of the siege.
15. Prosecutor v. Momcilo Krajisnik, Case IT-00-39-T, Trial Judgment, ¶¶1143, 717 & 792; Sept. 27, 2006.
16. *Id.*, ¶ 793.
17. *Id.*, ¶ 867.
18. Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶¶ 775-782, Feb. 22, 2001.
19. The central charge before the ICTR, which was created in response to the 1994 genocide in Rwanda, has been that of genocide.
20. See David Hawk, *Concentrations of Inhumanity* (Freedom House, May 2007) (developing support for the claim that human rights violations in North Korea are crimes against humanity); Amnesty International, *Myanmar: Crimes against Humanity in Eastern Myanmar*, ASA 16/001/2008 (June 5, 2008); Michael A. Newton, *Seeking Justice for Burma* (Oct. 17, 2008).

STRENGTHENING UK LAW ON GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

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After the Second World War, suspected war criminals, including members of Hitler's SS, were allowed to make their way to the United Kingdom.² These people lived and worked here, largely undetected until the 1980s, when a campaign by Parliamentarians led to the Government setting up a commission of inquiry. The inquiry recommended that the law should be changed so that people suspected of war crimes committed in Nazi-occupied Europe, now resident in the UK, could be prosecuted in British courts.³ This led to the War Crimes Act of 1991 and the subsequent establishment of the War Crimes Unit in the Metropolitan Police.

The history of prosecutions under the War Crimes Act is a mixed one. Hundreds of suspects were investigated, yet only two were tried and only one, Anthony Sawoniuk, a British Rail ticket collector, was convicted. He was imprisoned for the murder of 18 Jews in Nazi-occupied Belarus.⁴ The practice of prosecuting Nazi-era crimes in the 1990s faced real problems relating to fading memories and deteriorating evidence. Yet by the time the War Crimes Unit was wound up in 1999 all potential leads had been thoroughly investigated and prosecutions brought where possible.

Current state of UK Law on Genocide, War Crimes, Crimes Against Humanity

Since 1945, those acts about which we said 'Never again' have happened repeatedly, and suspected perpetrators have again been found on UK soil. Since 2004, the UK Border Agency has considered 1,863 cases in which people have been suspected of war crimes, crimes against humanity and genocide.⁵ Currently, it investigates about 600 cases per annum. Sixteen per cent (c. 300) of those 1,863 cases have been referred for immigration action.⁶ Of these, 138 have received some sort of immigration action. Twenty-two cases have been referred to the police.⁷ Some of the suspects investigated will have been cleared.⁸ Others may have been deported, removed or refused entry to the UK. It is not clear how many suspects are now living in this country.

This is a matter of public interest and should be clarified by the Government, perhaps through a commission of inquiry similar to that set up in the 1980s. The problem is that even if suspects are identified on British soil, UK law on international crimes contains serious jurisdictional gaps. When a suspect cannot be extradited or deported, UK law does not always allow for prosecution in this country. The jurisdictional gap then risks becoming an 'impunity gap'. Anomalies in current

UK law on international crimes are set out below:

- People suspected of genocide, war crimes (internal conflicts) and crimes against humanity can only be prosecuted in the UK if the acts were committed overseas *after 2001*, when the International Criminal Court Act (ICC) was enacted. Therefore, suspected Rwandan or Cambodian *génocidaires* resident in the UK cannot be tried for genocide because they committed their crimes before 2001.
- Genocide, war crimes (internal conflicts) and crimes against humanity committed overseas can only be prosecuted in the UK if they were perpetrated by a *UK national or resident*. Therefore, Burmese or Sudanese visitors to Britain suspected of crimes against humanity, even of acts committed after 2001, could not be tried as they are not UK residents. 'Residence' is not clearly defined in UK law.⁹
- Other international crimes of hostage taking and torture are 'fully prosecutable' under UK law, meaning that they can be prosecuted here regardless of the suspect's nationality or residency status, and regardless of where the crimes were committed.

The table overleaf sets out the UK's jurisdiction over these crimes:

Crime	Prosecutable if you are a UK resident?	Prosecutable if you are present on UK soil but not a UK resident?
Genocide	Yes – for crimes committed since 2001 (ICC Act)	No
Crimes against Humanity	Yes – for crimes committed since 2001 (ICC Act)	No
War Crimes – internal conflicts	Yes – for crimes committed since 2001 (ICC Act)	No
War Crimes – Nazi occupied Europe	Yes – for crimes committed between 1939-45 (War Crimes Act)	No
War Crimes – international conflicts	Yes – for crimes committed since 1957 (Geneva Conventions Act)	Yes – from 1957
Torture	Yes – for crimes committed since 1988 (Criminal Justice Act)	Yes – from 1988
Hostage taking	Yes – for crimes committed since 1982 (Taking of Hostages Act)	Yes – from 1982

The law is currently a patchwork of norms, with little rational basis underlying which crimes are the subject of extraterritorial jurisdiction and which are not. In practice, this means that suspected torturers and hostage-takers who commit their crimes overseas and visit the UK can be prosecuted, but not *génocidaires*. The former Director of Public Prosecutions, Sir Ken Macdonald QC (2003-8), has argued that these distinctions ‘lack moral logic’.¹⁰

This is not just a theoretical problem: there are currently¹¹ four Rwandan genocide suspects in the UK, fighting their extradition to Rwanda. The International Criminal Tribunal for Rwanda (ICTR), which is winding down, has recently refused to send suspects to Rwanda for fear they will not receive a fair trial. It is possible that the British High Court will also not permit extradition. If this is so, the suspects will be unable to be prosecuted here in the UK for genocide. The Crown Prosecution Service has ruled that the alleged crimes do not fit the offences of torture or hostage taking – for which the UK has full extraterritorial jurisdiction.¹² If extradition or immigration action fail, the jurisdictional gap will translate into an impunity gap.

Reforms to strengthen the law in this area

The jurisdictional gap arises because there was no international treaty obligation on the UK to incorporate these offences, with extra-territorial jurisdiction, into domestic law. The arguments in favour of new legislation therefore revolve around the status of customary international law, rather than treaty law, at the time of, say, the Rwandan genocide.

To strengthen UK law on international crimes, three reforms should be considered:

1. There should be a move from a residence to a presence requirement. The meaning of residence is unclear in this area of UK law and this lack of certainty presents difficulties for the Crown Prosecution Service. A simple presence requirement would bring the UK into line with other common law countries such as Australia, New Zealand, Canada, South Africa and the United States (for genocide only).

2. The jurisdiction of UK courts should be applied retrospectively. The UK could backdate jurisdiction for genocide to 1969 when the Genocide Act was enacted; for war crimes in internal conflicts to 1957 when the Geneva Conventions Act was enacted and for crimes against humanity to 1991, based on the jurisdiction given to the International Criminal Tribunal for Yugoslavia. New Zealand has applied jurisdiction retrospectively in this way.¹³

It is understandable that there might be nervousness about retrospectivity. However, these reforms are retrospective application of the jurisdiction, not the law itself. By the proposed dates, the acts were already offences in customary international law, and the underlying crimes (murder, rape etc) were always illegal in UK law. In addition, retrospective application of jurisdiction for such serious international crimes is legal under European and international law, and, consequently, the Human Rights Act.¹⁴ Jurisdiction has been applied retrospectively before, in the War Crimes Act (1991).

3. The two reforms listed above will lack teeth unless they are

accompanied by the establishment of a specialist and properly resourced War Crimes Unit. War Crimes Units currently operate in Canada, Netherlands, Norway, Sweden, Denmark and Belgium.

Extradition, deportation and the ICC

Prosecution in this country should, as now, be a last resort after extradition, transfer to a tribunal or immigration action has failed. Justice works best when it is local. However, when a country is unable or unwilling to prosecute, or where there are concerns about the ability of the accused to receive a fair trial, then we must not allow the UK to become a safe haven for people suspected of heinous crimes.

People often assume that the International Criminal Court provides the answer. The ICC does not, however, have the capacity or remit to take many of the suspects who may be found in the UK. The UK Government has noted that *'the ICC's budget for 2009 has not yet been finalised, but the court will base its planned expenditure on the assumption that two trials will take place consecutively; there will be some pre-trial activities for a third; and the prosecutor will continue investigations in three of the situations currently before the court, with no new investigations envisaged'*.¹⁵ This effectively means that only high-level suspects might be suitable for trial at the ICC. Both the international tribunals for Rwanda and Yugoslavia are currently winding down their activities.

Fears that the UK will become a global prosecutor are unfounded

These reforms would close current loopholes in UK law. They would not make the UK a global prosecutor. There would be no investigations or trials *in absentia*. The roles of the Director of Public Prosecutions and the Attorney General would be retained, to stop proceedings where the evidence is not of a high enough standard, or where prosecution would not be in the public interest.

These reforms would not break new ground – they would be based on current UK law relating to torture and hostage taking. In July 2005, Faryadi Zardad Sarwar, a mujahadeen military commander was prosecuted in the UK for crimes committed in Afghanistan in the 1990s and sentenced to 20 years' imprisonment.¹⁶ The principle of extra-territorial jurisdiction is not a new concept in the UK.

Finally, the suggested reforms would not require changes to current immunities for heads of states and diplomats. For example, sitting heads of state and some ministers of foreign governments enjoy immunity from prosecution under section 14 (1) of the State Immunity Act 1978. If it is necessary to talk to suspects who may lack immunity, for example to conduct peace negotiations or receive intelligence, diplomats and security personnel could still do this in countries other than the UK.

Ultimately, any change to UK law in this area is a matter for Parliament to decide. It is up to our elected representatives to determine whether the current situation, with its loopholes, gaps and anomalies is acceptable. The risk of inaction, of course, is that this country may end up becoming a haven for people suspected of the most heinous crimes. As we commemorate the 60th Anniversaries of the United Nations Genocide Convention and the Universal Declaration on Human Rights, we should consider very carefully whether this is a defensible scenario.

Notes

1. Anna Macdonald is Senior Campaigns and Policy Officer at the Aegis Trust.
2. David Cesarani, *Justice Delayed: How Britain Became a Refuge for Nazi War Criminals*, William Heinemann, 1992.
3. War Crimes Inquiry Report, Thomas E Heatherington and William Chalmers, 1989.
4. R v Sawoniuk, 10 February 2000, Court of Appeal (Criminal Division) (2000) Crim. L. R 506.
5. <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081113/text/81113w0013.htm#081113122000907>
6. <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081113/text/81113w0013.htm#081113122000907>
7. http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/81126w0002.htm#81126w0002.htm_spnew10
8. <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081113/text/81113w0013.htm#081113122000907>
9. It has the following, rather circular, definition: "a 'United Kingdom resident' means a person who is resident in the United Kingdom" in the International Criminal Court Act 2001, part 5, 67 (2).
10. Speech by the Director of Public Prosecutions, Sir Ken Macdonald QC, to the APPG Genocide Prevention and Parliamentary Human Rights Group, 21 October 2008.
11. At the time of writing, December 2008.
12. Speech by the Director of Public Prosecutions, Sir Ken Macdonald QC, to the APPG Genocide Prevention and Parliamentary Human Rights Group, 21 October 2008.
13. See, for example, International Crimes and International Criminal Court Act 2000, <http://www.legislation.govt.nz/act/public/2000/0026/latest/096be8ed802db0e3.pdf>
14. Article 7, European Convention on Human Rights; Article 15, International Covenant on Civil and Political Rights.
15. <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081023/text/81023w0015.htm#08102335004247>
16. R v Zardad, High Court judgement of 19 July 2005; appeal denied 17th February 2007.

ANNEX:

Princeton Principles on Universal Jurisdiction¹

Principle 1 -- Fundamentals of Universal Jurisdiction

1. For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.
2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.
3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1) provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.
4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as "international due process norms").
5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law.

Principle 2 -- Serious Crimes Under International Law

1. For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.
2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

Principle 3 -- Reliance on Universal Jurisdiction in the Absence of National Legislation

With respect to serious crimes under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it.

Principle 4 -- Obligation to Support Accountability

1. A state shall comply with all international obligations that are applicable to: prosecuting or extraditing persons accused or convicted of crimes under international law in accordance with a legal process that complies with international due process norms, providing other states investigating or prosecuting such crimes with all available means of administrative and judicial assistance, and under-taking such other necessary and appropriate measures as are consistent with international norms and standards.
2. A state, in the exercise of universal jurisdiction, may, for purposes of prosecution, seek judicial assistance to obtain evidence from another state, provided that the requesting state has a good faith basis and that the evidence sought will be used in accordance with international due process norms.

Principle 5 -- Immunities

With respect to serious crimes under international law as specified in Principle 2(1), the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

Principle 6 -- Statutes of Limitations

Statutes of limitations or other forms of prescription shall not apply to serious crimes under international law as specified in Principle 2(1).

Principle 7 -- Amnesties

1. Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle 2(1).
2. The exercise of universal jurisdiction with respect to serious crimes under international law as specified in Principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state.

Principle 8 -- Resolution of Competing National Jurisdictions

Where more than one state has or may assert jurisdiction over a person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria:

- (a) multilateral or bilateral treaty obligations;

- (b) the place of commission of the crime;
- (c) the nationality connection of the alleged perpetrator to the requesting state;
- (d) the nationality connection of the victim to the requesting state;
- (e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
- (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
- (g) the fairness and impartiality of the proceedings in the requesting state;
- (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
- (i) the interests of justice.

Principle 9 -- Non Bis In Idem/ Double Jeopardy

1. In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct where the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards. Sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle.
2. A state shall recognize the validity of a proper exercise of universal jurisdiction by another state and shall recognize the final judgment of a competent and ordinary national judicial body or a competent international judicial body exercising such jurisdiction in accordance with international due process norms.
3. Any person tried or convicted by a state exercising universal jurisdiction for serious crimes under international law as specified in Principle 2(1) shall have the right and legal standing to raise before any national or international judicial body the claim of non bis in idem in opposition to any further criminal proceedings.

Principle 10 -- Grounds for Refusal of Extradition

1. A state or its judicial organs shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated and no satisfactory assurances to the contrary are provided.
2. A state which refuses to extradite on the basis of this Principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in Principle 2(1) or extradite such person to another state where this can be done without exposing him or her to the risks referred to in paragraph 1.

Principle 11 -- Adoption of National Legislation

A state shall, where necessary, enact national legislation to enable the exercise of universal jurisdiction and the enforcement of these Principles.

Principle 12 -- Inclusion of Universal Jurisdiction in Future Treaties

In all future treaties, and in protocols to existing treaties, concerned with serious crimes under international law as specified in Principle 2(1), states shall include provisions for universal jurisdiction.

Principle 13 -- Strengthening Accountability and Universal Jurisdiction

1. National judicial organs shall construe national law in a manner that is consistent with these Principles.
2. Nothing in these Principles shall be construed to limit the rights and obligations of a state to prevent or punish, by lawful means recognized under international law, the commission of crimes under international law.
3. These Principles shall not be construed as limiting the continued development of universal jurisdiction in international law.

Principle 14 -- Settlement of Disputes

1. Consistent with international law and the Charter of the United Nations, states should settle their disputes arising out of the exercise of universal jurisdiction by all available means of peaceful settlement of disputes and in particular by submitting the dispute to the International Court of Justice.
2. Pending the determination of the issue in dispute, a state seeking to exercise universal jurisdiction shall not detain the accused person nor seek to have that person detained by another state unless there is a reasonable risk of flight and no other reasonable means can be found to ensure that person's eventual appearance before the judicial organs of the state seeking to exercise its jurisdiction.

1. <http://www1.umn.edu/humanrts/instree/princeton.html> (last accessed at 2 December 2008). Also see Princeton Principles, in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, Penn, 2004.

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