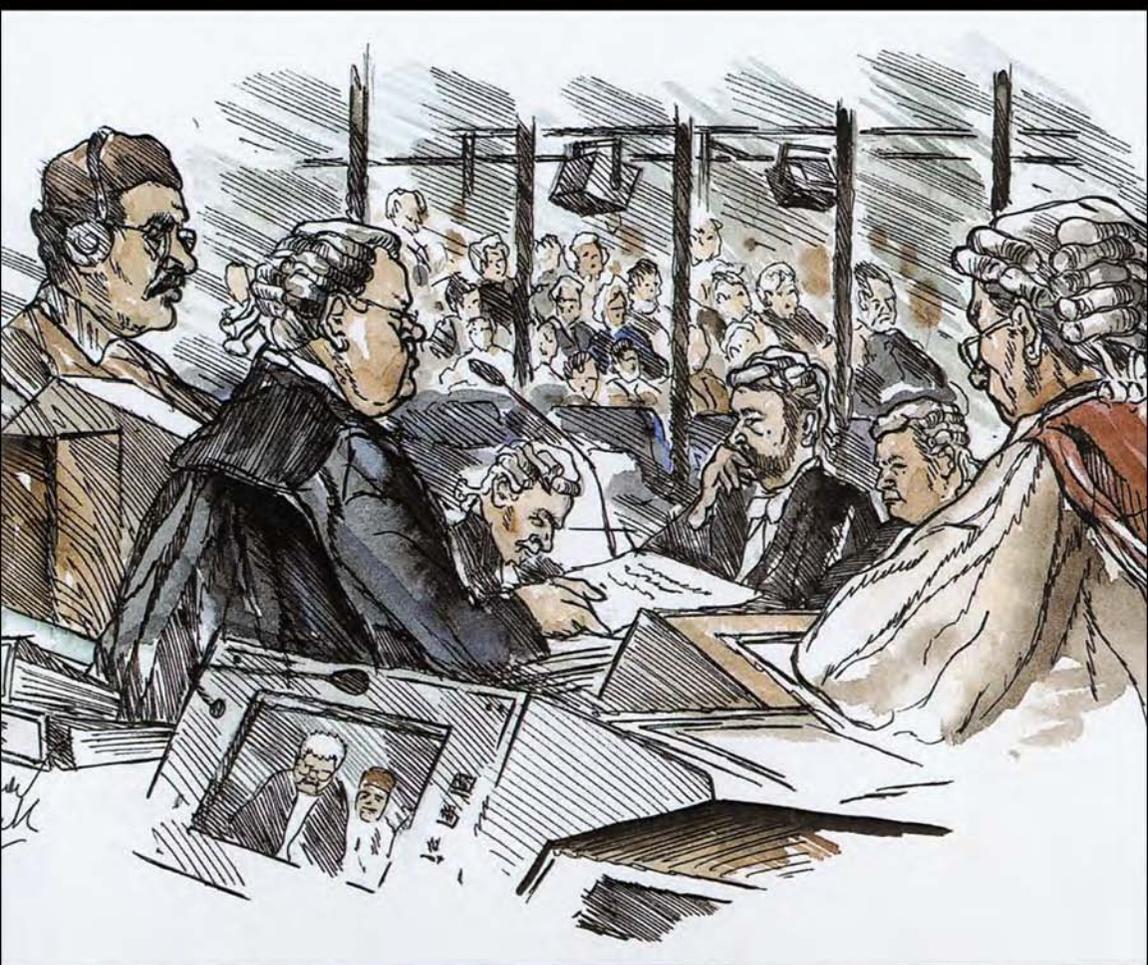


SECOND EDITION

INTERNATIONAL CRIMINAL LAW

ILIAS BANTEKAS & SUSAN NASH



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INTERNATIONAL CRIMINAL LAW

Second Edition



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FOREWORD

The publication of the second edition of *International Criminal Law* coincides with the first real work of the International Criminal Court (ICC), now that the fanfares that accompanied its creation and the swearing-in of the judges have died away. The presidency is now permanently installed in The Hague; the prosecutor has begun the task of sifting the many referrals that have been made by a myriad of different organisations and individuals; and the judges are engaged in the crucial task of writing the regulations for this new court. Elsewhere, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda are working under tight timetables within which they aim to conclude their trials, and the Special Court for Sierra Leone is preparing to try the defendants who have been both identified and indicted by the prosecutor. At this moment in our legal history it is particularly critical that there is detailed information readily available about the role, the power and the limitations of these new international criminal courts and tribunals. There is much misunderstanding, unrealistic expectations abound, and there is a great danger that the gap between the achievable and the hoped-for will undermine the credibility and importance of these fledgling institutions, and particularly the ICC.

Just to take some examples, Stalin and Napoleon will not be tried posthumously in The Hague and the court has no jurisdiction over international money launderers or drug-traffickers. Inevitably, it will take time for investigations to be followed by completed trials, particularly given that the ICC only has jurisdiction over events that occurred after July 2002. Before the court can be expected to intervene in a country, it will often be necessary for a significant degree of stability and maturity to be demonstrated on the part of the post-conflict regime. Investigators, lawyers and judges cannot operate in conditions of significant lawlessness, and witnesses and victims must be provided with appropriate protection and assistance. Perpetrators will be brought to justice, but the ICC should not be expected to provide a quick fix. History is firmly on the side of the remarkable developments that have occurred in the field of international criminal justice, but it is critical that measured and careful decisions are taken as to when prosecutions are launched.

This book is an excellent and detailed guide to the realities of this new and rapidly changing legal landscape. One of its many strengths is that it draws together a wide variety of different subjects that are not usually found under the same cover and as a result both the new student and the seasoned practitioner will find invaluable assistance on subjects as diverse as the courts and the tribunals, extradition and abduction, mutual legal assistance and relevant European Union material. The first edition was a constant companion to this judge, and the authors are to be commended for producing a second edition so quickly, expanding on and updating the original.

*The Hon Mr Justice Fulford
British Judge at the International Criminal Court*

PREFACE

Although the second edition of this book has been significantly restructured and expanded, our aim remains to provide a book that introduces both students and practitioners to international criminal law. It explores and links together a range of topics which until recently could only be found in separate texts. Until the 1990s, international criminal law was not generally considered to be a discrete topic for inclusion in either the undergraduate or postgraduate law curriculum. However, the need to study certain particularities of the international criminal justice process has been highlighted by lawyers and non-lawyers working for intergovernmental organisations and academic institutions not only in the field of human rights and criminal justice, but also in diverse fields, such as commerce, energy and the environment. Furthermore, the growth in both the volume and diversity of transnational crime and the increased mobility of suspects and witnesses continues to result in international criminal law and procedure assuming critical importance for domestic lawyers and law enforcement agencies. In the second edition we take account of the legal cataclysm in the aftermath of 11 September 2001, the jurisprudence emanating from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and developments relating to the International Criminal Court and other international tribunals. In order to reflect these developments we have added chapters on defences, evidence before the ad hoc tribunals and an introduction to internationalised domestic tribunals. We have also developed several topics introduced in the first edition, including torture, apartheid, enforced disappearances, transnational criminal offences and mutual legal assistance mechanisms. In order to reflect the various strands of international criminal law we have re-organised this edition into substantive, procedural and enforcement sections. While the limitations of this broad categorisation in the horizontal law making framework of international law are self-evident, the gradual evolution of international criminal justice into a coherent system cannot be underestimated. As demonstrated throughout the book, the international criminal process is shaped not only by traditional participants, but also by non-traditional actors, including organisations such as the Organisation for Economic Co-operation and Development and the European Union.

In the preparation of this edition the authors are both jointly responsible for the content and any errors are ours alone. However, Ilias Bantekas is primarily responsible for Chapters 1, 2, 4, 5, 6, 7 and 12–15, and the material on organised crime, bribery, postal offences and obscene publications in Chapter 3. Susan Nash is primarily responsible for Chapters 8, 9 and 10, and the material on cybercrime and money laundering in Chapter 3. We would like to express our gratitude to Caroline Buisman for contributing Chapter 11. While we have made changes to material included in the first edition, where it has been retained we remain grateful to Mark Mackarel for his work on the first edition. In the preparation of this new edition the publication team at Cavendish Publishing have done an excellent job in dealing with a significant number of changes, and we are grateful to them for their patience and professionalism.

The date of completion of this edition was 25 March 2003.

Ilias Bantekas, Susan Nash
July 2003

CONTENTS

<i>Foreword</i>	<i>v</i>
<i>Preface</i>	<i>vii</i>
<i>Table of Cases</i>	<i>xvii</i>
<i>Table of Primary National Legislation</i>	<i>xxxix</i>
<i>Table of Statutory Instruments</i>	<i>xlvi</i>
<i>Table of International Instruments</i>	<i>xlvii</i>
<i>Table of EC Decisions, Directives, Regulations and ICTY/ICTR/ICC Rules of Procedure</i>	<i>lxiii</i>
<i>Table of Abbreviations</i>	<i>lxv</i>
CHAPTER 1 THEORY OF INTERNATIONAL CRIMINAL LAW	1
1.1 Introduction	1
1.2 Sources of International Law and Individual Legal Personality	2
1.3 The International Criminalisation Process	4
1.4 Enforcement of International Criminal Law	8
1.5 State 'Criminality'	12
1.6 International Criminal Law and Human Rights	14
CHAPTER 2 TERRORISM	17
2.1 Introduction	17
2.2 The Thematic Approach in International Law	19
2.3 International Terrorism in National Statutes	20
2.4 The Specialised Anti-Terrorist Conventions	23
2.4.1 Offences against civil aviation	23
2.4.2 Hostage taking and attacks against internationally protected persons	28
2.4.3 Terrorist bombings and nuclear terrorism	30
2.4.4 Terrorist financing and Security Council Resolution 1373 (2001)	32
2.4.5 Establishment of regional mechanisms	35
2.5 State Sponsored Terrorism	38
2.6 Terrorism and National Liberation Movements	40
2.7 Organised Crime and its Relation to Terrorism	43
2.8 Terrorist Acts as Political Offences	44
2.9 Terrorism and Human Rights	46
CHAPTERS 3 TRANSNATIONAL OFFENCES	49
3.1 Transnational Organised Crime	49
3.1.1 The additional CATOC Protocols	52

3.2	Drug-Trafficking	53
3.2.1	Development of international measures to control drug-trafficking	54
3.2.2	Drug-trafficking as a crime against international law	59
3.3	Money Laundering	60
3.3.1	Introduction	60
3.3.2	Self-regulation	61
3.3.3	UN initiatives	64
3.3.4	Council of Europe initiatives	67
3.3.5	EU initiatives	68
3.3.6	National initiatives to combat money laundering	69
3.4	Cybercrime	73
3.4.1	Council of Europe initiatives	74
3.4.2	EU Initiatives	76
3.4.3	Other international initiatives	81
3.4.4	National initiatives	81
3.5	Bribery of Foreign Public Officials	83
3.6	International Postal Offences	87
3.7	Circulation and Trafficking in Obscene Publications	88
CHAPTER 4 INTERNATIONAL CRIMINAL LAW OF THE SEA		93
4.1	Introduction: The Law of the Sea	93
4.2	Piracy <i>Jure Gentium</i>	94
4.2.1	Definition of piracy under international law	95
4.2.2	Mutiny and other violence against ships not amounting to piracy	98
4.2.3	Mechanisms for the prevention and eradication of piracy	99
4.3	Offences Against Submarine Cables and Pipelines	100
4.4	Unauthorised Broadcasting from the High Seas	103
4.5	The Right of Hot Pursuit	104
4.5.1	Introduction	104
4.5.2	Commencement and continuous nature of hot pursuit	106
4.5.3	The doctrine of constructive presence	107
CHAPTER 5 OFFENCES AGAINST THE PERSON		109
5.1	Introduction	109
5.2	Slavery and Related Practices	109
5.2.1	The slave trade and similar institutions	111
5.2.2	Remedies and international enforcement measures	116

5.3	Torture as a Crime under International Law	117
5.3.1	Defining torture	118
5.3.2	The 'public official' requirement of torture	120
5.4	Apartheid	121
5.5	Enforced or Involuntary Disappearances	122
CHAPTER 6 DEFENCES IN INTERNATIONAL CRIMINAL LAW		127
6.1	Theoretical Underpinnings of Criminal Defences	127
6.1.1	Is there a place for domestic defences in the ICC Statute?	129
6.2	Superior Orders	131
6.3	Duress and Necessity	135
6.4	Self-Defence	138
6.5	Intoxication	140
6.6	Mistake of Fact or Mistake of Law	141
6.7	Mental Incapacity	141
CHAPTER 7 STATE JURISDICTION AND IMMUNITIES		143
7.1	Criminal Jurisdiction: An Introduction	143
7.2	Territorial Jurisdiction	144
7.2.1	Subjective territoriality	145
7.2.2	Objective territoriality	146
7.2.3	Territorial jurisdiction in the UK	148
7.2.4	The ambit of national territory	149
7.3	The Active Personality Principle	151
7.4	The Passive Personality Principle	152
7.5	The Protective Principle	154
7.6	Universal Jurisdiction	156
7.7	<i>Aut Dedere Aut Judicare</i> Principle	160
7.8	Jurisdiction With Respect to Crimes Against Civil Aviation	162
7.9	International Criminal Jurisdiction	162
7.10	Immunities from Criminal Jurisdiction	165
7.10.1	General conception of immunity in international law	165
7.10.2	Immunity from criminal jurisdiction	168
7.10.3	Act of State doctrine	169
7.11	Immunity Under Domestic Law and <i>Jus Cogens</i> Norms	170

7.12	Foreign and Multinational Forces Abroad	173
7.13	Diplomatic and Consular Immunities	174
7.14	Immunity from International Criminal Jurisdiction	176
CHAPTERS 8 EXTRADITION AND ABDUCTION		179
8.1	Introduction	179
8.2	The Extradition Process: General Principles	179
8.2.1	Double criminality	181
8.2.2	Specialty	184
8.2.3	Re-extradition	185
8.2.4	Political offence exception	186
8.2.5	Capital punishment	188
8.2.6	Fiscal offences and offences under military law	189
8.2.7	Double jeopardy	189
8.2.8	Surrender of nationals	190
8.2.9	The rule of non-inquiry	191
8.3	International Initiatives	192
8.3.1	The UN Model Treaty on Extradition	192
8.3.2	1957 European Convention on Extradition	193
8.3.3	EU initiatives	194
8.3.4	1995 Convention on Simplified Extradition Procedure	195
8.3.5	1996 Convention Relating to Extradition	196
8.3.6	Council Framework Decision on the European arrest warrant	199
8.3.7	UK Extradition Bill 2002	200
8.4	Extradition and EC Law	201
8.4.1	Expulsion of nationals	203
8.4.2	The right to free movement	204
8.5	Extradition and International Human Rights Instruments	205
8.5.1	European Convention on Human Rights	206
8.5.2	Prohibition against torture and inhuman and degrading treatment	207
8.5.3	The <i>Soering</i> principle and deportation	209
8.5.4	International Covenant on Civil and Political Rights	211
8.5.5	1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	212
8.6	Extradition Proceedings and Domestic Fair Trial Safeguards	213

8.7	Applicability of Domestic Exclusionary Rules of Evidence	214
8.8	Review by Domestic Authorities	216
8.9	Extradition and Abduction	218
8.9.1	The <i>male captus, bene detentus</i> rule	218
8.9.2	Approach taken by courts in the US	219
8.9.3	Approach taken by the European Court of Human Rights	221
8.9.4	The doctrine of abuse of process	222
8.9.5	Collusion by law enforcement agencies	223
8.9.6	Seriousness of the crime	224
8.10	Extradition and the Case of Senator Pinochet	225
8.10.1	The facts	225
8.10.2	<i>Pinochet (No 1)</i>	226
8.10.3	<i>Pinochet (No 3)</i>	227
CHAPTER 9 MUTUAL LEGAL ASSISTANCE		231
9.1	Introduction	231
9.2	UN Initiatives	233
9.2.1	UN Model Treaty on Mutual Legal Assistance	233
9.3	1959 European Convention on Mutual Assistance in Criminal Matters	234
9.4	EU Initiatives	235
9.4.1	Introduction	235
9.4.2	1990 Schengen Implementing Convention	236
9.4.3	2000 EU Convention on Mutual Assistance in Criminal Matters	237
9.5	Mutual Legal Assistance Initiatives in the UK	240
9.5.1	Introduction	240
9.5.2	Crime (International Co-operation) Bill	242
9.6	The Use of Evidence Obtained Abroad	242
9.6.1	Introduction	242
9.6.2	Evidence obtained outside the UK	243
9.6.3	Evidence obtained in breach of foreign law	243
9.6.4	Evidence obtained in compliance with foreign law but which is irregular under local law	246
9.7	Evidence Obtained in Breach of International Human Rights standards	254

9.8	Failure to Use Mutual Legal Assistance Provisions	256
9.9	MLATs and Individual Rights	260
9.10	Informal Methods of Mutual Assistance	261
CHAPTER 10 INTERNATIONAL POLICE CO-OPERATION		265
10.1	Introduction	265
10.2	Interpol	265
	10.2.1 Organisation of Interpol	266
	10.2.2 Interpol operational activities	268
10.3	EU Initiatives	270
	10.3.1 The European Court of Justice	272
	10.3.2 Europol	273
	10.3.3 The Schengen <i>Acquis</i>	277
	10.3.4 The Schengen Information System	279
	10.3.5 Eurojust	280
	10.3.6 The European Public Prosecutor	281
	10.3.7 The European arrest warrant	282
	10.3.8 The European Judicial Network	283
	10.3.9 The European Police College	283
	10.3.10 1959 European Convention on Mutual Assistance in Criminal Matters	284
	10.3.11 <i>Corpus Juris</i>	284
	10.3.12 Common procedural safeguards	285
CHAPTER 11 EVIDENCE BEFORE THE AD HOC TRIBUNALS		287
11.1	Introduction	287
11.2	The Legal Framework of Evidence	289
	11.2.1 The Rules of Evidence of the ad hoc tribunals	290
	11.2.2 Analysis of the Rules of Evidence of the ad hoc tribunals	295
11.3	Admissibility	298
	11.3.1 Relevant definitions	300
11.4	Hearsay Evidence	302
11.5	Deposition Evidence	304
11.6	Character Evidence	306
11.7	Investigator's Report	307

11.8	Expert Evidence	309
11.9	Exclusion of Improperly Obtained Evidence	313
11.10	Determination of Weight of Evidence	315
	11.10.1 General principles	316
	11.10.2 Corroboration	316
	11.10.3 Documentary evidence	316
	11.10.4 Weight of hearsay evidence	317
	11.10.5 Lapse of time	318
	11.10.6 Traumas	319
	11.10.7 Prior statements	320
	11.10.8 Language problems	321
	11.10.9 Cultural aspects	321
	11.10.10 Expert evidence	322
	11.10.11 Standard on appeal	322
CHAPTER 12 NUREMBERG, TOKYO AND THE BIRTH OF MODERN INTERNATIONAL CRIMINAL LAW		325
12.1	Introduction	325
12.2	Efforts to Try International Crimes Prior to the Second World War	325
12.3	The Background to the Establishment of the IMT	326
	12.3.1 The law and jurisdiction of the IMT at Nuremberg	327
	12.3.2 The legal basis and criticism of the IMT	333
12.4	The IMTFE	334
12.5	The ILC's Role in the Post-Nuremberg Era	335
CHAPTER 13 THE INTERNATIONAL CRIMINAL TRIBUNALS FOR YUGOSLAVIA AND RWANDA		339
13.1	Introduction	339
13.2	Formative Years of the Ad Hoc Tribunals	342
13.3	Jurisdiction of the ICTY and ICTR	346
	13.3.1 Grave breaches of the 1949 Geneva Conventions	348
	13.3.2 Violations of the laws or customs of war in internal conflicts	351
	13.3.3 Crimes against humanity	353
	13.3.4 Genocide	358
13.4	Rape and Sexual Violence as International Offences	364

13.5	The Doctrine of Superior Responsibility	368
13.6	Enforcement Capacity of the Tribunals	369
13.7	Rights of the Accused	372
CHAPTER 14 THE PERMANENT INTERNATIONAL CRIMINAL COURT		375
14.1	Introduction	375
14.2	Jurisdiction and Admissibility	377
14.3	Subject Matter Jurisdiction	381
14.3.1	The crime of aggression	381
14.3.2	Genocide	384
14.3.3	Crimes against humanity	384
14.3.4	War crimes	386
14.4	General Principles of Criminal Law	390
14.5	International Co-operation and Judicial Assistance	392
14.6	Reservations and Amendments to the Statute	393
14.7	Reparation of Victims	395
CHAPTER 15 INTERNATIONALISED DOMESTIC CRIMINAL TRIBUNALS		397
15.1	Introduction	397
15.2	The Sierra Leone Special Court	397
15.3	The East Timor Special Panels	401
15.4	UNMIK and the Kosovar Judicial System	404
15.5	The Cambodian Extraordinary Chambers	406
15.6	The Lockerbie Trial	408
15.7	National Truth Commissions and Amnesties	411
<i>Index</i>		415

TABLE OF CASES

A v UK (1998) 27 EHRR 611	120
Abbasi and Another v FCO Secretary of State and Others, Judgment (6 November 2002)	166
Abbott v R [1977] AC 755	135
Advisory Opinion Concerning Exchange of Greek and Turkish Populations (1925) PCIJ Reports, Ser B, No 10	4
Advisory Opinion Concerning Reparation for Injuries Suffered in the Service of the UN (1949) ICJ Reports 174	377
Advisory Opinion on Interference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 93 AJIL (1999), 913	175
Advisory Opinion on Judgments of the Administrative Tribunal of the ILO (1956) ICJ Reports 77	341
Advisory Opinion on the Legality of the Use or Threat of Use of Nuclear Weapons (Nuclear Weapons Advisory Opinion), 35 ILM (1996), 809	130, 131
Advisory Opinion Concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (1971) ICJ Reports 3	342
Advisory Opinion Concerning Reservations to the Genocide Convention (1951) ICJ Reports 23	342, 358
Advisory Opinion in the Genocide case (1951) ICJ Reports 15	394
Advisory Opinion on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1954) ICJ Reports 47	163
AG of the Government of Israel v Eichmann (Eichmann case) (1961) 36 ILR 5; (1962) 36 ILR 277	133, 155, 219
AG's Reference (No 1 of 1982) [1983] 2 All ER 721	148
AG's Reference (No 5 of 1980) [1985] 3 All ER 816	90
Ahlstrom v Commission (Wood Pulp case) [1988] 4 CMLR 901	147
Ahmad v Wigen, 910 F 2d 1063 (1990)	191
Ahmed v Austria (1996) 24 EHHR 278	207
Akayesu <i>See</i> Prosecutor v Akayesu	
Alejandro v Republic of Cuba, 996 F Supp 1239 (1997)	152
Aleksovski <i>See</i> Prosecutor v Aleksovski	
Al-Adsani v UK, Judgment (21 November 2001) (2002) 34 EHHR 11	171

Al-Fawwaz v Governor of Brixton Prison and Another [2001] UKHL 69	182–83
Al-Megrahi v HM Advocate 14 March 2002 (Appeal No C104/01)	410
Alfred Dunhill of London Inc v Republic of Cuba, 425 US 682 (1976)	170
Allan v UK, Application No 48539/99	225
Alves v DPP [1992] 4 All ER 787	184
AMCO v Republic of Indonesia (1990) 89 ILR 366	3
Amand v Home Secretary and Minister of Defence of Royal Netherlands Government [1943] AC 147	216
Ambrose Light case (1885) 25 Fed 408	96–97
Amministrazione delle Finanze v Simmenthal [1978] ECR 629	201
Anglo-Norwegian Fisheries (UK v Norway) (1951) ICJ Reports 116	143
Antelope, The, 23 US 66 (1825)	109
Arton, Re [1896] 1 QB 108	180, 213
Argentina v De Blake, 507 US 1017 (1992)	117
Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association Ltd [1983] 1 All ER 590	97
Atkinson v US Government [1971] AC 197	189
Aujla <i>See R v Aujla</i>	
Austrian Universal Jurisdiction case, 28 ILR 341	159–60
Aydin v Turkey (1998) 25 EHRR 251	119
Azanian Peoples Organisation v President of the Republic of South Africa (1996) 4 SA 671	172, 412
Baader-Meinhof Group Terrorist case (1977) 74 ILR 493	45
Bagosora <i>See Prosecutor v Bagosora</i>	
Banco Nacional de Cuba v Sabbatino, 376 US 398 (1964)	169
Bankovic and Others v Belgium and Sixteen Others, Admissibility Decision (13 December 2001), Application No 52207/99	144
Barayagwiza v Prosecutor, Appeals Decision (Barayagwiza decision) (3 November 1999), Case No ICTR-98–34-S	127, 373
Barbie case <i>See Federation Nationale de Deportes et Internes Resistants et Patriotes and Others v Barbie</i>	
Barcelona Traction case <i>See Belgium v Spain (Barcelona Traction Light and Power House Co Ltd)</i>	

Beckford v R [1988] AC 130	141
Belgian Arrest Warrant case	
<i>See</i> Democratic Republic of Congo v Belgium	
Belgium v Spain (Barcelona Traction Light and Power House Co Ltd) (Barcelona Traction case) (1970) ICJ Reports 3	9, 110, 358
Bennett v Horseferry Road Magistrates' Court	
<i>See</i> R v Horseferry Road Magistrates' Court ex p Bennett	
Bennett, Petitioner [1994] SCCR 902	224, 243
Berrehab v The Netherlands (1988) 11 EHRR 322	210
Blackmer v USA, 284 US 421 (1932)	151
Blaskic	
<i>See</i> Prosecutor v Blaskic	
Blockburger v USA, 52 S Ct 180 (1932)	190
Board of Trade v Owen [1957] 1 All ER 411	148
Border Guards Prosecution case, 100 ILR 364	169
Bosnia and Herzegovina v FRY (1993) ICJ Reports 3	359
Bouchereau	
<i>See</i> R v Bouchereau	
Bozano v France (1986) 9 EHRR 297	185
Brdanin and Talic	
<i>See</i> Prosecutor v Brdanin and Talic	
Brugge, Klaus, Case No C-385/01	273
Brulay v USA, 383 F 2d 345 (1967)	252
Buck v AG [1965] Ch 745; 42 ILR 11	166
Budlong	
<i>See</i> R v Governor of Pentonville Prison ex p Budlong	
Burgos v Uruguay (1981) 1 Selected Decisions Human Rights Committee 88	255
C v Australia Human Rights Committee, Com No 900/1999	117
Canada v USA (I'm Alone case) (1935) III UNRIAA 1609	106
Castioni, Re [1891] 1 QB 149	44, 187
Celebici case	
<i>See</i> Prosecutor v Delalic and Others	
Chahal v UK (1996) 23 EHRR 413; EurCtHR, Ser A, No 22	117, 209
Chalkley [1998] 2 Cr App R 79	314
Chaudhary v State of Madhya Pradesh (1948) 3 SCC 243	112
Chinoy, Ex p	
<i>See</i> R v Governor of Pentonville Prison ex p Chinoy	
Chinoy v UK, Application No 15199/89	244
Chow Hung Ching v R (1948) 77CLR 449; 15 AD 47	173

Chung Chi Cheung v R [1939] AC 160	150
Cicippio v Islamic Republic of Iran, 18 F Supp 2d 62 (1998)	40
Cloutier	
<i>See</i> R v Cloutier	
Compania Naviera Vascongado v SS Cristina [1938] AC 485	144
Conegate Ltd v HM Customs & Excise [1986] ECR 1007	90
Connelly v Director of Public Prosecutions [1964] AC 1254	222
Costello-Roberts v UK (1993) 19 EHRR 112	120
Croissant, Re (1978) 74 ILR 505	31, 45
Cruz Varas v Sweden (1991) 14 EHRR 1	206
Cuba Submarine Co Ltd Claim (1923–24) 2 AD 419	102
D v UK (1997) 24 EHRR 423	209
Delalic	
<i>See</i> Prosecutor v Delalic and Others	
Delta v France (1993) 16 EHRR 574	302
Demjanjuk, In re, 457 US 1016 (1986)	160
Democratic Republic of Congo v Belgium (Arrest Warrant of 11 April 2000), Judgment (14 February 2002), Separate Opinion of Judge Guillaume	158, 168–69
Denmark, Norway, Sweden and The Netherlands v Greece (Greek case) (1969) 12 ECHR Yearbook 134	11, 118
Diana, The (1813) 165 ER 1245	109
Dickinson v Del Solar [1930] 1 KB 376	168, 174
DPP v Doot [1973] 1 All ER 940	147, 149
DPP v P [1991] 2 AC 447	306
DPP v Stonehouse [1977] 2 All ER 909	149
Doe v Unocal, 963 F Supp 880 (1997)	170
Dole v New England Mutual Marine Insurance Co (1864) 7 F Cas 838	96
Dombo Beheer BV v The Netherlands (1993) 18 EHRR 213	254
Dover Castle case, 16 AJIL (1922), 704	132, 326
Driver, Ex p	
<i>See</i> R v Plymouth Justices ex p Driver	
Dudley v Stephens (1884) 14 QBD 273	138
Dunlayici, Ex p	
<i>See</i> R v Governor of Belmarsh Prison and Another	
Duvalier and Madam Duvalier, Re, 111 ILR 528	172
Eastern Extension, Australasia and China Telegraph Co Ltd Claim (1923–24) 2 AD 415	102
Eck and Others, Re (The Peleus) (1945) 13 AD 248	133

Einsatzgruppen case	
<i>See</i> USA v Ohlendorf and Others	
Elliniki Radiophonia Tileorassi AE v Ypourgeoio Pliroforissis and Kouvelas [1991] ECR I-2925	203
Empson v Smith [1996] 1 QB 426	174
Engelke v Musmann [1928] AC 433	174
Erdemovic case	
<i>See</i> Prosecutor v Erdemovic	
Federal Democratic Republic of Germany v Denmark;	
Federal Democratic Republic of Germany v Netherlands (North Sea Continental Shelf cases) (Merits) (1969) ICJ Reports 3	2
Federation Nationale de Deportes et Internes Resistants et Patriotes and Others v Barbie (Barbie case) (1988) 100 ILR 330; 78 ILR 125	156, 354
Fernando and Raquel Mejia v Peru, Decision (1 March 1996), Report No 5/96, Case No 10,970	119
Finucane v Mahon [1990] IR 165	187
Flatow v Islamic Republic of Iran, 999 F Supp 1 (1998)	40
Folkerts v Prosecutor (1978) 74 ILR 498	44
Ford v USA, 273 US 593 (1927)	146
Former Syrian Ambassador to the German Democratic Republic case (1996) 115 ILR 597	151, 174
Forti v Suarez-Mason, 672 F Supp 1531 (1987)	123, 171
Fortuna, The (1811) 165 ER 1240	109
France v Turkey (Lotus case) (1927) PCIJ Reports, Ser A, No 10	143, 146, 150, 153, 164
Francis, Ex p	
<i>See</i> R v Governor of Belmarsh Prison ex p Francis	
Frisbie v Collins, 342 US 519 (1952); 1 L Ed 541	220
Funke v France (1993) 16 EHRR 297	254
Furundzija	
<i>See</i> Prosecutor v Furundzija	
Galdeano case (1984) 111 ILR 505	45
Germany v Poland (1928) PCIJ Reports, Ser A, No 15	361
Gil v Canada (1994) 107 ILR 168	44–45
Giles v Tumminello, 38 ILR 120	155, 160
Grace and Ruby, 283 F 475 (1922)	107
Grand Jury Proceedings; Marsoner v USA, Re, 40 F 3d 959 (1994)	257
Grille Motta, Com No 11/1977	119

Gulay Asliturk v Government of Turkey [2002] EWHC 2326	179
Gutierrez, Re (1957) 24 ILR 265	152
HM Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, Case No 1475/99	275
HM Advocate v McKay 1961 SLT 176	247
Habeas Corpus Application of Carthage Healy, In re [1984] 3 CMLR 575	205
Habeas Corpus Application of Navinder Singh Virdee, Re [1980] 1 CMLR 709	205
Hajrizi and Others v Yugoslavia, Com No 161/2000, Cat Doc CAT/C/29/D/161/2000	120
Handyside case (1976) 58 ILR 150	90
Hartford Fire Insurance Co v California, 113 S Ct 2891 (1993)	147
Hartley [1978] 2 NZLR 199	223
Hatch v Baez, 7 Hun 596 (1876)	169
Healy, Ex p <i>See R v Guildford Justices ex p Healy</i>	
Herrera Rubio v Colombia, Com No 161/1983	119
Hilal v UK (2001) 33 EHRR 2	189, 208
Hirsch v State of Israel and State of Germany, 113 ILR 543	168
HLR v France (1998) 26 EHRR 29	210
Honecker Prosecution case (2000) 100 ILR 393	171
Honorary Consul of X v Austria, 86 ILR 553	175
Hoogovens v High Authority [1962] ECR 253	3
Hostages case <i>See USA v List</i>	
Howard Martin v Jamaica, Application No 317/1988	211
Huseyin Gozutok, Case No C-187/01	273
ICI v Commission (Dyestuff case) [1972] ECR 619	147
ICTY Prosecutor v Blaskic <i>See Prosecutor v Blaskic</i>	
ICTY Prosecutor v Delalic and Others <i>See Prosecutor v Delalic and Others</i>	
ICTY Prosecutor v Kanyabashi <i>See Prosecutor v Kanyabashi</i>	
ICTY Prosecutor v Karadzic and Mladic <i>See Prosecutor v Karadzic and Mladic</i>	
ICTR Prosecutor v Kayishema and Ruzindana <i>See Prosecutor v Kayishema and Ruzindana</i>	

ICTY Prosecutor v Erdemovic	
<i>See</i> Prosecutor v Erdemovic	
ICTY Prosecutor v Furundzija	
<i>See</i> Prosecutor v Furundzija	
ICTY Prosecutor v Krnojelac	
<i>See</i> Prosecutor v Krnojelac	
ICTY Prosecutor v Kunarac and Others	
<i>See</i> Prosecutor v Kunarac and Others	
ICTY Prosecutor v Kvočka and Others	
<i>See</i> Prosecutor v Kvočka	
ICTY Prosecutor v Plavšić	
<i>See</i> Prosecutor v Plavšić	
ICTY Prosecutor v Tadić	
<i>See</i> Prosecutor v Tadić	
ICTY Prosecutor v Vasiljević	
<i>See</i> Prosecutor v Vasiljević	
I Congresso del Partido [1981] 2 All ER 1064	167
Illich Sanchez Ramirez v France, Application No 28780/95	206
I'm Alone case	
<i>See</i> Canada v USA	
In the Matter of Extradition of Atta, 104 ILR 52	44–45, 153
Ireland v UK (1978) 2 EHRR 25	46, 118–19, 210, 342
Islamic Republic of Iran v USA, Aerial Incident of 3 July 1988	26
Ismail, Re [1999] AC 320	180
Jabari v Turkey (2000) 9 BHRC 1	208
Javar, Re and Munyeshyaka, Re, 93 AJIL (1999), 525	160
Jhirad v Ferrandina, 536 F 2d 478 (1976)	191
Jimenez v Aristeguieta, 311 F 2d 547 (1962)	170
Johnson v Jamaica (1997) 4 IHRR 21	255
Jorgić case, StR 215/98 (30 April 1999)	362
Joyce v DPP [1946] AC 347	151, 154–55
Kahan v Pakistan Federation [1951] 2 KB 1003	168
Kebeline, Ex p [1999] 4 All ER 801	251
Ker v Illinois, 119 US 436 (1886)	220
Khan v UK (2001) 31 EHRR 45	251, 255–56
Kindler v Canada (1991) 84 DLR (4th) 438	179, 211, 215
Kirkpatrick v Environmental Tectonics, 493 US 403 (1990)	169
Konscol [1993] Crim LR 950	247–48
Kostovski v The Netherlands, Judgment (20 November 1989)	303

Kovacevic, Official Transcript (6 July 1998)	310
Krupp and Eleven Others, Trial of, 10 LRTWC (1949), 147	136
Kurt v Turkey, Judgment (25 May 1998), Case No 15/1997/799/1002	124
Kuwait Airways Corp v Iraqi Airways Co [1995] 1 WLR 1147	166
Lafontant v Aristide (1994) 103 ILR 581	170
Launder, Ex p	
<i>See</i> R v Secretary of State for the Home Department ex p Launder	
Lee, Ex p	
<i>See</i> R v Governor of Pentonville Prison and Another ex p Lee	
Leki case	
<i>See</i> Prosecutor v Joseph Leki	
Levin, Ex p	
<i>See</i> R v Governor of Brixton Prison ex p Levin	
Levinge v Director of Custodial Services, Department of Corrective Services and Others (1987) 9 NSWLR 546	223
Liangsiriprasert v Government of USA [1990] 2 All ER 866	149
Libman v Queen (1986) 21 DLR 174	145
Libya v USA; Libya v UK (Lockerbie case) (1992) ICJ Reports 3	12, 27, 39, 161, 409
Liechtenstein v Guatemala (Nottebohm case) (Merits) (1955) ICJ Reports 4	361
Llandovery Castle case, 16 AJIL (1922), 708	132, 326
Lockerbie case	
<i>See</i> Libya v USA; Libya v UK	
Lodhi v Governor of Brixton Prison [2002] EWHC 2029	223
Los Palos case	
<i>See</i> Prosecutor v Joni Marques and Others	
Lotus case	
<i>See</i> France v Turkey	
Louis, Le (1817) 2 Dods 213	110
Lovelace v Canada, UN Human Rights Committee (1981) 68 ILR 17	361
Lüdi v Switzerland, ECHR Judgment (15 June 1992)	302
McAliskey, Re (1997) The Times, 22 January	190
McBoyle v USA, 43 F 2d 273 (1930)	146
McCann v UK (1996) 21 EHRR 97	31
McKay	
<i>See</i> HM Advocate v McKay	
Mackeson, Ex p	
<i>See</i> R v Bow Street Magistrates ex p Mackeson	

Macleod v AG for New South Wales [1891] AC 455	143
McMullen, Re, 668 F 2d 122 (1981)	187
McMullen v INS, 788 F 2d 591 (1986)	44
MacNeil and Others v HM Advocate [1986] SCCR 288	248
Magellan Pirates (1853) 1 A & E 81	96
Makin v AG for New South Wales [1894] AC 57	306
Malek Adhel case	
<i>See</i> USA v Cargo of the Brig Malek Adhel	
Mamatkulov and Abdurasulovic v Turkey, Application Nos 46827/ 99 and 46951/99	208
Mannington Mills Inc v Congoleum Corp, 595 F 2d 1287 (1979)	147
Marcos, Re Estate of, 25 F 3d 1467 (1994)	123, 171
Martin Ex p	
<i>See</i> R v Governor of Belmarsh Prison ex p Martin	
Maryland v Craig, 497 US 836 (1990)	374
Meunier, Re [1894] 2 QB 415	187
Miango Muiyo v Zaire, Com No 194/85	119
Miller v California, 413 US 15 (1973)	91
Miranda v Arizona, 86 S Ct 1602 (1966)	253
Molyneaux, Ex p [1986] 1 WLR 331	166
Mrksic	
<i>See</i> Prosecutor v Mrksic and Others	
Mueller, Trial of Emil, 16 AJIL (1922), 684	326
Mullen [1999] 3 WLR 777; 2 Cr App R 143	218, 224, 243, 260
Munyeshyaka, Re	
<i>See</i> Javar, Re and Munyeshyaka, Re	
Murray v UK (1996) 22 EHRR 29	254, 255
M/V Saiga case, Judgment (4 December 1997)	107
Naletilic	
<i>See</i> Prosecutor v Naletilic and Martinovic	
Neil Walker v Governor of HM Prison Nottingham [2002] EWHC 39	182
Newton Bay case, The, 36 F 2d 729 (1929)	107
Nicaragua v USA (1986) ICJ Reports 14	31, 38, 351
Nielsen, Re [1984] AC 606	181, 184
Niyitegeka	
<i>See</i> Prosecutor v Niyitegeka	
Nold, j v Commission [1974] ECR 491	202
North case, 11 Ex Rep (1905), 141	105–06

North Sea Continental Shelf cases	
<i>See</i> Federal Democratic Republic of Germany v Denmark; Federal Democratic Republic of Germany v Netherlands	
Nottebohm (Guatemala v Liechtenstein) (1955) ICJ Reports 4	143
Nulyarimma v Thompson [1999] FCA 1192; 39 ILM (2000), 20	32
Nunez Chipana v Venezuela, Case No 110/1998, CAT/C/21/D/110/1998	212
Öcalan v Turkey, Application No 46221/99	221
O/C Depot Battalion, RASC, Colchester ex p Elliott [1949] 1 All ER 138	219
Oppenheim v Cattermole [1976] AC 249	166
Osborne v Ohio, 495 US 103 (1990)	91
People's Mojahedin Organisation of Iran v US Dept of State, 38 ILM (1999), 1287	
22	
Pepper v Hart [1993] AC 593	90
Phillips v UK, 11 BHRC 280	70
Pinochet, Re, 93 AJIL (1999), 690	160
Pinochet, Re, 93 AJIL (1999), 700	156
Pinochet (No 1), Re	
<i>See</i> R v Bow Street Metropolitan Stipendiary Magistrate and Others ex p Pinochet Ugarte (No 1)	
Pinochet (No 3), Re	
<i>See</i> R v Bow Street Metropolitan Stipendiary Magistrate and Others ex p Pinochet Ugarte (No 3)	
Piracy Jure Gentium, Re [1934] AC 586	96, 156
Plavsic case	
<i>See</i> Prosecutor v Plavsic	
Prefecture of Voiotia and Others v Federal Republic of Germany, 92 AJIL (1998), 765	165
Propend Finance Pty Ltd and Others v Sing and Others (1998) 111 ILR 611	168
Prosecutor v Akayesu, Defence Motion Decision (9 March 1998)	310
Prosecutor v Akayesu, Judgment (Akayesu judgment) (2 September 1998), Case No ICTR-96-4-T	291, 295, 297, 314-17, 319-21, 352-53, 356-57, 360-66
Prosecutor v Akayesu, Appeal Judgment (1 June 2001), Case No ICTR-96-4-A	322-23
Prosecutor v Aleksovski (Aleksovski appeals decision on admissibility) (16 February 1999), Case No IT-95-14/1-AR73	298, 301-03

Prosecutor v Aleksovski, Judgment (15 June 1999), Case No IT-95-14/2-A	391
Prosecutor v Aleksovski, Appeals Judgment (Aleksovski judgment) (25 June 1999), Case No IT-95-14/2-A	367-69, 372
Prosecutor v Aleksovski, Appeal Judgment (24 March 2000), Case No IT-95-14/1-A	295, 323, 342, 349
Prosecutor v André Ntagerura and Others, Defence Motion Decision, Case No ICTR-99-46-T	296
Prosecutor v Bagilishema, Ignace, Judgment (7 June 2001), Case No ICTR-95-1A-T	321, 363
Prosecutor v Bagosora, Bagosora Pre-Determination Decision (8 July 1998), Case No ICTR-96-7-T	297
Prosecutor v Bagosora and Others Decision on Prosecutor's Motion (5 December 2001), Case No ICTR-98-41-I	305
Prosecutor v Bagosora and Others, Oral Decisions on Defence Objections (4 September 2002), Case No ICTR-41-98-T	310-11
Prosecutor v Blaskic (Blaskic appeals subpoena decision), Appeals Judgment (29 October 1997) (1997) 110 ILR 607	164, 370, 393
Prosecutor v Blaskic (Blaskic hearsay decision) (21 January 1998), Case No IT-95-14-T	296-97, 303-04
Prosecutor v Blaskic, Trial Chamber Decision (25 March 1999), Case No IT-95-14	297, 308
Prosecutor v Blaskic (Blaskic judgment), Judgment (3 March 2000), Case No IT-95-14-T (2000) 110 ILR 607	302, 349-50, 356-57, 368-69, 391-
Prosecutor v Brdanin and Talic, Brdanin and Talic Admission of Evidence Order (15 February 2002), Case No-IT-99-36-T	288, 295, 298-99, 301-02, 315-17
Prosecutor v Delalic and Others, Preliminary Judgment (28 April 1997)	303
Prosecutor v Delalic and Others, Decision on Video- Link Testimony (28 May 1997)	305
Prosecutor v Delalic and Others, Delalic Decision on Exclusion of Evidence (2 September 1997)	301, 314
Prosecutor v Delalic and Others, Decision on Defence Motion (8 September 1997)	296

Prosecutor v Delalic and Others, Decision re Exclusion and Restitution of Evidence (25 September 1997)	314
Prosecutor v Delalic and Others, Delalic Decision on Admission of Evidence (19 January 1998), Case No IT-96-21-T	288, 300-01
Prosecutor v Delalic, Decision on Admission of Evidence (21 January 1998)	317
Prosecutor v Delalic and Others, Decision re Tendering of Prosecution Exhibits (9 February 1998)	314
Prosecutor v Delalic and Others, Delalic Decision on Admissibility (21 June 1998)	301-02
Prosecutor v Delalic and Others (Celebici case), Judgment (16 November 1998), 38 ILM (1998), 57	118, 128, 142, 290, 294, 297, 314, 318, 368-69, 391
Prosecutor v Delalic, Appeal Judgment (20 February 2001), Case No IT-96-21-A, Appeals Chamber	323
Prosecutor v Erdemovic, Sentencing Judgment (29 November 1996)	136
Prosecutor v Erdemovic (Erdemovic appeals judgment), Appeals Chamber Decision (7 October 1997), 92 AJIL (1998), 283	4, 136-37, 372-73, 391
Prosecutor v Furundzija (Furundzija judgment), Judgment (10 December 1998), 38 ILM (1999), 317	117-19, 121, 130, 365-67
Prosecutor v Furundzija, Appeal Judgment (21 July 2000), Case No IT-95-17/1-A	319, 322-23
Prosecutor v Galic, Appeal Judgment (7 June 2002), Case No IT-98-29-AR73 2	296
Prosecutor v Jelusic (Jelusic judgment), Judgment (14 December 1999), Case No IT-95-10-T	357-58, 360-62
Prosecutor v Jelusic (Jelusic appeals judgment), Appeals Chamber Judgment (5 July 2001), Case No IT-95-10-A,	360-61
Prosecutor v Kajelijeli, Decision (8 May 2000), Case No ICTR-98-44-I	373
Prosecutor v Kambanda, Judgment (4 September 1998), Case No ICTR-97-23-S; 37 ILM (1998), 1411	90
Prosecutor v Kanyabashi, 92 AJIL (1998), 66	163
Prosecutor v Karadzic and Mladic (Karadzic and Mladic decision), r 61 Decision (11 July 1996), Case Nos IT-95-5-R61 and IT-95-18-R61; (1996) 108 ILR 86	14, 343, 357, 360, 362, 365, 387

Prosecutor v Kayishema and Ruzindana (Kayishema and Ruzindana judgment), Judgment (21 May 1999), Case No ICTR-95-1-T	14, 290, 316, 318–21, 352–53, 356–57, 361–63, 365
Prosecutor v Kayishema and Ruzindana, Appeal Judgment (1 June 2001), Case No ICTR-95-1-A	315–16, 318, 323
Prosecutor v Kordic and Cerkez, Prosecutor’s Request Decision (13 April 1999)	305
Prosecutor v Kordic and Cerkez, Decision re Trial Chamber’s Ruling (25 June 1999)	314
Prosecutor v Kordic and Cerkez, Kordic and Cerkez Decision on the Tulica Report (29 July 1999), Case No-IT-95-14/2-T	298, 303, 307
Prosecutor v Kordic and Cerkez, Official Transcript (28 January 2000)	310–11
Prosecutor v Kordic and Others (Kordic case), Judgment (26 February 2001), Case No IT-95-14/2-T	138–39, 342, 356, 358
Prosecutor v Kovacevic (6 July 1998), Case No IT-97-24-T	310
Prosecutor v Krnojelac, Judgment (15 March 2002), Case No IT-97-25-T	119–20, 290, 307, 316, 318
Prosecutor v Krstic (Krstic judgment) (2 August 2001), Case No IT-98-33	360–64
Prosecutor v Kunarac, Kovac and Vukovic, Judgment (22 February 2001), Case Nos IT-96-23-T and IT-96-23/1-T	118, 290, 319, 355–56, 366–68
Prosecutor v Kunarac, Appeal Judgment (12 June 2002), Case No IT-96-23-A	319, 322, 367
Prosecutor v Kupreskic and Others (25 February 1999), Case No IT-95-16-T	305
Prosecutor v Kupreskic and Others (15 July 1999), Case No IT-95-16-AR73	305
Prosecutor v Kupreskic and Others (Kupreskic judgment), Judgment (14 January 2000)	356–58
Prosecutor v Kvocka and Others, r 71 (15 November 1999), Case No IT-98-30-PT	305
Prosecutor v Kvocka and Others, Judgment (2 November 2001)	119–20, 367
Prosecutor v Joseph Leki, Judgment (11 June 2001), Case No 5/2000	404
Prosecutor v Joni Marques and Others (Los Palos case), Judgment (11 December 2001), Case No 09/2000	403

Prosecutor v Mrksic and Others (Vukovar Hospital case), r 61 Decision (3 April 1996) (1996) 108 ILR 53	355, 357
Prosecutor v Milosevic and Others, Decision on Review of Indictment and Application for Consequential Orders (24 May 1999)	345, 370
Prosecutor v Musema (Musema judgment), Judgment (27 January 2000)	295, 297, 301, 304, 316–17, 320–21, 363, 366
Prosecutor v Musema, Appeals Judgment (16 November 2001), Case No ICTR-96-13-A	301, 317, 319–20, 322–23
Prosecutor v Nahimana, Oral Decision (20 May 2002)	310
Prosecutor v Nahimana, Barayagwiza, Ngeze, Expert Witnesses Decision (24 January 2003), Case No ICTR-99-52-T	310
Prosecutor v Nahimana and Others, Decision to Reconsider Trial Chamber's Decision (25 February 2003)	310
Prosecutor v Naletilic and Martinovic (10 November 2000), Case No IT-98-34-PT	305
Prosecutor v Ndayambaje, Kanyabashi and Others, Motion to Remove Decision (22 January 2003), Case No ICTR-98-42-T	296
Prosecutor v Nikolic (Nikolic decision), r 61 Decision (20 October 1995), Case No IT-94-2-R61 (1995) 108 ILR 21	343, 356, 360
Prosecutor v Niyitegeka, Decision on Prosecutor's Motion (4 October 2002), Case No ICTR-96-14-T	305
Prosecutor v Ntahobali and Others (1 July 2002), Case No ICTR-98-42-T	304
Prosecutor v Plavsic, Sentencing Judgment (27 February 2003), Case Nos IT-00-39 and 40/1-S	10
Prosecutor v Ruggiu, Judgment (1 June 2000), Case No ICTR-97-32-I	364
Prosecutor v Rutaganda (Rutaganda judgment), Judgment (6 December 1999), Case No ICTR-96-3-T	295, 297–98, 316, 319–21, 361–62
Prosecutor v Saric (1995) unreported	344
Prosecutor v Semanza (20 October 2000), Case No ICTR-97-20-I	305
Prosecutor v Serushago, Judgment (5 February 1999), Case No ICTR-98-34-S	373
Prosecutor v Sikirica and Others (3 September 2001), Case No IT-95-8-T	360, 363

Prosecutor v Simic and Others, Decision on the Prosecution Motion Under r 73 for a Ruling Concerning the Testimony of a Witness (27 July 1999)	371
Prosecutor v Tadic, Decision for Deferral to International Criminal Tribunal of Yugoslavia (8 November 1994), Case No IT-94-1-D	344
Prosecutor v Tadic, Decision on Protective Measures (10 August 1995) (1997) 105 ILR 599	341
Prosecutor v Tadic, Tadic Appeals Jurisdiction Decision (2 October 1995) (1995) 105 ILR 453; 36 ILM (1997), 908	3, 7, 31, 163, 341, 348, 351, 355, 367, 372, 389
Prosecutor v Tadic, Tadic Decision on Hearsay (5 August 1996), Case No IT-94-1-T	288, 295, 301, 303-04
Prosecutor v Tadic, Judgment (7 May 1997), Case No IT-94-1-T	297
Prosecutor v Tadic, Appeal Judgment (15 July 1999), Case No IT-94-1-A	322, 349-50, 355, 372
Prosecutor v Tadic, Appeals Judgment on Allegations of Contempt Against Prior Counsel, Tadic Judgment on Allegations of Contempt (31 January 2000), Case No IT-94-1-A-R77	290, 300-01, 307, 315, 318
Prosecutor v Vasiljevic, Judgment (29 November 2002), Case No IT-98-32-T	6
Public Prosecutor v Antoni (1960) 32 ILR 140	152
Public Prosecutor v Ashby, 93 AJIL (1999), 219	173
Public Prosecutor v Djajic, 92 AJIL (1998), 528	160, 344, 362
Public Prosecutor v Eichmann, Judgment (1962) 36 ILR 277	363
Public Prosecutor v Grabec, 92 AJIL (1998), 78	160, 344
Quinn [1990] Crim LR 581	246-8
Quirin, Ex p, 317 US 27 (1942)	159, 331
R v Anderson (1868) 11 Cox Crim Cases 198	149
R v Aujla [1998] 2 Cr App R 16	250-51, 256, 259, 262
R v Baxter [1971] 2 All ER 359	149
R v Benjafield and Rezvi [2001] 3 WLR 75	70
R v Bevan (1986) 84 Cr App R 143	148
R v Bouchereau [1977] ECR 1999; 2 CMLR 800; [1978] QB 732	203-05
R v Bow Street Magistrates ex p Mackeson (1982) 75 Cr App R 24	219

R v Bow Street Metropolitan Stipendiary Magistrate and Others ex p Pinochet Ugarte (No 1) [1998] 3 WLR 1456	226
R v Bow Street Metropolitan Stipendiary Magistrate and Others ex p Pinochet Ugarte (Amnesty International and Others Intervening) (No 3) [1999] 2 WLR 827; 2 All ER 97; 17 ILR 393	157, 159, 165, 170, 183, 225, 227
R v Byrne [1960] 3 All ER 1	142
R v Casement [1917] 1 KB 98	151
R v Charrington and Others 49 ICLQ (2000), 477	59
R v Cloutier [1979] 2 SCR 709; 99 DLR (3d) 577	300
R v Conway (1990) 91 Cr App R 143	214
R v Cox [1968] 1 All ER 410	148
R v Donyadideh and Others, 101 ILR 259	30
R v Filonov (1993) 82 CCC 3d 516	245
R v Finta (Finta case) (1994) 104 ILR 284	134, 354
R v Governor of Ashford ex p Postlethwaite [1988] AC 924	180
R v Governor of Belmarsh Prison ex p Dunlayici (1996) The Times, 22 August	187
R v Governor of Belmarsh Prison ex p Francis [1995] 1 WLR 1121	216
R v Governor of Belmarsh Prison ex p Martin [1995] 1 WLR 412	214, 249
R v Governor of Brixton Prison ex p Kolczynski [1955] 1 QB 540 187	216
R v Governor of Brixton Prison ex p Kotronis [1971] AC 250	214, 216
R v Governor of Brixton Prison ex p Levin [1996] 3 WLR 657; [1997] 3 WLR 117	184
R v Governor of Brixton Prison ex p Osman (No 3) [1992] 1 All ER 122	44, 187
R v Governor of Brixton Prison ex p Schtraks [1964] AC 556	204–05
R v Governor of Pentonville Prison ex p Budlong [1980] 1 WLR 1110	187
R v Governor of Pentonville Prison ex p Cheng [1973] AC 931	214, 216, 243, 259
R v Governor of Pentonville Prison ex p Chinoy [1992] 1 All ER 317	183, 185, 214, 216
R v Governor of Pentonville Prison and Another ex p Lee [1993] 3 All ER 504	214
R v Governor of Pentonville Prison ex p Sinclair [1990] 2 All ER 789	91
R v Graham (2000) LTL, 6 April	

R v Guildford Justices ex p Healy [1983] 1 WLR 108	219
R v Harrer (1995) 101 CCC 3d 193; 3 SCR 562	253, 314
R v Henn and Darby [1979] ECR 3795	90
R v Highbury Magistrates' Court ex p Boyce (1984) 79 Cr App R 132	214
R v Horseferry Road Magistrates' Court ex p Bennett [1994] 1 AC 42; [1993] 3 All ER 138	215, 221–24, 243, 260
R v Horsham Justices ex p Bukhari (1981) 74 Cr App R 291	214
R v Howe and Others [1987] 1 AC 417	131, 135
R v Jameson [1896] 2 QB 425	159
R v Kelly [1981] 2 All ER 1098	151
R v Land (1998) 1 CAR 301	90
R v Madan [1961] 2 QB 1	174
R v Nekuda (1989) 39 A Crim R 5	145
R v Neumann (1949) 3 SA 1238	155
R v P and Others (2000) The Times, 19 December	260
R v Plymouth Justices ex p Driver [1986] QB 95	219
R v Radak [1999] 1 Cr App R 187; 3 E & P 195	241, 258
R v Robb (1991) 93 Cr App R 161	309
R v Sansom and Others [1991] 2 WLR 366	149
R v Sawoniuk (1999) unreported	151
R v Secretary of State ex p Johnson [1999] 2 WLR 932	185
R v Secretary of State ex p Kirkwood [1984] 1 WLR 913	217
R v Secretary of State ex p Peter Elliot [2001] EWHC 559	179
R v Secretary of State for the Home Department ex p (1) Mohammed Sani Abacha (2) Abubaker Baguda & Federal Republic of Nigeria [2001] EWHC 787	232
R v Secretary of State for the Home Department ex p Bugdaycay [1987] AC 514	217
R v Secretary of State for the Home Department ex p Lauder [1997] 1 WLR 864	201, 204–05, 217
R v Secretary of State for the Home Department ex p Rachid Ramda [2002] EWHC 1278	192, 213
R v Silver Lock [1894] 2 QB 766	309
R v Stockwell (1993) 97 Cr App R 260	309
R v Sunila and Soleyman (1986) 28 DLR 450	107
R v Terry (1994) 91 CCC 3d 209	245, 252
R v Turner [1975] QB 834	309
R v Ward [1993] 2 All ER 577	215
R v Wray [1971] SCR 272	314

R v X; R v Y; R v Z (2000) <i>The Times</i> , 23 May	251, 256, 259
R (On the Application of Saadi) v Secretary of State for the Home Department [2002] UKHL 41	210
Radak	
<i>See</i> R v Radak	
Rahimtoola v Nizam of Hyderabad [1958] 3 All ER 961	165
Red Crusader case (1962) 35 ILR 485	106
Rees v Secretary of State for the Home Department [1986] 2 All ER 321	153, 190
Rein v The Socialist People's Libyan Arab Jamahiriya, 38 ILM (1999), 447; 119 S Ct 2337; 162 F 3d 748 (1998)	22, 40, 172
Reparations case	
<i>See</i> Advisory Opinion Concerning Reparation for Injuries Suffered in the Service of the UN Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd [1909] 1 KB 785	96
Request from L Kasper-Ansermet, 132 FRD 622 (1990)	232
Rex v Dawson (1696) 13 St Tr 451	95
Rey v Government of Switzerland [1998] 3 WLR 1	181
Rivard v USA, 375 F 2d 882 (1967)	155
Rocha v USA, 288 F 2d 545 (1961)	155
Rohrig, Re (1950) 17 ILR 393	156
Ruiz Torija v Spain, ECHR Judgment (9 December 1994)	323
Rutaganda	
<i>See</i> Prosecutor v Rutaganda	
Saadi, Ex p	
<i>See</i> R (On the Application of Saadi) v Secretary of State for the Home Department	
Saifi, Re [2001] 4 All ER 168	179, 192, 213
Sang [1980] AC 402	314
San Juan Nepomuceno (1824) 166 ER 94	109
Sankoh, In the Matter of (2000) 119 ILR 386	397
Saunders v UK (1994) 18 EHRR CD 23	254
Saunders v UK (1997) 23 EHRR 313	225, 255
Schenk v Switzerland (1988) 13 EHRR 242	254
Schmidt, Re [1995] 1 AC 339	215
Schooner Exchange v MacFaddon (Schooner Exchange case) (1812) 7 Cranch 116	150, 165, 173
Schreiber v Canada [1998] 1 SCR 841	249
Scott, Ex p (1829) 9 B & C 446	218
Sealed Case, Re, 832 F 2d 1268 (1987)	256

Secretary of State for the Home Department v Rehman (2000) <i>The Times</i> , 31 May	21
Secretary of State for Trade v Markus [1976] AC 35	148
Sharon v Time Inc, 599 F Supp 538 (1984)	170
Siderman de Blake v Argentina, 965 F 2d 699 (1992)	117
Sinclair, Ex p <i>See</i> R v Governor of Pentonville Prison ex p Sinclair	
Sinclair v HM Advocate (1890) 17 R(J) 38	219, 224, 243
Smith v Socialist People's Libyan Arab Jamahiriya (1997) 113 ILR 534	150, 168
Soering v UK (1989) 11 EHRR 439	117, 188, 206–10, 213, 217, 222, 255
State of Arizona v Willoughby (1995) 114 ILR 586	145
State v Brown, 543 A 2d 750 (1988)	314
Stocke v Germany, Ser A, No 199	221
St John v Governor of HM Prison Brixton [2001] EWHC 543	180
Stonehill v USA, 405 F 2d 738 (1968)	252
T v Australia, Case No 706/1996	211
T v Immigration Officer [1996] AC 742	188
T v Secretary of State for the Home Department [1996] 2 All ER 865; 107 ILR 552	45, 161, 187
Tadic <i>See</i> Prosecutor v Tadic	
Talbot v Jansen, 3 US 153 (1795)	95
Teixeira v Portugal (1998) 28 EHRR 101	225, 255
Tel-Oren v Libyan Arab Republic, 726 F 2d 795 (1984)	18
Teper v R [1952] AC 480	302
Timberlane Lumber Co v Bank of America (1976) 66 ILR 270	147
Torres v HM Advocate [1997] SCCR 491	248
Touvier Case, French Court of Cassation Judgment (1992) 100 ILR 337	354
Treacy v DPP [1971] AC 537	148, 149
Trendtex Trading Corp v Central Bank of Nigeria [1977] 1 All ER 881	167
Trial of Earl Russell [1901] AC 446	151
Trial of Emil Mueller, 16 AJIL (1922), 684	70
Turkey v France (Lotus case) (1927) PCIJ Reports, Ser A, No 10	95
Tyrer Case, Judgment (1978) EurCtHR, Ser A, No 26, para 31	342

Urios, Re (1920) 1 AD 107	154
Underhill v Hernandez, 168 US 250 (1897)	169
United Brands Co v Commission [1978] ECR 207; 1 CMLR 429	148
USA v Aluminium Co of America, 148 F 2d 416 (1945)	147–48
USA v Alvarez-Machain, 112 S Ct 2188 (1992)	220, 258
USA v Artt, 38 ILM (1999), 100	45
USA v Baker (1955) 22 ILR 203	159
USA v Bank of Nova Scotia, 740 F 2d 817 (1988)	257
USA v Burns and Rafay QL (2001) SCJ 8	189
USA v Basic, 587 F 2d 577 (1978); 592 F 2d 13	252, 259
USA v Calley, 46 CMR 1131 (1973)	134
USA v Cargo of the Brig Malek Adhel (Malek Adhel case), 43 US 210 (1844)	96
USA v Columba-Colella, 604 F 2d 356 (1979)	151
USA v Cotroni, 527 F 2d (1975)	252
USA v Garcia, 37 F 3d 1359 (1994)	260
USA v George G Davis, 767 F 2d 1025 (1985); 18 Fed R Evid Serv (Callaghan) 53	260
USA v Iran (US Diplomatic and Consular Staff in Iran), Judgment (24 May 1980) (1980) ICJ Reports 3	29, 174
USA v Johnpoll, 739 F 2d 702 (1984)	232
USA v Keller, 451 F Supp 631 (1978)	155
USA v Kinder, 14 CMR 742 (1954)	134
USA v Langlois (1989) 50 CCC 3d 445	245
USA v Leon, 468 US 897 (1984)	314
USA v List (Hostages case), 8 LRTWC (1949), 34	3, 29
USA v Mackin (ND Cal 11 May 1979), Case No 3–78–1899	187
USA v Marino-Garcia, 679 F 2d 1373 (1982)	160
USA v Marzano, 537 F 2d 257 (1975)	252
USA v Noriega, 99 ILR 143	170–71
USA v Ohlendorf and Others (Einsatzgruppen case), 15 ILR 656	132–33
USA v Palmer, 16 US 610 (1818)	98
USA v Pizzarusso, 388 F 2d 8 (1968)	155
USA v Postal, 589 F 2d 862 (1979)	107
USA v Raucher, 119 US 407 (1886)	184
USA v Smith, 18 US 153 (1820)	95
USA v Sturman (D); R Levine; R Sturman; and M Kaminsky, 951 F 2d 1466 (1991)	261
USA v The Public Service Alliance of Canada, 32 ILM (1993), 1	167
USA v Thomas, 726 F 2d 1191 (1982)	91

USA v Toscanino, 500 F 2d 267 (1974)	220, 252
USA v Verdugo-Urquidez, 108 L Ed 2d 222 (1990); 939 F 2d 1341; 110 S Ct 1056	220, 243, 258
USA v Von Leeb and Others (High Command case) (1949) 15 ILR 376; 11 TWC 543–44	132
USA v Wright-Barker, 784 F 2d 161 (1986)	155
USA v Yamashita 4 LRTWC 94–95	368
USA v Yunis (No 3) (1991) 88 ILR 176; 924 F 2d 1086	22, 153, 155
Universal Jurisdiction Over Drug Offences case, 28 ILR 166	159
Unterperntinger v Austria, Judgment (24 November 1986)	302
Van den Plas, Re (1972–73) 22 ILR 205	155
Van Droogenbroeck v Belgium, Application No 7906/77, Decision (5 July 1979) (1982) 4 EHRR 443	113
Van Mechelen and Others v The Netherlands, ECHR Judgment (23 April 1997)	302, 307
Velasquez Rodriguez case (Merits) (29 July 1988) (1988) 95 ILR 232	123, 385
Verdugo-Urquidez <i>See</i> USA v Verdugo-Urquidez	246
Victory Transport Inc v Comisaria General De Abastecimientos y Transportos (Victory Transport case) (1963) 35 ILR 110	167
Visser v The Netherlands, ECHR Judgment (14 February 2002)	307
Waltier v Thomson, 189 F Supp 319 (1960)	175
Wildenhus' case, 120 US 1 (1887)	149
Williams (1984) 78 Cr App R 276	141
Wright v Cantrell (1943–45) 12 AD 37	173
Xuncax and Others v Gramajo, 886 F Supp 162 (1995)	117
X, Y and Z <i>See</i> R v X; R v Y; R v Z	
Yamashita, Re, 327 US 1 (1946)	331
Yugoslav Terrorism case (1978) 74 ILR 509	4
Yunis case <i>See</i> USA v Yunis (No 3)	
Zelaya Blanco v Nicaragua (1995) 2 IHRR 123	255

TABLE OF PRIMARY NATIONAL LEGISLATION

Australia		East Timor	
1976 Internationally Protected Persons Act—		Penal Code	403
s 8(2), (3)	30	UNTAET/REG/1999/1	403
2001 Australian Cybercrime Act	74, 82	s 3	403
Belgium		UNTAET/REG/2000/11	
1867 Code d'Instruction Criminelle		(6 March 2000)	402
Belge (Criminal Procedure Code)—		s 10.1	402
Art 342	295	s 10.3	402
1930 Loi du 13 Octobre—		UNTAET/REG/2000/15	
Art 17	250	(6 June 2000)	402–04
1993 Law Relative to the Repression of Grave Breaches	158	s 2.4	402
		s 4	403
		s 5.1	403
		s 6.1	403
		s 8	403
		s 9	403
Cambodia		s 22.2	402
1956 Penal Code	407	s 10.4	402
1992 United Nations Transitional Authority in Cambodia Supreme National Council Decree on Criminal Law and Procedure	407	UNTAET/REG/2001/10	
2001 Law on the Establishment of Extraordinary Chambers for the Prosecution of Crimes Committed During the Period of Democratic Cambodia	407–08	(13 July 2001)	413
Art 3	407	France	
Art 4	407	1879 Code de Procédure Pénale (Code of Penal Procedure)—	
Art 5	407	Arts 122–127	138
Art 6	407	Art 427	295
Art 7	407	Art 430	307
Art 8	407	Art 537	307
Art 11(2)	407	Art 689(1)	153
Art 11(3)	407	Germany	
Art 14	408	1845 Prussian Military Code	131
Art 29(4)	407	1872 Military Penal Code—	
Art 40	408	Art 47	132
Art 46	408	1945 Allied Control Council Law	
Canada		No 10	164, 327, 331, 354
1982 Canadian Charter of Rights and Freedoms	245, 252–53, 314	Art II(4)(a)	176
Art 7 189		Art II(1)(c)	365
Art 24(2)	245, 314	1987/2001 Strafprozess Ordnung (Code of Criminal Procedure)—	
1999 Extradition Act	180	paras 52–55 and 136(a)	296
		1998 Federal Criminal Code—	
		Art 6(5)	160

Greece

1975/86 Hellenic Constitution— Art 93(4)	45
1985 Criminal Code— Art 5	152

Holland

1971 Wetboek van Strafrechtsvordering (Code of Criminal Procedure)— Art 339(1)	295
Art 341 (4)	307
Art 342(3)	307
Art 344(2)	307
Art 359(a)	296
Art 385(a)	23

India

1976 Bonded Labour System (Abolition) Act (No 19)	111
--	-----

Israel

1951 Nazi and Nazi Collaborators Law	155
1977 Penal Code— s 7(a)	153

Italy

1930 Penal Code— Art 54(1)	138
-------------------------------	-----

Kosovo

UNMIK/REG/1999/1 (25 July 1999)	404–05
UNMIK/REG/1999/24 (12 December 1999) s 1 405	405
UNMIK/REG/2000/64	405
UNMIK/REG/2001/34 (15 December 2001)	405

New Zealand

1961 Crimes Act— s 7	145
-------------------------	-----

Russian Federation

1998 Federal Anti-Terrorism Act	20
---------------------------------	----

Sierra Leone

1861 Malicious Damage Act— ss 2, 5, 6	400
1926 Prevention of Cruelty to Children Act— ss 6, 7, 12	400
2002 Statute of the Special Court for Sierra Leone	10, 398
Art 2	399
Art 2(g)	400
Arts 2–4	400
Art 3	399
Art 4	399–400
Art 5	400
Art 8	399
Art 10	400
Art 12(1)	399
Art 15(3)	399
Art 15(4)	399
Art 15(5)	400
Art 16	399

South Africa

1995 Promotion of National Unity and Reconciliation Act 412	
--	--

Spain

1985 Judicial Branch Act— Art 23(4)	160
--	-----

United Kingdom

1536 Act for the Punishment of Pirates and Robbers at Sea	95
1833 Abolition of Slavery Act	109
1857 Obscene Publications Act	88
1861 Offences Against the Person Act— s 9	151
s 57	151
1870 Extradition Act 180 s 2	182
s 10	214
Sched 1	227

1885 Submarine Telegraph Act—		s 4	228	
s 3	102	1979 Customs and Excise		
s 6(5)	102	Management Act		248
1894 Merchant Shipping Act—		1980 Protection of Trading		
s 686(1)	151	Interests Act		147
1946 United Nations Act	410	1982 Aviation Security Act		408
1952 Visiting Forces Act	205	1982 Taking of Hostages Act		228
1956 Sexual Offences Act	151	s 3(4)		153
1957 Geneva Conventions Act	160	1984 Police and Criminal		
1959 Obscene Publications		Evidence Act	71, 214, 246,	248
Act—		s 76		248
s 1(1)	90	s 78	216, 244, 248,	
s 1(2)	90		256, 259, 314	
s 1(3)	90	s 78(1)	244, 247, 251,	253
s 2(1)	90	s 78(3)		244
s 2(5)	90	1984 Prevention of Terrorism		
1964 Diplomatic Privileges		(Temporary Provisions) Act		209
Act—		1985 Interception		
s 2(3)	174	of Communications Act	214, 249–51	
1964 Obscene Publications		1986 Drug Trafficking Act		70
Act—		1988 Criminal Justice Act	180, 228	
s 1(3)	90	Pt II		258
1967 Fugitive Offenders Act	180	Pt VI		70
1968 Theft Act—		s 3(7)		241
s 21	148	s 3(8)		242
1971 Criminal Damage Act	151	s 3(9)		242
1971 Immigration Act—		s 23		258
s 3(5)(b)	209	s 23(1)		258
s 15(3)	21	s 23(2)		258
1972 European Communities Act—		s 23(3)		258
s 2	204	s 25		241
s 2(2)	72	s 26		258
1978 Internationally Protected		s 134	158, 226,	228
Persons Act—		1989 Extradition Act	183, 216, 226–28	
s 1	30	Pt III		180, 182
s 1(3)	183	s 1		214
1978 Northern Ireland		s 1(1)(a)		180
(Emergency Provisions)		s 2		182–83
Act	46	s 6		233
1978 State Immunity Act	167, 171, 228	s 6(1)		191
s 3	167	s 6(1)(c), (d)		191
s 14(1)	168	s 8		226
s 20(1)	168	s 9		180
1978 Suppression of		s 9(2)		215
Terrorism Act	228	s 9(8)(a)		215
		s 11		215
		s 11(3)		191

Pt III	180, 182	1998 Criminal Justice (Terrorism and Conspiracy) Act	20
s 12	215	1998 Human Rights Act	217, 224–25, 246, 251, 314
Sched 1	182	2000 Financial Services and Markets Act	72
1989 Official Secrets Act— s 15(1)	151	2000 Postal Services Act s 85(3)–(5)	88
1989 Prevention of Terrorism (Temporary Provisions) Act	20	2000 Terrorism Act	20–21, 149
1990 Criminal Justice (International Co-operation) Act	240	s 1	20
Pt 1	240	s 1(1)	20
s 3	258	s 1(4), (5)	20
s 3(1)	241	s 3(4), (5)	20
s 3(1)(a)	241	s 18	72
s 3(1)(b)	241	ss 62–64	20
s 3(2)	241	2001 Anti-Terrorism, Crime and Security Act— s 111	199
s 3(3)	241	2001 Criminal Justice and Police Act 242	
s 3(4)	241	2002 Proceeds of Crime Act 70–71	
s 3(5)	241	s 6	71
s 3(8)	260	s 327	70
s 3(9)	260	s 328	70
1991 War Crimes Act— s 1(2)	151	s 329	70
1993 Criminal Justice Act	70, 148–49	s 330	71
ss 1–2	147	s 331	71
s 3(2)	149	s 333	71
s 3(3)	149	s 340	70, 71
s 5	149	s 340(11)	72
1994 Criminal Justice and Public Order Act— s 84(3)(b)	91	s 352	71
1994 Drug Trafficking Act	70	s 377	71
1995 Geneva Conventions (Amendment) Act	160	Sched 9	71
1995 Merchant Shipping Act— s 281	151	United States	
1996 Criminal Procedure and Investigations Act— s 31 (3)	250	1789 Aliens Tort Claims Act	123
s 35(1)	250–51	§ 1350	116, 171
Sched 1, para 26	244	1888 Submarine Cables Act— § 21	102
1996 Northern Ireland (Emergency Provisions) Act	20	§ 22	102
1996 Sexual Offences (Conspiracy and Incitement) Act	151–52	§ 33	102
		1890 Sherman (Anti-Trust) Act 1890— § 1	147
		1938 Foreign Agents Registration Act	22

1946 Charter of the International Tribunal for the Far East	327, 335, 365	1989 Anti-Terrorism and Arms Export Amendments Act— § 2151	21
Art 6	176	1996 Anti-Terrorism and Effective Death Penalty Act	39–40
1948 Mail Fraud Act— § 1341	88	§1603(b)	39
1948 Obscenity Act— § 1461	88	§ 1605(a)(7)	18, 21, 22, 32, 39, 172
§ 1462	90	§ 1610(a)(7)	40
1948 Piracy and Privateering Act— § 1651	95	§ 1610(b)(2)	40
1951 Racketeering Act— §§ 1951 <i>et seq</i>	49	1996 Cuban Liberty and Democratic Solidarity Act (Helms Burton Act)— § 6021	147
1961 Foreign Assistance Act— § 2371	40	Title III	147
1970 Bank Secrecy Act	22	1996 US War Crimes Act— § 2401	160
1974 Anti-Hijacking Act— § 1472(n)	22, 153	1998 International Anti-Bribery and Fair Competition Act	85
1976 Foreign Sovereign Immunities Act	22, 32, 39–40, 167, 172	1998 US Presidential Directives— 62/1998	38
§ 1605	168	63/1998	38
1977 Foreign Corrupt Practices Act	83, 85	2001 International Money Laundering Abatement and Anti-Terrorist Financing Act	22
§§ 78a, 78dd-1, 78dd-2	83	2001 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act) Title III	22 22
1979 Export Administration Act— §1603(b)	39	2003 US Federal and Revised Uniform Rules of Evidence— r 402	295
§ 2405	21	r 404(a)	306
§ 2405(j)	40	r 404(b)	306
1984 Hostage Taking Act— § 1203	22, 153	r 405(a)	306
§ 1203(b)(1)(A)	22, 153	r 703	309
1986 Omnibus Diplomatic Security and Anti- Terrorism Act— § 1202	21	r 704(a)	309
§ 2331	21, 153, 155	r 704(b)	309
1986 Restatement (Third) of the Foreign Relations Law— § 402(3)	155	r 705	309
§§ 402–03	159		
§ 403	147		
§ 404	159		

TABLE OF STATUTORY INSTRUMENTS

European Union Extradition Regulations 2002	
SI 2002/419	199
European Union Extradition (Amendment) Regulations 2002	
SI 2002/1662	199
High Court of Justiciary (Proceedings in The Netherlands) Order 1998	
SI 1998/2251	410
s 3(1)	410
Money Laundering Regulations 1993	
SI 1993/1933	72
reg 14	71
Money Laundering Regulations 2001	
SI 2001/3641	72
Money Laundering Regulations 2003	72
reg 2	72
UN ICTY Order 1996	
SI 1996/716	370
USA (Extradition) Order 1976	
SI 1976/2144	182, 207
USA (Extradition Amendment) Order 1986	
SI 1986/2020	207

TABLE OF INTERNATIONAL INSTRUMENTS

1864 Convention to Warfare at Sea	337	1912 Convention Relating to the Suppression of the Abuse of Opium and Other Drugs	55
1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field	331	1919 League of Nations Covenant	328
1878 Universal Postal Union Convention	87	1919 Peace Treaty of Versailles	325–26, 354
Art 11	87	Art 227	382
1884 Convention for the Protection of Submarine Cables	101–02	1920 Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sevres)	353
Art 2(1)	101–02	Art 226	354
Art 2(2)	101	Art 230	354
Art 4	101	1920 Universal Postal Union Convention—	
Art 8	102	Art 18(1)	87
Art 10(2)	102	Art 18(2)(d)	89
Art 15	102	Art 18(5)	87
1885 Additional Act to the 1878 Universal Postal Union Convention	87	Art 20	87
Art VIII	87	1923 Convention for the Suppression of the Circulation of and Traffic in Obscene Publications—	
1885 General Act of the Conference of Berlin Concerning the Congo—		Art 1	89
Art 9	110	Art 2	91
1890 Brussels General Act Relative to the African Slave Trade—		1923 Treaty of Peace between the Allied Powers and Turkey (Treaty of Lausanne)	354
Art V	110	1924 Universal Postal Union Convention—	
Art XIX	110	Art 41	87
Art XXI	110	Art 79	87
Art XXII	110	1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare	388
Art XXIII	110	1927 Slavery Convention	110
1899 Declaration Concerning Asphyxiating Gases	388	Art 1(1)	110
1899 Declaration (IV, 3) Concerning Expanding Bullets	388	Art 1(2)	111
1906 Universal Postal Union Convention—		Art 2(b)	110
Art 16(3)	87	Art 5	110
Art 16(3)(2)(d)	89	1928 General Treaty for the Renunciation of War (Kellogg-Briand Treaty/ Pact of Paris)	329, 382
Art 18	87		
1907 Hague Convention IV on Respecting the Laws and Customs of War on Land	331, 351, 353, 382		
1910 Agreement for the Suppression of the Circulation of Obscene Publications	89		
Art 1	89		

1929 Convention for the Suppression of Counterfeiting Currency	145, 161	Art 8 Art 16(d) Art 17–25 Principle IV	131–33, 332 333 333 133
1929 Universal Postal Union Convention— Art 45 Art 80	87 87	1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis	4, 353
1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws— Art 1	151	1945 Declaration of Potsdam 1945 Statute of the International Court of Justice— Art 38(1)	334 2
1930 International Labour Organisation Forced Labour Convention (No 29) Art 2(1) Art 2(2) Art 25	115–16 110, 115 115 115	1945 United Nations Charter Chapter VII Art 1(2) Art 2(4) Art 2(7) Art 25 Art 29 Art 39 3 Art 41 Art 42 Art 51 Art 55 Art 103	43, 341, 377 27, 29, 39, 164, 339, 370–71, 378–81, 387, 398–99, 409 41 39, 138, 382–83, 388 170, 371 8, 27, 340, 370 340 9, 382 9, 339 11, 138–39, 383, 387–88 38, 138–39, 382–83, 388 41 27, 380, 390, 409
1931 Geneva Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs	55	1946 Convention on the Privileges and Immunities of the United Nations— Art VI, s 22(b)	176
1936 Convention for the Prevention of Illicit Drug Traffic	145	1948 Universal Declaration on Human Rights— Art 4	110
1937 League of Nations Convention for the Prevention and Suppression of Terrorism— Art 1(2) Art 9 Art 10	17 161 161	1948 Convention on the Prevention and Punishment of the Crime of Genocide Art II Art III Art IV Art VI	5, 9, 104, 132, 334, 342, 347, 354, 358–59, 361, 363–64, 375, 384, 403, 407 359 359–60 172, 176 8, 375
1939 Universal Postal Union Convention— Art 46 Art 81	87 87		
1943 Cairo Declaration on World War II	334		
1945 Charter of the International Military Tribunal at Nuremberg Art 1 Art 5 Art 6 Art 6(a) Art 6(b) Art 6(c) Art 7	133, 327, 329, 336, 354–55, 382 327 355 327, 332–34 330, 381–82 330 330–31, 334, 353, 355 176, 332		

1948 Protocol Bringing Under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as Amended by the Protocol Signed on 11 December 1946	55	Art 14 Art 130	119 119, 348
1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	6, 111, 115	Art 2 Art 3	374, 404 31, 42, 119, 347, 351–53, 364, 386, 399
Art 1	114	Art 3(1)(b)	29
Art 2	114	Art 4	347, 349–50
1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	41–42, 120, 132, 156–58, 160, 334, 347–48, 351, 365, 371, 386–87, 407	Art 4(2) Art 5 Art 27 Art 32 Art 34 Art 147	350 347 119, 364 119 29 119, 348, 364
Art 2	404	1949 Protocol Amending the 1910 Agreement for the Suppression of the Circulation of Obscene Publications	89
Art 3	31, 42, 96, 119, 347, 351–53, 364, 386, 399	1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	70, 124, 188–89, 196, 198, 202–04, 206, 217, 238, 243–44, 246, 250, 256, 285, 302
Art 12	119	Art 2(1)	207
Art 50	119, 348	Art 3	46, 120, 124, 188, 207–08, 210, 255, 257
1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	41–42, 96, 120, 132, 156–58, 160, 334, 347–48, 351, 365, 371, 386–87, 407	Art 5 Art 5(1)(c) Art 5(1)(f) Art 6	185, 221, 244 221–22 206 46, 209, 225, 251, 254–57, 282, 302
Art 2	404	Art 6(1)	255
Art 3	31, 42, 119, 347, 351–53, 364, 386, 399	Art 6(3)	259, 314
Art 12	119	Art 6(3)(d)	259, 302
Art 51	119, 348	Art 7	120
1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War	41–42, 96, 120, 132, 156–58, 160, 334, 347–48, 351, 365, 371, 386–87, 407	Art 8 Art 8(4) Art 10(2) Art 13 Art 15 Art 18(3)	79, 244, 250–51, 255–57 258 90 217 46 314
Art 2	404		
Art 3	31, 42, 347, 351–53, 364, 386, 399		
Art 13	119		

1951 North Atlantic Treaty		Art 2(4)	196
Organisation Status of Forces Agreement	173	Art 3	194
Art VII, § 3(a)(i)	173	Art 4	189, 194
Art VII, § 3(a)(ii)	173	Art 5	194
Art VII, § 3(b)(ii)	173	Art 6	190, 194
		Art 9	189
		Art 10	190
1951 United Nations Convention		Art 11	194
Relating to the Status of Refugees	172	Art 14	184, 186, 194
Art 1(F)(c)	172	Art 14(1)(a)	198
Art 33	207	Art 15	185–86, 194
		Art 17	194
1953 Protocol Amending the 1927 Slavery Convention	110	1957 Treaty Establishing the European Community (EC Treaty / Treaty of Rome)	90, 204–05, 262
1953 Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium	55	Art 6	197
		Arts 30–37	278
		Art 39	203–05
		Art 39(3)	203–04
		Art 43	204
1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict—Art 8(3)	390	Art 48(3)	203
		Arts 48–51	278
		Art 49	204
		Arts 59–66	278
		Arts 67–73h	278
1954 Cultural Property Convention	407	Art 100	203
		Art 226	203
1956 Constitution of Interpol—Art 2	266	Art 234	203
Art 3	266		
Art 30	271	1958 Geneva Convention on the Continental Shelf	93
1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery	112	1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas	93
Art 1	111–12	1958 Geneva Convention on the High Seas	24, 93, 97, 105–06
Art 1(a)	111	Art 2(3)	101
Art 1(b)	113	Art 14	97
Art 1(c)	112	Art 15	24
Art 1(d)	112	Arts 13–20	95
Art 3(1)	111	Art 23	104, 106
1957 European Convention on Extradition	184–85, 190, 192–96, 198, 228, 234	Art 26(1)	101
Art 1	188	Art 27	101
Art 2	193	Art 101	97
Art 2(1)	196	1958 Geneva Convention on the Territorial Sea and the Contiguous Zone	93
Art 2(3)	196		

1959 European Convention on Mutual Assistance in Criminal Matters	67, 231, 234, 237, 272–73	Art 11 Art 16(2)	23 23
Art 1(2)	232	1963 Vienna Convention on Consular Relations	175
Art 2	234	Art 41	175
Art 3	234–35	Art 43	175
Art 5	235	1964 Final Protocol to the Universal Postal Union Constitution—	
Art 6	234–35	Art 14	87
Art 7	235	Art 14(e)	87
Art 8	235	1965 Convention on the Elimination of All Forms of Racial Discrimination	121
Art 12	235	Art 3	121
Art 14	235	Art 4	121
Art 15(2)	241	1965 European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories	103
1961 Single Convention on Narcotic Drugs	55–57, 59, 257	Art 2	103
Art 30(2)(a)	56	Art 2(2)(e)	103
Art 36	57, 160	Art 3	103
1961 Protocol Amending the Single Convention on Narcotic Drugs	257	1966 International Covenant on Civil and Political Rights	11, 14, 41, 198, 212
Art 6	257	Art 1	41
1961 Vienna Convention on Diplomatic Relations—		Art 3	120, 208
Art 29	29, 174–75, 407	Art 6	211
Art 30	29	Art 7	117, 120–11, 172, 255, 385
Art 31(1)	175	Art 8(1), (2)	110
Art 32	174	Art 8(3)	110
Art 32(2)	174	Art 14	46, 254
Art 37	175	Art 14(4)(e)	303
Art 39(1)	174	Art 28	211
Art 39(2)	174	Art 41	394
1962 Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters	194, 234, 237	Optional Protocol I	254, 394
1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	112	1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity	128, 354
1963 Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft	18, 23–24, 26	Art 1	381
Art 1(1)	23	Art 1(b)	385
Art 1(2)	23	1969 Inter-American Convention on Human Rights	123, 208, 412
Art 1(3)		Art 4	123
Art 1(4)	23		
Art 4	162		

Art 5	123, 255	1971 United Nations Convention	
Art 7	123	on Psychotropic	
Art 13(4)	117	Substances	55–57, 59
1969 Vienna Convention on the		Art 2	57
Law of Treaties—		Art 22	57
Art 2(a)	341	1972 European Convention on	
Art 5	341	State Immunity	167
Art 53	3, 158	1972 Protocol Amending the	
Art 19(c)	115	Single Convention on	
Art 31(1)	341	Narcotic Drugs	55–57
Art 32	341	Art 2	56
Art 34	377	Art 12	56
Art 65	198	Art 14	57
1970 Hague Convention for the		Art 18	57
Suppression of Unlawful		1973 Convention on the	
Seizure of Aircraft	18, 23, 24–6,	Prevention and Suppression	
	99, 162	of Apartheid—	
Art 1	23	Art I	385
Art 3(1)	24	Art V	8
Art 4(1)	162	1973 Internationally Protected	
Art 4(2)	162	Persons Convention—	
Art 4(3)	162	Art 6(2)	46
Art 6(3)	46	Art 9	46
Art 8	10	1973 United Nations Convention on the	
Art 8(1)	25	Prevention and Punishment of	
1971 Montreal Convention for the		Crimes Against Internationally	
Suppression of Unlawful Acts		Protected Persons,	
Against the Safety of Civil		Including Diplomatic	
Aviation	18, 23, 25–7,	Agents	29–30, 34
	39, 161–62, 409	Art 1	29
Art 1	25	Art 1(a)	29
Art 2(a)	25	Art 2	29–30
Art 2(b)	26, 162	Art 3(1)(c)	154, 407
Art 5(1)(a)	162	1973 USA–Switzerland Treaty on	
Art 5(2)–(3)	27	Mutual Assistance in	
Art 5(3)	154	Criminal Matters	231–32, 257
Art 6(3)	46	Art 5	232
Art 7	27, 161, 409	Art 18(5)	261
Art 8	10	Art 37	261
Art 11(1)	27	Art 37(1)	260
1971 Organisation of American States		Art 37(3)	261
Convention to Prevent and Punish		Art 38(1)	257
the Acts of Terrorism Taking the		1974 European Convention	
Form of Crimes Against Persons		on the Non-Applicability	
and Related Extortion that are of		of Statutory Limitations to	
International Significance—		Crimes Against Humanity	
Art 2	29	and War Crimes	354

1974 International Convention on the Suppression and Punishment of the Crime of Apartheid	121–22	Art 86(2) Art 90	368–69, 391 339
Art II	121	1977 Protocol (II) Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts	7, 41, 120, 139, 156, 158, 351–53, 365, 371, 386, 389, 399
Art III	122	Art 1(1)	352, 389
1975 Additional Protocol to the 1957 European Convention on Extradition	188, 190, 194–95, 234	Art 1(2)	389
Art 1	234	Art 3(1)	389
Art 2	190	Art 4 11	9, 347
1975 Declaration on the Protection of All Persons Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	118	Art 4(1)	364
Art 1	118	Art 4(2)(a)	364
1976 European Convention on the Suppression of Terrorism	19, 188, 194, 197, 228	Art 4(2)(c)	364
Art 1	19, 197	Art 4(2)(e)	353
Art 1(c)	30	Art 4(3)(c)	388, 399
Art 1(d)	28	Art 13(3)	352
Art 2	197	1977 US-UK Extradition Treaty	45
Art 5	46–47	Art 5	45
Art 13	197	1978 US-Mexico Extradition Treaty	220
1976 Canada-US Extradition Treaty	211	1978 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters	231, 284
1977 Protocol (I) Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts	41, 120, 139, 156, 158, 348, 365, 371, 386, 389	1978 Second Additional Protocol to the European Convention on Extradition	189–90, 194–95
Art 1(4)	41, 42	Art 4	190
Art 4	41	1979 Convention on the Elimination of All Forms of Discrimination Against Women— Art 6	114
Art 4(d)	41	1979 Convention on the Physical Protection of Nuclear Material	32
Art 48	41	Art 2	32
Art 49(1)	355	Art 3	32
Art 50	352, 357	Arts 7–11	32
Art 51(4)	139	1979 International Convention Against the Taking of Hostages	22, 29
Art 51(5)	139	Art 1(1)	28
Art 51(6)	139		
Art 52(2)	389		
Art 75	42, 119		
Art 76(1)	364		
Art 77(2)	388–89		
Art 85(4)(c)	364		

Art 2	28	1984 United Nations Convention	
Art 3(1)	29	Against Torture and Other	
Art 3(2)	29	Cruel, Inhuman or	
Art 6(3), (4)	46	Degrading Treatment	
Art 9(1)	47	or Punishment	118–19, 212,
Art 10(1)	28		226, 228, 403
Art 13	28	Art 1	120, 212
		Art 1(1)	118, 171–72
1981 Inter-American Convention		Art 3	117, 212–13
on Extradition	192	Art 5	158
		Art 5(1)	158
1982 United Nations Convention on the		Art 5(1)(a)	158
Law of the Sea	1, 25, 53, 93,	Art 5(1)(b)	152, 158
	97–98, 104,	Art 5(1)(c)	154, 158
	106–07, 157	Art 5(2)	158–59
Art 3	150	Art 5(3)	158
Art 3(1)	99	Art 8(4)	159
Art 8	150	Art 16	120
Art 22(1)(f)	106	Art 17	212
Art 27	99, 146, 150	1985 Inter-American	
Art 27(1)	150	Torture Convention—	
Art 27(2)	150	Art 3	116
Art 28	101	1985 Schengen Agreement on the	
Art 30	150	Gradual Abolition of Checks	
Art 33	105, 150	at Common Borders and the	
Art 33(1)(a)	150	Convention Applying the	
Art 33(1)(b)	150	Agreement	277–78
Art 51	101	1985 Supplementary Treaty to the	
Art 56	105	USA-UK Extradition Treaty	
Art 58	101	of 1977	45
Art 58(2)	98	Art 1	45
Art 87(1)(c)	101	Art 3(a)	45
Art 97(1)	150	1986 USA-UK Treaty Concerning	
Art 99	53, 116, 157	the Cayman Islands and Mutual	
Art 100	99	Legal Assistance in	
Art 101	24, 97–98,	Criminal Matters—	
Art 102	97	Art 17	256
Art 105	99, 157	Art 17(3)	257
Art 107	99	1988 Protocol to the Montreal	
Art 109	103–04	Convention on the Suppression	
Art 109(1)	104	of Unlawful Acts of Violence at	
Art 109(4)	103	Airports Serving International	
Art 110	99, 103	Civil Aviation	26
Art 110(1)(b)	116	Art II(1)	26
Art 111	104–06, 108	1988 Vienna Convention	
Art 111(1)	105	Against Illicit Traffic in	
Art 111(4)	107	Narcotic Drugs and	
Art 112	101	Psychotropic Substances	50, 55,
Art 113	101–02		57–59, 61,
Art 114	101		63–64, 68, 231

Art 2(1)	56	Art 39	279–80
Art 3(1)(a)(iv)	58	Art 41	237
Art 3(1)(a)(v)	50	Art 46	280
Art 3(1)(c)(iv)	50	Art 49(a)	237
Art 3(5)	50	Art 52	237
Art 5(3)	64	Art 53	232, 237
Art 12	58	Art 54	273
Art 14(4)	58	Art 63	197
Art 17	58–59, 104	Art 73	237
Art 19	88	Arts 77–91	278
Art 58(1.4)	88	Arts 92–119	279
		Art 96	195
1988 United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation	98	Schengen Protocol Annex to the Treaty on European Union— Art 4	237, 280
Art 6(1)(c)	152	1991 Comprehensive Settlement Agreement for Cambodia	406
Art 6(2)(b)	154	1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection	26
Art 11	99	Art II	26
1989 United Nations Convention on the Rights of the Child	113, 389	Art III	26
Art 34	113	Art III(2)	26
Art 35	113	Art IV	26
Art 36	113	Art IV(1)	26
Art 38(2)	388	1992 United Nations General Assembly Declaration on the Protection of All Persons from Enforced Disappearances	123, 385
Art 38(3)	388, 399	Art 4	124
1989 Declaration of Fundamental Rights and Freedoms	278	Art 6	124
Art 8(1)	278	Art 8–12	124
1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	51, 61, 67, 231	Art 14	124
Art 2	67, 189	1992 Treaty on European Union (Maastricht Treaty or TEU)	36, 77, 202, 262, 274
Art 4	67	Title IV	36
Art 3	67	Title VI	77, 236, 263, 270, 274
Art 6	67	Art 6	78, 199
Art 39	68	Art 6(2)	202
1990 Convention Implementing the Schengen Agreement	59, 194, 200, 234, 237, 242, 272, 277–80, 283	Art 14	276
Art 3–8	278	Art 29	236, 280
Arts 9–18	236	Art 30	236, 276
Arts 9–27	278	Art 31	236, 280
Arts 19–24	236	Art 34	237
Arts 28–38	236, 278	Arts K1–9	36
		Art K3	36, 273, 276
		Art 34 (Art K4)	236

1993 Chemical Weapons Convention—		Art 21(4)(g)	372
Art 22	394	Art 22	367
		Art 22(2)	323
1993 Conakry Convention on Sub-Regional Co-operation in the Exercise of Hot Pursuit and Protocol	104	Art 24(1)	4, 130
		Art 29	164, 342, 344, 369–71
		Art 29(2)	344
1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	388	1993 Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights	33, 47
Art 22	10	1994 International Criminal Tribunal for Rwanda Statute	134, 254, 341, 355, 358, 385, 400, 407
1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoptions	113	Art 2	359
		Art 2(2)(a)	363
1993 International Criminal Tribunal for the Former Yugoslavia Statute	6, 122, 134, 138, 142, 254, 303, 340–41, 355, 358, 364, 371, 385, 400	Art 2(2)(b)	363
Art 1	347	Art 2(2)(c)	363
Art 2	350, 367	Art 2(2)(d)	363
Arts 2–5	347	Art 2(2)(e)	363
Art 3	120, 351, 353	Art 2(3)	364
Art 3(g)	365	Art 3	353, 355, 358
Art 4	353, 359	Art 3(g)	365
Art 4(e)	365	Art 4	352–53
Art 5	120, 354–55, 358	Art 4(e)	353, 365
Art 5(g)	365	Art 5(g)	365
Art 7(1)	347	Art 6(1)	347
Art 7(2)	176	Art 6(2)	176
Art 7(3)	348, 368–69	Art 6(3)	348, 368–69
Art 7(4)	131	Art 6(4)	131
Art 9	346	Art 8	346
Art 9(1)	163	Art 12(2)	340
Art 9(2)	163	Art 14	287–88
Art 10	15	Art 15(3)	340
Art 15	287, 343	Art 20	298, 303
Art 20	15, 323, 372	Art 20(3)	290
Art 21	15, 298, 303, 323, 372	Art 20(4)(e)	297, 303
Art 21 (d)	343	Art 21	367
Art 21(2)	323, 372	1994 Naples Political Declaration and Global Action Plan Against Organised Transnational Crime	49
Art 21(3)	290	1994 Inter-American Convention on the Forced Disappearance of Persons	123–25, 385
Art 21 (4)(b)	372	Art 7(2)(i)	123
Art 21(4)(d)	372		
Art 21(4)(e)	297, 303, 308, 372		

1994 Universal Postal Parcels Agreement		Art 5(2)	197
Art 26(2), (5.3)	87	Art 5(4)	197
Art 58(1.1)–(1.3)	89	Art 6	197
Art 58(1.4)	88	Art 6(3)	197
	88	Art 7	197
1995 Council of Europe Agreement on Illicit Traffic by Sea	104	Art 7(2)	198
		Art 10	198
		Art 10(3)	198
		Art 18(3)	198
		Art 18(4)	198
1995 Agreement for the Implementation of the Provisions of UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks	106	1996 Declaration and Plan of Action of Lima to Prevent, Combat and Eliminate Terrorism	35–36
1995 Convention on Simplified Extradition Procedure Between Member States of the European Union	194–96, 199, 201	1996 Organisation of American States Inter-American Convention Against Corruption—	
Art 16(2)	198	Art 4(1)	85
Art 16(3)	198	Art 11	85
1995 General Framework Agreement for Peace (Dayton Peace Agreement)	342, 345	1996 Settlement Agreement Between the USA and Iran	26
Art 3	342	1997 Amsterdam Treaty Amending the Treaty on European Union	36, 202, 235, 237, 270–72
1995 Convention on the Establishment of a European Police Office	78, 273–74, 276	Art K1	36
Annex	273	Arts K2–6	36
Art 2	275	Art K3(d)	144
Art 2(1)	274	Art K7	36
Art 2(2)	274	Art K8	36
Art 2(3)	275	1997 European Union Convention on the Fight Against Corruption Involving Officials of the EC or Officials of Member States of the EU—	
Art 3	275	Art 2	85
Art 8	275	Art 3	85
Art 10	275	Art 3(2)	85
Art 14	276	Art 6	85
Art 34(1)	274	Art 8	85
Art 43(3)	275	Art 10	85
1996 Abidjan Peace Agreement	397	1997 Organisation of American States Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials	53
1996 Convention Relating to Extradition Between the Member States of the European Union	194–99, 201		
Art 2(1)	197		
Art 3(1)(a)	197		
Art 3(1)(b)	197		
Art 5(1)	197		

1997 Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Officials in International Business Transactions	50, 85–86	Art 7(1) Art 7(1)(g) Art 7(1)(h) Art 7(1)(j) Art 7(1)(k) Art 7(2)(a) 384	384 386 386 122 385
Art 1(1)	85	Art 7(2)(e)	120, 386
Art 1(2)	85	Art 7(2)(f)	386
Art 8	86	Art 7(2)(g)	385
Art 12	86	Art 7(2)(h)	122, 385
1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction— Art 19	10, 394	Art 7(2)(i) Art 7(3) Art 8 Art 8(1) Art 8(2)(a) Art 8(2)(b)	385 386 386–88, 390, 403 387 387 387
1998 Agreement Between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning a Scottish Trial in the Netherlands	28, 150, 409–10	Art 8(2)(b)(iii) Art 8(2)(b)(iv) Art 8(2)(b)(ix) Art 8(2)(b)(xvii) Art 8(2)(b)(xviii) Art 8(2)(b)(xxvi) Art 8(2)(b)(xix) Art 8(2)(b)(xx)	387 388 389 387 388 388, 399 388 388
Art 1(1)	410	Art 8(2)(c)	352, 389
Art 6	410	Art 8(2)(d)	389
Art 16(2)(a)	410	Art 8(2)(e)	352, 389
Art 17	410	Art 8(2)(e)(iii)	387
Art 18	410	Art 8(2)(e)(iv)	389
Art 27	410	Art 8(2)(e)(vii) Art 8(2)(f)	388 389
1998 Anti-Terrorism Agreement of the League of Arab States	36	Art 9 Art 9(1)	390 390
1998 Good Friday Agreement	45	Art 12	164, 377, 380
1998 Manila Declaration	49	Art 12(1) Art 12(2)	164, 377 9, 164, 377, 379–80, 394
1998 Rome Statute of the International Criminal Court	9, 59–60, 122–24, 129, 132–33, 140, 142, 164, 174, 330, 336–37, 376, 377, 380, 388, 391, 399, 404	Art 12(3) Art 13(a) Art 13(b) Art 14(1) Art 15(1) Art 15(2) Art 16	164, 377 380 380, 394 380 380 392 379, 381
Art 1	376, 379	Art 17(1)	
Art 2	376	Art 17(1)(a)	163
Art 2(a)	163	Art 17(1)(b)	163
Art 4(1)	376	Art 17(2)	379
Art 5	377, 381, 395	Art 17(6)	381
Art 5(2)	138, 382	Arts 17–19	380
Arts 5–8	394	Art 18(3)	381
Art 6	384, 390	Art 18(5)	381
Arts 6–8	390		
Art 7	384–86, 390		

Art 19(2)	379	Art 98(1)	380
Art 19(8)	381	Art 98(2)	378
Art 20	127	Art 101	392
Art 21	128–29	Art 112	394
Art 21(1)(a)	390	Art 112(3)	394
Art 21(1)(c)	4, 127, 130, 137, 139	Art 112(7)	394
Art 22	127	Art 115(a)	376
Art 23	127	Art 115(b)	376
Art 24	128	Art 115(1)	395
Art 25(3)	390	Art 115(2)	395
Art 26	381, 390	Art 116	376, 395
Art 27(1)	176	Art 117	395
Art 27(2)	176	Art 120	10, 393
Art 28(a)(i)	391	Art 121	381, 388, 394
Art 29	128, 381	Art 123	381, 388
Art 31(1)(a)	141–142, 391	Art 123(1)	395
Art 31(1)(b)	140, 391	Art 124	164, 390
Art 31(1)(c)	138–39, 391	1998 United Nations Convention for the Suppression of Terrorist Bombings	18, 20, 31
Art 31(1)(d)	135–37, 391	Art 2(1)	31
Art 31(3)	127–30, 139, 141	Art 2(2)	31
Art 32	141, 391	Art 2(3)(a)	31
Art 32(2)	141	Art 2(3)(b)	31
Art 33	133–35, 332	Art 2(3)(c)	31
Art 33(1)	391	Art 5	10, 32, 45
Art 33(2)	135	Art 7(3)	46
Art 35	377	Art 8(2)	161
Art 36	377	Art 9	10, 45
Art 38	129	Art 10(2)	161
Art 42	377	Art 11	45
Art 43(4)	377	Art 12	47
Art 59	392	Art 14	46
Art 66	128	1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism—	
Art 67(1)(i)	128	Art 2(d)	33
Art 72(5)	393	1999 Convention on the Safety of United Nations and Associated Personnel	381
Art 72(7)(a)(i)–(iii)	393	1999 Council of Europe Criminal Law Convention on Corruption	85
Art 72(7)(b)(i)	393	1999 General Agreement Between Indonesia and Portugal on the Question of East Timor	401
Art 75	395	1999 International Convention for the Suppression of the Financing of Terrorism	65
Art 75(4)	395	Art 18	52
Art 79	396		
Art 85	396		
Art 86	174, 378, 392		
Art 87(4)	392		
Art 87(5)	392		
Art 87(5)(b)	393		
Art 87(7)	12, 393		
Art 88	392–94		
Art 90	392		
Art 93(1)(k)	395–96		
Art 93(4)	393		
Art 98	380		

1999 International Labour Organisation Convention for the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour—		2000 United Nations Convention for the Suppression of the Financing of Terrorism	18, 20, 31, 33–35, 161
Art 3(a)	112–13	Art 2(1)	33
Art 3(a), (b)	113	Art 2(1)(a)	33
Art 7	112	Art 2(1)(b)	33–34
1999 Lome Peace Agreement	398	Art 2(4)	33
Art IX	400	Art 2(5)	33
2000 Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union	234, 237–38, 240, 242	Art 5(1)	31
Art 1	237	Art 6	32, 45
Art 3	239	Art 7	45
Art 4	239	Art 7(5)	144
Art 5	238	Art 8(1)	31, 34
Art 6	238	Art 8(4)	31
Art 6(7)	238	Art 9(3)	46
Art 7	239	Art 11	32, 45
Art 9	239	Art 13	32, 45
Art 10	239	Art 14	32, 45
Art 11	239	Art 15	47
Art 12	239	Art 18(1)(b)	31
Art 13	239	Art 18(1)(b)(ii)	34
Art 14	239	Art 18(1)(b)(iv)	34
Arts 15–18	239	2000 United Nations Convention Against Transnational Organized Crime	33, 43, 50, 52, 65, 115
Art 23	240	Art 1	65
2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography—		Art 2(a)	43, 51
Art 2(b), (c)	113	Art 2(b)	50
Art 3	113	Art 3	43, 50
Art 3(1)(c)	91	Art 3(2)	50
Art 4	91	Art 5	50–51
2000 Optional Protocol II to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography—		Art 6	50
Art 2(a)	113	Art 7	52
2000 Organisation for Security and Co-operation in Europe Charter for European Security	114	Art 7(1)(a)	65
		Art 7(1)(b)	65
		Art 7(2)	65
		Art 7(3)	65
		Art 8	50, 85
		Art 12(6)	52
		Art 16	52
		Art 18	52
		Art 23	50–51
		Art 27	52
		Art 28	52
		Art 30(2)(b), (c)	52
		Art 37(2)	52
		Art 40	52
		Art 41	52

2000 Vienna Declaration on Crime and Justice	18	2001 Protocol Against the Smuggling of Migrants by Land, Sea and Air	50, 52
2001 Council of Europe Convention on Cybercrime	74–5	Art 2	52
Chapter 1	75	Art 5	53
Chapter II	75	Art 8(2)	53
Chapter III	75	Art 8(5)	53
Chapter IV	75	Art 12	52
Art 1	75	Art 13	52
Art 27	75	Art 16	53
2001 Additional Protocol to the Convention on Cybercrime	74–5	Art 18	53
2001 Durban Declaration Against Racism, Racial Discrimination, Xenophobia and Related Intolerance	121	Pt II	53
2001 Protocol to the Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union	238, 242	2001 Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition	50, 52–53
Art 1	240	Art 2	53
Art 7	240	Art 5	53
Art 8	240	Arts 7–12	53
Art 9	240	2001 Treaty of Nice	280
2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	50, 52, 115	2002 Protocol Amending the Europol Convention	273, 276
Art 3(a)	115	2002 Treaty Between the United Nations and Sierra Leone Establishing a Special Court for Sierra Leone	397–400
Arts 4–6	53	Art 2	399
		Art 3	399
		Art 6	401
		2003 United Nations-Cambodia Agreement	408

**TABLE OF EC DECISIONS, DIRECTIVES,
REGULATIONS AND ICTY/ICTR/
ICC RULES OF PROCEDURE**

Decisions		Regulations	
Council Decision 1999/424/CFSP, 26 June 1999	12	Council Regulation 1294/1999, 1999 OJ L153/63	12
Council Decision 2000/820/JHA, 22 December 2000— Art 6	284	Rules of procedure 1994 International Criminal Tribunal for the Former Yugoslavia (Code of International Criminal Procedure)	288–89, 292, 294, 371
Council Decision 2001/931/CFSP, 27 December 2001— Art 4	37	s 3	254, 289–90, 298
Council Decision 2002/996/JHA, 28 November 2002	37	r 6	289
Decision 276/1999/EC	79, 91	r 7 bis (B)	342
Joint Action 96/610/JHA (15 October 1996)	36	r 34(A)(i)	368
Joint Action 96/668/CFSP (29 November 1996)	147	r 34(A)(ii)	368
Joint Action 97/12/JHA (20 December 1996)	36	r 39(ii)	345
Joint Action 97/289/CFSP (29 April 1997)	36	r 40	373
Joint Action 98/428/JHA (29 June 1998)	283	r 42(A)(i)	314
		r 61	14, 343, 345, 387
		r 61(C)	343
		r 61(D)	343
		r 61(E)	343
		r 62 bis (iv)	298
		r 63	292
		r 69(A)	374
		r 71	294, 296, 304–05
		r 71(D)	374
		r 73 bis (C)	292
		r 73 ter (C)	292
		r 75(B)(i)(a)	374
		r 75(B)(i)(b)	374
		r 75(B)(i)(c)	374
		r 75(B)(i)(d)	374
		r 75(B)(ii)	374
		r 79	374
		r 86	211
		r 87	290
		r 87(A)	290
		r 88(C)	323
		r 89	254, 289–90, 295–96, 298, 301
		r 89(A)	295
		r 89(B)	254, 298
		r 89(C)	295, 300, 308, 312, 343
		r 89(D)	289, 291, 296
		r 89(E)	317
		r 89(F)	291, 297, 303–04
		r 90	291
Directives			
Directive 64/221/EEC Art 2	203 204		
Directive 91/308/EEC Art 1	51, 61, 69–70, 72 68		
Art 2	68		
Art 3	68		
Art 4	68		
Art 6	68		
Art 7	69		
Art 11	68		
Directive 95/46/EC Art 29	77 77		
Art 30	77		
Directive 2001/97/EC Art 1(E)	51, 61, 69 69		
Art 2a	69		
Art 3	69		
Art 6	69		
Art 11	69		

r 90(A)	291	r 62(B)(iv)	298
r 90(B)	291	r 63	292
r 90(C)	292	r 71	291, 296, 304
r 90(D)	292	r 87	290
r 90(E)	292	r 87(A)	290
r 90(F)	292	r 88(C)	323
r 90(G)	292	r 89	254, 291, 295–96, 298, 301, 318
r 90(H)	292	r 89(A)	295
r 90 bis	292	r 89(B)	298
r 91	292	r 89(C)	295–96, 300
r 92	292	r 89(D)	296, 317
r 92 bis	293, 296	r 90	291–92
r 92(A)(i)(a), (b), (c), (d), (e), (f)	293	r 90(A)	291, 297, 303–04
r 92(A)(ii)(a), (b), (c)	293	r 90(B)	291
r 92(B)(i)(a), (b)	293	r 90(C)	289, 291, 294
r 92(B)(ii)(a), (b), (c)	293	r 90(D)	292
r 92 bis (D)	293	r 90(E)	292
r 93	293, 296, 306–07	r 90(F)	292
r 93(A)	307	r 90(G)	292
r 94	292	r 90 bis	292
r 94(B)	293	r 92	292
r 94(B)(iii)	294	r 92 bis	293, 296
r 94 bis	293–94	r 92(A)(i)(a), (b), (c), (d), (e), (f)	293
r 94 ter	294	r 92(A)(ii)(a), (b), (c)	293
r 95	289, 294, 296, 300, 314	r 92(A)(ii)(a), (b)	293
r 96	368	r 92(B)(ii)(a), (b), (c)	293
r 96(1)	367	r 92 bis (D)	293
r 96(i)	289	r 93	293, 296, 306–07
r 96(ii)(a), (b)	294	r 94	292
r 96(iii)	294	r 94(B)	293
r 96(iv)	294	r 94 bis	293–94
r 97	297	r 95	289, 296, 300
r 97(i), (ii)	294	r 96	294, 297
r 98	294, 297	r 96(i)	289, 297
r 98 ter (C)	323	r 97	297
r 108	212	r 98	297
1995 International Criminal Tribunal for Rwanda		2002 International Criminal Court Rules of Procedure	
r 3	288–89, 306 289–90, 298	r 70	129–30, 395 367
r 6	289	r 80(1)	131
r 14(1)	401	r 80(2)	131
r 14(2)	401	r 80(3)	131
r 20(3)	401	r 121(9)	129
		r 135(1)	142
		r 135(3)	142

TABLE OF ABBREVIATIONS

A

ACIU	Analytical Criminal Intelligence Unit
AEDPA	Anti-Terrorism and Effective Death Penalty Act 1996
AFRC	Armed Forces Revolutionary Council
APC	All People's Congress
ASF	automated search facility

C

CATOC	United Nations Convention Against Transnational Organized Crime 2000
CDPC	European Committee on Crime Problems of the Council of Europe
CEPOL	European Police College
CERD	Convention on the Elimination of All Forms of Racial Discrimination 1965
CIA	Central Intelligence Agency
CICTE	Inter-American Committee Against Terrorism
CIME	Committee on International Investment and Multinational Enterprises
CFSP	Common Foreign and Security Policy
CJA	Criminal Justice Act 1993, 1988
CJICA	Criminal Justice (International Co-operation) Act 1990
CPIA	Criminal Procedure and Investigations Act 1996

D

DEA	Drug Enforcement Agency
DTA	Drug Trafficking Act 1994

E

EA	Extradition Act 1870, 1970, 1989
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
EDU	Europol Drugs Unit
EEZ	exclusive economic zone
EO	Executive Order
EPP	European Public Prosecutor
EU	European Union

F

FAR	Governmental Rwandan Forces
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FCPA	Foreign Corrupt Practices Act 1977
FRY	Federal Republic of Yugoslavia
FSIA	Foreign Sovereign Immunities Act 1976

G

G7	Group of Seven
G8	Group of Eight

GDR German Democratic Republic
 GFAP General Framework Agreement for Peace

H

HRA Human Rights Act 1998
 HRV human rights violations
 HTA Hostage Taking Act 1984

I

IAEA International Atomic Energy Agency
 ICAO International Civil Aviation Organisation
 ICC International Criminal Court
 ICCPR International Covenant on Civil and Political Rights
 ICJ International Court of Justice
 ICL international criminal law
 ICPC International Cable Protection Committee
 ICPC International Criminal Police Commission
 ICPO International Criminal Police Organisation
 ICRC International Committee of the Red Cross
 ICSID International Centre for the Settlement of Investment Disputes
 ICTR International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States
 ICTY International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia
 ILC International Law Commission
 ILO International Labour Organisation
 IMB International Maritime Bureau
 IMO International Maritime Organisation
 IMT International Military Tribunal at Nuremberg
 IMTFE International Military Tribunal for the Far East
 INMARSAT International Mobile Satellite Organisation
 IRA Irish Republican Army
 ISPA Internet Service Providers Association
 ICA Interception of Communications Act 1985
 ITLOS International Tribunal for the Law of the Sea
 IWF Internet Watch Foundation

J

JHA Justice and Home Affairs

K

KLA Kosovo Liberation Army
 KWECC Kosovo War and Ethnic Crimes Court
 KYC Know Your Client

M

MLAT mutual legal assistance treaties

N

NATO North Atlantic Treaty Organisation
 NCB National Central Bureau
 NCIS National Criminal Intelligence Service
 NGO non-governmental organisation

O

OAS Organisation of American States
 OAU Organisation for African Unity
 ODCCP Office for Drug Control and Crime Prevention
 OECD Organisation for Economic Co-operation and Development
 OFAC Office of Foreign Assets Control
 OIC Organisation of the Islamic Conference
 OPA Obscene Publications Act 1959
 OSCE Organisation for Security and Co-operation in Europe

P

PACE Police and Criminal Evidence Act 1984
 PC-R-EV Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures
 PIU Performance and Innovation Unit
 PKK Kurdistan Workers' Party
 PLO Palestine Liberation Organisation
 PRC Piracy Reporting Centre
 Prep Com Preparatory Committee

R

R&R reparation and rehabilitation
 RPF Rwandan Patriotic Front
 RUF Revolutionary United Front

S

SAARC South Asian Association for Regional Co-operation
 SFOR NATO-led Stabilisation Force
 SFRY Socialist Federal Republic of Yugoslavia
 SIA State Immunity Act 1978
 SIRENE Supplementary Information Requests at the National Entry
 SIS Schengen Information System
 SOA Sexual Offences (Conspiracy and Incitement) Act 1996
 SOFA Status of Forces Agreement
 STA Suppression of Terrorism Act 1978
 STR Suspicious Transactions Report

T

TA 1985 Telecommunications Act 1985
 TA 2000 Terrorism Act 2000
 TEC Treaty Establishing European Communities

TEU Treaty on European Union
TRC Truth and Reconciliation Commission

U

UN United Nations
UNCLOS United Nations Law of the Sea Convention 1982
UNMIBH United Nations Mission in Bosnia and Herzegovina
UNMIK United Nations Interim Administration Mission in Kosovo
UNTAC United Nations Transitional Authority in Cambodia
UNTAET United Nations Transitional Administration in East Timor
UPU Universal Postal Union
USC United States Code

V

VRS Bosnian Serb Army

W

WTO World Trade Organisation

THEORY OF INTERNATIONAL CRIMINAL LAW

1.1 INTRODUCTION

International criminal law (ICL) constitutes the fusion of two legal disciplines: international law and domestic criminal law. While it is true that one may discern certain criminal law elements in the science of international law, it is certainly not the totality of these elements that make up the discipline of ICL. Its existence is dependent on the sources and processes of international law, as it is these sources and processes that create and define it. This can be illustrated by examining any one of the acknowledged international offences. Piracy *jure gentium*, for example, exists simultaneously as a crime under customary international law, as well as treaty law, specifically the 1982 United Nations Convention on the Law of the Sea (UNCLOS).¹ In examining its status and nature, whether as a treaty or customary rule, recourse is to be made not only to the relevant sources and norms of international law, but also to the non-piracy clauses of UNCLOS itself. The concept of piracy cannot be fully realised unless other concepts are first explored, such as the freedom to navigate on the high seas, delimitation of maritime zones, Flag State jurisdiction and many others. Similarly, one cannot examine an international offence, such as piracy, without recourse to those rules which delineate the legal standing of natural persons in the international legal system and their capacity to enjoy rights directly from this system, as well as to suffer lawful consequences for any violations (international legal personality). Undoubtedly, it does not suffice simply to discern and extrapolate mechanically all those criminal elements that are abundant in general international law and then combine them to establish a new discipline, as this does not help explain the binding nature of rules, nor their role in any given normative system.

The criminal laws of nations, expressed both through legislative action and the common law, constitute a vital component of ICL. International rules are generally imperfect and imprecise, not least because of the political difficulties in their drafting and agreement among competing national interests. With few exceptions, and in correlation to the preceding argument, international treaties rely on signatory States to further implement their provisions with precision at the domestic level, not necessarily in identical manner, but with a certain degree of consistency and uniformity based on the object and purpose of each particular treaty. In the case of piracy *jure gentium*, for example, the national legislation implementing the piracy provisions of UNCLOS into domestic criminal law will have to address the question of the material and mental attributes of the offence. UNCLOS is largely silent on the *mens rea* of piracy and so a myriad of mental components has to be prescribed at the domestic level, including whether or not the offence is one of strict liability. Some States may further posit that, according to general principles of their own criminal law, the perpetrator of an offence is relieved from criminal culpability if the act was based on political or other ideological motivation (the so called 'political offence

1 Reprinted in 21ILM (1982), 1261.

exception')—in those instances where a convention is unclear or silent on the issue. Similarly, the imposition of penalties, at the discretion of parliament or the national judiciary, as well as the judicial determination of the extent of the various maritime zones, serve to indicate that certain elements of even a very old and reasonably well established international offence, such as piracy, may vary from country to country. But, this is an unavoidable occurrence, since criminal law is above all a practical discipline, and so ICL cannot operate in a theoretical vacuum, but in strict accordance with its objectives, that is to prevent the commission of offences, to prosecute and ultimately to punish offenders. In the absence of an all-embracing international criminal authority, these functions have been bestowed to national authorities, whose conformity to international law generally passes through domestic channels, such as national law and the dictates of the executive. As will be demonstrated below, however, the discretion of States to define international offences in their domestic law is not unlimited, but circumscribed by general international law and certain ICL principles.

1.2 SOURCES OF INTERNATIONAL LAW AND INDIVIDUAL LEGAL PERSONALITY

Article 38(1) of the 1945 Statute of the International Court of Justice recognises two types of sources: primary and secondary. The primary sources of international law are treaties, international custom and general principles of law, all being independent and capable of producing binding rules. The secondary sources of international law, namely the writings of renowned publicists and the decisions of international courts, simply serve to ascertain, and perhaps interpret, the primary sources. Treaties are agreements between sovereign nations, governed by international law and generally binding only upon parties to each particular agreement. Customary law is composed of two elements, an objective and a subjective.² The objective element is made up of the uniform and continuous practice of States with regard to a specific issue and, depending on its adherents, this may take the form of a universal or a local custom. The subjective element comprises a State's conviction that its practice on a particular issue emanates from a legal obligation, which it feels bound to respect. It has been reasonably argued that the objective element is not always required in the formation of a customary rule. This is predicated on the notion that, although every sovereign State has an interest in the development of international norms, not all States have the capacity to demonstrate some kind of material action. For example, the utilisation of outer space has been possible only by certain developed nations, as has the exploration of the natural resources lying beneath the seabed of the high seas. This, it is argued, should not prevent less developed States from having a voice in the regulation of these areas. It is for this reason that General Assembly resolutions,

2 *FDR v Denmark; FDR v The Netherlands (North Sea Continental Shelf cases)* (Merits) (1969) ICJ Reports 3, paras 73–81; see generally M Akehurst, 'Custom as a Source of International Law', 47 *BYIL* (1974–75), 1.

which are not: otherwise binding, may be declaratory of customary law where they evince universal consensus through the unanimity of participating States.³ But, even where State practice may be deemed to be required, physical action is not necessarily the best determinant. In the field of international humanitarian law, for example, it would be impracticable to ascertain State practice with regard to the behaviour of troops on the battlefield and recourse should be made to military manuals and decrees, ratification of relevant instruments and other similar official pronouncements indicating a legal commitment.⁴

International customary rules bind all States, except for those that have consistently and openly objected to the formation of a rule from its inception.⁵ This general framework is subject to one exception; consistent objection to a customary rule where that rule is also a peremptory norm of international law (that is, a *jus cogens* norm) is unacceptable.⁶ No derogation is allowed from *jus cogens* norms, which generally comprise fundamental human rights and rules of international humanitarian law, as well as the prohibition of the use of unlawful armed force. Similarly, treaty provisions reflecting peremptory norms of international law are binding upon third parties to such treaties.

General principles of law can be found both in international law itself, as well as in the domestic legal systems of States.⁷ General principles of international law, such as *pacta sunt servanda*, constitute *a priori* principles that underlie both customary and treaty law. On the other hand, general principles of municipal law are practices or legal provisions common to a substantial number of nations.⁸ It has been accepted by post-Second World War military tribunals,⁹ as well as by contemporary international judicial bodies such as the European Court of Justice (ECJ),¹⁰ that for a domestic principle to be regarded as generally accepted it must be recognised by most legal systems, not all. Under customary international law, reliance upon principles deriving from national legal systems is justified either when rules make explicit reference to national laws,¹¹ or when such reference is 'necessarily implied

3 R Sloan, 'General Assembly Resolutions Revisited (Forty Years After)', 58 *BYIL* (1987), 39.

4 *ICTY Prosecutor v Tadic*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (*Tadic* appeals jurisdiction decision) (2 October 1995) 105 ILR 453, para 99; see T Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 *AJIL* (1996), 238, pp 239–40, who states that due to the scarcity of supporting practice in both human rights and humanitarian law, evidence of *opinio juris* is compensated through official statements.

5 J Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 *BYIL* (1985), 1.

6 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art 53.

7 B Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1987, Cambridge: Grotius; AD McNair, 'The General Principles of Law Recognised by Civilised Nations', 33 *BYIL* (1957), 1.

8 *AMCO v Republic of Indonesia*, Decision of the Arbitration Tribunal of the International Centre for the Settlement of Investment Disputes, reprinted in (1990) 89 ILR 366, p 461.

9 The tribunal in the *Hostages* case noted that, if a principle is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified: *USA v List (Hostages case)* (1949) 8 LRTWC 34, p 49.

10 In the words of Advocate General Lagrange in *Hoogovens v High Authority* [1962] ECR 253, pp 283–84: 'The Court is not content to draw on more or less arithmetical common denominators between different national solutions, but chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to be the best or...the most progressive.'

by the very content and nature of the concept'.¹² This suggests that the practice of international tribunals has been to explore all the means available at the international level before turning to national law. It is instructive to note that the 1998 International Criminal Court (ICC) Statute places general principles of law derived from legal systems of the world in a position of last resort and only then to be utilised if they are consistent with international law.¹³ To a very large degree, these propositions reflect the fact that the vast majority of fundamental general principles of national laws, such as the principle of legality and the prohibition of retroactive laws, have matured into customary and treaty norms.

States have been the traditional subjects of international law, the entities primarily endowed with international legal personality, that is, the ability to enjoy and enforce rights and duties directly under international law.¹⁴ From the latter part of the 19th century, a certain amount of international legal competence was granted to international intergovernmental organisations. Natural persons, it has been advocated, became subjects, and not merely objects, of the international legal system at the end of the Second World War, at which time they assumed personal liability under the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.¹⁵ This is not true, as a substantial number of international offences were recognised by the international community prior to the dawn of the 20th century, such as piracy *jure gentium*, war crimes, injuries to submarine cables, postal offences and others. At present, natural persons are endowed with legal personality in a plethora of international fields, such as human rights and humanitarian law, international financial transactions, European Community law and others. For the purposes of ICL, the fundamental question is whether the attribution of legal personality to natural persons in relation to a treaty crime necessarily entails, as a direct correlation, individual criminal liability under international law. To put it simply, where UNCLOS defines piracy as an act that may be perpetrated only by natural persons, does it establish an offence under international law or an offence under domestic law, and what is the difference between the two in practical terms?

1.3 THE INTERNATIONAL CRIMINALISATION PROCESS

An international offence is any act entailing the criminal liability of the perpetrator, and emanating from treaty or custom. The heinous nature of an act, such as the

11 As does, eg, International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute, Art 24(1) which states that, in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

12 *Advisory Opinion Concerning Exchange of Greek and Turkish Populations* (1925) PCIJ Reports, Ser B, No 10, pp 19–20, cited by Judges McDonald and Vohrah in *ICTY Prosecutor v Erdemovic*, Appeals Chamber Judgment (1997), summarised in 92 *AJIL* (1998), 283.

13 This formulation was consistent with the *Report of the Preparatory Committee on the International Criminal Court* at the Diplomatic Conference held in Rome (15 June–17 July 1998), UN Doc A/CONF 183/2/Add 1 (14 April 1998), pp 46–47.

14 See generally R Higgins, *Problems and Process: International Law and How We Use It*, 1994, Oxford: OUP, pp 48–55.

15 59 Stat 1544.

extermination of an identified group, is not the sole determinant for elevating such behaviour to the status of an international offence, although this may serve as a good incentive to do so. Rather, as Dinstein correctly points out, 'the practice of States is the conclusive determinant in the creation of international law (including international criminal law), and not the desirability of stamping out obnoxious patterns of human behaviour'.¹⁶ Simply put, the establishment of international offences is the direct result of interstate consensus, all other considerations bearing a distinct subordinate character.

The legal basis for considering an offence to be of international import is where existing treaties or custom consider the act as being an international crime.¹⁷ Since every international offence is now codified in multilateral agreements, we shall continue our analysis on the basis of treaty law. Although international treaties define or prescribe offences by employing inconsistent terminology, it is possible to discern two broad categories where they purport to so criminalise specific conduct. The first category comprises those treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,¹⁸ which contain a categorical provision that the forbidden act constitutes a crime under international law (usually termed 'universal' crimes). A second category of treaties may or may not describe the forbidden conduct as a crime, but clearly imposes a duty on contracting parties to prosecute or extradite the alleged offender, or simply render the said conduct an offence under their national law. The different variants of this latter category have attracted wide application in the international criminalisation process and have been the major vehicle for the anti-terrorist treaties. The fact that a treaty defines certain conduct simply as an offence, or imposes a duty on States to take action at the domestic criminal level, without, however, describing the conduct as an international crime, in no way detracts from the international nature of the offence prescribed by the treaty. Treaties of this nature usually point out that they are not applicable to acts perpetrated solely within a single country—although this may be subject to change in the post-11 September 2001 era.

Cherif Bassiouni's analysis of 22 categories of international crimes revealed that the conventions in which they were contained demonstrated the following 10 penal characteristics:

- (1) Explicit recognition of proscribed conduct as constituting an international crime, or a crime under international law, or as a crime;
- (2) implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like;
- (3) criminalisation of the proscribed conduct;
- (4) duty or right to prosecute;
- (5) duty or right to punish the proscribed conduct;
- (6) duty or right to extradite;
- (7) duty or right to cooperate in prosecution, punishment (including judicial assistance in penal proceedings);
- (8) establishment of a criminal jurisdictional basis (or theory of criminal jurisdiction or priority in criminal jurisdiction);
- (9) reference to the establishment of an international criminal court or international tribunal with penal characteristics (or prerogatives); and
- (10) elimination of the defence of superior orders.¹⁹

16 Y Dinstein, 'International Criminal Law', 20 *Israel Law Review* (1985), 206, p 221.

17 The authors have not found an international offence emanating independently from general principles of international law or the criminal laws of nations. For a contrary view, see CM Bassiouni (ed), *International Criminal Law*, 1986, Dobbs Ferry, New York: Transnational, p 2.

18 78UNTS 277.

19 *Op cit*, Bassiouni, note 17, p 3.

No ICL convention embodies all 10 of these characteristics. Bassiouni discovered that crimes with a significant ideological or political component, such as aggression, contain the least number of these characteristics in contrast to those offences devoid of political considerations, such as drug offences. He concluded that, due to the decidedly penal nature of these treaties or their provisions, the existence of any one of the 10 aforementioned characteristics in a convention makes it part of ICL.²⁰

When examining the general effect of treaties and their passing into the realm of customary law, one automatically looks at the status of ratifications. This does not necessarily paint a true picture. Treaties that encompass a wide variety of topics and, at the same time, expressly exclude reservations, or where certain reservations would be deemed to conflict with the object and purpose of a treaty, will, in most cases, attract few parties, not because other States fundamentally disagree with the entire convention, but simply particular aspects of it. A good example is the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.²¹ This instrument, which penalises the procurement and enticement to prostitution as well as the maintenance of brothels, has received a marginal number of ratifications, simply because a large number of States possess legislation legalising voluntary prostitution. From a number of sources, such as the *travaux préparatoires* of the Convention, from the global uniformity ascertained in national legislations, as well as from official pronouncements in international fora and other relevant treaties, it is beyond doubt that the enticement to and maintenance of all forms of involuntary prostitution constitute international offences under customary law. Thus, even though the Convention is not widely ratified, one of the acts it criminalises is clearly an offence under customary law.

Where international custom criminalises certain conduct, the incumbent court must also satisfy itself that the particular offence is 'defined with sufficient clarity under customary international law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible'.²² In the *Vasiljevic* judgment, the Prosecution charged the accused, *inter alia*, with the offence of 'Violence to life and person'. The Trial Chamber was faced with the decision whether the definition of the offence was of sufficient clarity in order to satisfy the requirements of the principle *nullum crimen sine lege*. Despite the existence of the offence in the ICTY Statute, the Trial Chamber very boldly stated that in the absence of any clear indication in the practice of States as to what the definition of the offence of 'Violence to life and person' may be under customary law, it was not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law.²³

Every offence prescribed in treaties or custom must ultimately be implemented into national law through an act of legislation. This process is followed not only where the offence is not precisely defined in the treaty, but also where it is set out in detail in its constitutive instrument. The national legislator might wish further to elaborate the substantive or procedural elements of the offence, and/or adapt it to domestic exigencies, but should be guided in this respect by the framework

20 *Op cit*, Bassiouni, note 17, p 4.

21 96UNTS 271.

22 *ICTY Prosecutor v Vasiljevic*, Judgment (29 November 2002), Case No IT-98-32-T, para 201.

23 *Ibid*, para 203.

established in the relevant treaty. A State that violates its treaty obligations by either failing to incorporate a treaty into its domestic legal system, or by omitting fundamental aspects of the treaty from its implementing statute, will generally be held liable vis-à-vis other contracting parties. In the field of ICL there may be great divergence in the views of States during the negotiation of a treaty. Where the treaty is finally adopted through a compromise the divergence remains, and in the absence of a contrary provision there is no reason why a State party cannot adopt implementing legislation that helps to supplement or fortify the provisions of a weak treaty. A State may decide, for example, that the 1977 Protocol II Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts²⁴ does not cover enough offences, nor does it establish a high enough gravity, nor sufficient jurisdictional bases. Such fortifications to ICL treaties should be accepted with extreme caution however, as long as they: are not expressly or tacitly prohibited; do not conflict with the object or purpose or other obligations under that treaty; and they, moreover, do not violate the rights of the accused.

The practical difference between offences clearly specified under international law, and those whose further elaboration is left to contracting States, relates primarily to the removal of perplexities associated with the negotiation and drafting of definitions at preparatory conferences. If it is felt that, to get more States on board, a well signed convention is more important than a 'strong' convention, specificity, depth, or other elements that were initially envisaged to be included in the convention may have to be sacrificed. Ultimately, the gravity of an offence as a universal crime is devoid of significance if political or other considerations prevent prosecution or other criminal enforcement action. Thus, while several instances of genocide have occurred since 1948 no action was taken at either national or international level until the creation of the ad hoc tribunals for Yugoslavia and Rwanda in 1993 and 1994, respectively.

Although the majority of international penal proscriptions require that each crime have an international or transnational element, which is based on the nature of the violative conduct, the nationality of the offender or the victim, or its impact, these two elements (the international or transnational) are not generally required in the international criminalisation process.²⁵ This was clearly demonstrated by the elevation of breaches of humanitarian law, applicable in non-international armed conflicts, to the status of international offences entailing the individual responsibility of the offenders.²⁶ Non-international armed conflict violations do not by their nature possess international or transnational elements and are confined to a single territory, unless other States decide to intervene. This development further shows the evolution of the international society in regulating areas otherwise falling within the exclusive domain of States, thus eroding the principle of domestic jurisdiction.

In conclusion, the prohibition of certain conduct by treaty or custom always entails the criminal liability under international law of the offender, irrespective of whether

24 1125 UNTS 609.

25 For a contrary view, see *op cit*, Bassiouni, note 17, p 24.

26 *Tadic* appeals jurisdiction decision (1995), para 134.

the prohibited conduct is defined as a universal crime or an offence to be further elaborated through domestic law. This represents the first step in the criminalisation process. In the dawn of the 21st century, one should dismiss the notion espoused in 1950 by Schwarzenberger that ICL is 'merely a loose and misleading label for topics which comprise anything but international criminal law'; he argued further that whatever the content of these rules, there is no evidence that they are endowed with a prohibitive character and specific penal sanctions.²⁷ Schwarzenberger grounded his argument on the fact that, in the absence of international enforcement mechanisms, the concept of offences against the law of nations was redundant, unless regulated and enforced before a domestic setting, believing that ICL could not function outside each individual State. This led him to believe that ICL was, in fact, domestic criminal law. He also argued that sovereign States could not and would not agree to being held liable for State crimes, a notion that now seems to be settled within the ranks of the International Law Commission and general *opinio juris*.²⁸ Next, we will examine the final step of the international criminal process, which comprises the enforcement of substantive ICL.

1.4 ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW

Unlike the national legal systems, the international community predicates its rules not upon a preconceived hierarchical ladder, but on the basis of the principle of juridical equality among States. It is, therefore, a horizontal system of law making. Since it does not possess a legislative body, a law enforcement agency, or a compulsory judicial jurisdiction, its primary subjects must necessarily premise their relations on a framework of mutual interdependence. International enforcement action against natural persons for violations of ICL takes two general forms: direct and indirect.

Direct enforcement implies Prosecutorial and judicial action against persons suspected of having committed an international offence. Although, in the past, a substantial number of quasi-judicial commissions were set up to investigate breaches of the laws of war alleged to have taken place in various armed conflicts, it was not until the establishment of the Nuremberg and Tokyo tribunals at the close of the Second World War that enforcement took place before an international forum and on the basis of international law. Two later conventions, Art VI of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and Art V of the 1973 Convention on the Prevention and Suppression of Apartheid,²⁹ called for the creation of an international penal tribunal with authority to adjudicate violations of these Conventions. Similarly, on the basis of contractual obligations stemming from Art 25 of the 1945 United Nations (UN) Charter, which renders Security Council resolutions binding on UN Member States, the ad hoc tribunals for

27 G Schwarzenberger, 'The Problem of an International Criminal Law', 3 *CLP* (1950), 263, p 274.

28 The much contested draft Art 19 of the ILCs Draft Articles on State Responsibility, which made reference to international offences giving rising to State responsibility, was removed from the ILC's finalised Articles. See UN Doc A/CN.4/L.600 (21 August 2000).

29 1015 UNTS 243.

Yugoslavia³⁰ and Rwanda³¹ were established under the process of Art 41 of the 1945 UN Charter (that is, measures authorised by the UN Security Council not involving the use of armed force). Unlike the two ad hoc tribunals, the ICC, whose Statute was adopted in 1998,³² is not endowed with compulsory jurisdiction. Subject to an exception under Art 12(2) of its Statute, whereby the Court may assume jurisdiction where either the territorial State or the State of nationality of the accused submits to its jurisdiction, the ICC is generally empowered to adjudicate a case only after the concerned State has given its unequivocal consent.

It is not only international tribunals that possess the capacity to take direct enforcement action, but also domestic criminal courts. When domestic courts exercise wide-ranging extraterritorial jurisdiction, especially universal jurisdiction over piracy *jure gentium*, war crimes and crimes against humanity, they, too, are acting as international tribunals, since they are directly enforcing international law. The prosecution of cases subject to universal jurisdiction in particular, where the forum State does not have any connection to the elements of the offence, necessarily implies that domestic courts assume more than an international character; they are discharging that State's obligation to the whole of the international community, in protecting and enforcing fundamental human rights (*erga omnes* obligations). As the International Court of Justice (ICJ) pointed out in the *Barcelona Traction* case, all States have a legal interest in the protection of fundamental rights worldwide.³³ This should subsequently give rise to an *actio popularis*. The non-contractual character of the 1948 Genocide Convention, for example, is premised on its capacity to create obligations, even vis-à-vis non-affected States, on the basis of its compelling humanitarian nature.

In the absence of international tribunals and general reluctance in the exercise of universal jurisdiction, States have found themselves compelled to reach minimum agreement on international co-operation in criminal matters. The various facets of this co-operation extend not only to purely domestic offences, but, more importantly, to international crimes with a view to preventing impunity. Most prominent among these measures is the insertion of a provision in ICL treaties obligating parties either to prosecute or extradite persons accused of having committed an offence stipulated by the relevant convention (*aut dedere aut judicare*). This clause, whose origin can be traced in the work of Hugo de Groot (Grotius), does not constitute an independent basis for extradition, but requires an additional agreement between the requesting and requested States. It does, nonetheless, serve as a deterrent to establishing safe havens for alleged criminals and forces parties to a convention to take responsible enforcement action. The mechanism of extradition itself also supplements indirect enforcement processes by enabling a more willing and better-equipped (in terms of evidence and proximity to the facts of the case) jurisdiction to investigate a particular case. Another complementary safeguard is the inclusion of broad jurisdictional competence in most international criminal treaties, thereby enabling national

30 SC Res 827 (25 May 1993).

31 SC Res 955 (8 November 1994).

32 37 ILM (1998), 999.

33 *Belgium v Spain (Barcelona Traction Light and Power House Co Ltd)* (1970) ICJ Reports 3, Second Phase, p 32.

prosecutorial authorities to assume direct action. Similarly, contemporary treaties have allowed few or no reservations³⁴ and have refused contracting States the ability to characterise offences within the framework of a convention as politically or ideologically motivated.³⁵ This has deprived States of the ability otherwise to refuse extradition and has created a large degree of uniformity as regards the *mens rea* of international offences. Finally, through bilateral and multilateral mutual legal assistance agreements, it has become possible to communicate evidence and other documentation facilitating criminal prosecution between two or more States, as has the process of transferring judicial proceedings across two jurisdictions.

The threefold objective of ICL, that is, to prevent, prosecute and punish offenders, must ultimately be beneficial to all people. If international criminal justice does not serve this purpose, it will have failed. Although the UN has persistently taken a contrary view,³⁶ should an independent and impartial Truth and Reconciliation Commission that has the potential to restore trust and facilitate redevelopment in a shattered community be used as an alternative to criminal prosecutions? If there is even one such instance available, it must not be denied to fulfil that perspective. Since the aim of criminal justice is not only to punish the culprit, but to restore law and order, other supplementary mechanisms should be allowed to function alongside. In the *Plavsic* case, the accused was co-President of the Serbian Republic of Bosnia and Herzegovina between February and May 1992, occupying thereafter other significant posts within the Bosnian Serb leadership. Having been informed of an indictment against her, she surrendered to the ICTY and entered a guilty plea with regard to a wide range of crimes against humanity. A number of mitigating factors were set out by *Plavsic*, among which was that her unequivocal guilty plea, surrender and acceptance of responsibility contributed to the establishment of truth and was a significant effort towards the advancement of reconciliation. The Trial Chamber went to great pains to demonstrate that the process of reconciliation was one of its primary aims, besides retribution, and that the accused's full disclosure and acceptance of responsibility facilitates the purpose and processes of reconciliation, thus indeed constituting a mitigating factor.³⁷

As will become evident in other chapters, the UN is opposed to blanket immunities and not to truth commissions in general. Moreover, the aforementioned threefold objective of ICL is served not only through State action, but also through the efforts of private organisations. These efforts relate solely to preventive action, since prosecution and punishment constitute exclusively public functions. Private

34 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Art 22, 32 ILM (1993), 804; 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Art 19, 320 IRRC (1997), 563; 1998 ICC Statute, Art 120.

35 See, eg, 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, Art 8, 860 UNTS 105; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Art 8, 974 UNTS 177; 1998 UN Convention for the Suppression of Terrorist Bombings, Arts 5 and 9, 37 ILM (1998), 249.

36 The negotiations leading to the adoption of the Statute of the 2002 Sierra Leone Special Court, after agreement between the UN and the Government of Sierra Leone, vigorously reflected the position of the Secretary General that the granting of amnesties would not bar prosecutions. *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, UN Doc S/2000/915 (4 October 2000), para 22.

37 *ICTY Prosecutor v Plavsic*, Sentencing Judgment (27 February 2003), Case Nos IT-00-39 and 40/1-S, paras 79-81.

organisations such as the International Committee of the Red Cross (ICRC), the Piracy Reporting Centre, established by the International Chamber of Commerce, and the International Cable Protection Committee, established by corporations active in that industry, undertake a range of preventive measures to minimise the risk of offences associated with their field of interest. This is welcome and unavoidable to a large extent, as in the case of piracy, for example, most developing States do not have the resources to patrol their coastlines, let alone the adjacent high seas. Moreover, these organisations have, in the past, been the protagonist instigators for the evolution of international norms in a certain field, such as the development of international humanitarian law through the efforts of the ICRC.

The process of ICL enforcement, however, may also involve State entities, in the sense that they may be responsible for the perpetration of an international offence, or because they have transgressed their international obligations by failing to co-operate with other States or international organisations in the suppression of particular criminal activity. A State that breaches any of its international obligations commits an internationally wrongful act and bears responsibility vis-à-vis injured States. Some wrongful acts, however, especially those relating to gross violations of human rights within one country and against that country's nationals, do not produce harm to any particular State. They do, nonetheless, breach obligations owed to the international community as a whole and, as such, every country possesses a legal interest in their termination and satisfaction of the victims. In both aforementioned cases (that is, direct injury and obligations *erga omnes*) recourse is available to the ICJ or other interstate judicial bodies, although no case has so far been entertained by the ICJ on account of a non-injured party alleging breach of a *jus cogens* norm.³⁸ Increasingly, natural persons have been granted legal standing before international judicial bodies with compulsory jurisdiction, capable of rendering binding judgments, such as the European Court of Human Rights. Judgments and non-binding rulings emanating from other quasi-judicial bodies, such as the Human Rights Committee, have in recent years been respected and complied with by a large number of States that have been found to breach particular human rights provisions in the 1966 International Covenant on Civil and Political Rights (ICCPR), although levels of compliance are far from perfect.³⁹ Moreover, Security Council resolutions are binding upon all States, thus rendering any recalcitrant State subject to possible Council countermeasures on account of its refusal to comply. The Security Council may even authorise the use of armed force in accordance with Art 42 of the 1945 UN Charter, where it is convinced, and its members are capable of deciding, that such action would best counter a particular breach or threat to the peace, or an act of aggression.⁴⁰ This was amply exemplified in the case of Iraqi aggression against Kuwait in 1990, where the Council authorised a coalition of allied States to use force in order to restore not only Kuwaiti independence, but also

38 The European Court and Commission of Human Rights has had a chance to examine interstate complaints alleging human rights violations taking place solely on the territory and against the nationals of a single State. See *Denmark, Norway, Sweden and The Netherlands v Greece (Greek case)* (1969) 12 ECHR Yearbook 134.

39 D McGoldrick, *The Human Rights Committee*, 1994, Oxford: Clarendon, pp 202–04.

40 See C Gray, *International Law and the Use of Force*, 2000, Oxford: OUP

international peace and security in the region.⁴¹ Sanctions can also be imposed by regional organisations and this is usually decided and executed in co-operation, or in execution of, relevant Security Council resolutions.⁴² Finally, recalcitrant States may also suffer adverse consequences on the basis of particular treaty regimes and the obligations contained therein.⁴³ Inevitably, all the aforementioned means relating to measures against States, as part of the ICL process, are premised on political considerations as to whether a judicial or other confrontational avenue should be followed, except where this involves individual claimants.

1.5 STATE 'CRIMINALITY'

The notion of 'criminality' essentially refers to liability of a criminal nature. Liability itself is based on the attribution of a criminal offence to a particular individual. Criminal liability in both national and international law is generally attributed to natural persons, and, exceptionally, also to other legal entities, as was the case with several Nazi-related organisations after the Second World War. Even so, it was not the legal person that was deemed to be liable; rather, it was individual membership that constituted the particular criminal offence. It is, therefore, evident that any discussion of liability that does not involve any natural persons as perpetrators is devoid of a criminal nature, but not necessarily a civil one.

All crimes are committed by natural persons and it seems self-evident that personal culpability should somehow follow. Personal attribution, however, that will eventually materialise into criminal liability is a complex exercise in the international legal system. The majority of international offences are committed by individuals acting under the guise of or on behalf of State orchestrated policies, whether overtly or clandestinely. The policy of apartheid in South Africa, the genocides against Jews, Armenians and Tutsi, as well as cases of State sponsored terrorism (for example, Libyan involvement in the *Lockerbie* case)⁴⁴ are just some instances where an international offence originates from the highest echelons of a State apparatus and is, subsequently, executed by its subordinate organs or agents. Leaving aside the issue of personal immunity for acts perpetrated by or on behalf of the State,⁴⁵ is there any room for the State itself to be viewed as having committed a criminal act, and if so, is this a worthwhile exercise? Until August 2000, this notion, even though progressive, was entertained although not wholly accepted by the international community. Then draft Art 19 of the International Law Commission's (ILC) Draft Articles on State Responsibility distinguished between international 'crimes' and 'delicts'. In accordance with Art 19(2), an international crime resulted 'from the breach by a State of an international obligation so essential for the protection of fundamental

41 SC Res 678 (29 November 1990).

42 European Union implementation of petroleum embargo, 1999 OJ L108/1; freezing of Yugoslav funds abroad and bar of future investment in Serbia, Council Regulation 1294/1999, 1999 OJ L153/63 and Council Decision 1999/424/CFSP, 1999 OJ L163/86, 26 June 1999.

43 See ICC Statute, Art 87(7).

44 See Chapter 2.

45 See Chapter 7.

interests of the international community that its breach is recognised as a crime by that community as a whole'. Any other breach falling below this standard was classified as an international delict. The formulation found in draft Art 19, however, was not universally acceptable and was possibly unnecessary. Nonetheless, the idea that there do exist obligations owed to the international community as a whole and that serious breaches should attract special consequences was never doubted.⁴⁶

In August 2000, the ILC, prompted also by its new rapporteur, James Crawford, decided to delete draft Art 19, as well as any reference to the word 'crime', from the text. The Articles no longer differentiate between criminal and delictual responsibility, viewing, instead, a State's internationally wrongful acts as forming a single category of violations. While, as explained, the problematic notion of 'international State crime' was deleted, it was recognised that a State may be liable for acts breaching peremptory norms (*jus cogens*), as well as obligations owed to the international community as a whole (*erga omnes*).

State responsibility in no way precludes individual responsibility, but, if the ILC Articles are to have any real significance, it is imperative that additional consequences flow from the serious breach of community obligations. In its last reading, the Commission favoured the idea of proportionate damages in accordance with the gravity of the offence. Such damages would be sought by the victim State, or in the absence of such a State, by any other State acting on behalf of and in the interests of the individual victims of the breach.⁴⁷ Moreover, the Commission's draft endorses, under strict circumstances, the possibility of countermeasures. Article 54 constitutes a compromisory balance between the reservations about collective countermeasures and the revulsion against turning a blind eye to gross breaches, especially human rights breaches.⁴⁸ This provision limits such countermeasures to those which are taken in response to serious and manifest breaches of obligations to the international community, and obliges participating States to co-operate in order to ensure that the principle of proportionality is observed.⁴⁹

Although the debate on the international criminality of States seems to have ended as far as the ILC is concerned, many still argue that the regime contained in former draft Art 19 answers an indisputable need, pointing out, however, that it was the legal regimes of the envisaged crimes that were debatable.⁵⁰ The new regime contained in the adopted Articles strikes a right balance between the need to formulate a realistic framework for enforcement of *jus cogens* and *erga omnes* obligations, while at the same time rendering the text more accessible to States that would otherwise have objections to the definitional uncertainty and scope of draft Art 19.

46 J Crawford, 'Revising the Draft Articles on State Responsibility', 10 *EJIL* (1999), 435.

47 J Crawford *et al.*, 'The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading', 94 *AJIL* (2000), 660, p 673.

48 See C Antonopoulos, *The Unilateral Use of Force by States in International Law*, 1997, Athens: Sakkoulas.

49 *Op cit*, Crawford *et al.*, note 47, p 674.

50 A Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *EJIL* (1999), 425.

1.6 INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS

Bassiouni convincingly argues that the last stage in the development of a rights regime is the 'criminalisation' stage.⁵¹ It is there that the shared values contained in that particular right are further protected by the promulgation of penal proscriptions. This is true of all rights. The whole concept of human rights was premised on the notion that the State is the violator, although it is not infrequent for private individuals to commit depredations. The prohibitions contained in human rights treaties are addressed to States and are of two types: the first involves a negative obligation, requiring that State officials or agents thereof be prevented from violating human rights (such as torture and apartheid); the second type involves a negative obligation, requiring States to ensure that the rights guaranteed are not violated, or in any other way suppressed by entities beyond the public domain (such as slavery and terrorist offences against the person). On this basis, it may reasonably be argued that the promulgation of a right at the international level entails the obligation to criminalise at the domestic level. For example, the right to be free from involuntary servitude⁵² would be meaningless unless implementing legislation, among other measures, effectively penalised and suppressed all forms of slavery—although slavery is explicitly criminalised by a plethora of international conventions. Many offences that were traditionally attributable to State agents, such as crimes against humanity and war crimes, are at present also attributable to non-State entities, in particular paramilitary organisations,⁵³ while other international offences that can only be perpetrated by private actors, such as organised crime, have not subsided. Although private individuals bear criminal liability for committing international offences, they cannot assume international responsibility for violating international human rights, as the obligations arising from this legal regime are addressed exclusively to States. Despite this observation, a number of States have been supporting the idea that non-State entities are responsible for the 'destruction' of human rights, especially where acts of terrorism are attributed to national liberation or other guerrilla movements.⁵⁴ Such a discourse can only have adverse effects on the human rights movement, since it helps certain States that frequently violate human rights to shift global attention from their obligations and legitimately deny the enjoyment of rights, especially the right to self-determination.⁵⁵

Additionally, as will be evident throughout this book, the rights of the accused should prevail above all other considerations. Fundamental procedural and judicial guarantees, such as the right to a fair trial within a reasonable time, the prohibition

51 CM Bassiouni, 'International Criminal Law and Human Rights', 9 *Yale Journal of World Public Order* (1982), 193.

52 International Covenant on Civil and Political Rights, Art 8(1), (2), 999 UNTS 171.

53 ILC report, *Draft Code of Crimes Against the Peace and Security of Mankind*, UN Doc A/51/10 (1996) Supp No 10, p 94; in *ICTR Prosecutor v Kayishema and Ruzindana*, Judgment (21 May 1999), Case No ICTR-95-1-T, para 125, the ICTR convicted the accused Ruzindana, a local businessman, of crimes against humanity because he partook in the overall Hutu extremist policy to exterminate the minority Tutsis; see also *ICTY Prosecutor v Karadzic and Mladic*, r 61 Decision (11 July 1996), Case Nos IT-95-5-R61 and IT-95-18-R61, 108 ILR 86, paras 60–64.

54 GA Res 48/122 (20 December 1993); GA Res 49/185 (23 December 1994); GA Res 50/186 (22 December 1995); GA Res 51/210 (17 December 1996); GA Res 52/133 (27 February 1997).

55 See Chapter 2.

of retroactive legislation, the observation of the doctrine *ne bis in idem*, and others, have matured as general principles of law, or generally accepted custom and have found their way into the Statutes of all contemporary international criminal tribunals.⁵⁶ The same set of principles should also guide domestic criminal proceedings on the basis at least of their customary force, which are not to be dismissed lightly under the guise of emergency measures, as occurs all too often with terrorist-related offences. In many countries, so called domestic terrorism constitutes a pretext for suspending democracy and civil liberties and is a solid excuse for engaging in widespread curtailment and violation of fundamental freedoms. On the basis of the aforementioned, the reader will come to realise that the international criminal process is inextricably linked with the development and application of human rights.

56 ICTY Statute, Arts 10, 20 and 21, 32 ILM (1993), 1159.

TERRORISM

2.1 INTRODUCTION

The term 'terrorism' is commonly and widely used in everyday parlance with varying political and criminal connotations,¹ but at the same time it remains a designation which is elusive and one that has never been singly defined under international law,² at least at the global level. The first ever international attempt at codification was made in 1937 through the League of Nations by the adoption of a Convention for the Prevention and Punishment of Terrorism.³ Article 1(2) of that Convention, which required merely three ratifications to come into force, but received only one and was subsequently abandoned, defined:

...acts of terrorism [as] criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or groups of persons or the general public.⁴

Such a definition does not accurately describe a criminal act of terrorism as distinct from a common crime and leaves a wide margin of discretion as to the specific *mens rea* of a terrorist offence, that is, the creation of a state of terror. What is further problematic, and more so in 1937, was determining when an otherwise criminal offence is deemed to have been committed for a political purpose and not in the context of a purely criminal enterprise. Since, in the majority of countries, the characterisation of a criminal offence as a political one removes personal culpability, the so called 'political offence exception' is therefore of seminal importance.⁵ The distinction between political and non-political offences was more difficult in the past than at present, exemplifying the tension and variety of opinion in international relations, resulting in a seeming impossibility of agreement on politically sensitive issues.

The regulation of terrorism in international law has been shaped by terrorist events, whose force and impact in certain periods of world history outraged the international community, prompting its members to conclude subject specific anti-terrorist agreements. Events of this nature were initially the alarming number of incidents regarding seizure or interference with civil aviation in the 1960s and 1970s by private individuals, proffering either financial or political demands. This led to the adoption

1 'Tibetan Leader Accused of Terrorism' (1999) *The Times*, 23 October, where China accused the Dalai Lama of masterminding several explosions and assassinations in Tibet.

2 See generally A Evans and J Murphy, *Legal Aspects of International Terrorism*, 1978, Lexington, Mass Heath: Teakfield; MT Franck and BB Lockwood, 'Preliminary Thoughts Towards an International Convention on Terrorism', 68 *AJIL* (1974), 69.

3 (1938) 19 *LNOJ* 23.

4 See A Cassese, 'The International Community's Legal Response to Terrorism', 38 *ICLQ* (1989), 589, p 591.

5 CM Bassiouni (ed), *International Terrorism and Political Crimes*, 1975, Springfield: Thomas.

of three distinct international treaties: the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft;⁶ the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft;⁷ and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.⁸

The lack of a single definition has resulted in a thematic consideration and codification of criminal acts deemed to be terrorist by the international community.⁹ This is clearly exemplified by the various subject specific conventions relating to hijacking, hostage taking, bombings, financing of terrorist operations and others. This thematic approach is still the preferred route in concluding counter-terrorism treaties among States,¹⁰ with organs of international organisations increasingly taking an active part in reinforcing and crystallising those rules that are common to all these treaties.¹¹

Besides the issue of a single definition of terrorism and the determination of political crimes, other related problem areas have arisen, such as the relationship between terrorism and human rights and that between national liberation movements and terrorist violence. A thorough examination of these issues is necessarily dependent on the recognition and application of certain *jus cogens* norms, especially those emanating from the realm of international human rights law. Furthermore, one should not overlook contemporary forms of terrorist activity, beyond the private domain, namely, the involvement and support of States, or agencies thereof, to persons or organisations involved in terrorism. Such 'State sponsored terrorism' has resulted in the promulgation in some jurisdictions of laws sanctioning the culprit State both internally and extraterritorially¹² Finally, it has been observed, especially by the United Nations (UN), that terrorist activity exhibits in many cases a link with organised crime,¹³ even though it should be acknowledged that, whatever its manifestation, terrorism always involves some kind of political element, whilst organised crime does not.

Following the terrorist attacks of 11 September 2001 against the US, and subsequent related terrorist activity through the attempted use of chemical and biological agents, the use of the mail, as well as terrorist bombings against tourist resorts, some States have taken measures to adopt legislation that either departs from human rights standards or disregards fundamental principles of international law, such as that relating to the use of force. In this chapter we argue that the vast majority of States

6 2 ILM (1963), 1042.

7 860 UNTS 105; 10 ILM (1971), 133.

8 974 UNTS 177; 10 ILM (1971), 1151.

9 In *Tel-Oren v Libyan Arab Republic* 726 F 2d 795 (1984), where an action for tort against an alleged terrorist attack on a bus in Israel was dismissed, Edward J noted the lack of international consensus on terrorism and stated that, besides those acts which are already prohibited by international conventions, no other terrorist action can be regarded as a crime under international law.

10 1998 UN Convention for the Suppression of Terrorist Bombings 37 ILM (1998), 249, and 2000 UN Convention for the Suppression of the Financing of Terrorism 39 ILM (2000), 270.

11 See, eg, GA Res 49/60 (1994).

12 US Anti-Terrorism and Effective Death Penalty Act 1996, 28 USC § 1605(a)(7); reprinted also in 36 ILM (1997), 759.

13 Resolution of the UN Commission for the Prevention of Crime and Criminal Justice, Ninth Cairo Congress on the Prevention of Crime and Treatment of Offenders, UN Doc A/CONF 169/16 (12 May 1995), p 17; see also 10th Vienna Congress, UN Doc A/CONF 187/4/Rev 3 (15 April 2000), p 4, adopting the Vienna Declaration on Crime and Justice.

agree that there is no special need to depart from human rights standards or fundamental principles of international law. On the contrary, legality at all levels should be fortified.

2.2 THE THEMATIC APPROACH IN INTERNATIONAL LAW

Following an attack against Israeli athletes during the 1972 Munich Olympic Games, the General Assembly of the UN commenced discussions on a US draft treaty proposal for the prevention and suppression of certain acts of international terrorism. This proposal was outvoted by developing and communist countries which, with the urging of Syria, desired to see the adoption of a convention containing a single definition of terrorism. Western States argued that a general definition would not only be impossible to obtain, but would further serve the purposes of certain organisations, such as the Palestine Liberation Organisation (PLO), which would try to distinguish between terrorism and national liberation movements in order to further their causes. Moreover, it was feared by the West that a wide embracing definition would result in subsuming Israel under the rubric of State terrorism. Nonetheless, a compromise was reached and an Ad Hoc Committee was established by the General Assembly under Resolution 3034, adopted on 18 December 1972, to examine the matter. The Committee met three times between 1972 and 1979. During this time, developing nations argued that terrorism should be viewed from its root causes, such as racism, colonialism, occupation and apartheid, and be differentiated from action undertaken by national liberation movements. Nothing concrete emerged from these discussions, as Western States vociferously opposed the above proposals. From 1979 onwards, it was the Sixth (Legal) Committee of the General Assembly that became the forum for discussions on terrorism and, since 1985, the Syrian proposal has either been raised in brief or abandoned from the Committee's agenda. Between 1972 and 1989 the General Assembly, upon request of the then Secretary General Kurt Waldheim, had been discussing the issue of terrorism on an annual basis under the title 'Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardises Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes'. The title of the series is significant because it underpins its Arab and developing world sponsorship, and because it places emphasis on the underlying causes of terrorism, a taboo subject in current legal and political discourse. In recent years, however, there have been renewed discussions on the drafting of a comprehensive convention on terrorism under the aegis of the General Assembly; this topic is currently under discussion.

The only anti-terrorist convention that does not follow a purely thematic approach is the 1976 European Convention on the Suppression of Terrorism.¹⁴ However, far from adopting a single definition, Art 1 of this European Convention enumerates all existing counter-terrorism treaties and reiterates the obligation of States parties not to characterise the acts therein as political offences for the purposes of extradition.

14 ETS 90; 15 ILM (1976), 1272.

As is evident, the adoption of a single definition on terrorism, just like Pandora's box, raises a variety of issues with substantial implications which most States are not prepared to discuss. The thematic route, despite current discussions on a single comprehensive convention, so far appears the only vehicle guaranteeing both international co-operation and relative consensus.

2.3 INTERNATIONAL TERRORISM IN NATIONAL STATUTES

The political sensitivities identified previously in the adoption of a single definition among States are naturally absent in domestic statutes.¹⁵ Where such statutes do not implement a State's subject specific contractual obligations into national law, they may, indeed, offer a general definition of terrorism. Section 1 of the UK Terrorism Act (TA) 2000 defines terrorism as the use or threat of action involving serious violence against a person, damage to property, endangering a person's life, creating a serious risk to public safety or health and seriously interfering with or disrupting an electronic system, where according to sub-s (1):

- (a) the use or threat is designed to influence the Government or to intimidate the public or a section of the public; and
- (b) the use or threat is made for the purpose of advancing a political, religious or ideological cause.¹⁶

Section 1 provides a general definition of terrorism, but this definition is operational only within the framework of the TA 2000 and other legislative enactments may deem it expedient to adopt thematic definitions depending on the situation they aim to regulate. The Act aims to consolidate the larger part of the relevant UK legislation, apart from subject specific anti-terrorist instruments and the Criminal Justice (Terrorism and Conspiracy) Act 1998, further managing to incorporate the 1998 UN Convention for the Suppression of Terrorist Bombings¹⁷ and the 2000 Terrorist Finance Convention.¹⁸ The Act is designed exclusively for offences committed abroad and against non-UK nationals,¹⁹ and recognises that terrorist operations cannot be the product of a single individual but require a structured organisation. In this manner, all offences described in the Act are presumed to be offences undertaken for the benefit of a terrorist organisation.²⁰ An organisation, through an order of the Secretary of State, is deemed to be 'concerned in terrorism' and subsequently placed on a special list, if its members have been found to commit, participate in, prepare, promote, encourage, or otherwise concern themselves in acts of terrorism.²¹

15 The Russian Federation's Federal Anti-Terrorism Act 1998 contains extensive provisions defining the main terms of relevance (terrorism, terrorist activity, offences of a terrorist nature, terrorist organisation, etc).

16 The Act revokes the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996.

17 TA 2000, ss 62 and 64.

18 *Ibid*, ss 63 and 64.

19 *Ibid*, s 1(4).

20 *Ibid*, s 1(5).

21 *Ibid*, s 3(4), (5).

UK courts have also been concerned with the effects for national security of terrorist activities perpetrated internally, but which are aimed at targets abroad. In *Secretary of State for the Home Department v Rehman*,²² the appellant was a member of an Islamic fundamentalist organisation, being its UK point of contact, and was involved in both the recruitment of British Moslems and fundraising on the group's behalf. The Court of Appeal, in interpreting s 15(3) of the Immigration Act 1971 which provided no right of appeal against a deportation order if this was conducive, *inter alia*, to UK national security, held that the promotion of terrorism against any State by an individual in the UK was capable of being a threat to UK national security. It further accepted that a person could be regarded as a danger to national security in the light of a case as a whole which was made against that person, even though it could not be proven to a high degree of probability that he or she had performed any individual act which would justify that conclusion.

US legislation is far more diverse and complex, due in large part to an increase in terrorist activities against US and US-affiliated targets from the 1970s onwards, as the USA consolidated its financial and political dominance in world affairs. In order to protect its interests abroad, and also convey a message that attacks against its nationals would not go unpunished, the US promulgated legislation with far reaching judicial and prescriptive extraterritorial jurisdiction. Likewise, it did not hesitate to use armed force of dubious legality against targets believed to be engaged in terrorist operations against US citizens. Hence, following the *Achille Lauro* incident where an American was murdered by a Palestinian splinter faction that had hijacked the Italian cruiser whilst in an Egyptian port, Congress passed § 1202 of the Omnibus Diplomatic Security and Anti-Terrorism Act 1986.²³ This Act criminalises all terrorist violence inflicted upon Americans abroad and allows for their prosecution in the USA, despite the fact that the USA had long maintained a policy of opposition to the application of criminal jurisdiction based on the passive personality principle.²⁴

Among the variety of terrorist legislation targeting terrorist violence with an international element, one notes with interest the Export Administration Act 1979.²⁵ Section 6(j) of this Act, obviously attesting to the political and military might of the US, empowers the Secretary of State to provide a list of countries which are determined to have repeatedly supported acts of international terrorism. On the basis of this list, Congress is justified in prescribing sanctions, such as the prohibition of military sales, as well as termination of financial aid and tax benefits.²⁶ As far as the author is aware, no other State employs a similar legislative instrument, directly naming other countries as sponsors of terrorism, but there does not exist any rule of international law prohibiting the US from acting in this way. Much like the UK TA 2000, the US Anti-Terrorism and Effective Death Penalty Act (AEDPA) 1996 confers upon the Secretary of State the power to designate 'foreign terrorist organizations'.²⁷

22 (2000) *The Times*, 31 May.

23 18 USC § 2331.

24 *Cutting* case, reported in IA Moore, *Moore's Digest of International Law*, 1906, p 228; see below pp 152–54.

25 50 USC § 2405.

26 Similarly, and on the basis, *inter alia*, of the Export Administration Act 1979, the Anti-Terrorism and Arms Export Amendments Act 1989, 22 USC § 2151, prohibits exports of military equipment to countries supporting international terrorism, as well as for other purposes.

27 28 USC § 1605(a)(7).

This power was used in 1997 in order to designate as such the People's Mojahedin Organisation of Iran, whose subsequent petition for judicial review of its designation was denied by the Court of Appeals.²⁸ As will be demonstrated further below, the AEDPA 1996, through amendment to the Foreign Sovereign Immunities Act 1976, allows for certain claims in tort against offending States.

As for criminal prosecution of terrorist acts, Paust *et al* rightly point out that 'while the United States has a full arsenal of anti-terrorism legal tools, to date there have been but a handful of judicial opinions concerning application of the various anti-terrorism statutes'.²⁹ The most influential attempt at prosecution on the basis of anti-terrorism statutes was the *Yunis* case.³⁰ Yunis was arrested after being lured to the open seas of the Mediterranean by the FBI with the promise of a drug deal, a few years after it was revealed that he was responsible for taking control of a Jordanian airliner in Beirut in 1985, which he subsequently forced to fly him and his accomplices to Tunis. Upon refusal by the local authorities to land the aircraft, Yunis returned to Beirut, where he released the passengers, among which there were two Americans, and then blew up the plane. The Court of Appeals upheld the District Court's conviction on the grounds of hostage taking,³¹ hijacking (air piracy)³² and conspiracy,³³ under the relevant US statutes which it found to be consistent with the 1979 Convention Against the Taking of Hostages³⁴ and the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.

Following the 11 September 2001 attacks against the US, the most significant piece of legislation that was adopted was the 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act' of 2001 (Patriot Act). Title III of the Patriot Act, the International Money Laundering Abatement and Anti-Terrorist Financing Act (the IMLA) of 2001 amended prior US anti-money laundering legislation as well as the 1970 Bank Secrecy Act. Among other things, it has extended the range of predicate crimes which give rise to money laundering offences, while the definition of 'specified unlawful activity' has been expanded to include terrorist-related offences such as smuggling or export control violations, unlawful importation of firearms, firearms trafficking and any felony violation of the Foreign Agents Registration Act 1938. The IMLA 2001 has also extended the jurisdictional scope of predicate offences, covering offences committed outside the US, where the US would be required by treaty to extradite the alleged offender or prosecute him where he was found to be within the US.³⁵

28 *People's Mojahedin Organisation of Iran v USA Dept of State* 38 ILM (1999), 1287; in a previous ruling in *Rein v Socialist People's Libyan Arab Jamahiriya* 38 ILM (1999), 447, the Second Circuit Court of Appeals found the AEDPA 1996 to be constitutional.

29 JJ Paust *et al*, *International Criminal Law: Cases and Materials*, 1996, Durham, NO. Carolina Academic Press, p 1212.

30 *USA v Yunis* (No 3), 924 F 2d 1086 (1991).

31 Hostage Taking Act 1984, 18 USC § 1203. Jurisdiction was based on the passive personality principle under § 1203(b)(1)(A).

32 Anti-Hijacking Act 1974, 49 USC App § 1472(n). The Court of Appeals held, rather surprisingly, that hijacking constituted a clear case of an international crime subject to universal jurisdiction. Reported in 88 ILR 176, p 182.

33 Conspiracy to Commit Offense or Defraud the United States, 18 USC § 371.

34 18 ILM (1979), 1460.

35 See Society for Advanced Legal Studies, *The Funding of Terror: The Legal Implications of the Financial War on Terror*, 2002, London: SALS, pp 68–72.

2.4 THE SPECIALISED ANTI-TERRORIST CONVENTIONS

2.4.1 Offences against civil aviation

The first international agreement to emerge on the subject was the 1963 Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft (Tokyo Convention).³⁶ Its application extends to any act, whether a recognised offence or not, which jeopardises the safety of an aircraft or 'of persons or property therein or which jeopardise[s] good order and discipline on board'.³⁷ Such acts become offences under the Tokyo Convention only if they are committed by a person on board an aircraft in flight or on the surface of the high seas.³⁸ An aircraft is considered to be 'in flight', for the purposes of the Tokyo Convention, 'from the moment when the power is applied for the purpose of take-off until the moment when the landing run ends'.³⁹ Although not clear from the wording of the Convention, an act taking place solely on the territory of one State does not substantiate an international offence under the scheme of the Convention. Similarly, the Convention does not apply to three types of public aircraft: military, custom and police.⁴⁰ Unlike other anti-terrorist treaties, the 1963 Tokyo Convention was not designed to address urgent problems, and was generally viewed as reflecting customary law; yet, it was frugally ratified by signatory States.⁴¹

The plethora of attacks against aircraft in the 1960s and the inadequate hortatory anti-hijacking provision contained in Art 11 of the 1963 Tokyo Convention rendered imperative the adoption of a new instrument which would not only elaborate the elements of the offence, but would moreover affirm and reinforce interstate mechanisms towards effective suppression and eradication.⁴² Since, at the time, airport security was not equipped with sophisticated detection machinery, nor was surveillance or other security safeguards high on the agenda of most national airport authorities, the majority of attacks against civil aviation took place by persons embarking an aircraft with weapons and seizing control of it when its external doors had closed.⁴³ This specific problem of aircraft hijacking was the focal point of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention). The 1970 Hague Convention deals exclusively with acts of international hijacking committed by persons on board an aircraft in flight.⁴⁴ The notion of an

36 See generally M Mendelsohn, 'In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention', 53 *Virginia Law Review* (1967), 509.

37 1963 Tokyo Convention, Art 1(1).

38 *Ibid*, Art 1(2). It is also required that the aircraft in question be registered in a contracting State.

39 *Ibid*, Art 1(3).

40 *Ibid*, Art 1(4).

41 E McWhinney, *Aerial Piracy and International Terrorism*, 1987, Dordrecht, Lancaster: Martinus Nijhoff, pp 39–40.

42 1963 Tokyo Convention, Art 16(2) noted that nothing in the Convention 'shall be deemed to create an obligation to grant extradition'.

43 See ICAO Resolutions A17–3 (1970), A17–4 (1970), A17–5 (1970) and A17–6 (1970), reprinted in YO Elagab, *International Law Documents Relating to Terrorism*, 1997, London: Cavendish Publishing, pp 443–45.

44 1970 Hague Convention, Art 1; in *Public Prosecutor v SHT 74 ILR 162*, the accused was charged with hijacking a British aircraft in flight from Beirut to London, forcing it to land in Amsterdam. The Dutch court applied the 1971 Dutch Penal Code, Art 385(a), which implemented the 1971 Montreal Convention, and which provides for the punishment of persons, 'who by force, threat thereof or intimidation seize or exercise control over an aircraft, and cause it to change course'.

aircraft 'in flight' is wider in the 1970 Hague Convention than in the 1963 Tokyo Convention, since its temporal application encompasses the period of time when all external doors are closed following embarkation until the moment any such door is opened for disembarkation.⁴⁵ The offence of aircraft hijacking under the 1970 Hague Convention is consummated by a person who:

- (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of [an] aircraft, or attempts to perform any such act; or
- b) is an accomplice of a person who performs or attempts to perform any such act.

The phrase 'any other form of intimidation' seems to be superfluous, since there can be no other form of unlawfully taking over an aircraft without the use or threat of force,⁴⁶ so it seems as though the drafters intended to cover every possible future situation, even if it was unknown to them at the time. It is possible, nonetheless, that seizure be perpetrated without use of force, through bribery or collaboration with the aircraft's pilots or cabin crew. An Australian proposal to include such non-forceful seizure in the 1970 Hague Convention was rejected by the Legal Committee of the International Civil Aviation Organisation (ICAO) by 25:7. Shubber argued in 1973 that a reasonable interpretation, compatible with the aim and purpose of the Convention requires a wide construction, one which would define non-forceful seizure as hijacking.⁴⁷ This inference seems to be arbitrary, especially in light of its previous rejection and the highly specialised nature of this and all other terrorist conventions, which cannot, accordingly, allow any room for interpretations of this kind.

For the purposes of the Hague Convention, the seizure must originate and be perpetrated by the principal from within the aircraft. Likewise, an accomplice falls within the ambit of the Convention only if such person provides assistance while on board the aircraft in flight. Accomplices whose participation in the offence takes place outside the aircraft are subject only to local criminal jurisdiction.⁴⁸ To meet the growing refusal of certain recalcitrant States to counter the aforementioned terrorist offences, the delegates to the 1978 Bonn Economic Summit issued a Joint Statement whereby they agreed to cease all incoming and outgoing flights to those countries that refused to extradite or prosecute hijackers and/or did not return illegally seized aircraft. It is worth noting that a joint US-Canadian draft sanctions treaty to the same effect was rejected by the Legal Committee of the ICAO in 1972.⁴⁹ The Bonn Declaration was subsequently enforced against Iran, Afghanistan and later Libya.⁵⁰

A very specific form of unlawful aircraft seizure is that of 'air piracy', as defined under Art 15 of the 1958 Geneva Convention on the High Seas⁵¹ and Art 101 of the 1982 UN Convention on the Law of the Sea (UNCLOS)⁵²—although the term is also

45 1970 Hague Convention, Art 3(1).

46 SShubber, 'Aircraft Hijacking under the Hague Convention 1970—A New Regime?', 22 *ICLQ* (1973), 687, p 691.

47 *Ibid*, pp 692–93.

48 *Ibid*, pp 704–05.

49 *Op cit*, McWhinney, note 41, pp 48–62.

50 See 1981 Ottawa Economic Summit (Point 3); 1986 Tokyo Economic Summit (Point 4).

51 450 UNTS 82.

52 Both UNCLOS, 21 *ILM* (1982), 1261, and the 1958 Convention reflect well established customary law; SShubber, 'Is Hijacking of Aircraft Piracy in International Law?', 43 *BYIL* (1968–69), 193.

used generally to describe offences under the three anti-terrorist civil aviation conventions. Unlike aerial hijacking under the Hague Convention, air piracy under UNCLOS involves an illegal act of violence, namely, an unlawful diversion to a destination, other than that envisaged in the target aircraft's original flight plan, and originating from outside the attacked aircraft—thus requiring an aircraft of assault—and occurring in a place outside the jurisdiction of any State. Although the Hague Convention obliges States parties to consider the offences described therein as extraditable offences,⁵³ in effect denying the culprits a political motive excuse, the application of this rule to 'air piracy' under UNCLOS would be problematic, since piracy exists only where the illegal act of violence was committed for private ends, thus excluding action undertaken on political grounds. One is therefore presented with the regulation of this issue by two distinct legal regimes: on the one hand, UNCLOS and, on the other, the anti-terrorist treaties. The former allows the invocation of a political motive, whereas the latter does not. Clearly, the two regimes are contradictory and there do not exist any discernible guidelines as to which should prevail. However, in light of the by now customary prohibition of unlawful interference with civil aviation, it is uncertain whether the illegal diversion of a civil aircraft, even for political purposes, would not amount to an international offence under UNCLOS.⁵⁴

With the signing of the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), the international community supplemented the legislative structure initialled by its two precursor conventions.⁵⁵ The aim of the 1971 Montreal Convention was to combat the scourge of attacks and other forms of aerial sabotage endangering the safety of civil aviation. Under Art 1, an offence is committed where a person unlawfully and intentionally:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
- (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which is likely to endanger its safety in flight; or
- (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of an aircraft in flight; or
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

The concept of an aircraft 'in flight' is identical to that contained in the 1970 Hague Convention,⁵⁶ while an aircraft is considered to be 'in service' from the beginning of

53 1970 Hague Convention, Art 8(1).

54 See, to this effect, Council of Europe Resolution 450 (1970) on Air Piracy, reprinted in *op cit*, Elagab, note 43, p 440.

55 CS Thomas and MI Kirby, 'Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation', 22 ICLQ (1973), 163.

56 1971 Montreal Convention, Art 2(a).

its pre-flight preparation until 24 hours after landing; the duration of an aircraft 'in service' cannot be shorter than that 'in flight'.⁵⁷ Besides this latter innovation and the various offences it covers, the 1971 Montreal Convention is similar to its Hague counterpart in all its other procedural provisions, that is, jurisdiction,⁵⁸ rendering proscribed offences extraditable, incorporation of *aut dedere aut judicare* principle, mutual legal assistance and other forms of interstate co-operation and the obligation to adopt implementing legislation. It is fair to say that, solely from the point of view of the offences stipulated by the Hague and Montreal Conventions combined, the 1963 Tokyo Convention has, in fact, but not in law, been superseded.

The enhancement of security services in airports worldwide since the early 1980s has made hijacking far less frequent than in previous years.⁵⁹ This has resulted, however, in an increase in remote controlled detonations using plastic explosives and has rendered the application of the 1971 Montreal Convention all the more relevant. Observation of the Montreal Convention without other combined efforts to prevent the production and distribution of plastic explosives would be futile. Hence, under the aegis of ICAO, a Convention on the Marking of Plastic Explosives for the Purpose of Detection was adopted in 1991,⁶⁰ which obliges States parties to introduce detection agents into explosive products, whether manufactured in that State or simply imported therein, in order to render such explosives detectable—this process is termed 'marking' of explosives.⁶¹

At the same time, the provisions of the 1971 Montreal Convention have been triggered by clandestine or confessed attacks against civil aircraft by State entities. The most notorious attack of the latter kind, which was subsequently admitted to by the culprit State, concerned the downing of Iranian Airbus Flight 655, on 3 July 1988, by two surface to air missiles launched from USS Vincennes, causing the death of the 290 passengers and crew. Iran brought the case to the International Court of Justice (ICJ), claiming the US had violated the 1971 Montreal Convention by refusing to prosecute or extradite those responsible.⁶² The US argued that the Convention was not applicable to acts committed by the armed forces of a State. The two parties finally resolved their dispute through a Settlement Agreement on 9 February 1996.⁶³ In another incident, North Korea was implicated in the destruction of a South Korean airliner on 29 November 1987. Although there was sufficient evidence demonstrating that a North Korean woman was responsible for the bombing,⁶⁴ that country did not

57 *Ibid*, Art 2(b).

58 See Chapter 7.

59 A supplementary Protocol to the Montreal Convention on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation was also agreed in 1988, reprinted in 27 ILM (1988), 627. Article II(1) criminalises unlawful and intentional acts of violence against persons at international airports which cause serious injury or death, as well as acts of destruction or serious damage to facilities of such airports, where such acts endanger or are likely to endanger safety at said airports.

60 30 ILM (1991), 721.

61 *Ibid*, Arts II, III and IV. The terms of the Convention do not apply to authorities performing military or police functions, unless they are used for purposes inconsistent with objectives of the Convention (Arts III(2) and IV(1)).

62 *Islamic Republic of Iran v USA*, Aerial Incident of 3 July 1988. Iran instituted proceedings on 17 May 1989. Text reprinted in 28 ILM (1989), 843.

63 Reprinted in 35 ILM (1996), 572. By an order of 22 February 1996, the ICJ struck the case off its docket: (1996) ICJ Reports 9.

assume responsibility for the incident, nor, of course, did it launch an investigation against the alleged offender.

One case that has attracted widespread public opinion has been the Lockerbie incident. On 21 December 1988, Pan Am flight 103A with direction from London to New York exploded above Lockerbie in Scotland, killing all its passengers and crew, as well as 11 unsuspecting Lockerbie residents from the falling debris. Three years later two Libyans were indicted in the US. Libya refused to extradite the accused, claiming it had investigated the case against them and had found no indication of criminal liability.⁶⁵ The case was, moreover, complicated by the fact that both the US and UK argued that the two men were Libyan agents ordered by the government of that country to sabotage the aircraft. From the point of view of its accusers, this meant that any Libyan prosecution or, indeed, criminal investigation was, thereafter, an exercise in futility. Continued intransigence through Libya's refusal to extradite prompted the Security Council to pass Resolution 731 on 21 January 1992, urging Libya to co-operate with the US and UK in establishing responsibility for the terrorist acts. Rather than complying with the Security Council's request, on 3 March 1992, Libya lodged two separate complaints against the two countries, claiming violation of Arts 5(2)–(3), 7 and 11(1) of the 1971 Montreal Convention and asked the Court to order provisional measures. Meanwhile, on 31 March 1992, and pre-empting the World Court's decision, the Security Council acting under Chapter VII of the UN Charter adopted Resolution 748 with which it demanded Libya extradite the two accused, denounce terrorism and, further, imposed a number of sanctions. On 14 April 1992, the ICJ ruled that under Arts 25 and 103 of the UN Charter, Security Council resolutions take precedence over all other treaty commitments, including Libya's claim for refusal to extradite under the Montreal Convention, which, as most of the judges determined, would have probably been in the right had it not been for Resolution 748.⁶⁶ Despite an ICJ ruling on 27 February 1998 finding jurisdiction over the merits of the dispute,⁶⁷ for the purposes of international criminal law the above cases exemplify the difficulties in the application of the 1971 Montreal Convention to situations of terrorist attacks involving States, which the Convention in question was not initially envisaged to cover. By 1998, the deadlock regarding the criminal prosecution of the two accused had been broken and an agreement was reached whereby a court established in The Netherlands and composed of Scottish judges

64 See European Parliament Resolution of 10 March 1988 on Terrorist Attacks on Civil Aviation, reprinted in *op cit*, Elagab, note 43, p 440.

65 See C Joyner and W Rothbaum, 'Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law', 14 *Michigan JIL* (1992–93), 643.

66 *Libya v UK, Libya v USA*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Provisional Measures), Order of 14 April 1992 (1992) ICJ Reports 3, p 114.

67 *Libya v UK, Libya v USA*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Preliminary Objections), Judgment of 27 February 1998 (1998) ICJ Reports 115; see F Beveridge, 'The Lockerbie Cases', 48 *ICLQ* (1999), 658; V Debbas-Gowland, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case', 88 *AJIL* (1994), 643; K Kaikobad, 'The Court, the Council and Interim Protection: A Commentary on the Lockerbie Order of 19 April 1992', 17 *Australian YIL* (1996), 87.

applying Scottish law would sit in trial of the two Libyans.⁶⁸ Whether due to the stringent and effective security measures at airports worldwide, enhanced interstate co-operation, or simply because air offences do not attract the attention of public opinion as in the past, air travel is now far safer. At the second meeting of its 156th Session, on 22 February 1999, the ICAO Council reported a sharp decline in the number of incidents of unlawful interference with international civil aviation.⁶⁹ The events of 11 September 2001 revealed the extent to which fundamentalist terror groups are prepared to employ civilian aircraft for terrorist action. Although this incident has no bearing on the legal effect of the various civil aviation treaties, the industry itself reviewed internal procedures and has restricted access to the pilots' cabin, among other measures.

2.4.2 Hostage taking and attacks against internationally protected persons

The practice of hostage taking for political ends, especially prevalent in the 1970s and 1980s among terrorist organisations active in the Middle East, Western Europe and South America,⁷⁰ has once again resurfaced in the territories of the former Soviet Union and in the various civil wars in South America. Under Art 1(1) of the 1979 International Convention Against the Taking of Hostages, the offence of taking hostages is committed by:

...any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.

As is evident, acts of hostage taking overlap with other counter-terrorist treaties. The provisions of the Convention are not applicable to purely internal situations of hostage taking, thus requiring at least one international element.⁷¹ The Convention, like all its other anti-terrorist predecessors, recognises the grave nature of the offence,⁷² and obliges States parties to define it as an extraditable crime under their domestic laws.⁷³ The Convention is inapplicable to situations involving armed conflicts, but,

68 Agreement between the Government of the Kingdom of The Netherlands and the Government of the UK of Great Britain and Northern Ireland, Concerning a Scottish Trial in The Netherlands, 18 September 1998, reprinted in 38 ILM (1999), 926.

69 Report of the Secretary General, *Measures to Eliminate International Terrorism*, UN Doc A/54/301 (3 September 1999), p 7.

70 SC Res 579 (18 December 1985), 618 (29 July 1988) and 638 (31 July 1989); Organisation of American States (OAS) GA Res 4(I-E 170) (30 June 1970); see also TH Sponsler, *international Kidnappings*, 5 *International Lawyer* (1970), 25.

71 1979 International Convention Against the Taking of Hostages, Art 13.

72 *Ibid*, Art 2.

73 *Ibid*, Art 10(1); likewise, all forms of unlawful detention constitute offences under the 1976 European Convention on the Suppression of Terrorism, Art 1(d), which the Member States are obliged to regard as extraditable.

in any event, hostage taking is prohibited in armed conflicts by both customary law and relevant conventions.⁷⁴

Although the 1979 Convention makes no provision regarding the handling of hostage situations once these have occurred, it requires parties to take all appropriate measures, such as to 'ease the situation of the hostage, in particular, to secure their release',⁷⁵ and subsequently return to them any object which the offender has obtained as a result of the offence.⁷⁶ Most States have adopted a policy of refusing to yield to terrorist demands,⁷⁷ a practice which is compatible with Art 3(1) of the Convention by discouraging an endless chain of abductions. Even non-yielding States are under an obligation not to abandon a hostage situation. To this end, both peaceful as well as forceful means are permitted and, in many cases, whether openly or secretly, mounting domestic political pressure forces States to concede to kidnappers' demands, as was the case with the US hostages in Iran during the 1979 crisis.⁷⁸

A more specialised international offence against the person is that formulated by the 1973 UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.⁷⁹ This Convention penalises what has been an ancient customary obligation to protect the person and property of diplomatic agents and other foreign public officials,⁸⁰ as was reaffirmed in the year long hostage incident involving 59 US diplomatic personnel in Iran.⁸¹ Article 1 of the Convention distinguishes two categories of internationally protected persons: first, Heads of State, Heads of Government or Foreign Affairs Ministers, whenever such persons are in a foreign State, as well as accompanying family members.⁸² This protection exists regardless of official capacity and extends under customary law only to immediate family members.⁸³ The second category includes representatives of States or intergovernmental organisations who are entitled to special protection under general international law; that is, diplomats, consuls,

74 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Arts 3(1)(b) and 34, 75 UNTS (1950) 287; *USA v List (Hostages case)* 8 LRTWC (1949), 34; see also SC Res 674 (29 October 1990), demanding, under the 1945 UN Charter, Chapter VII, that Iraq release all hostages in occupied Kuwait.

75 1979 International Convention Against the Taking of Hostages, Art 3(1).

76 *Ibid*, Art 3(2).

77 See US counter-terrorism policy statement, *op cit*, Paust *et al*, note 29, p 1176; the participating nations in the G8/Russia 1995 Ottawa Anti-terrorist Summit, agreed, *inter alia*, to deny demands from kidnappers.

78 The two countries negotiated an agreement whereby Iran was to release, *inter alia*, the hostages under the condition that the US unfreeze Iranian assets and an arbitral tribunal be established to settle individual claims for compensation arising from the 1979 coup. See *op cit*, Elagab, note 43, pp 615–49.

79 13 ILM (1974), 41.

80 1961 Vienna Convention on Diplomatic Relations, Arts 29, 30, 500 UNTS 95; 1971 OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Art 2, reprinted in 10 ILM (1971), 255, makes kidnapping, murder and other assaults against the life or integrity of internationally protected persons 'common crimes of international significance'. Therefore, unlike the 1973 Convention, the relevant offences contained in the 1971 OAS Convention are not considered international offences.

81 *USA v Iran (US Diplomatic and Consular Staff in Iran case)*, Judgment (24 May 1980), ICJ Reports 3.

82 1973 UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, Art 1(a).

83 CL Rozakis, *Terrorism and the Internationally Protected Persons in the Light of the ILC's Draft Code*, 23 ICLQ (1974), 32, p 43.

accredited officials of States and international organisations on official visits.⁸⁴ The offence is completed through the intentional commission, threat, attempt of or complicity in the murder, kidnapping, attack upon the person or liberty thereof, or a violent attack against the official premises, private accommodation, or transportation of internationally protected persons, likely to endanger their person or liberty.⁸⁵ Additionally, the accused must be aware of the protected status of the person when perpetrating the *actus reus* of the offence, hence a fatal road traffic accident does not necessarily fall within the scope of Art 2.⁸⁶

The rise in attacks against internationally protected persons accelerated concerted international efforts towards acknowledging the seriousness of the problem and taking measures to give effect to the 1973 Convention. The Venice Economic Summit Conference of 1980 contained a Statement on the Taking of Diplomatic Hostages (the Venice Statement), noting the duty of States to adopt appropriate policies and criminal legislation and refrain from taking a direct or indirect part in such acts. The Venice Statement was reaffirmed in the Ottawa Summit of 1981, which further addressed the resolve of participating States to take prompt action in cases of State support of related terrorist activities. Moreover, a reporting procedure was established by the General Assembly in 1980, urging Member States to submit reports on offences against protected persons, as well as the application of domestic laws and measures taken to effectively implement them.⁸⁷ This procedure was supplemented in 1987 by a request for more detailed information to be supplied to the Secretary General with regard to his *Annual Report* on the subject.⁸⁸

2.4.3 Terrorist bombings and nuclear terrorism

The Ad Hoc Committee on Terrorism established by the General Assembly in 1996⁸⁹ examined the drafting of three distinct treaties on specific issues of international terrorism: terrorist bombings, terrorist financing and nuclear terrorism. So far, only the first two have emerged as treaties, while the draft Convention on the Suppression of Nuclear Terrorism,⁹⁰ although largely agreed upon, has found its drafters divided on its scope provision. The issue of urban terrorist bombings was never placed on the international agenda before the end of the Cold War, because the vast majority of such attacks were committed within a single State by persons or groups that were nationals of that State. Countries also felt that such incidents were of purely domestic concern for an additional reason. They did not wish to trigger debate over the possible application of the laws of armed conflict in their battle against terrorist organisations,

84 In *R v Donyadideh and Others*, 101 ILR 259, 11 persons were charged with offences against representatives of Iran in Australia. The Australian Supreme Court convicted the culprits under that country's Internationally Protected Persons Act 1976, s 8(2) and (3), incorporating the relevant 1973 UN Convention, for offences against the liberty and damage to property of said officials; see also UK Internationally Protected Persons Act 1978, s 1.

85 1973 Convention, Art 2; see also 1976 European Convention on the Suppression of Terrorism, Art 1(c).

86 *Op cit*, Rozakis, note 83, pp 49–50.

87 GA Res 35/168 (15 December 1980).

88 GA Res 42/154 (7 December 1987), operative para 9.

89 GA Res 51/210 (17 December 1996) and affirmed by GA Res 53/108 (8 December 1998).

90 UN Doc A/C6/53/L4, Annex I (1998), draft Art 4.

subsequently giving rise to questions of self-determination. This was particularly the case with the provisional Irish Republican Army (IRA) in the UK and the Kurdistan Workers' Party (PKK) in Turkey. Such cases assumed an international element either when governmental forces acted clandestinely abroad,⁹¹ or the said States requested the extradition of alleged perpetrators apprehended elsewhere.⁹² This practice of branding groups as terrorist organisations and refusing to recognise the existence of a non-international armed conflict and combatant status vis-à-vis enemy belligerents, where the criteria were satisfied under common Art 3 of the 1949 Geneva Conventions,⁹³ resulted in appalling human rights abuses both for belligerents and civilian populations.⁹⁴

With the demise of communism and the concentration of politics and commerce in supra-national institutions, terrorist organisations began conducting urban warfare across borders, as restrictions in cross-border crossings were also declining in many parts of the world. Common interests, therefore, should preclude isolationist politics on issues of terrorism, unless these involve strictly domestic incidents without any international elements or repercussions. In 1998, the UN Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention) was adopted by the General Assembly of the UN. This instrument made it an offence to unlawfully and intentionally deliver, place, discharge or detonate an explosive or other lethal device in, into or against a place of public use, a State facility, a public transportation system or infrastructure facility, with intent to cause death or bodily injury, or extensive destruction, resulting or likely to result in major economic loss.⁹⁵

Both the terrorist bombings and financing conventions view terrorism as a series of pre-planned operations carried out by persons participating in multifaceted organisational webs, and oblige Member States to take specific measures in such a way as to curb terrorism from its roots. The 2000 UN Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), for example, establishes a regime of liability for legal entities, which might be criminal, civil or administrative in nature,⁹⁶ and requires that parties oblige financial and other institutions, which are involved in financial transactions, to identify usual or occasional customers and report suspicious transactions.⁹⁷ Furthermore, Art 8(1) of this Convention requires that Member States freeze and seize all proceeds and assets originating from or destined for terrorism and consider establishing mechanisms for compensating victims or their families from such forfeitures.⁹⁸ The obligation contained in this provision does not seem to apply to terrorist-related activity

91 *McCann v UK* (1996) 21 EHRR 97.

92 *Re Croissant* (1978) 74 ILR 505, Conseil d'Etat.

93 Common Art 3 is a norm of customary international law. See *Nicaragua v USA* (Military and Paramilitary Activities in and against Nicaragua) (Merits) (1986) ICJ Reports, para 218; affirmed in *ICTY Prosecutor v Tadić*, Decision on Interlocutory Appeal on Jurisdiction 105 ILR 453, para 98.

94 See E Yuksel, 'Cannibal Democracies, Theocratic Secularism: The Turkish Version', 7 *Cardozo J Int'l & Comp L* (1999), 423.

95 1998 Terrorist Bombings Convention, Art 2(1). It is also an offence to attempt (Art 2(2)), participate (Art 2(3)(a)), organise or direct (Art 2(3)(b)), or act in a common purpose (Art 2(3)(c)) to commit any of the offences contained in Art 2(1).

96 2000 Terrorist Financing Convention, Art 5(1).

97 *Ibid*, Art 18(1)(b).

98 *Ibid*, Art 8(4).

supported by a foreign State, as this would require radical amendment to domestic sovereign immunities legislation.⁹⁹ Building on a growing depoliticisation of terrorist-related activities, both conventions make it clear that no justification is to be provided under domestic law for the offences contemplated, regardless of political, philosophical, ideological, religious, or other motive involved.¹⁰⁰

Finally, with the growth of criminal organisations, the issue of nuclear terrorism has once again resurfaced. The 1979 Convention on the Physical Protection of Nuclear Material,¹⁰¹ an instrument indirectly related to terrorism, was adopted with a twofold objective: to establish levels of physical protection of nuclear material used for peaceful purposes while in international nuclear transport,¹⁰² and to provide for measures against unlawful acts (for example, the requirements that relate to making specified acts criminal offences under national law, to establish jurisdiction over those offences and prosecute or extradite alleged offenders) with respect to such material while in international transport, as well as in domestic use, storage and transport.¹⁰³ The drafting of a specialised Convention on the Suppression of Acts of Nuclear Terrorism by the Ad Hoc Committee of the General Assembly is aimed at being in conformity with existing anti-terrorist conventions, and although it is near completion, issues such as the exclusion or not of the activities of armed forces from its scope have so far hindered the adoption of a final text. The gravity of illicit trafficking in nuclear material has alarmed the International Atomic Energy Agency (IAEA) since the early 1990s. To this end, the IAEA's illicit trafficking database programme for incidents involving nuclear materials and other radioactive sources dates from August 1995, when the IAEA Secretariat invited governments to participate in its database programme and to identify points of contact for that purpose. As of 1 June 1999, the database contained information on 254 trafficking incidents that had been officially confirmed by co-operating States.¹⁰⁴

2.4.4 Terrorist financing and Security Council Resolution 1373 (2001)

Prior to the collapse of communism it was not uncommon for terrorist groups to be funded by certain States. This was achieved through direct funding or logistical support and by allowing or tolerating the use of their territory by such groups as a base for launching and planning illegal acts. The New World Order, following the end of the Cold War, created a vacuum with regard to State-financing, and thus terrorist groups turned increasingly to other means of self-preservation. Since the early 1990s the UN General Assembly had identified possible links between terrorism and organised crime.¹⁰⁵ The 2000 UN Convention Against Transnational Organized

99 The AEDPA 1996, 28 USC § 1605(a)(7), which amended the US FSIA 1976, is the only piece of national legislation that allows for claims in tort in cases of State sponsored terrorism.

100 1998 Terrorist Bombings Convention, Art 5, and 2000 Terrorist Financing Convention, Arts 6, 11, 13, 14.

101 18 ILM (1979), 1422.

102 1979 Convention on the Physical Protection of Nuclear Material, Arts 2 and 3.

103 *Ibid*, Arts 7–11.

104 *Op cit*, Report of the Secretary General, p 8.

Crime (CATOC)¹⁰⁶ exemplifies this connection between terrorism and organised crime, but despite the acknowledged and manifest links between the two,¹⁰⁷ the insertion of terrorist acts in the definition of organised crime was finally avoided. Nonetheless, some groups such as the Colombian FARC and the Taliban, who at the time sheltered Al-Qaeda in Afghanistan, were known to cultivate and traffic illicit narcotic substances.¹⁰⁸ In other instances, terrorists had formed alliances with organised criminal rings in order to conduct trafficking of arms, drugs and women, launder illicit proceeds and infiltrate legitimate banking and commercial markets. Council Resolution 1333 determined that proceeds from narcotics strengthened the Taliban's capacity in harbouring terrorists and imposed a sanctions regime.¹⁰⁹

In January 2000, the General Assembly of the UN opened for signature an International Convention for the Suppression of the Financing of Terrorism.¹¹⁰ This Convention makes it an offence to directly or indirectly, unlawfully and wilfully: provide or collect funds with the intention or knowledge they are used, in full or in part, to carry out acts described in the various anti-terrorist conventions; commit other criminal acts with the aim of intimidating a population; or compel a government to do or abstain from a certain act.¹¹¹ The Convention establishes a distinct offence of terrorist financing, which is constituted by 'directly or indirectly, unlawfully and wilfully provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part', in order to carry out an offence described in any one of the nine counter-terrorist treaties, or to commit any other violent act with the intent of intimidating a population or of compelling a government to act in a certain way.¹¹² While the criminalisation of funding of acts falling within the ambit of previous counter-terrorist treaties requires ratification of those treaties by the State concerned, that is not the case with regard to 'other violent intimidating acts', as described in sub-para 1(b). This wide definition may well encompass offences encountered in the nine counter-terrorist treaties. For example, the provision of financial assistance by an individual who is a national of country A, with the aim of kidnapping a Head of State, becomes an international offence only if country A has ratified both the 2000 Terrorist Financing Convention and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally

105 GA Res 49/60 (9 December 1994); the Vienna Declaration and Program of Action, adopted at the World Conference on Human Rights, emphasised that the linkage between terrorism and drug-trafficking aims at the 'destruction' of human rights and democracy, UN Doc A/CONF.157/23 (14–25 June 1993).

106 40 ILM (2001), 335.

107 Second session of the Ad Hoc Committee (8–12 March 1999), UN Doc A/AC.254/4 Rev.1 (10 February 1999).

108 SC Res 1214 (8 December 1998).

109 SC Res 1333 (19 December 2000).

110 GA Res 54/109 (25 February 2000); see V Morris and A Pronto, 'The Work of the Sixth Committee at the Fifty-Fourth Session of the UN General Assembly', 94 *AJIL* (2000), 582, p 585; see also EC Council Recommendation of 9 December 1999 on Co-operation in Combating the Financing of Terrorist Groups (OJ C373, 23 December 1999).

111 2000 Terrorist Financing Convention, Art 2(1). It is also an offence to participate in, organise or direct, act in a common purpose (Art 2(5)), or attempt (Art 2(4)) any of the offences described in Art 2(1).

112 Art 2(1)(a) and (b); Art 2(d) of the 1999 Convention of the Organisation of the Islamic Conference (OIC) on Combating International Terrorism Terrorist Convention, states, *inter alia*, that 'all forms of international crimes, including illegal trafficking in narcotics and human beings, money laundering, aimed at financing terrorist objectives shall be considered terrorist crimes'.

Protected Persons, Including Diplomatic Agents.¹¹³ The effect of sub-para (1)(b), however, is to establish such an act as an offence under the 2000 Terrorist Financing Convention, where it is understood that the kidnapping in question was either intended to intimidate the civilian population or compel a government to do or abstain from doing a certain act.¹¹⁴ As regards the definition of ‘financing’, it was pointed out during the deliberations in the Sixth Committee that, while the Convention focused on the financing of the most serious terrorist acts, all means of financing were covered, including both ‘unlawful’ means (such as racketeering) and ‘lawful’ means (such as private and public financing, financing provided by associations).¹¹⁵ The Convention obliges parties to take appropriate measures in order to identify, detect, freeze, or seize terrorist-related funds as well as the proceeds derived from such offences.¹¹⁶ A number of intergovernmental bodies, as well as domestic enforcement agencies have called or imposed stricter client identification on financial institutions, as well as an obligation to file Suspicious Transactions Reports (STRs). The so called ‘Know Your Client’ (KYC) principle, which has been derived from counter-money laundering procedures, requires that financial institutions verify in as much detail as possible all their clients, whether these are natural or legal persons.¹¹⁷

Following the 11 September 2001 terrorist attack in the US, the Security Council adopted Resolution 1373 on 28 September 2001. This establishes a general—that is, not specifically directed against Al-Qaeda and their associates—financial regime which: criminalises all activities falling within the remit of terrorist financing; obliges States to freeze all funds or financial assets of persons and entities that are directly or indirectly used to commit terrorist acts or that are owned and controlled by persons engaged in, or associated with, terrorism; obliges States to prevent their nationals (including private financial institutions) from making such funds available, thus imposing strict client detection measures, requirements relating to the filing of STRs, and subordination to other intergovernmental institutions in order to receive the names of designated terrorist organisations or individuals;¹¹⁸ and imposes substantive and procedural criminal law measures at the domestic level, including an obligation to co-operate in the acquisition of evidence for criminal proceedings.¹¹⁹ In order to implement and monitor the terms of the Resolution, the Council decided to establish a subsidiary organ, the Counter-Terrorism Committee.¹²⁰ Member States were obliged to report to the Committee, within 90 days, on the steps they had taken to implement

113 13 ILM (1979), 41.

114 Report of the Ad Hoc Committee established by GA Res 51/210 (1996), GAOR 54th Session, UN Doc A/54/37/Supp No 37 (5 May 1999), p 3.

115 *Ibid.*

116 2000 Terrorist Financing Convention, Art 8(1).

117 *Ibid.*, Art 18(1)(b)(ii) requires, with regard to legal persons, the following: proof of incorporation, including information concerning the customer’s name, legal form, address, directors, and provisions regulating the power to bind the entity. Sub-paragraph 1(b)(iv) further requires that ‘financial institutions maintain, for at least five years, all necessary records on transactions, both domestic or international’.

118 Operative para 1; although in practice this also includes national law enforcement authorities, such as the FBI, CIA and OFAC (Office of Foreign Assets Control).

119 Operative para 2.

120 Operative para 6.

the Resolution. By late May 2002 the Committee had received more than 150 reports from States,¹²¹ as well as reports from the Organisation for Security and Co-operation in Europe (OSCE)¹²² and the European Union.¹²³

In practical terms, both the 2000 Convention and Resolution 1373 must be construed in accordance with the findings and Recommendations of the OECD's Financial Action Task Force (FATF). The FATF had warned about the channelling of funds to terrorists from money laundering, underground remittance systems (*hawala*), disguised charities and trusts. Most of these activities are difficult to detect, and so it is the duty of financial or other institutions to implement appropriate monitoring mechanisms (such as KYC and the filing of STRs). At an extraordinary plenary, held on 29 and 30 October 2001, the FATF expanded its mandate to encompass terrorist financing—apart from money laundering. During the plenary it was agreed that the FATF would issue Special Recommendations on Terrorist Financing. These commit members to: ratify counter-terrorism treaties; criminalise terrorist financing; freeze and confiscate terrorist assets; report suspicious transactions; provide related assistance to other countries; impose anti-money laundering requirements on alternative remittance systems; strengthen customer identification measures in international and domestic wire transfers; ensure that non-profit organisations cannot be misused to finance terrorism.¹²⁴ The Special Recommendations, which although not binding are of extremely persuasive value, were followed by an Action Plan that included the completion of a self-assessment exercise by all FATF members. This included: the issuance of additional FATF Guidance for Financial Institutions in Detecting Terrorist Financing;¹²⁵ the identification of and measures to be taken vis-à-vis jurisdictions that lack appropriate measures; regular publication of frozen terrorist assets; provision of technical assistance to non-FATF members.

2.4.5 Establishment of regional mechanisms

The thematic approach to terrorism facilitates the international community's efforts in finding means to curtail its impact on regional and global stability. If this thematic approach adequately describes a definitional consensus among nations, the key feature of anti-terrorist treaties is the establishment of a framework of international co-operation, in a way that principles, such as *aut dedere aut judicare*, promulgation of criminal laws and prevention, exchange of information and mutual legal assistance, are reiterated in every instrument.¹²⁶ At the same time, regional anti-terrorist treaties are born out of regional needs and their aim is to consolidate and strengthen co-operation among the States concerned. Thus, following its 1996 Declaration and Plan of Action of Lima to Prevent, Combat and Eliminate Terrorism,

121 Available at www.un.org/docs/sc/committees/1373/reptse.htm.

122 UN Doc S/2002/34 (8 January 2002).

123 UN Doc S/2001/1297 (28 December 2001).

124 FATF Special Recommendations on Terrorist Financing (31 October 2001); see I Bantekas, 'The International Law of Terrorist Financing', 97 *ASIL* (2003) 1.

125 FATF Guidance for Financial Institutions in Detecting Terrorist Financing (24 April 2002), pp 2–3.

126 See JF Murphy, 'The Future of Multilateralism and Efforts to Combat International Terrorism', 25 *Columbia J Trans L* (1986), 35.

the General Assembly of the Organisation of American States adopted Resolution 1650 (1999), whereby it decided to establish the Inter-American Committee Against Terrorism (CICTE), whose purpose is to develop sufficient co-operation in order to prevent and combat terrorism.¹²⁷ Similarly, the Member States to the South Asian Association for Regional Co-operation (SAARC) adopted in 1987 their Regional Convention on Suppression of Terrorism, promoting the mechanisms existing in the various multilateral treaties, and convenience more effective co-operation through the establishment of a supervisory organ. This organ is the SAARC Terrorist Offences Monitoring Desk, created in 1992, which is mandated to collate, analyse and disseminate information on terrorist incidents, tactics, etc. Likewise, The League of Arab States adopted in 1998 the Arab Anti-Terrorism Agreement, which contains 43 clauses, organising trial and extradition procedures for those accused and convicted in terrorist incidents. It also deals with co-ordination between the security services in the Arab countries and exchange of information, as well as the adoption of measures to prevent infiltration across borders.

Of particular interest is the legal framework created in the context of the European Union. Under Arts K1–K9 of the 1992 Treaty on European Union (TEU),¹²⁸ terrorism was defined as an issue of ‘common interest’. An intergovernmental body, the Executive Committee, was further established, which controls and co-ordinates these points of common interest (unofficially named ‘K4 Committee’).¹²⁹ The 1998 Amsterdam Treaty amending the TEU¹³⁰ has retained terrorism in the Third Pillar of the EU (Title IV), promoting it from a point of common interest to an ‘objective’ of the EU through the adoption of common action between national law enforcement agencies, Europol and judicial authorities, as well as through approximation of criminal laws.¹³¹ Arts K2–K6 specify a detailed platform of action in order to achieve the objectives of Art K1, all of which are to be co-ordinated by a Co-ordinating Committee.¹³² Interestingly, the European Court of Justice (ECJ) is given jurisdiction over some aspects of Title IV, but this is subject to special consent by the Member States of the EU.¹³³ Following the 11 September 2001 attacks against the US, at its extraordinary meeting on 21 September 2001, the European Council declared that terrorism is a real challenge to the world and to Europe and that the fight against it would be a priority of the EU. On 27 December 2001 the Council adopted Common Position 931, which obliged both the EU and Member States to freeze the funds and financial assets of named terrorists and organisations, as well as enhance police and

127 OAS GA Res 1650 (XXIX–0/99), operative para 3.

128 31 ILM (1992), 247.

129 Joint Action 97/12/JHA (20 December 1996), adopted by the Council on the basis of the 1992 TEU, Art K3, established a programme for enhancing law enforcement co-operation, known as Oisin (OJ L7, 10 January 1997); Joint Action 96/610/JHA (15 October 1996) established a Directory of specialised counter-terrorist competences, skills and expertise in the Member States of the EU (OJ L273, 25 October 1996); Joint Action 97/289 /CFSP (29 April 1997) created an assistance programme to support the Palestinian Authority in its efforts to counter terrorist activities emanating from territories under its control (OJ L120, 12 April 1997).

130 37 ILM (1998), 56.

131 1998 Amsterdam Treaty, Art K1.

132 *Ibid.*, Art K8

133 *Ibid.*, Art K7.

judicial co-operation, affording each other the 'widest possible assistance in preventing and combating terrorist acts'.¹³⁴ Article 1(2) of the Common Position provided a definition of 'persons' and 'groups' involved in terrorism as: 'persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts', whereas terrorist groups or entities are those 'owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities'. Article 3 of the Common Position further contained a list of acts constituting 'terrorist acts'. While the majority of these can be traced in the global anti-terrorist conventions, sub-para iii(h), relating to 'interference with or disrupting the supply of water power or any other fundamental natural resource, the effect of which is to endanger human life', introduces something novel. The annexed list contained names and organisations that were not confined to Islamic militancy or Al-Qaeda, but include also other European terrorist organisations, such as ETA and 17 November.¹³⁵

Some commitments have been agreed to in the context of the OSCE. Given the background of this organisation, it is not surprising that its members have described terrorism as a threat to security, democracy, human rights and friendly relations and have consistently called, since its 1983 Madrid Conference, for closer interstate co-operation, non-encouragement of terrorist organisations and enforcement of appropriate sanctions. However, no mechanism has been established under the OSCE to deal with terrorism.

Finally, there is growing concern at the risk that computer networks and electronic information may also be used for committing terrorist offences. At the international level the matter has not been resolved, especially since there is no definition of cyberterrorism and most of the systems under possible attack are classified. It is therefore, at least for the moment, an issue of domestic enforcement, although the requirements imposed on banks and other financial institutions, as already explained, involve some kind of protection of sensitive financial data. In the US, a Critical Infrastructure Protection Order was adopted in 1996,¹³⁶ which recognised that certain infrastructures, both public and private, are so vital that their incapacity or destruction would have a debilitating impact on the defence or economic security of the United States. The Order established a Commission of Critical Infrastructure Protection and recognised the potential of cyber-warfare. Two tools have been promoted as a means of protection in recent years: encryption and the use of firewalls. The latter involves a filtering system which serves to define the services and access permitted to each user.

134 2001/931/CFSP, 27 December 2001 (OJ L 344/93), Art 4.

135 The list of designated entities and persons has been periodically updated. Among the many measures adopted since by the EU, of particular importance is Council Decision 2002/996/JHA of 28 November 2002 (OJ L 349/1), 24 December 2002, which established a mechanism for evaluating the various EU legal systems and their implementation at national level in the fight against terrorism.

136 Executive Order (EO) 13010 (15 July 1996).

2.5 STATE SPONSORED TERRORISM

Too many political intricacies have so far obstructed the attainment of a single definition of terrorism; it is of no wonder therefore that there does not exist a single provision in any of the aforementioned anti-terrorist treaties setting out the criteria for branding a State as such. Starting in the late 1960s, the West was disinclined to accept claims made by developing and Arab countries to the effect that Israel was a 'terrorist State', believing that only individuals or groups could be characterised as terrorists. However, since the 1980s, and with evidence that some countries were behind terrorist activities, this stance was altered, describing such acts as 'State sponsored terrorism'. The main concern in these cases should be the degree of support actually enjoyed; however, both direct and indirect assistance are prohibited and render a State liable.¹³⁷ This can include: the deployment of State agents or other persons controlled by that State; groups or persons independent from the State, but in receipt of financial aid or weapons, or only of logistic support; and persons or groups receiving no active support, but in respect of which a State acquiesces in their use of its territory.¹³⁸ When a State renders any form of support from the aforementioned list to terrorist armed activities, it does not only violate the *jus cogens* principle of non-intervention,¹³⁹ it further risks retaliatory action from the target State. Indeed, in an extreme case of a State being equated with a terrorist organisation,¹⁴⁰ and whose actions amount to an armed attack, the target State is entitled to reply with force against the aggressor State in order to repel the attack.¹⁴¹ However, since the criteria for determining both an armed attack and an agency require military operations and support of a very high threshold, it is doubtful that the acts of a terrorist organisation, even if an agency relationship could be established, could ever amount to an armed attack.

This latter view has vehemently been objected to by the US and Israel, the former, since the 1980s, and the latter, from the 1970s, arguing that terrorist attacks justify the use of force in order to defend, but also for pre-emptive reasons.¹⁴² On 7 August 1998, US embassies in Nairobi and Dar-es-Salam were devastated by bomb blasts that killed approximately 300 people, including 12 American nationals. Investigations led US authorities to suspect the involvement of Al-Qaeda that was at the time based in Afghanistan. In retaliation, on 20 August 1998, the US launched 79 Tomahawk Cruise missiles against paramilitary camps in Afghanistan and a Sudanese pharmaceutical plant in Sudan, claiming the latter produced chemical weapons. In his report, President Clinton stated that the US acted in the exercise of its right of self-defence under Art 51 of the 1945 UN Charter, pointing out that the strikes were

137 See GA Res 49/60 (9 December 1994).

138 *Op cit*, Cassese, note 4, p 598.

139 *Nicaragua v USA* (Military and Paramilitary Activities in and against Nicaragua) (Merits) (1986) ICI Reports, para 205; ILC Draft Code of Crimes Against the Peace and Security of Mankind, draft Art 14, reprinted in 18 *HRLJ* (1997), 96.

140 For the requirements of an 'agency' relationship, see *ibid*, *Nicaragua* judgment, para 108.

141 1945 UN Charter, Art 51.

142 *Op cit*, Cassese, note 4, pp 600, 603; see Israeli claim of pre-emptive self-defence regarding the interception of a Libyan civil aircraft in 1986, UN Doc S/PV 2655/Corr 1 (18 February 1986); see US Presidential Directives 62 (on combating terrorism), 22 May 1998, and 63 (on critical infrastructure protection), 22 May 1998.

necessary and proportionate to an imminent terrorist threat, further arguing that they were intended to prevent and deter future attacks.¹⁴³ The day following the 11 September 2001 attack against the US by Al-Qaeda, the Security Council adopted Resolution 1368, which made reference to the inherent right of self-defence. The connotation was adamantly clear, since the Resolution was adopted on the basis of a terrorist attack; thus, its drafters adhered to the view that the particular terrorist attack was tantamount to an armed attack, therefore justifying recourse to armed force. Alternatively, however, one can take a counter-restrictionist stance and consider the Resolution to imply that it is irrelevant whether or not the terrorist act amounted to an armed attack, as pre-Charter law allows the use of retaliatory force under such circumstances. This is highly unlikely, and in any event is a dangerous path to follow.

The Security Council itself has condemned the involvement of States in certain incidents related to terrorism,¹⁴⁴ but even where, as in the Lockerbie incident, it acted under Chapter VII of the 1945 UN Charter, it has never used the term 'State sponsor' of terrorism, preferring instead to demand that culprit States desist from all forms of terrorist action and all assistance to terrorist groups.¹⁴⁵ The inclusion of terrorism within the ambit of Chapter VII necessarily equates some forms of terrorist activity with either a threat to the peace, breach of the peace or an act of aggression, making them theoretically susceptible to collective enforcement action.¹⁴⁶ Some commentators have argued that terrorist action of this kind is tantamount to 'low intensity aggression',¹⁴⁷ but on a level of scale and effect only a sizeable terrorist army that is deployed and equipped through a State is capable of launching an armed attack.

In light of controversies and ambiguities highlighted, it is highly unlikely whether cases involving direct or indirect State support of terrorism can be solved through the mechanisms envisaged in anti-terrorist treaties. In contesting the existence of the dispute in the *Lockerbie* case, the US and UK argued that the element of State sponsored terrorism in that case placed the situation outside the framework of the 1971 Montreal Convention.¹⁴⁸ Indeed, these conventions were premised on interstate co-operation under the assumption that terrorists acted against the interests of all States. The involvement of States in terrorist attacks on the territory of other States triggers, instead, the application of Art 2(4) of the 1945 UN Charter and international humanitarian law.

In its fight against State sponsored terrorism, the US Congress amended the 1976 Foreign Sovereign Immunities Act (FSIA) in 1996 through the adoption of the AEDPA, permitting civil suits for compensatory and punitive damages against a foreign State, or its State agency or instrumentality that either committed the terrorist act or provided aid to the culprit group.¹⁴⁹ A terrorist act includes torture, extra-judicial

143 SD Murphy, 'Contemporary Practice of the US Relating to International Law', 93 *AJIL* (1999), 161.

144 Eg, SC Res 461 (31 December 1979); SC Res 731 (21 January 1992); SC Res 1044 (31 January 1996).

145 SC Res 748 (31 March 1992); SC Res 883 (11 November 1993); SC Res 1054 (26 April 1996).

146 1945 UN Charter, Art 39.

147 See SS Evans, *The Lockerbie Incident Cases: Libyan Sponsored Terrorism, Judicial Review and the Political Question Doctrine*, 18 *Maryland JIL & Trade* (1994), 20, p 70.

148 *Op cit*, Beveridge, note 67, p 660.

149 AEPDA 1996, 28 USC §§ 1603(b) and 1605(a)(7).

killing, aircraft sabotage, and hostage taking, provided that the victim is a US national and the offence occurs outside the US. The terrorism exception to the FSIA 1976 applies only vis-à-vis States that are designated by the State Department as State sponsors of terrorism.¹⁵⁰ Significantly, the AEDPA 1996 permits the claimant to execute a judgment against State owned property that is used for a commercial activity in the USA, even if the property cannot be connected to the terrorist act.¹⁵¹ Successful suits, but with no money collected at the time of writing, were brought under the Act against Cuba¹⁵² and Iran,¹⁵³ while a case against Libya is pending.¹⁵⁴ Nonetheless, the State Department has objected to the passing of AEDPA by Congress, believing that the terrorism exception to immunity is incompatible with US treaty obligations, and that it will negatively impact on the country's ability to use frozen assets to negotiate with recalcitrant States.¹⁵⁵

2.6 TERRORISM AND NATIONAL LIBERATION MOVEMENTS

Contemporary terrorism has primarily manifested itself through ideological and revolutionary movements.¹⁵⁶ The earliest revolutionary movements appeared in the 1920s in South America following the establishment of autocratic regimes that were assisted through external intervention. Contemporary movements are less inclined to remove anti-democratic governments as they are to bringing revolutionary terrorism to the masses,¹⁵⁷ which is also the cause for numerous illicit operations such as drug-trafficking. The erosion of the South American revolutionary movements began with the death of Ernesto 'Che' Guevara, which saw terrorist operations conducted for the first time in urban centres, and the adoption of Marxist/Leninist teachings advocating that the execution of terrorist acts was within the purpose of uprooting political power.¹⁵⁸ These movements, detached from Che Guevara's idealist socialist society, ultimately failed, while their successors in this region of the world seem to be fighting regular armed conflicts against governmental forces, their operations widely linked to organised criminal activity.

Ideological movements in Europe had, until very recently, been inspired by Marxist and, to a lesser degree, by fascist theories. Other groups such as Baader Meinhof and the Red Brigades drew their motivation from the theories of anarchocommunist

150 The Secretary of State is authorised to determine whether a foreign country has provided repeated support to international terrorism, and should therefore be designated as a State sponsor of terrorism. See the 1979 Export Administration Act, 50 USC § 2405(j); 1961 Foreign Assistance Act, 22 USC § 2371.

151 28 USC §§ 1610(a)(7) and (b)(2).

152 *Alejandro v Republic of Cuba* 996 F Supp 1239 (1997).

153 *Flatow v Islamic Republic of Iran*, 999 F Supp 1 (1998); *Cicippio v Islamic Republic of Iran*, 18 F Supp 2d 62 (1998); see also SD Murphy, 'Contemporary Practice of the US Relating to International Law', 94 *AJIL* (2000), 117.

154 *Rein v Socialist People's Libyan Arab Jamahiriya*, 162 F 3d 748 (1998) *cert denied*, 119 S Ct 2337 (1999).

155 M Vadnais, 'The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?', 5 *UCLA J Int'l L & For Aff* (2000), 199, p 201.

156 See generally G Schwarzenberger, 'Terrorists, Hijackers, Guerillas and Mercenaries', 24 *CLP* (1971), 257.

157 K Hortatos, *International Law and Crimes of Terrorism Against the Peace and Security of Mankind*, 1993, Athens: Sakkoulas, pp 29–30; see E Halperin, *Terrorism in Latin America*, 1976, London: Sage.

158 *Ibid.*, Halperin, pp 32–33.

as formulated by Kropotkin and Bakunin, the latter especially advocating the abolition of capitalism and collectivisation of production and consumption.¹⁵⁹ Were ideological and revolutionary movements to disseminate their agenda without the use of violence, the invocation of international human rights law would certainly aid their plight against any oppressive regimes. Nonetheless, the mere fact that violence has been used by a group does not automatically render that group a terrorist organisation. Since the principle of self-determination of peoples is well established in international law,¹⁶⁰ a certain degree of violence must necessarily be legitimised to pursue it when all other peaceful means have failed. Article 1(4) of the 1977 Additional Protocol I to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) equates to international armed conflicts those struggles in which peoples are fighting against colonial domination, alien occupation and racist regimes in the exercise of their right to self-determination.¹⁶¹ The three conditions contained in Art 1(4) are exhaustive, thus being applicable only to a limited number of groups. Article 1(4) was earlier preceded by the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN, which affirmed not only a duty to refrain from forcible action depriving peoples of their right to self-determination, but made it clear that in their actions against, and resistance to, such forcible action, peoples are entitled to seek and receive support in accordance with the 1945 UN Charter.¹⁶² These legal developments offer the conclusion that organised groups and members thereof enjoy legitimate combatant status under international law, as long as their struggle falls within Art 1(4) of the 1977 Protocol I.¹⁶³ The level of violence permitted in an ensuing armed conflict with government forces is thereafter regulated by international humanitarian law—and not the various anti-terrorist treaties—and applies equally to both parties. Not only acts of terrorism,¹⁶⁴ but all acts of violence to life or property are prohibited against non-combatants.¹⁶⁵

With the demise of the major racist, colonial and occupation regimes by the 1980s the General Assembly Sixth Committee's resolutions on terrorism continued to affirm the legality of all national liberation struggles in their exercise of self-determination,¹⁶⁶ but, in practice, these rights were not afforded to such movements. In fact, the reasons for dropping draft Art 24 (on terrorism) of the International Law Commission's Code of Offences in 1996 were definitional problems and the precise relationship between

159 *Ibid*, pp 35–39.

160 1945 UN Charter, Arts 1(2) and 55; 1966 International Covenant on Civil and Political Rights, Art 1, 999 UNTS 171.

161 1125 UNTS 3 (1979).

162 GA Res 2625 (24 October 1970); similarly GA Res 3103 (12 December 1973), affirmed the legitimate character of self-determination struggles and the fact that ensuing armed conflicts are of an international nature and covered by the 1949 Geneva Conventions.

163 See C Pilloud *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, Geneva: Martinus Nijhoff, pp 41–56.

164 1977 Protocol I, Art 4(d).

165 *Ibid*, Arts 4, 48.

166 GA Res 36/109 (10 December 1981); GA Res 38/130 (19 December 1983); GA Res 40/61 (9 December 1985); GA Res 42/159 (7 December 1987); GA Res 44/29 (4 December 1989); GA Res 46/51 (9 December 1991); GA Res 49/60 (9 December 1994); GA Res 50/53 (11 December 1995); GA Res 51/210 (17 December 1996); GA Res 52/165 (15 December 1997).

terrorism and self-determination.¹⁶⁷ Despite some clear-cut acts of terrorism perpetrated by their members, it is obvious that groups such as the IRA, PKK and the PLO fall squarely within the parameters of Art 1(4) of the 1977 Protocol I. However, none of these groups were recognised as having this status, although the PLO was admitted with observer status in international organisations. It should be noted that, on the insistence of Turkey, an Annex was attached to General Assembly Resolution 49/60 (1994) identifying terrorism as a factor endangering friendly relations and territorial integrity. Turkish insistence on the maintenance of 'territorial integrity' relates to its interest in labelling Kurdish rebel fighters as terrorists, refusing to allow them recognition of their legitimate struggle under international law.¹⁶⁸

A similar troublesome situation has arisen with regard to the treatment by the US military of captured Taliban and Al-Qaeda members. Despite a series of confusing statements in early 2002, the US Government's position seems to differentiate between Taliban and Al-Qaeda members, characterising the latter as unlawful combatants, while recognising that the former belonged to the forces of a State that was a party to the Geneva Conventions.¹⁶⁹ Both the Military Order of 13 November 2001 and the US position in general make it clear that the protection and guarantees afforded under the Geneva Conventions will not apply to Al-Qaeda members. Certainly, the characterisation of Al-Qaeda fighters as unlawful combatants may to a certain degree be justified and on account of the gravity of the situation and the strength of this organisation particular security measures may have to be employed. However, this does not mean that they are not entitled to fair trial guarantees under the Geneva Conventions and Protocol I of 1977, Art 75 of which obliges parties to grant fundamental guarantees to those combatants that do not benefit from more favourable provisions. Similarly, the use of military commissions against individuals deemed to fall outside the ambit of armed conflict and humanitarian law presents a serious contradiction in criminal procedure terms.¹⁷⁰ That is, if one is classified as falling outside the scope of the laws of war, then the offences accused of having been committed are common criminal offences, even if extremely serious, but which in any event are subject to the jurisdiction of ordinary courts.

The fact that legitimate national liberation movements may conduct some urban operations by violating domestic criminal law or international norms does not entail the passing of such groups into the sphere of terrorist organisations. Rather, any infractions should be attributed to persons taking a direct or indirect part in these infractions of the law, in the same way that armies are not outlawed in cases where their members violate international humanitarian law.

167 ILC, *Report on the Work of Its 48th Session*, UN Doc A/51/10, Supp No 10 (6 May-26 June 1996).

168 Even if the PKK is considered to be outside the context of 1977 Protocol I, Art 1(4), the scale of military operations between government and rebel forces is unquestionably within the ambit of the 1949 Geneva Conventions, common Art 3, a provision that is part of customary law.

169 Both are to be tried by military commissions, in accordance with Military Order of 13 November 2001, *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, F Reg 57833, vol 66, No 222.

170 See generally DA Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Attacks*, 96 *AJIL* (2002), 320; HH Koh, *The Case Against Military Commissions*, 96 *AJIL* (2002), 337.

2.7 ORGANISED CRIME AND ITS RELATION TO TERRORISM

In recent years concerns have been raised regarding possible links between terrorism and organised crime. Narco-terrorism (illicit trafficking in drugs), unlawful arms trade, money laundering and smuggling of nuclear and other lethal material feature prominently among activities linked to terrorism in the Annex attached to General Assembly Resolution 49/60 (1994).¹⁷¹ In that year, the World Ministerial Conference on Organised Transnational Crime adopted the Naples Political Declaration and Global Action Plan Against Organised Transnational Crime, which, *inter alia*, recognised the existence of links between transnational organised crime and terrorist acts.¹⁷² A later General Assembly Resolution pointed out that organisations financing terrorists are usually also engaged in unlawful activities, such as the ones described in Resolution 49/60, for the purpose of funding terrorist operations.¹⁷³ These observations are not useful for ascertaining legal principles, *per se*, since despite the similarity in organisation and violence between terrorist organisations and organised crime, terrorism involves a political element which is absent from organised crime. Article 2(a) of the CATOC¹⁷⁴ is instructive:

‘Organised criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Some delegations participating in the preparatory working groups of the Transnational Organized Crime Convention, including those of Algeria, Egypt and Turkey, were of the view that the scope of the Convention should specifically include crimes committed in order to obtain, directly or indirectly, moral benefit. Other delegations, however, were of the view that this concept was ambiguous. During the Eighth Session the delegation of Algeria proposed the addition of the words ‘or any other purpose’, which was supported by Egypt, Morocco and Turkey. In the same Eighth Session, the Turkish representative stated that his country could not accept the present formulation of the paragraph, which excluded not only crimes committed for purposes other than financial or material benefit, but also omitted any mention to the links between transnational organised crime and terrorist acts, as established in the 1994 Naples Political Declaration, which Turkey strongly favoured annexing to the Draft Convention.¹⁷⁵ Although this position was supported by some delegations at the Ninth Session of the Ad Hoc Committee, including Algeria, Egypt and Mexico, the eventual definition of organised crime contains neither express nor tacit reference to terrorism.¹⁷⁶ This is not only reasonable; it also prevents

171 Similarly GA Res 50/186 (22 December 1995).

172 UN Doc A/49/748 (23 November 1994).

173 GA Res 51/210 (17 December 1996).

174 UN Doc A/55/383 (2 November 2000).

175 Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organised Crime, Revised Draft United Nations Convention Against Transnational Organised Crime, 10th Session (Vienna, 17–28 July 2000), UN Doc A/AC 254/4/Rev 9 (29 June 2000), p 3.

176 The Ad Hoc Committee’s interpretative notes on Art 3 (scope of application) emphasised ‘with deep concern the growing links between transnational organised crime and terrorist crimes’, taking into account the 1945 UN Charter and relevant General Assembly resolutions; UN Doc A/55/383/Add 1 (3 November 2000), p 2.

unnecessary future confusion, since it is unquestionable that a group which is involved in drug-trafficking, or bribing of foreign officials for financial or related benefit does not constitute a terrorist organisation under any of the anti-terrorist conventions. The Convention does not address the situation of groups engaging in certain offences described therein (especially, trafficking in arms and bribery of officials) for financial benefit, which they ultimately intend to allocate for charitable purposes. In such remote cases, one should not dismiss the possibility of an organisation with political or ideological motives.

Our previous analysis on national liberation movements helps us better comprehend the political benefits associated with the insistence of countries such as Turkey, Algeria and Egypt regarding possible connections between terrorism and organised crime. Indeed, the branding of a national liberation movement either as a terrorist group, or as a collectivity involved in organised crime, on the basis of its participation in offences aimed at financing its otherwise legitimate struggle, justifies political manoeuvres targeted to removing all legitimacy from that movement before international fora. On the one hand, it is unarguable that terrorist groups engaged in prohibited acts for financial benefit do enter the sphere of organised crime. On the other hand, prohibited acts committed by national liberation movements, where the financial benefit is intended only to finance a movement's struggle, do not necessarily render that group illegal, as long as the prohibited acts in question do not violate *jus cogens* norms and depending on the extent of politicisation (that is, to what degree they are viewed as political offences) afforded to such offences.

2.8 TERRORIST ACTS AS POLITICAL OFFENCES

As previously stated, terrorism involves an ideological or political element. For the purposes mainly of extradition, but also immigration, many countries regard political offences as non-extraditable, while the international impetus is to depoliticise most acts and, thus, render them extraditable. The relevant jurisprudence shows that a political offence must primarily satisfy the so called 'incidence test', as formulated in *Re Castioni*.¹⁷⁷ Stephen J noted, in that case, that offenders are not to be extradited if the crimes concerned were 'incidental to and formed a part of political disturbances'.¹⁷⁸ In fact, there must exist a close nexus between the violence and the political objective of forcing a regime to resign or change its policies, taking place in the course of a violent disturbance.¹⁷⁹ In determining whether the political aspect of the offence is of a predominant character, domestic courts have enquired whether the offender could reasonably expect that the offence would yield a result directly related to the political goal.¹⁸⁰ This query has since become more explicit by making

177 [1891] 1 QB 149.

178 *Ibid.*, p 166.

179 *R v Governor of Brixton Prison ex p Schtraks* [1964] AC 556, pp 583–84, *per* Lord Reid; *Gil v Canada* (1994) 107 ILR 168, Canadian Federal Court of Appeal, p 170; *In the Matter of Extradition of Atta*, 104 ILR 52, p 87; *McMullen v INS* 788 F 2d 591 (1986), 9th Cir, a refugee determination case.

180 *Folkerts v Prosecutor* (1978) 74 ILR 498, Dutch Supreme Court.

it clear that the political motive of an offence is irrelevant where it is likely to involve killing or injuring members of the public.¹⁸¹ It is evident, however, from the Good Friday Agreement, reached between the political branch of the IRA and the UK Government, that, although indiscriminate violent attacks may constitute criminal offences, a subsequent amnesty agreement may lift criminal liability where a political element was involved.¹⁸²

This jurisprudence is in conformity with the various anti-terrorist conventions, despite its outward liberal appearance. These conventions demand that Member States criminalise the relevant acts and further render them extraditable.¹⁸³ However, all the offences described in anti-terrorist conventions refer to acts which either directly or indirectly are intended to cause or likely to inflict indiscriminate death or injury to members of the public, and which are not committed in the context of violent disturbances. Despite broad ratification of anti-terrorist treaties since 1963, covering a wide spectrum of areas, national judges still enjoy some discretion in deciding on a case-by-case basis the political character of an offence in relation to the motive involved and the means pursued to achieve it. Such judicial determination may well depend on certain occasions on a common sense of justice prevalent at any given time in a particular community, due to its affiliation and sympathy to the offenders and their aims. Some States, however, have limited this judicial discretion through amendment to their extradition treaties. The US-UK Extradition Treaty of 1977¹⁸⁴ provided in Art 5 a political offence exception to extradition. This served as the basis by US courts to deny the extradition of members of the IRA. These decisions were criticised by both the US and the UK, the former fearing adverse effect on law enforcement and foreign relations, the latter as condoning terrorism. Subsequently, a Supplementary Treaty was agreed in 1985 as a means of limiting the political offence exception by making reference to a list of offences that no longer may be regarded as political.¹⁸⁵ The 1985 Supplementary Treaty endows, under Art 3(a), US judges with a limited judicial inquiry into the fairness and guarantees of trial in the UK.¹⁸⁶ Despite the signing of such agreements and the promulgation of laws limiting judicial discretion, the majority of constitutions contain a clause obliging their independent judiciary not to apply laws that are in conflict with the constitution.¹⁸⁷ Thus, since the concepts of fairness, justice and civil rights form an integral part of every constitutional tradition and, as we have seen, some countries wilfully manipulate

181 *T v Secretary of State*, 107 ILR 552, a refugee determination case; *Re Croissant* (1978) 74 ILR 505, Conseil d'Etat; *Yugoslav Terrorism* case (1978) 74 ILR 509, FRG Federal Supreme Court; *Galdeano* case (1984) 111 ILR 505, Conseil d'Etat; *In the Matter of Extradition of Atta*, 104 ILR 52; *Gil v Canada* (1994) 107 ILR 168, Canadian Federal Court of Appeal; in the *Baader-Meinhof Group Terrorist* case (1977) 74 ILR 493, FRG Constitutional Court, p 498, the court stated that membership of a politically motivated organisation constituted an offence where it executed its objective through the perpetration of serious offences.

182 Good Friday Agreement (10 April 1998), reprinted in 37 ILM (1998), 751, Strand 10(1), provides for the release of prisoners convicted of scheduled offences in Northern Ireland, or in the case of those sentenced outside Northern Ireland, similar offences.

183 Eg, 1998 Terrorist Bombings Convention, Arts 5, 9 and 11, and 2000 Terrorist Financing Convention, Arts 6, 7, 11, 13–14.

184 28 UST 227.

185 Article 1, reprinted in TIAS 12050.

186 See *USA v Artt* 38 ILM (1999), 100.

187 1975/86 Hellenic Constitution, Art 93(4).

the issue of terrorism for 'social control' purposes,¹⁸⁸ national judges are under an obligation to disregard laws that violate these principles.

2.9 TERRORISM AND HUMAN RIGHTS

We have already examined a number of human rights issues related to terrorism; now we shall briefly look at the problem of human rights and the role of non-State actors (reference to which has already been made), as well as procedural guarantees prescribed for those persons accused of terrorist offences. Article 14 of the 1966 International Covenant on Civil and Political Rights (ICCPR) guarantees the right to a fair trial as well as other pre-trial protections to those accused or arrested in relation to criminal offences.¹⁸⁹ Many countries suffering from sustained terrorist attacks promulgate legislation that falls below the standard set by the ICCPR. Beginning in 1973, the UK enacted sweeping emergency legislation in its effort to counter violence arising from the Northern Ireland conflict.¹⁹⁰ This legislation eliminated a number of pre-trial procedural safeguards typically available to criminal defendants in the UK. It also established an alternative system of tribunals to try those accused of 'scheduled offences', that is, certain politically motivated criminal offences. These 'Diplock courts' employed abbreviated trial procedures, eliminating trial by jury and significantly relaxing evidentiary standards. Such practice, irrespective of the gravity of the alleged offence, violates fundamental pre-trial procedural safeguards as these are formulated in international instruments. Likewise, on the basis of derogation provisions contained in human rights treaties, States are afforded a certain degree of discretion as to the suspension of certain rights in times of public emergency.¹⁹¹ The European Court of Human Rights' jurisprudence evinces the enjoyment of a margin of discretion which Member States may utilise in order to determine a state of emergency. Such discretion is not unlimited but subject to control by the court.¹⁹²

Anti-terrorist conventions contain minimum procedural safeguards entitling the accused to fair treatment and ensuring communication with an appropriate person, either a representative of his State or another.¹⁹³ The 1976 European Convention on the Suppression of Terrorism included a provision whereby a requested State is not

188 N Chomsky, 'Human Rights Priorities and Responsibilities for Citizens', in D Barnheizer (ed), *Effective Strategies for Protecting Human Rights*, 2002, Aldershot: Ashgate.

189 See also 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 6, 213 UNTS 221.

190 See Northern Ireland (Emergency Provisions) Act 1978, Chapter 5.

191 1950 European Convention for the Protection of Human Rights, Art 15, and ICCPR, Art 4.

192 In *Ireland v UK* (1978) 2 EHRR 25, although UK interrogation techniques violated the European Convention for the Protection of Human Rights, Art 3, the court ruled that, due to the wave of terrorist attacks prevalent in 1972, the UK could validly decide that its legislation was insufficient under the European Convention for the Protection of Human Rights, Art 15.

193 1970 Haeue Convention, Art 6(3); 1971 Montreal Convention, Art 6(3); 1973 Internationally Protected Persons Convention (the latter guaranteeing fair treatment), Arts 6(2) and 9; 1979 Hostages Convention, Art 6(3), (4); 1998 Terrorist Bombings Convention (the latter guaranteeing fair treatment), Arts 7(3) and 14; 2000 Terrorist Financing Convention, Art 9(3).

bound to extradite if it has substantial grounds for believing that the request is a guise for prosecution or punishment on account of a person's race, religion, nationality, ethnic origin or political opinion.¹⁹⁴ This is known as '*clause française*', and one of its purposes is to protect the concept of asylum. This clause has been inserted in all subsequent international anti-terrorist treaties.¹⁹⁵ In general, there is unanimous agreement from international bodies that procedural guarantees should not be set aside when investigating terrorist-related offences.¹⁹⁶

States with particular terrorist problems, such as Turkey, Algeria and Russia, have consistently argued that terrorism violates human rights. This, itself, is a contradictory statement since the whole rationale of human rights is based on the State being the transgressor and not private entities. To address these concerns, the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 condemned terrorism as an act aiming at the 'destruction' of human rights, democracy and territorial integrity.¹⁹⁷ This new terminology is hardly reconcilable with human rights philosophy, and was sadly included on the insistence of States with poor human rights records. The 1993 Vienna Declaration was followed up by annual decisions of the Third Committee of the General Assembly, which were subsequently endorsed by the Assembly under the title 'Human Rights and Terrorism'. These resolutions recognise the 'destruction' of human rights through terrorist acts, ascertain its connection to organised crime and further demand for measures consonant with 'international human rights standards'.¹⁹⁸ The term 'standards' was preferred because most developing countries are not parties to the major international human rights instruments. Sadly, States non-parties to customary human rights treaties are allowed to regress back to an unacceptable state of affairs where they not only defy international institutions accusing them of gross rights violations; they also establish new 'human rights' regimes which entitle them to abuse those whom they are under a customary obligation to protect.¹⁹⁹ The Third Committee's initiative to engage in an examination of terrorism has unofficially been contested vehemently by the Sixth Committee, which has demanded without success an end to the Third Committee's involvement in the issue. Finally, the role of non-State actors has been addressed by the special rapporteur on human rights and terrorism, Kalliopi Koufa. In her 1999 report she noted that terrorism puts under threat those social and political values that relate, either directly or indirectly, to the full enjoyment of human rights and fundamental freedoms, namely the areas of: (a) life, liberty and dignity of the individual; (b) democratic society; and (c) social peace and public order. While emphasising that terrorism prevents individuals from fully

194 1976 European Convention on the Suppression of Terrorism, Art 5.

195 1979 Hostages Convention, Art 9(1); 1998 Terrorist Bombings Convention, Art 12; 2000 Terrorist Financing Convention, Art 15.

196 *Report of the Inter-American Commission on Human Rights on Terrorism and Human Rights*, OAS Doc OEA/Ser L/V/II 116, Doc 5/Rev 1/Corr (22 October 2002).

197 UN Doc A/CONF 157/23 (12 July 1993), para 17.

198 GA Res 48/122 (20 December 1993); GA Res 49/185 (23 December 1994); GA Res 50/186 (22 December 1995); GA Res 51/210 (17 December 1996); GA Res 52/133 (27 February 1997); some CSCE/OSCE Concluding Documents make a connection between terrorism and human rights, however, on the basis of State sponsored terrorism. The latest 1999 Istanbul Summit, Chapter I(4), made reference only to a 'challenge to security' emanating from terrorism.

199 This new terminology is also contained in GA Res 49/60 (9 December 1994).

enjoying human rights, and whereas recent developments in international law render individual perpetrators liable under international law, the special rapporteur pointed out that the 'relevance and adequacy of international and human rights law with regard to terrorist activities of non-State actors is questionable. For non-State actors are not, strictly speaking, legally bound by the supervisory mechanisms of international and human rights law'.²⁰⁰

200 UN Doc E/CN.4/Sub.2/1999/27 (7 June 1999), paras 18, 56.

TRANSNATIONAL OFFENCES

3.1 TRANSNATIONAL ORGANISED CRIME

Until the collapse of the USSR, and the subsequent cataclysmic effects, organised crime was essentially a domestic affair, even though transnational patterns were evident. Some States chose to see the phenomenon holistically,¹ while others preferred to view each underlying offence in isolation from the organised nature of the group. Similarly, requests for international co-operation such as extradition and mutual legal assistance were made on the basis of the underlying offence. The post-1990 era, with the advent of globalised trade and physical movement of persons, witnessed an increase in organised crime, originating especially from the former Eastern bloc, necessitating a different approach to the problem.² Two factors have generally contributed to the eruption of organised crime at the dawn of the 21st century: the emergence of 'weak' States and corruption.³ The former refers to the institutional capacity of States to govern legitimately, effectively administer justice and demand obedience from the entire population. To the effect that the vast majority of South American States and Russia have been unsuccessful in achieving these ends, they are seen as 'weak'. Moreover, in this environment of a weak State, a thriving poor population provides the cauldron in which criminality multiplies. Corruption further exacerbates the situation,⁴ as does the ability of such groups to launder their criminal proceeds in tax havens where banking regulations are relaxed.⁵

Since the early 1990s the United Nations (UN) General Assembly had detected the increase and expansion of organised criminal activity worldwide, and made reference to the emergent links between organised crime and terrorism.⁶ In 1994, the World Ministerial Conference on Organised Transnational Crime, adopted the Naples Political Declaration and Global Action Plan Against Organised Transnational Crime,⁷ which *inter alia* addressed the issue of convening a conference for the negotiation of a convention on the matter. By Resolution 53/111 the General Assembly

1 For example, the 1951 US Racketeering Act, 18 USC § 1951 *et seq.*

2 N Passas, 'Globalisation and Transnational Crime: Effects of Criminogenic Asymmetries', 4 *Transnational Organized Crime* (1998), 2.

3 W Rensselaer and I Lee, 'Transnational Organised Crime: An Overview', in T Farer (ed), *Transnational Crime in the Americas* (1999), 4.

4 JM Waller and VJ Yasmann, 'Russia's Great Criminal Revolution: The Role of the Security Services', 11 *Journal of Contemporary Criminal Justice* (1995), 282.

5 RE Grosse, *Drugs and Money: Laundering Latin America's Cocaine Dollars* (2001); J Blum, 'Offshore Money', in *op cit*, Farer, note 3, p 57.

6 GA Res 49/60 (9 December 1994), and 50/186 (20 December 1995). See E Mylonaki, 'The Manipulation of Organised Crime by Terrorists: Legal and Factual Perspectives', 2 *ICLR* (2002), 213.

7 UN Doc A/49/748 (1994), approved by GA Res 49/159 (23 December 1994). This was followed by the 1995 Buenos Aires Declaration on Prevention and Control of Organised Transnational Crime, UN Doc E/CN.15/1996/2/Add.1 (1996) and the 1997 Dakar Declaration on the Prevention and Control of Organised Transnational Crime and Corruption, UN Doc E/CN.15/1998/6/Add.1 (1998), and the 1998 Manila Declaration, UN Doc E/CN.15/1998/6/Add.2 (1998).

established an Ad Hoc Committee for the purpose of elaborating a convention and three additional protocols.⁸ After a series of eleven sessions between 1999 and 2000, the UN Convention Against Transnational Organized Crime (CATOC)⁹ and two Additional Protocols were adopted in late 2000, while another one on firearms was adopted on 31 May 2001.¹⁰ CATOC establishes four distinct offences: (a) participation in organised criminal groups;¹¹ (b) money laundering;¹² (c) corruption;¹³ and (d) obstruction of justice.¹⁴ Under Art 3, the Convention applies to the four aforementioned offences, as well as to any 'serious crime', as defined by Art 2(b),¹⁵ if cumulatively the offence is 'transnational in nature' and 'involves an organised criminal group'. In accordance with Art 3(2), offences are transnational in nature if they are: committed in more than one State; committed in only one State, but are prepared, planned, directed, controlled or have substantial effects in other States; and committed in one State by an organised criminal group that engages in criminal activities in more than one State.¹⁶ It is evident that the relationship between the 2000 Convention and other sectoral agreements, especially those relating to narcotics and corruption,¹⁷ is complementary but at the same time the convention is independent of those agreements. Because of its unique scope it finds application only where the underlying offence possesses a transnational element and involves an organised criminal group. The only other reference to organised crime in previous sectoral treaties is found in the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Narcotics Convention). Article 3(1)(a)(v) of the latter instrument obliges States to 'criminalise the organisation, management or financing of the offences listed' therein, and relating to the various processes, from cultivation to final distribution. Moreover, sub-s (c)(iv) criminalises 'participation in, association or conspiracy to commit' any of the listed offences, while sub-s (5) of Art 3 requires that Member States adopt legislation requiring courts to take into account the involvement of organised criminal groups and individual membership therein as rendering the offence 'serious' in nature. Not all of the offences established

8 GA Res 53/111 (9 December 1998).

9 40 ILM (2001), 335.

10 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 40 ILM (2001), 377; Protocol Against the Smuggling of Migrants by Land, Sea and Air, 40 ILM (2001), 384; Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition.

11 CATOC, Art 5.

12 *Ibid*, Art 6.

13 *Ibid*, Art 8.

14 *Ibid*, Art 23.

15 This means any conduct constituting an offence punishable by at least a four year incarceration or a more serious penalty. The main criminal activities of criminal organisations are: racketeering, fraud, robberies, car theft, armed assault, drug-trafficking, trafficking in arms and radioactive materials, trafficking in human beings, alien smuggling, smuggling of goods, extortion for protection money, gambling, embezzling from industries and control of black markets.

16 See GOW Mueller, 'Transnational Crime: Definitions and Concepts', 4 *Transnational Organised Crime* (1998), 14.

17 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Narcotic Substances 28 ILM (1989), 497; 1997 OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, 37 ILM (1998), 1.

under CATOC, however, have in the past been subject to universal regulation, particularly, money laundering,¹⁸ participation in organised criminal groups and obstruction of justice, and States parties are under an obligation to criminalise these activities. For the purposes of CATOC, an 'organised criminal group' is defined as:

A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.¹⁹

The *travaux préparatoires* construe the term 'direct or indirect benefit' to be a broad one, encompassing, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or costsharing among ring members.²⁰ Although a group falls within the scope of CATOC if it is 'structured', this would exclude randomly formed groups, but would include groups with a hierarchical or other structure, as well as non-hierarchical groups, where the roles of the members of the group need not be formally defined.²¹

The offence of participating in an organised criminal group under Art 5 of CATOC is constituted by taking part in the activities of such a group, either with the knowledge of the group's aims, or in the knowledge that one's activities will somehow contribute to the achievement of those aims. Moreover, a person is also culpable by organising, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organised criminal group. Under Art 23 of CATOC, parties are obliged to criminalise any form of obstruction of justice, including the use of corrupt or coercive methods in order to influence testimony, other evidence or the actions of any law enforcement or other justice official at both pre-trial and trial stage. This would not, however, cover those countries whose legislation grants natural persons the privilege not to give evidence.²²

The main purpose behind CATOC was the enhancement of co-operation between States, and calls for assistance and co-operation were echoed by most developing countries, since organised crime was seen by many as a serious destabilising threat.²³ Co-operation has a twofold dimension in the Convention. First, law enforcement agencies are required to assist one another in general and specific terms, while the usual forms of co-operation are also provided, such as extradition and mutual legal assistance,²⁴ as well as more specialised measures, such as collection and exchange

18 See 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS 141; 1991 EC Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering, 91/308/EEC, OJ L166/77, as amended by the new EC Directive 2001/97/EC.

19 CATOC, Art 2(a).

20 Interpretative Notes, UN Doc A/55/383/Add 1 (2000), p 2.

21 See also P Williams, 'Organising Transnational Crime: Networks, Markets and Hierarchies', 4 *Transnational Organised Crime* (1998), 57.

22 *Op cit*, Interpretative Notes, note 20, p 9.

23 *Report of the Ad Hoc Committee on the Work of its First to Eleventh Sessions*, UN Doc A/55/383 (2000), p 18.

of information.²⁵ Secondly, since States are required to maintain adequate expertise in dealing with transnational organised crime, it is only developed countries that can afford to efficiently comply. For that purpose, both CATOC and the Protocols envisage the creation of technical assistance projects, whereby developed nations would provide material and financial assistance to developing nations, while calling also for the establishment of a fund to which regular and voluntary contributions would be paid.²⁶ Moreover, States parties are obliged to adopt domestic laws and practices that would prevent organised crime-related activities. Some of these are already contained in other international instruments, and deal mainly with money laundering,²⁷ such as maintaining accurate bank records, lifting of bank secrecy with regard to organised crime investigations,²⁸ while under the 2001 Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), minimum standards for the issuance and verification of passports and other travel documents are required.²⁹

3.1.1 The additional CATOC Protocols

The three additional Protocols are supplementary and subordinate to CATOC. Under Art 37(2) of CATOC, before a State can become a party to any of the Protocols it must first ratify CATOC. It is obvious and explicit that the offences stipulated in the Protocols are both transnational in nature and must be committed in the context of an organised criminal group or operation. The structure of CATOC is such that its provisions relating to co-operation and technical assistance are applicable to the Protocols however, each Protocol establishes in addition specific provisions supplementing and adapting the general rules found in CATOC. Reference to the Trafficking Protocol is made elsewhere in this book.³⁰ The Smuggling Protocol obliges States to criminalise the smuggling of migrants, which includes the procurement of either illegal entry or illegal residence with the aim of financial benefit, as well as the procurement, provision, possession or production of a fraudulent travel document, where this was done for the purpose of smuggling migrants.³¹ In addition to the co-operation procedures established under the Smuggling and Trafficking Protocols, both instruments require parties to take measures to protect trafficked and smuggled persons, whether by giving them access to medical, welfare, social and other facilities and programmes, or by entitling them

24 CATOC, Arts 16 and 18; police co-operation in the context of the 1990 Schengen Agreement on the Gradual Abolition of Checks at Common Borders, 30 ILM (1991), 68; Member States have agreed to allow pursuit over national frontiers for, *inter alia*, breach of laws relating to explosives and arms, illicit traffic in narcotic drugs, traffic in human beings, etc, in accordance with Arts 40 and 41.

25 *Ibid*, Arts 27 and 28.

26 *Ibid*, Art 30(2)(b) and (c).

27 FATF 40 Recommendations; SC Res 1373 (29 September 2001); 1999 International Convention for the Suppression of the Financing of Terrorism, Art 18, 39 ILM (2000), 270.

28 CATOC, Arts 7 and 12(6).

29 2001 Smuggling Protocol, Arts 12 and 13.

30 See Chapter 5, section 5.2.1.

31 2001 Smuggling Protocol, Art 2. The IMO Maritime Safety Committee's 2002 *Report on Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea*, IMO Doc MSC 3/Circ 3 (30 April 2002), noted that by that date 276 incidents had been reported to the Organisation, involving 12,426 migrants.

to confidentiality and protection against offenders where they provide evidence to prosecutorial authorities.³² Of particular importance is Pt II of the Smuggling Protocol, which refers to the taking of measures against vessels at sea. This was drafted in conformity with the 1982 UN Convention on the Law of the Sea (UNCLOS) and the 1988 Narcotics Convention. The general rule is that no action can be taken in the territorial sea of a State without the coastal State's consent. Similarly, no action can be taken against a vessel at sea without the approval of the Flag State. However, the Protocol requires parties to 'co-operate to the fullest extent possible'. In cases where a State has credible evidence that a vessel registered in another State is involved in the smuggling of migrants, it must acquire the permission of that Flag State in order to board, search, and if evidence of smuggling is found, to take other action with the consent always of the Flag State.³³ The Flag State must respond to such requests expeditiously and may impose conditions upon the requesting State. Although the conditions set by the Flag State must be respected, the requesting State may take other remedial action only where this is necessary in order to relieve imminent danger to the lives of persons, or in the existence of a bilateral or multilateral agreement that rules otherwise.³⁴ It would not be inconsistent with the Protocol and UNCLOS to assimilate a smuggling vessel to a slave vessel, thereby granting the right to any other ship to liberate the migrants, even without the consent of the Flag State.³⁵

In May 2001 the Protocol Against the Illicit Manufacturing of a Trafficking in Firearms, their Parts and Components, and Ammunition (Firearms Protocol) was adopted. The origins of this instrument can be traced back to the 1997 Organisation of American States (OAS) Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials. Article 5 of the Protocol criminalises illicit manufacturing and trafficking of firearms, components and ammunition, as well as falsification or illicit obliteration, removal or alteration of the marking on firearms. The Protocol sets out comprehensive procedures for the import, export and transit of firearms, their components and ammunition. It is a reciprocal agreement requiring States to provide authorisation to each other before permitting shipments of firearms to leave, arrive or transit across their territory and enables law enforcement authorities to track the movement of shipments through record-keeping and unique marking in order to prevent theft and diversion.³⁶ The Protocol does not apply to interstate transactions relating to the transfer of arms, nor does it prejudice or have any impact upon national security.³⁷

3.2 DRUG-TRAFFICKING

Drug-trafficking generates large financial profits for criminal organisations. The creation of wealth has provided an opportunity for these organisations to infiltrate

32 Trafficking Protocol, Arts 4–6; 2001 Smuggling Protocol, Arts 16 and 18. Art 5 of the Smuggling Convention further provides that migrants will not become subject to criminal prosecution.

33 Smuggling Protocol, Art 8(2).

34 *Ibid*, Art 8(5).

35 UNCLOS, Art 99. However, only the Flag State may seize the slave vessel and arrest those engaged in slave trade.

36 2001 Firearms Protocol, Arts 7–12.

37 *Ibid*, Art 2.

legitimate commercial businesses, undermine weakened economies and corrupt the structures of government. The recognition that drug-trafficking is linked to other serious criminal activity, including terrorism, has raised concern in the international community that trafficking has the potential to destabilise society. Thus problems related to drug taking and drug-trafficking have become a major preoccupation for governments and law enforcement agencies. The social problems caused by the use of illicit drugs are difficult to quantify, but include health problems and the loss of people participation in ordinary society. Individuals who are heavy users or addicts of drugs may resort to crime to fund their drug use, thus burglary, prostitution and shop theft are all common problems associated with drug use. Trafficking drugs is an illegal activity and, therefore, not subject to the normal regulation of commercial and contract law that legitimate business abides by. Violence and intimidation are the tactics of 'enforcement' in the drug-trafficking industry. Trafficking of illicit drugs is a lucrative market and large scale operations are the business of organised crime groups. It has also been the case that States themselves have been implicated in illicit drug-trafficking in various ways. History shows that Britain encouraged the opium trade in Asia for national profit and that the US and French Governments aided and abetted drug-trafficking in Laos for political reasons during the course of the Vietnam War. Furthermore, there is evidence to show that the governments in some South American States, such as Bolivia and Colombia, have been influenced or even run by drug-trafficking cartels and that the US was involved with cocaine traffickers in order to provide covert assistance to insurgent activities in Nicaragua. The US has also apprehended the Head of State of Panama, General Noriega who was subsequently convicted of drug-trafficking offences.³⁸

Other significant problems associated with drug-trafficking are the bribery and corruption of public officials so as to ease trafficking or avoid the scrutiny of police and customs. Furthermore, the object of illicit drug-trafficking is to make profit. The proceeds of drug-trafficking cannot be accounted for in an ordinary legitimate way and, therefore, need to be disguised so that they can be used. This chapter will also consider the problem of money laundering. Debate is ongoing and discussion exists over the decriminalisation or legalisation of some of the drugs currently outlawed. Commentators argue that by allowing the sale and consumption of some drugs currently considered illegal, thereby removing their illicit nature, State authorities would be able to regulate those drugs to a more effective degree and consequently mitigate the network of crime that is currently associated with drug-trafficking. International legal efforts to counter drug-trafficking should be viewed in concert with other aspects of international legal co-operation including police co-operation during investigations and extradition and mutual legal assistance in preparing prosecutions.

3.2.1 Development of international measures to control drugtrafficking

International efforts to control drug-trafficking were ongoing throughout the 20th century. In 1909, the US president Theodore Roosevelt called together 13 countries to establish the International Opium Commission, which subsequently produced a

³⁸L. Sunga, *The Emerging System of International Criminal Law*, 1997, Dordrecht: Kluwer, pp 206–12.

range of resolutions which recommended the gradual suppression of opium smoking 'with due regard to the circumstances of each country concerned'. Formal treaty measures followed a few years later.³⁹ Subsequent multilateral conventions were developed to regulate the production of narcotic drugs for medical and scientific purposes under the League of Nations.⁴⁰

Following the Second World War and the creation of a new international order under the auspices of the UN, it was apparent that the framework of international instruments relating to drug-trafficking was insufficient to meet the modern scale and nature of the problem. Furthermore, international diplomatic relations had changed greatly after the war and much of the work of the League of Nations had little remaining practical legal value. The control of illicit drugs was an issue of concern to the UN from the outset following the Second World War. In 1946, the UN Economic and Social Council, at its First Session, established the Commission on Narcotic Drugs to work towards effective implementation of measures controlling illicit drugs.⁴¹ The UN continued to develop legal mechanisms for the control of illicit drugs.⁴² The UN has subsequently created a new framework of provisions relating to illegal drug-trafficking.⁴³ Controls were extended to drugs used for illicit purposes by the 1961 Single Convention on Narcotic Drugs (1961 Convention). Aspects of the 1961 Convention were developed by a protocol in 1972.⁴⁴ During the 1960s, stimulants such as amphetamines, hallucinogens such as LSD and depressant drugs such as barbiturates and tranquillisers became more widely available. These drugs, known as psychotropic drugs, were not controlled by the 1961 Convention and, in 1971, the UN concluded a Convention on Psychotropic Substances (1971 Convention).⁴⁵ These initiatives were strengthened by the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁴⁶ It was anticipated that by confiscating the proceeds of crime the incentive for drug-trafficking would be eliminated. Contracting parties are required to criminalise not only the organisation, management and financing of drug-trafficking but also the conversion, transfer and concealment of the proceeds of drug-trafficking.

In addition to drafting international treaties for the control of illegal drug-trafficking, the UN has also created a number of agencies with specific responsibilities

39 Convention Relating to the Suppression of the Abuse of Opium and Other Drugs, 23 January 1912, 38 Stat 1912; 8 LNTS 187.

40 See, eg, Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Geneva, 13 July 1931.

41 Resolution of the First Session of the Economic and Social Council, Official Records, ECOSOC, First Session, 1946, Vol I, p 168.

42 See, eg, Protocol Bringing Under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as amended by the Protocol signed at Lake Success, New York on 11 December 1946, signed at Paris, 19 November 1948, 44 UNTS 277; The Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, signed at New York, 23 June 1953, 456 UNTS 56.

43 See generally C Bassiouni, 'The International Narcotic Control Scheme', in C Bassiouni (ed), *International Criminal Law: Crimes*, 1986, New York: Transnational, pp 507–24.

44 Protocol Amending the Single Convention on Narcotic Drugs, 25 March 1972, TIAS No 8118, 976 UNTS 3.

45 Convention on Psychotropic Substances, 10 ILM (1971), 261.

46 Reprinted at 28 ILM (1989), 497.

in relation to the control of illicit drugs. The Commission on Narcotic Drugs was established in 1946 as an organ of the Economic and Social Council (ECOSOC). Its task is to consider and report on all aspects of international drug control and it can initiate work and make recommendations to ECOSOC and to national governments. A particular role of the Commission is to achieve effective implementation of the provisions set out under the 1961 Convention and 1972 Protocol. The International Narcotics Control Board was established by the 1961 Convention and is comprised of members elected by the ECOSOC on the basis of their impartiality. The Board is in charge of controlling the international trade in narcotic drugs and for taking measures to ensure the execution of the provisions of the 1961 Convention. The Board manages the estimates and statistics systems set up under the 1961 and 1971 Conventions. The UN Fund for Drug Abuse Control was established in 1971 and is funded by State contributions. Its primary function is to provide professional and technical assistance to governments on law enforcement and social measures for drug control.⁴⁷

3.2.1.1 1961 Single Convention on Narcotic Drugs

The overall effect of the 1961 Convention was to codify and amalgamate previous multilateral drugs conventions.⁴⁸ International measures were extended over the cultivation of plants grown as raw materials for the production of natural narcotic drugs and existing restrictions on the production of opium and its derivatives were continued. The 1961 Convention includes the requirement that State parties should control and license individuals and commercial entities involved in the trade or distribution of licit drugs. Parties are obliged to 'prevent the accumulation in the possession of traders, distributors, State enterprises or duly authorised persons...of quantities of drugs and poppy straw in excess of those required for the normal conduct of business, having regard to the prevailing market conditions'.⁴⁹ There are provisions in the Convention ensuring that licit drugs are issued under prescription, are properly labelled and that trade in drugs is regulated and conforms with the estimates system, as well as encouraging full legal and administrative co-operation between countries.

3.2.1.2 1972 Protocol Amending the 1961 Single Convention on Narcotic Drugs

Further development of the initiatives set out in the 1961 Convention were brought about through the measures of the 1972 Protocol. The International Narcotics Control Board will seek to limit the cultivation, production, manufacture and use of drugs to amounts necessary for medical and scientific purposes.⁵⁰ Article 12 of the Protocol strengthens measures concerning the illicit cultivation of opium and cannabis under the 1961 Convention, in that parties are not only obliged to take measures prohibiting

47 See generally M Lopez-Ray, *A Guide to United Nations Criminal Policy*, 1985, Aldershot: Gower.

48 *Ibid.*, p 52.

49 1961 Convention, Art 30(2)(a).

50 1972 Protocol, Art 2. The Board is not permitted to interfere with national law, merely give advice to a government. Commentary on the Protocol Amending the Single Convention on Narcotic Drugs 1961 (UN, New York), p 13, para 11.

illicit cultivation, but also to seize and destroy plants used for illicit production. Article 18 of the Protocol widens the duties of the parties to inform and provide information relating to domestic enforcement to the Secretary General of the UN. Article 14 of the Protocol complements Art 36 of the Single Convention in that it provides that parties should, as an alternative, or as an addition to punishment of narcotic drug offences, provide measures of treatment, education, aftercare, rehabilitation and social reintegration. Finally, the Protocol also provides that the offences set out in the 1961 Convention shall be extraditable offences and that the 1972 Protocol may act as a basis for extradition where no other provision exists.

3.2.1.3 1971 UN Convention on Psychotropic Substances

In setting out measures to control the illicit use of what were a 'new' range of drugs, the 1971 Convention adopts a range of preventative and prohibitive provisions. Thus, the Convention includes measures under which the parties will adopt strict measures for the control of the trade, manufacture and production of the listed psychotropic substances.⁵¹ These restrictions also apply to materials used in preparation or manufacture of these drugs. The Convention requires parties to ensure that offences are punishable under domestic law.⁵²

3.2.1.4 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Despite these international agreements being widely ratified, a view emerged during the 1980s that the existing conventions focused primarily on controlling the production of licit drugs and the prevention of their diversion into the illicit market place.⁵³ To this end, the UN General Assembly began a process of consultation in 1984 which resulted in the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention)⁵⁴ which had as its stated aim to 'promote co-operation among the parties so that they may address more effectively the various aspects of illicit traffic...having an international dimension'.⁵⁵ The Vienna Convention is the most comprehensive international agreement on the control of drug-trafficking. The Convention recognises that, whilst drug-trafficking is an international criminal activity, State parties should develop procedures in domestic law to identify, arrest, prosecute and convict those who traffic drugs across national boundaries. These measures include establishing drug related offences and sanctions under domestic criminal law, providing for extradition in respect of those offences, providing for mutual legal assistance and co-operation on investigating and prosecuting those offences and establishing measures to seize and confiscate the proceeds from illicit drug-trafficking.⁵⁶ The Convention provides for stringent controls on the international trade of constituent

51 1971 Convention, Art 2.

52 *Ibid*, Art 22.

53 UN Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 10th Congress, First Session, Committee Print, S Prt 100-64, p iii.

54 Reprinted at 28 ILM (1989), 497.

55 Vienna Convention, Art 2(1).

56 For further discussion on the measures to prevent money laundering, see below, 3.3.

chemicals and equipment (precursors) used in manufacturing illicit drugs and that State parties take measures to prevent and eradicate the illicit cultivation of plants used to manufacture drugs. The Convention is not only concerned with tightening legal controls on drug-trafficking, but also recognises that measures need to be taken to reduce demand for illicit drugs and thereby introduces provisions to promote treatment, education, aftercare, rehabilitation and social reintegration of drug offenders.⁵⁷ The Vienna Convention was adopted by consensus and entered into force on 11 November 1990. A particularly innovative feature of the Vienna Convention is the introduction of controls set down on precursor chemicals and equipment used to manufacture synthetic drugs:

Chemicals are imperative to the manufacture of illicit drugs. The production of heroin and cocaine relies on essential chemicals, which are used in the processing and refining of the drug. The production of synthetic drugs relies on precursor chemicals that become part of the resulting product.⁵⁸

Commentators have pointed out that the misuse of precursor chemicals has challenged the traditional perception of the nature and origin of the drug problem. The common perception is that drugs emanate from producer countries in Asia and South America; however, evidence suggests that, in relation to precursor drugs, the situation is different and that it is 'the industrialised countries of Europe and the USA and Japan that manufacture the essential and precursor chemicals'.⁵⁹ In discussions prior to the Vienna Convention, an Iranian delegate reported that his country's experience was that precursors which were essential for drug manufacture were being easily and illegally imported from industrial European countries into countries of the Middle East and the Far East, where raw materials were available for their conversion into heroin and other narcotic drugs by simple chemical processes.⁶⁰ In the light of these developments, the Vienna Convention adopts two main strategies in respect of precursor drugs. The first is to require parties to criminalise the intentional 'manufacture, transport or distribution of equipment, materials or of substances listed in [two tables annexed to the Convention], knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances'.⁶¹ The second prong of the Convention's strategy against precursors is to prevent diversion of these chemicals from legitimate medical, scientific and commercial origins into the illicit production of narcotic drugs, both by way of domestic law and regulation and international co-operation.⁶²

3.2.1.5 *Measures preventing the trafficking of illicit drugs at sea and other initiatives*

Due to the problems of establishing an effective framework of jurisdiction over drug-trafficking at sea in international waters, Art 17 of the 1988 Vienna Convention

57 Vienna Convention, Art 14(4).

58 Chemical Action Task Force, *Final Report*, June 1991, Washington DC.

59 European Parliament, *Report on the Spread of Organised Crime Linked to Drugs Trafficking in the Member States of the EC*, 1992 A3-0358/91, p 26.

60 *Official Records: UN Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1991, New York: UN, Vol II, p 248.

61 Vienna Convention, Art 3(1)(a)(iv).

62 *Ibid.*, Art 12.

introduced a scheme whereby a party to the Convention may request from the Flag State of a vessel permission to board, search and take appropriate measures against vessels suspected of trafficking drugs. Such actions should be carried out by military vessels or aircraft or other vessels authorised for the purpose and caution must be taken not to endanger life, the security of the vessel or interests of the Flag State. The measures under Art 17 have been implemented by the Council of Europe in its Agreement on Illicit Traffic by Sea Implementing Art 17 of the UN Convention Against Illicit Drugs and Psychotropic Substances.⁶³

Whilst the UN has established a legal and administrative framework to counter the problems of illicit drug-trafficking and associated problems of drug use, there is a plethora of other anti-drug measures. The European Union (EU) has taken a range of measures aimed at a range of criminal problems, including drug-trafficking, not least the improvement of police co-operation culminating in the establishment of Europol Initiatives against drugs which is a specific priority to the Council of Ministers for Justice and Home Affairs.⁶⁴ Under the 1990 Schengen Implementing Convention, provisions are included to improve judicial and police co-operation and the Convention provides a means of implementing the measures set out in the UN conventions of 1961, 1971 and 1988 in the Member States to the Schengen *Acquis*.⁶⁵

3.2.2 Drug-trafficking as a crime against international law

Following the conclusion of the Vienna Convention in 1988, the UN General Assembly adopted a resolution requesting the International Law Commission to address the question of establishing an international criminal court, which would have jurisdiction over international offences including illicit trafficking in narcotic drugs across national frontiers.⁶⁶ Further discussions on the criminalisation of drug-trafficking in international law took place in the course of the drafting of the Draft Code of Crimes against the Peace and Security of Mankind. Whilst the crime of drug-trafficking was included in the 1991 Draft Code, doubts expressed by States on the provision saw its exclusion from the revised 1996 Draft.⁶⁷ Reviewing these developments, Sunga has claimed that, '[t]he proliferation of international agreements designed to suppress trafficking in illicit drugs indicates that the international community has recognised the need for international rather than purely domestic solutions to the drug problem'.⁶⁸ This view was borne out by discussion on the inclusion of the crime of drug-trafficking in the Rome Statute for the International Criminal Court.⁶⁹ In the frenzied discussion of the Rome Conference and the search for common agreement as to the crimes that should fall under the International

63 For discussion on these measures and their operation, see W Gilmore, 'Drug-Trafficking at Sea: The Case of *R v Charrington and Others*', 49 ICLQ (2000), 477.

64 See, eg, *Action Against Designer Drugs*, Council Meeting—Justice and Home Affairs, Brussels, 26–27 May 1997 (Pres/97/166); *Report on Drugs and Drug Related Issues*, Council Meeting—Justice and Home Affairs, 3–4 December 1998 (Pres/98/427); *Strategy on Drugs 2000–2004* (Pres/99/288).

65 H Meijers, *Schengen, Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police*, 1991, Dordrecht: Stichting Noem-Beokerij p 107.

66 Adopted by the General Assembly, UN Doc A/44/39 (4 December 1989).

67 *Op cit*, Sunga, note 38, pp 216–19.

68 *Op cit*, Sunga, note 38, p 216.

69 ICC Statute, 37ILM (1998), 999.

Criminal Court (ICC)'s jurisdiction and their definitions, interest in including drug-trafficking in the Statute waned during final negotiations. Drug-trafficking was not included in the final Statute; however, the parties adopted a resolution recommending that State parties consider reaching agreement on a definition and on including both drug-trafficking and terrorism at a future review conference.⁷⁰

During the course of the 20th century, measures against drug-trafficking developed from regulatory measures controlling the transit and quantities supplied, to measures which criminalise and prevent production and distribution. The UN initiatives are an acknowledgment that the growth in drug-trafficking adversely affects the economic, cultural and political foundations of society. Recently, there has been increasing awareness that drug-trafficking generates large financial profits enabling criminal organisations to penetrate and corrupt structures of government. By focusing on the proceeds from the sale of drugs, law enforcement agencies can develop an effective mechanism for disrupting major drug-trafficking networks. Thus, an important development has been the emergence of an international strategy to combat drug-trafficking through measures to address money laundering. The realisation that laundering dirty money is necessary in order to provide drug-traffickers and other organised criminal organisations with capital for developing illegal activities has resulted in the rapid increase in the international effort to tackle the problem.

3.3 MONEY LAUNDERING⁷¹

3.3.1 Introduction

While the increased interest in money laundering as an international crime has been engendered by the rapid growth in criminal activities linked to international drug-trafficking, money laundering is the natural consequence of many other large scale international organised criminal activities including corruption, fraud and terrorism. The term money laundering is used to describe the process whereby the proceeds of crime are converted for the purpose of concealing or disguising their illicit origin. This process is necessary in order to sever the link between the original criminal conduct and the proceeds of the crime. Several common factors can be identified: the conversion or transfer of property; the concealment or disguise of the source of the property; and the need to regain access to the money. Thus, money laundering is generally a three stage process: first, the placement phase where the profits generated by the criminal activity must become separated from the criminal activity itself; secondly, the layering phase when steps must be taken to disguise the route which the money takes during the laundering process; and, finally, the integration phase where the money must become available for use by the criminal organisation. During the placement phase, 'dirty' money is usually placed with other legitimate money in the financial system. However, before a criminal organisation gains access to the

70 *Rome Statute of the ICC, Background Information*, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF 183/9 (17 July 1998).

71 For further discussion of money laundering generally, see P Birks, *Laundering and Tracing*, 1995, Oxford: Clarendon; W Gilmore (ed), *international Efforts to Combat Money Laundering*, 1992, Cambridge: Grotius; and G Stessens, *Money Laundering: A New International Law Enforcement Model*, 2000, Cambridge: CUP.

money it needs to be satisfied that the money cannot be traced back to the original offence. It is at the layering phase that the real separation from the origin of the money is generally achieved.

Globalisation of the economy and the development of high tech communication systems that facilitate the international transfer of money have created a near perfect environment for the growth in money laundering. The electronic movement of money across national boundaries makes financial transactions difficult to trace and has produced problems for law enforcement agencies. In order to combat the problem, money laundering has been criminalised, national law enforcement agencies have been empowered to trace, freeze, seize and confiscate the proceeds of criminal conduct, and international mutual legal assistance schemes have been introduced.⁷² Furthermore, the realisation that banks and other financial institutions are used, albeit unwittingly, as intermediaries for the transfer or deposit of money derived from criminal activity, has generated a range of national and international initiatives aimed at preventing the banking system from being employed in this manner. These include the Vienna Convention,⁷³ the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime⁷⁴ and EU Directives on prevention of the use of the financial system for the purpose of money laundering.⁷⁵ There are also several significant self-regulatory regimes including those published by the Basle Committee on Banking Supervision and the Financial Action Task Force on Money Laundering. Many of these initiatives have been co-ordinated through the UN Office for Drug Control and Crime Prevention (ODCCP) within the framework of its global programme against money laundering. Arising from the growth in international terrorism, many international and national anti-money laundering initiatives now include measures to combat the financing of terrorism.⁷⁶

3.3.2 Self-regulation

In order to prevent the laundering of money through the financial system, banks and financial institutions have introduced a range of self-regulatory regimes. In its report in June 1980, the Committee of Ministers of the Council of Europe observed that the banking system could play a significant preventative role and suggested that increased co-operation with the police and judicial authorities could assist in the repression of criminal acts. Initially, the international effort to combat the growth in money laundering was addressed by banking regulations and codes of conduct rather than through legislative reform. In the late 1980s, representatives of the central banking authorities from 10 States met to consider how the institutions could assist in the suppression of money laundering. At the outset, the members of the Basle

72 For further discussion of mutual legal assistance, see Chapter 9.

73 28 ILM (1989).

74 ETS 141.

75 2001/97/EC amending the Council Directive 91/308/EEC.

76 For further discussion of terrorist financing see Chapter 2, 2.4.4.

Committee on Banking Regulations and Supervisory Practices⁷⁷ observed that the primary function of banking supervisory authorities is to maintain the overall financial stability of banks, rather than to ensure that individual transactions conducted by bank customers are legitimate. Further, national banking supervisory authorities do not necessarily have the same role and responsibilities in relation to the suppression of money laundering. In some States, supervisors have a specific responsibility; in others they may have no responsibility. Nevertheless, the Committee acknowledged that, as a consequence of the inadvertent association between banks and criminal activity, public confidence in the banking system could be undermined and the stability of the system threatened.

The Basle Committee agreed to draft a general statement of ethical principles in order to encourage banks worldwide to develop procedures to encourage customer due diligence and to discourage money laundering.⁷⁸ The Committee recommended that banks take reasonable steps to determine the true identification of persons conducting business with their institutions, including those using safe custody facilities, and should refuse to conduct business transactions with customers who fail to provide evidence of identity. However, while banks should be encouraged to co-operate with national law enforcement authorities and should close or freeze the accounts of persons suspected of depositing money which derived from criminal activity, the Committee observed that the Statement of Principles was not binding in international law and its implementation would depend upon national law and practice. However, the drafting of the Statement demonstrated a commitment to encourage ethical standards of professional conduct among banks and other financial institutions. This initiative has been acknowledged by the EU Council as a major step towards preventing the use of the financial system for money laundering.

Further Committee publications, issued in 1997 and 1999, recommend that banks develop policies which 'promote high ethical and professional standards in the financial sector and prevent the bank from being used, intentionally or unintentionally, by criminal elements'.⁷⁹ The Committee also strongly supports the recommendations of the Financial Action Task Force on Money Laundering (FATF) relating to customer identification, record keeping and reporting and the need to take measures to deal with States that do not have effective anti-money laundering procedures in place. A further publication, issued in October 2001, reinforced the principles established in earlier publications and provided precise guidance on the essential elements of 'Know Your Customer' (KYC) standards and their implementation.⁸⁰ It warns that without adequate controls and procedures in place to check customer credibility, banks risked damage to their reputation and might fail to meet requirements imposed by national anti-money laundering legislation. It considered that effective KYC safeguards required banks to formulate a customer

77 The original committee comprised of banking representatives from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, The Netherlands, Sweden, Switzerland, the UK and USA.

78 Basle Committee on Banking Supervision, *Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering*, 1988, Basle: Basle Committee.

79 Basle Committee on Banking Supervision, *Core Principles for Effective Banking Supervision and Core Principles Methodology*, 1997, Basle: Basle Committee.

80 Basle Committee on Banking Supervision, *Customer Due Diligence for Banks*, 2001, Basle: Basle Committee.

acceptance policy and a tiered customer identification programme which involved increased due diligence for higher risk accounts, and included proactive account monitoring for suspicious activities. The Basle Committee considers that similar guidance should be developed for both non-bank financial institutions and the professions frequently engaged in financial services, such as lawyers and accountants.

The increasing international dimension of organised criminal activity has also prompted a range of intergovernmental self-regulatory initiatives. In 1989, the FATF, a multi-disciplinary body established by the Heads of State of the seven major industrialised nations, known as the G7 countries, set out to develop and promote anti-money laundering policies. These policies aim to prevent the proceeds of crime from being used for future criminal activities and from affecting legitimate economic activities. Currently membership of FATF includes the European Commission, the Gulf Co-operation Council and 29 States from the major financial centre countries in Europe, North and South America and Asia. It works in co-operation with other like-minded bodies including the Caribbean Financial Action Task Force and the ODCCP. In 1990, a report was circulated setting out 40 recommendations for increasing co-operation in this area which aimed to establish a framework for anti-money laundering activities. They cover the areas of law enforcement, financial regulation and international co-operation and are accompanied by a set of interpretative notes which clarify the application of specific recommendations. Member States are required to monitor the implementation of the recommendations through a self-assessment exercise and a mutual evaluation process. This development is regarded as a benchmark in the field of international standards for combating money laundering.

In the general framework to the recommendations, Member States are encouraged to implement the 1988 Vienna Convention, to adopt an effective anti-money laundering programme, which should include mutual legal assistance initiatives, and to ensure that rules protecting financial confidentiality do not inhibit the operation of the FATF initiative. The remainder of the recommendations address both the role of national systems and the financial system in tackling money laundering. Thus States are encouraged to adopt measures similar to those set out in the Vienna Convention including criminalising money laundering activities and establishing procedures for tracing, seizing and confiscating assets. Acknowledging the important role that is played by financial institutions, States are also urged to introduce a range of anti-money laundering regulations including customer identification, record keeping and reporting requirements. These regulations should be applied to all branches and foreign subsidiaries of financial institutions, especially in States identified as having a poor anti-money laundering regime. It is recommended that international co-operation between law enforcement agencies be strengthened to facilitate the gathering and exchange of information. Further, mutual legal assistance measures should be introduced which include arrangements for co-ordinating seizure and confiscation, which may include the sharing of assets, and procedures to address conflicts of jurisdiction and extradition. Recently, the FATF undertook a review process that examined significant changes in money laundering trends and techniques to pinpoint the strengths and weaknesses emerging from the monitoring process and to consider possible changes to the recommendations. Among the areas identified as requiring further consideration were customer identification and suspicious transaction reporting and regulation, identification of beneficial ownership of companies, trusts and foundations and the

increased use of professional advice or other assistance with laundering criminal assets. The FATF has now extended its activities to include anti-terrorism initiatives and has issued special recommendations that address terrorist financing which Member States are urged to implement.

3.3.3 UN initiatives

The Vienna Convention⁸¹ was the first international instrument to address confiscation of the proceeds of crime and to require States to criminalise money laundering. This Convention has been used as a framework for several important international anti-money laundering initiatives including work undertaken by the Council of Europe, the EU and the FATF. Further, its provisions are frequently mirrored in national anti-money laundering legislation. The primary purpose of the Convention is to weaken the economic power of criminal organisations by promoting international co-operation to combat drug-trafficking. The preamble to the Convention notes that drug-trafficking generates large financial profits which enable criminal organisations to penetrate legitimate financial businesses, corrupt the structures of government and destabilise society. It was anticipated that by confiscating the proceeds of crime the incentive for drug-trafficking would be eliminated. Contracting parties are required to criminalise not only the organisation, management and financing of drug-trafficking but also the conversion, transfer and concealment of the proceeds of drug-trafficking. States must ensure that measures are adopted which enable the authorities to confiscate these proceeds. Thus States should introduce measures allowing the authorities to identify, trace and freeze or seize the proceeds of drug-trafficking, which may require the examination of relevant records held by banks and financial institutions.⁸²

Although the Vienna Convention limited its anti-money laundering provisions to the proceeds from drug-trafficking, these measures were eventually extended to include the proceeds from serious crime. Thus in a UN General Assembly Resolution, States and other relevant global and regional organisations were urged to develop effective international co-operation against the 'threats posed by organised transnational crime in relation to measures and strategies to prevent and combat money laundering and to control the use of the proceeds of crime'.⁸³ This Resolution was followed by the Political Declaration adopted at a Special Session of the UN General Assembly which expressed concern at the link between drug production, trafficking and terrorism and resolved to strengthen international and regional anti-money laundering initiatives. It recommended that by 2003 all States should have in place national anti-money laundering regimes in accordance with the measures set out in the Vienna Convention and the UN action plan entitled 'Countering Money

81 28 ILM (1989), 497.

82 *Ibid.*, Art 5(3).

83 GA Res 49/159.

84 GA Res s-20/4D.

Laundering'.⁸⁴ In this plan, States are urged to establish 'a legislative framework to criminalize the laundering of money derived from serious crimes in order to provide for the detection, investigation and prosecution of the crime of money laundering'.⁸⁵ Thus States should introduce measures to identify, seize and confiscate the proceeds of crime, facilitate international co-operation and implement mutual legal assistance measures and establish an effective financial and regulatory regime to prevent criminals laundering 'dirty' money through the financial system. The plan also recommended introducing 'KYC' procedures which included customer identification and record keeping.

The scope of money laundering was eventually extended to include the proceeds from serious crime in the 2000 CATOC.⁸⁶ In addition to requiring States to adopt legislative and regulatory measures to criminalise the laundering of the proceeds of crime, this Convention emphasises the importance of customer identification, record keeping and the reporting of suspicious transactions.⁸⁷ This applies not only to banks but also to other bodies particularly susceptible to money laundering. States are required 'within the parameters of national law' to ensure that administrative, regulatory and law enforcement authorities have the ability to co-operate and exchange information at the national and international level, and should contemplate establishing a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information.⁸⁸ In order to monitor the movement of cash across borders, States may implement measures which include a requirement that individuals and businesses report the cross-border transfer of substantial amounts of cash and negotiable instruments.⁸⁹ In establishing a domestic regulatory and supervisory regime, contracting parties are advised to refer to the relevant initiatives of regional and multilateral organisations involved in combating money laundering.⁹⁰

Work undertaken by the FATF indicated that terrorists could manipulate the financial system in much the same way as other criminal groups. It was also noted that terrorist financing might not be encompassed within the definition of money laundering used in the framework of many national and international anti-money laundering initiatives. FATF experts were of the opinion that terrorism should be considered to be a serious crime and recommended that States should take immediate steps to ratify the 1999 UN International Convention for the Suppression of the Financing of Terrorism. This Convention acknowledges that financing is at the heart of terrorist activity and applies to the provision or collection of funds which are intended to be used for the purpose of committing a terrorist act. Other steps taken by the UN to address the problem of terrorist financing include Security Council Resolutions 1368 and 1373 on combating financing which require States to take measures to stop the financing and training of terrorists. These initiatives require States to identify, detect,

85 *Ibid*, para 2(a).

86 CATOC, Art 1.

87 *Ibid*, Art 7(1)(a).

88 *Ibid*, Art 7(1)(b).

89 *Ibid*, Art 7(2).

90 *Ibid*, Art 7(3).

freeze and seize the funds. Thus many of the measures used to combat other forms of serious crime are now employed in the fight against terrorism.⁹¹

As part of its anti-money laundering programme, the UN has introduced Model Legislation on Laundering, Confiscation and International Co-operation in Relation to the Proceeds of Crime⁹² which facilitates the drafting of national legislative provisions designed to combat money laundering and to promote international co-operation between judicial and law enforcement agencies. While the model legislation incorporates many of the existing measures found in national and international instruments, it proposes several innovative provisions in order to improve the effectiveness of international co-operation. Adaptation of model legislation can present national legislative bodies with many difficulties. In order to address this problem, the model legislation presents optional or variant provisions. Thus under Art 1.1.1, money laundering is defined as:

- (a) the conversion or transfer of property for the purpose of concealing or disguising the illicit origin of such property or of assisting any person who is involved in the commission of the predicate offence to evade the consequences of his or her actions;
 - (b) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of property;
 - (c) the acquisition, possession or use of property,
- by any person who knows [variant: who suspects] [variant: who should have known] that such property constitutes the proceeds of crime as defined herein. Knowledge, intent or purpose required as an element of the offence may be inferred from objective factual circumstances.

This instrument has provisions relating to: transparency in financial and economic matters; the identification of customers; record keeping by financial institutions; the setting up of in-house anti-laundering programmes at financial institutions; and measures to facilitate collaboration with anti-laundering authorities. Due to the nature of the offence of money laundering, measures may be taken to legislate for special investigative techniques to facilitate the gathering of evidence. Article 3.3.1 provides for judicial authorities to order, for a specific period, the monitoring of bank accounts and grant access to computer systems, networks and servers. In addition, judicial authorities may order the seizure of financial and commercial records, approve the use of a range of intrusive surveillance techniques and resort to undercover operations and controlled deliveries.⁹³ The competent authorities shall be empowered to make compensation orders and to seize property connected with the offence and any evidence that may make it possible to identify the property. The final section of the model legislation addresses the matter of international co-operation and sets out a general provision under which States undertake to provide the widest possible measure of co-operation to the authorities of other States for the purposes of information exchange, investigations and court proceedings, in relation

91 For further discussion, see Chapter 2, 2.4.4.

92 For further information see www.imolin.org. The model legislation is part of the Global Programme Against Money Laundering, ODCCP.

93 Model Legislation, Art 3.3.2. Discussion relating to the civil liberties implications of these measures are beyond the scope of this book.

to the confiscation of the proceeds of criminal conduct. This section also addresses extradition and the provision of mutual technical assistance.⁹⁴

3.3.4 Council of Europe initiatives

In June 1987, the Committee of Ministers of the Council of Europe authorised a Select Committee of Experts to examine the applicability of existing international instruments to the tracing, seizure and forfeiture of the proceeds from crime. The Committee considered the problem from the standpoint of international co-operation and examined a range of international criminal law initiatives, including work undertaken by the UN into drug-trafficking. It noted that criminal investigations were sometimes hampered by lack of harmonisation in national criminal law and practice, and expressed concern that there were significant differences in national approaches to the confiscation of criminal proceeds. Further, existing initiatives introduced within the framework of the Council of Europe did not adequately address the problem. Thus the 1959 European Convention on Mutual Assistance in Criminal Matters did not apply to the search and seizure of property with a view to its subsequent confiscation, and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters raised problems of jurisdiction. The Committee's recommendations included the need to have in place effective mechanisms of international co-operation during all stages of the criminal investigation and the need for Member States to harmonise criminal law and adopt measures to confiscate criminal proceeds. The European Committee on Crime Problems of the Council of Europe (CDPC) eventually approved the draft proposal for an anti-money laundering convention which establishes a common criminal policy and lays down principles for international co-operation. Reflecting the global nature of the problem, this instrument, unlike most others drafted by the Council of Europe, omits the word 'European' from the title. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990 Convention) was eventually opened for signature in November 1990 by Member States of the Council of Europe and other non-Council States which had participated in its drafting.⁹⁵

The primary purpose of this Convention is to extend international co-operation initiatives between law enforcement agencies to prevent criminals from gaining an economic advantage from their involvement in crime. Contracting parties agree to adopt measures which criminalise money laundering,⁹⁶ and to facilitate the identification,⁹⁷ confiscation⁹⁸ and seizure⁹⁹ of the proceeds of crime. Thus contracting parties are required to introduce legislation which makes it an offence to knowingly be involved in the conversion, transfer, concealment, acquisition or use of criminal proceeds. Further, States are encouraged to implement legislation, regulations and administrative decisions to empower the courts and other competent authorities to

94 *Ibid*, Art 5.

95 ETS 141.

96 1990 Convention, Art 6.

97 *Ibid*, Art 3.

98 *Ibid*, Art 2.

99 *Ibid*, Art 4.

order that bank, financial or commercial records be made available in order to identify and trace property which may be confiscated. Contracting parties are urged to introduce measures which enable the authorities to use special investigative techniques to gather evidence related to the tracing of assets derived from criminal activity. Further, to increase the effectiveness of national anti-money laundering initiatives, the Convention includes provision for international co-operation procedures to assist law enforcement agencies, including operational assistance in the identification and tracing of the proceeds of crime. In addition, to prevent the disposal of property, parties should implement the necessary provisional measures which permit the authorities to freeze assets to enable confiscation to be enforced. The Convention, which is designed to complement other international initiatives, does not affect rights and undertakings given in respect of other mutual assistance treaties.¹⁰⁰

Further Council of Europe schemes include an initiative by the Committee of Ministers of the Council of Europe which in 1997 set up a committee to conduct an assessment of the anti-money laundering measures adopted in non-FATF States within the Council of Europe. The Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (PC-R-EV) is a sub-committee of the CDPC, which meets regularly to determine whether States are achieving the agreed anti-money laundering standards. It has developed a procedure for the conduct of mutual evaluations and a set of procedures and guidelines to deal with States which fail to comply with the FATF standards. The Committee publishes summaries of the mutual evaluations.

3.3.5 EU initiatives

Observing that criminalising money laundering is not the only method to combat the growth of this activity, the Council of the European Communities considered that financial institutions could and, indeed, should be encouraged to play an effective role in tackling the problem. Accordingly, a Council Directive was adopted on prevention of the use of the financial system for the purpose of money laundering.¹⁰¹ The 1991 Directive, which was based on the 1988 Vienna Convention, gave rise to a range of legal and non-legal developments in Member States. Article 1 of the Directive defines money laundering as the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences. The definition embraces the acquisition, possession or use of such property and includes forms of secondary participation. Member States should undertake to prohibit money laundering,¹⁰² and take appropriate measures to make sure financial institutions obtain adequate identification from customers before completing in a financial transaction,¹⁰³ and records should be kept for at least five years following any transaction.¹⁰⁴ Directors and employees of financial institutions are required to co-operate with the national authorities responsible for

100 *Ibid*, Art 39. For further discussion of mutual legal assistance, see Chapter 9.

101 Council Directive 91/308/EEC, OJ L166/77.

102 *Ibid*, Art 2.

103 *Ibid*, Art 3.

104 *Ibid*, Art 4.

combating money laundering¹⁰⁵ and establish adequate internal anti-money laundering regulations¹⁰⁶ and should refrain from carrying out transactions which they know or suspect to be related to money laundering until they have informed the relevant authorities.¹⁰⁷ The Directive required Member States to introduce legislative and other methods necessary to ensure compliance with these provisions before 1 January 1993.

In order to increase the effectiveness of EU anti-money laundering measures, the European Commission proposed changes to the 1991 Directive which would expand the definition of criminal activity to include a wider range of serious offences including terrorism and extend its provisions to cover non-financial professional service providers. The European Parliament has now approved a new EU Directive on Money Laundering.¹⁰⁸ Under the 2001 Directive, criminal activity means any kind of involvement in the commission of a serious crime which will include organised crime, corruption, and fraud against the European Community.¹⁰⁹ Further, the obligations incurred by financial institutions under the Directive are now imposed on members of the legal profession, accountants working in financial or allied industries, estate agents, art and antique dealers and casinos.¹¹⁰ Thus Member States must ensure that persons subject to the Directive undertake customer identification procedures,¹¹¹ report suspicious transactions to a designated authority¹¹² and establish appropriate training and internal reporting procedures.¹¹³ Lobbying by the professional bodies resulted in an acknowledgment of the need for lawyers in the United Kingdom to abide by legal professional privilege rules.¹¹⁴ Although the revised Directive has incorporated recent international developments and addressed some of the limitations of the original, there remains a need to address national regimes which may prevent effective operational international co-operation.¹¹⁵

3.3.6 National initiatives to combat money laundering¹¹⁶

3.3.6.1 *The UK*

Money laundering was initially criminalised in the United Kingdom in respect of the proceeds of drug-trafficking. The confiscation regime introduced by the Drug Trafficking Act 1986 provided the trial judge with the power to confiscate from

105 *Ibid*, Art 6.

106 Council Directive 91/308/EEC, OJ L166/77, Art 11.

107 *Ibid*, Art 7.

108 Council Directive 2001/97/EC

109 *Ibid*, Art 1(E).

110 *Ibid*, Art 2a.

111 *Ibid*, Art 3.

112 *Ibid*, Art 6.

113 *Ibid*, Art 11.

114 Under these rules communications between a legal adviser and a client for the purposes of obtaining legal advice are privileged. Thus legal professional privilege will apply when a lawyer is giving advice relating to contemplated legal proceedings, or if proceedings are not contemplated, the advice relates merely to the client determining their legal position.

115 See Chapter 9.

116 For a comprehensive account of the law and practice in the UK, see B Rider and C Nakajima, *Anti-Money Laundering Guide*, 2003, Bicester: CCH.

convicted defendants proceeds from drug-trafficking activities. When assessing the amount to be paid, the court can assume that assets accrued by the defendant in the six years prior to the commencement of proceedings were derived from criminal conduct. Arguments that this statutory assumption infringes the European Convention on Human Rights have so far been unsuccessful.¹¹⁷ Although the confiscation regime was initially limited to drug-trafficking cases, it has subsequently been extended to cover other offences. The 1986 Act has now been replaced by the Drug Trafficking Act 1994. Further anti-money laundering provisions appeared in a range of legislation, including the Criminal Justice Act 1993, which took account of the Council Directive 91/308/EEC. Subsequently, with a view to increasing the efficiency of the confiscation procedure, the Prime Minister requested an assessment of the recovery of illegally obtained assets regime. The report prepared by the Performance and Innovation Unit (PIU) in the Cabinet Office was published in 2000 and recommended the consolidation of existing legislation dealing with confiscation and money laundering. In 2001, the Proceeds of Crime Bill was introduced which incorporated many of the recommendations from the PIU report.

The Proceeds of Crime Act 2002, which came into force in February 2003, consolidates the existing confiscation provisions relating to drug-trafficking and other criminal offences and creates new powers of civil forfeiture without conviction. In addition to creating three specific money laundering offences, this legislation removes the distinction between laundering money from drug-trafficking and laundering the proceeds of other forms of criminal activity. This legislation also provides prosecuting authorities with a range of measures, including new powers of investigation, restraint orders and confiscation orders, which will make the recovery of unlawfully held assets more effective; it also includes provisions on international co-operation and mutual legal assistance. The three principal money laundering offences, which apply to the laundering of the offender's own proceeds of crime as well as the proceeds of other people's criminal activity,¹¹⁸ criminalise concealing,¹¹⁹ arranging,¹²⁰ acquiring, using or possessing¹²¹ criminal property. These offences all carry a maximum penalty of 14 years' imprisonment. The offence of concealing is committed when a person conceals, disguises, converts, transfers or removes from the jurisdiction criminal property. Similarly, it is an offence for someone to be concerned in arrangements which they know or suspect would make it easier for

117 In *Phillips v UK* (2002) 11 BHRC 280, the Strasbourg Court considered that although an issue relating to fairness may arise in circumstances where a confiscation order was based on hidden assets, in this case the relevant provisions were confined within reasonable limits, given the importance of what was at stake, and the Court was unanimous in holding that the operation of the statutory assumption did not violate the notion of a fair hearing. Similarly, in *R v Benjafield and Rezvi* [2001] 3 WLR 75, the appellant argued that a confiscation order imposed under Pt VI of the Criminal Justice Act 1988 did not accord with his rights under the Convention. In dismissing the appeal, the House of Lords considered that the legislation amounted to a proportionate response to the problem it was designed to address and represented a fair balance between the interests of the individual and the public. However, when considering an application for an order the trial judge must avoid any serious or real risk of injustice. If there was such a risk, the court should not make an order.

118 Proceeds of Crime Act 2002, s 340.

119 *Ibid.*, s 327.

120 *Ibid.*, s 328.

121 *Ibid.*, s 329.

another person to acquire, retain, use or control criminal property and to acquire, use or control criminal property. Criminal property is defined as being property which the alleged offender knows or suspects constitutes or represents benefit from any criminal conduct.¹²²

This legislation creates a new offence of failing to disclose suspicions that someone is engaged in money laundering activities. However, the duty to report is restricted to persons who receive information in the course of a business in the regulated sector, which is defined in Sched 9 to the Act.¹²³ Regulated sector businesses are required to nominate a Money Laundering Reporting Officer¹²⁴ who will incur criminal liability for failing to disclose an employee's suspicion to the National Criminal Intelligence Service (NCIS) as soon as is practicable.¹²⁵ It is also an offence to disclose information likely to prejudice a money laundering investigation.¹²⁶ The maximum penalty for these offences is five years' imprisonment. The Act provides for confiscation of proceeds derived from the defendant's criminal conduct. If the court is satisfied that the defendant has a criminal lifestyle, the confiscation order can relate to the proceeds of any criminal conduct whenever it occurred.¹²⁷ In line with earlier confiscation legislation, the court is permitted to make assumptions in respect of the amount the defendant has benefited from criminal conduct.

The Proceeds of Crime Act 2002 also introduces specific coercive powers to assist with investigations into money laundering. These powers are more intrusive than were previously available in an investigation into the proceeds of crime and have been justified on the ground that the government is committed not only to prosecuting crime but also to confiscating the proceeds of crime. A code of practice has been issued to provide guidance to the agencies exercising these powers.¹²⁸ The Act provides that in confiscation and money laundering investigations, applications can be made to a circuit judge for production orders, warrants for entry, search and seizure and customer information and account monitoring orders. Warrants issued under this legislation differ from those issued under the Police and Criminal Evidence Act 1984 (PACE) in that applications can be made without giving notice to the person whose premises will be searched.¹²⁹ However, provision is made to allow some of the search warrant provisions of PACE to apply to search warrants sought under this legislation in respect of money laundering investigations. The new powers of investigation are limited to confiscation investigations, civil recovery investigations and money laundering investigations. Whether this legislation is entirely convention compliant remains to be seen.

122 *Ibid*, s 340.

123 *Ibid*, s 330.

124 Money Laundering Regulations 1993, reg 14.

125 Proceeds of Crime Act 2002, s 331.

126 *Ibid*, s 333.

127 *Ibid*, s 6.

128 *Ibid*, s 377.

129 *Ibid*, s 352.

3.3.6.2 1993 EC Money Laundering Regulations

Exercising powers conferred under s 2(2) of the European Communities Act 1972, the Government introduced the Money Laundering Regulations 1993¹³⁰ to give effect to the Council Directive 91/308/EEC which relates to measures on prevention of the use of the financial system for the purpose of money laundering. This Directive was one of the early international initiatives in the fight against money laundering. Under the 1993 Regulations, financial institutions are required to establish and maintain procedures which would deter money laundering activities. The Regulations were designed to ensure persons engaged in relevant financial business activities in the UK took appropriate measures to help staff identify and prevent money laundering. Financial institutions were required to establish reporting systems and to set up training programmes for employees on the law and practice relating to anti-money laundering measures. The Regulations also required institutions to obtain adequate evidence of the identity of new applicants for business and, where persons were acting on behalf of another person, to take reasonable measures to obtain satisfactory evidence of the identity of the other person. Failure to comply with these regulations was punishable by a fine or imprisonment. The 1993 Regulations were updated in 2001.¹³¹

In December 2001, the European Parliament and the Council adopted a further Directive updating and amending the 1991 Directive. Responding to this new initiative the Government introduced the Money Laundering Regulations 2003, which revoke both the 1993 and 2001 Regulations. The new Regulations, which are also prescribed for the purposes of the Financial Services and Markets Act 2000, enter into force in June 2003. Money laundering for the purpose of these Regulations 'means an act which falls within s 340(11) of the Proceeds of Crime Act 2002 or an offence under s 18 of the Terrorism Act 2000'.¹³² Under these Regulations, persons seeking to form a business relationship, or conduct a one-off transaction in the course of a relevant business, must ensure compliance with a variety of procedures. These include: record keeping and internal reporting procedures; identification checks on applicants for business; and training to enable staff to recognise money laundering transactions. Casino operators are required to obtain satisfactory evidence of identity of all high spending customers. Failure to maintain these procedures will result in criminal liability. The Regulations require the Commissioners of Customs & Excise to keep a register of money service operators and a register of high value dealers and provide the Commissioners with powers to enter, search and seize documents and, in some circumstances, to impose a civil penalty. The Regulations also impose a duty on a 'supervisory authority' to inform the police if it knows or suspects that someone has been involved in money laundering. For the purposes of the Money Laundering Regulations, the Bank of England, the Office of Fair Trading and the Gaming Board of Great Britain are supervisory authorities.

130 SI 1993/1933.

131 SI 2001/3641.

132 A draft of 5 November 2002; SI 2003; Money Laundering Regulations 2003, reg 2.

3.4 CYBERCRIME

Recent developments in the field of information technology have given rise not only to rapid expansion in e-commerce but also to innovative forms of criminal behaviour and have provided new methods by which traditional criminal offences can be committed.¹³³ Using the Internet and other computer networks to commit crime has created serious problems for national legislative bodies and national law enforcement agencies. The rapid growth in cybercrime may restrict the development of e-commerce, which depends on safe systems for money transactions, as businesses struggle to make their computer networks and data more secure. Undoubtedly, self-regulation by the high tech industry can play an important role in preventing the proliferation of computer and Internet-related crime.¹³⁴ In addition to implementing technical measures to protect computer systems, legal and non-legal measures must be introduced to prevent and deter criminal activities. While self-regulatory mechanisms to combat misuse of the new technologies have many advantages over external regulation, to be effective self-regulation needs to be supported by appropriate national legislation and international agreements. However, many of the measures proposed by both national and international agencies to tackle the problem of cybercrime arguably inhibit the legitimate use and development of information technology and violate the right to freedom of expression and the right to privacy.

Cybercrime offences can include: using the Internet for illegal money transactions; violation of copyright by means of a computer system; gaining unauthorised access to data held on a computer with the intention of committing a serious criminal offence; intentionally hindering the functioning of a computer system by transmitting or deleting computer data; and the distribution of child pornography. The transnational nature of computer-related crime, which is generally committed in 'cyberspace', adds a jurisdictional complexity to the investigation and prosecution of cybercrime. Substantive criminal law and procedure varies from State to State and police investigative powers usually do not extend beyond national borders.¹³⁵ Lack of harmonisation in criminal legislation has led to difficulty in establishing a common definition of cybercrime and criminal investigations are hampered because cross-border evidence gathering is dependent upon both formal and informal international police co-operation.¹³⁶ However, while the law and practice in relation to mutual legal assistance in criminal matters has been notoriously slow and laborious, cybercrime is a rapidly developing phenomenon. Concerned at the

133 See generally Y Akdeniz, C Walker and D Wall, (eds), *Internet, Law, and Society*, 2000, Harlow: Longman; P Norman, 'Policing "High-Tech Crime" in the Global Context: The Role of Transnational Policy Networks', *Institute of Criminal Justice Studies*; V Ruggiero, 'Criminals and Service Providers: Cross-National Dirty Economies', 28 *Crime, Law and Social Change* (1997), 27; C Walker and Y Akdeniz, 'The Governance of the Internet in Europe with Special Reference to Illegal and Harmful Content', *Crim LR* [1998], December Special Edition: *Crime, Criminal Justice and the Internet*, pp 5–19.

134 See, eg, the Internet Service Providers Association (ISPA) which requires members to abide by a Code of Practice, the Internet Watch Foundation (IWF) and work undertaken by Microsoft's anti-counterfeiting team.

135 For further discussion see DL Speer, 'Redefining Borders: The Challenges of Cybercrime', 34 *Crime, Law and Social Change* (2000), 259.

136 See, for example, 'League Against Racism and Antisemitism (LICRA), French Union of Jewish Students v Yahoo! Inc. USA, Yahoo! France', 1(3) *Electronic Business Law Reports* [2001], 110–20. Case analysis by Y Akdeniz at www.cyber-rights.org/documents/yahoo_ya.pdf.

acceleration of high tech crime, and keen to signal the need to intensify international co-operation in the fight against cybercrime, Ministers from the G7/G8 States¹³⁷ recommended at the French summit in 1996 that:

States should review their laws in order to ensure that abuses of modern technology that are deserving of criminal sanctions are criminalised and the problems with respect to jurisdiction, enforcement powers, investigation, training, crime prevention and international co-operation are adequately addressed—States are urged to negotiate bilateral or multilateral agreements to address the problems of technological crime investigation.

Subsequently, at the Denver Summit in 1997 the G8 leaders issued a *communiqué* stating its intent to focus on the ‘investigation, prosecution and punishment of high-tech criminals, such as those tampering with computer and telecommunications technology, across national borders’. Further meetings have resulted in establishing an action plan to combat high tech crime, which has been endorsed by the EU Justice and Home Affairs Council, and a network of law enforcement experts.

While the G8 States continue to develop recommendations to combat the problem of crime in cyberspace, many other initiatives have been launched at both the international and national level. These include the Council of Europe Convention on Cybercrime¹³⁸ and the Additional Protocol, the European Commission Communications on Cybercrime,¹³⁹ the EU Forum on Cybercrime, the Organisation for Economic Co-operation and Development Guidelines for the Security of Information Systems and Networks,¹⁴⁰ the Australian Cybercrime Act 2001, and the National High Tech Crime Unit in the UK. Whether these schemes represent an adequate response to the problem of cybercrime and also achieve a balance between the interests of the information technology industry and the consumer, the needs of the law enforcement agencies and the protection of fundamental rights is open to question.

3.4.1 Council of Europe initiatives

3.4.1.1 Council of Europe Convention on Cybercrime

This Convention (Cybercrime Convention) is the first international treaty to address the commission of crime committed via the Internet and other computer networks. It aims to facilitate the detection, investigation and prosecution of cybercrime and to provide arrangements for efficient and reliable international co-operation. This initiative introduces a range of substantive, procedural and mutual legal assistance measures designed to deter the misuse of computer systems, networks and computer data. Following four years of discussions and many drafts, the Cybercrime Convention was opened for signature in November 2001. States eligible to sign and

137 The Group of Eight (G8) is comprised of the Heads of State of the major industrial democracies. This group holds an annual summit to discuss significant economic and political issues. Summit decisions can generate new initiatives to deal with global issues. At the time of the Lyon summit, the group comprised of seven states and Russia. Since 1998 Russia has been admitted as a full partner.

138 ETS 185.

139 COM (2000) 890.

140 DSTI/ICCP/REG (2002) 6.

ratify the Convention include Member States of the Council of Europe and non-Member States which have participated in the drafting process. It will enter into force when ratified by at least five States, which must include three States from the Council of Europe. Currently, the Convention has been signed by 33 States, including the US, but only ratified by Albania and Croatia. In order for it to become operational in the United States, it requires ratification by the US Senate. By adopting appropriate legislation and encouraging international co-operation, the Convention aims to establish a common criminal policy which will protect society from cybercrime. In the preamble reference is made to the need to maintain a balance between the interests of law enforcement and respect for fundamental rights. Its provisions supplement existing multilateral and bilateral mutual legal assistance and extradition treaties. In addition to providing law enforcement agencies with powers to search and intercept computer networks, the Convention addresses infringements of copyright, computer-related fraud, child pornography and violations of network security. An Additional Protocol to the Convention on Cybercrime will make it an offence to use the Internet to publicise racist and xenophobic propaganda.

The Convention has four chapters. Chapter I provides common definitions of some basic concepts including 'computer system', 'network', 'computer data' and 'service provider'. Chapter II, which is subdivided into three sections, deals with substantive criminal law and procedure and matters of jurisdiction. The list of offences set out in s 1 include offences against the confidentiality, integrity and availability of computer data systems, computer-related fraud and forgery, offences related to child pornography and offences related to infringements of copyright. Contracting parties are also required to implement legislation which makes it an offence to attempt, aid and abet the commission of the substantive offences. Measures must be taken to provide national authorities with appropriate powers and procedures to undertake effective criminal investigations and prosecutions. Thus measures must be taken to allow the prompt preservation of stored computer data and disclosure of traffic data, production orders, search and seizure of data stored in a computer, real-time collection of traffic data and the interception of content data. However, these powers must be balanced by procedural protections, which may include judicial or other independent supervision. This chapter concludes with provisions relating to jurisdiction.

Chapter III calls for parties to make liberal use of existing mutual legal assistance agreements and extradition arrangements for the purpose of investigating and prosecuting criminal offences. However, in the absence of a mutual assistance treaty, parties can use the provisions set out in Art 27 of this Convention. Requests for assistance may not be refused solely on the ground that the request relates to a fiscal offence and the rules relating to double criminality are relaxed. Specific mutual assistance provision is made in relation to expedited stored computer and traffic data and the accessing of stored computer data. Mutual assistance is not required for parties to gain access to publicly available stored computer data located in the territory of another party. Provided consent is obtained from the person with lawful authority to disclose data through a computer system, transborder access is also available without recourse to mutual assistance measures. Acknowledging that assistance can be required at any time, provision is made for a '24/7 Network'. Chapter IV contains the standard provisions relating to signature, entry into force, territorial application and reservations which are generally found in Council of Europe treaties.

3.4.2 EU initiatives

3.4.2.1 *European Commission Cybercrime and Communication*¹⁴¹

The EU Action Plan to combat organised crime, which was adopted in May 1997 by the Justice and Home Affairs Council and endorsed by the European Council, contained a request for a study to be undertaken into computer-related crime. The European Commission, the executive body of the EU, presented the findings of this study, known as the COMCRIME study, to the Council in April 1998. It provided the European Commission with reliable, current information on legal aspects of computer-related crime and established a database of relevant national criminal statutes on computer crime.¹⁴² The Cybercrime Communication, which considers the recommendations made by this study, is entitled *Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-Related Crime*. It is the European Commission's first comprehensive policy statement on cybercrime which includes proposals for Framework Decisions relating to child pornography and the spread of computer viruses. Taking account of this Communication, the European Parliament published a Recommendation entitled a *Strategy for Creating a Safer Information Society*.¹⁴³

The main aim of the COMCRIME study was to analyse the legal issues and to recommend a range of strategies to tackle the problem of computer crime. The researchers noted that, at the time, most legislation dealing with computer-related crime was linked to economic offences such as computer fraud and theft of intellectual property. However, public concern regarding the availability of illegal material on computer networks was on the increase. National authorities seldom considered using non-legal remedies to solve the problem, preferring to use the criminal law. Research revealed a lack of harmonisation with respect to the substantive criminal law, the range of coercive powers given to prosecuting authorities to investigate and prosecute computer crime and criminal jurisdiction. Nationally, there was also a lack of consistency regarding responsibilities imposed on the computer industry. While international responses to the problem were improving, the co-ordination of these activities remained a cause for concern. Suggestions made by international organisations were criticised as being too vague and for tending to focus too much on legal issues.

The research indicated that the international dimension of computer-related crime required international measures to combat it. It was submitted that the amount of data transferred via the Internet meant that national strategies would most likely fail and could create havens for cybercriminals. Consideration should be given to non-legal solutions, which would include measures to foster self-regulation by the computer industry and education of both business and private users. These measures were considered likely to be more effective than criminal law solutions and presented less risk to civil liberties. In addition, it was recognised that the problem created by the new

141 COM (2000) 890.

142 The report of the study *Legal Aspects of Computer-Related Crime in the Information Society—COMCRIME* is available at europa.eu.int/ISPO/legal/en/crime/crime.html.

143 A5-0284/2001.

information technologies would not be solved by recourse to tradition legal remedies. An effective solution required a new doctrine of information law which dealt with a new range of rights and responsibilities. Thus tackling the problem of computer crime would involve introducing measures which made use of a range of both legal and non-legal remedies which included technology, education, industry and the law.

Using these four remedies, the report listed specific recommendations. Non-legal recommendations included: improving intelligence with respect to the analysis of the links between high tech crime and organised crime; raising awareness and educating the consumer; increasing research with respect to computer security and international codes of conduct for the industry. Legal measures under the First and Third pillars of the Treaty of European Union (TEU)¹⁴⁴ should focus on directives which would identify the responsibility of Internet service providers and require Member States to create effective sanctions against clearly defined offences. Further, joint action and framework decisions should be adopted with respect to fostering transborder investigations, jurisdictional conflicts should be addressed and a set of common rules for record keeping in police and judicial statistics should be created. It was suggested that the European Commission should start its work by organising an international conference involving all parties interested in the fight against computer crime.

Taking account of these recommendations and the work undertaken by the Council of Europe and other international bodies including the G8, the European Commission issued a Communication which highlighted the need for a comprehensive EU policy initiative which aimed to improve the security of information infrastructures and to combat cybercrime. Prior to drafting the Cybercrime Communication, the Commission consulted with representatives from law enforcement agencies throughout the Member States, the EU advisory body on data protection¹⁴⁵ and members of the telecommunications industry. The Commission identified the need for an EU instrument to ensure Member States had in place effective sanctions to combat child pornography on the Internet. It would also seek to bring forward legislative proposals under Title VI of the 1992 TEU to harmonise substantive criminal law in the area of high tech crime. This would include offences related to hacking and denial of service attacks. In addition to promoting the creation of specialised police computer crime units at local level, it aimed to introduce measures to facilitate computer-related investigations involving more than one Member State. Non-legislative measures would include establishing an EU Forum on Cybercrime which would raise public awareness of the risks posed by cybercrime and would facilitate co-operation between all parties interested in tackling computer crime.

The forum is now operational and provides a website, a series of plenary sessions and expert group meetings. This initiative assists law enforcement agencies, civil liberty organisations, consumer representatives, ISP providers, telecommunications operators and data protection authorities to consider methods of promoting best practice to increase computer security and combat cybercrime. In addition, the Commission intended to continue to promote security awareness in the context of the *e-Europe* initiative.¹⁴⁶ In June 2001, the European Commission issued a further

144 1993 OJ L293/61.

145 See Directive 95/46/EC, Arts 29 and 30.

communication entitled 'Network and Information Security: Proposal for A European Policy Approach',¹⁴⁷ which developed some of the matters addressed in the Cybercrime Communication. In addition to emphasising the importance of international co-operation and the need to increase public awareness, this Communication provided an overview of threats posed to security. The focus of the latter Communication was on preventative measures and technical support. While examining the range of options open to the EU, the Commission has warned that the solutions chosen should not hinder the development of the Internal Market nor undermine the protection of fundamental rights. Thus any measures taken to prevent and combat misuse of the new technologies must comply with the EU Charter on Fundamental Rights, Art 6 of the TEU and the jurisprudence of the ECJ.

Responding to these initiatives, the European Parliament recommended that the Council and Commission establish a coherent strategy aimed at maintaining international communication networks as a global, free market place in order to allow everyone to pursue lawful activities and to prevent criminal activities which interfere with civil liberties and the public interest. It also recommended that the Commission draw up common definitions and proposals to resolve conflicts of jurisdiction between Member States in order to make it easier to prosecute and punish those responsible for cybercrime offences.¹⁴⁸ It was further recommended that the Commission propose legislative and non-legislative initiatives to enable a general framework to be established for a policy on computer-related crime. In order to encourage self-regulation, the Council and the Commission were encouraged to obtain the co-operation of those working in the field of information technology and urged to ensure that legislation did not place excessive burdens on the industry. Research into preventative techniques, such as encryption, should be encouraged and security should be developed and implemented by the industry. The scope for user self-protection should be increased and preventative technology measures implemented by the consumer.

The recommendation proposed that the Council clearly define the role of Europol and Eurojust in respect of cybercrime to avoid duplication of internal databases and to increase co-ordination of activities, and to ensure that these bodies remained subject to democratic control and comply with the *acquis communautaire* on the protection of personal data.¹⁴⁹ Further, leading jurists from Member States should be invited to attend a conference to discuss all aspects of cybercrime including problems associated with jurisdiction, human rights issues, evidential questions and the setting up of specialised 'cybercourts'. Insofar as the EU is responsible, the Council and Commission were recommended to define clearly the measures available to law enforcement agencies for the collection of evidence in order to comply with the rules

146 See *Europe 2002: An Information Society for All*, 14 June 2000.

147 COM (2001) 298.

148 Recommendation by the European Parliament on the Strategy for Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-related Crime (2001/2070/COS).

149 The Council of the European Union has expressed concern that the definition of computer crime in the Annex to the 1995 Europol Convention is insufficiently precise and proposed adding a specific definition which would include all forms of attack on automated data processing systems.

set out in existing instruments addressing mutual legal assistance provision. The recommendation emphasised that any coercive measures must strike a balance between effective prevention and punishment of offences, the legitimate interests of users and respect for fundamental rights, which includes the right to privacy and the protection of personal data. Thus, while international initiatives should be encouraged, care must be taken to maintain a balance between the interests of law enforcement and the need to safeguard fundamental rights and freedoms of citizens. Accordingly, no one may be forced to incriminate themselves by revealing encryption codes and data must not be transferred to a State which will not guarantee an equivalent degree of protection as guaranteed by Art 8 of the European Convention on Human Rights.

3.4.2.2 *EU Safer Internet Action Plan*

Several EU initiatives have focused on the issue of self-regulation within the computer industry. In January 1999, the European Parliament adopted a four year Community action plan designed to promote 'safer use of the Internet by combating illegal and harmful content on global networks'.¹⁵⁰ This Safer Internet Action Plan initiative, which was allocated a budget of 25 million euros, recognised the need not only to support and promote self-regulation mechanisms within the industry but also to co-ordinate the work of the self-regulating bodies and to raise public awareness. The action plan covered four areas of activity which included creating a safer environment, developing filtering and rating systems, encouraging awareness and a range of supporting activities such as addressing legal questions arising from Internet use. In order to achieve the objective of promoting safer use of the Internet, a range of activities would be undertaken in Member States under the guidance of the Commission. Thus funding allocated to the action plan is available to establish a network of hotlines to receive calls from users finding offensive material on-line and to develop European guidelines on codes of conduct for the industry. Financial support is also available for projects that encourage the industry to introduce content monitoring schemes, filtering tools and rating systems which allow parents and teachers to select appropriate content for children. In addition support was given to projects fostering international co-operation and exchange of best practice at both the European and international level and which aim to co-ordinate self-regulating activities across Europe. At the end of the first two years of the Action Plan, the Commission was required to submit an evaluation report to the European Parliament.

In March 2002, the Commission submitted a proposal to the European Parliament to amend and extend the action plan for a further two years. The Commission sought to include EU candidate States in the action plan's activities and to extend its coverage to include new online technologies including mobile and broadband content, online games and all forms of real-time communication. It also wanted to give more attention to other forms of illegal and offensive material communicated via the Internet including child pornography, racism and violence. Before approving this request, Parliament is required to assess the progress of the original Action Plan and examine

the new proposal. Accordingly, the Commission's proposal was referred to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs for its opinion. The Committee appointed a rapporteur to assist with the task of evaluating the achievements and shortcomings of the current Action Plan and to examine the new tasks mentioned in the proposal. In the Committee's draft report on the new proposal it was noted that although many projects had received funding many of the goals set out in the original Action Plan remained unfulfilled.¹⁵¹ It was noted that the Commission's evaluation report revealed that although a network of hotlines had been established in some Member States, contact details were not readily available and, while the University of Oxford had been contracted to conduct research into self-regulatory attempts in the media and to develop models of self-regulation which, hopefully, would lead to proposals for a European Code of Conduct, no project was looking specifically at the quality labelling system for suppliers of Internet services. Further, although several filtering projects had been financed, no project had focused on validating existing filtering software and conducting security tests against counterattacks, and the awareness raising projects failed to make best use of the new media to distribute information. Finally, the Commission's report did not indicate whether there had been a response to the European Parliament's call for tenders for an assessment of the legal questions raised by either the content or the use of the Internet, and no conference had been organised in the past four years. In the light of these shortcomings, the rapporteur considered it would be inappropriate to extend the original Action Plan beyond introducing amendments which emphasised the importance of the measures still to be taken and to include co-operation with the candidate States.

In March 2003, the European Parliament and the Council of the European Union acknowledged that more time was needed for actions to be implemented to achieve the objectives of the original Action Plan and to take account of the new online technologies and agreed to amend the original Community Safer Internet Action Plan.¹⁵² The activities to be undertaken in the second phase of the Action Plan include: completing the hotline network in all Member States and adapting best practice guidelines to new technology; promoting self-regulation through the systematic reporting of legal and regulatory issues and providing assistance to candidate States keen to set up regulatory bodies; focusing on benchmarking of filtering software services and providing assistance for developing filtering technology; encouraging user-friendly content rating by bringing together the industry, content providers, regulatory and self-regulatory bodies and consumer associations; providing support for awareness raising initiatives and to exchange best practice on new-media education; providing support for sociological research into children's use of the new technologies in order to develop educational and technological means for protecting them from harm; supporting networking and information sharing and developing methods which promote international co-operation including establishing a Safer Internet EU Forum. A further 13.3 million euros has been set aside for the second phase of the Action Plan which should be completed in 2004.

151 COM(2002)152-C5-0141/2002-2002/0071 (COD).

152 COM 2002/0071 (COD).

3.4.3 Other international initiatives

3.4.3.1 *The Organisation for Economic Co-operation and Development Security Guidelines*¹⁵³

Users of global information systems and networks have been aware for some time of the risks created by lack of security. However, until recently security was not always at the forefront for those responsible for designing, managing and providing information systems. Similarly, business and private users did not always appreciate the extent of the risk. Following the events of 11 September 2001, cyber security became an international matter. In 2002, the Organisation for Economic Co-operation and Development (OECD) issued a revised set of guidelines entitled *Guidelines for the Security of Information Systems and Networks: Towards a Culture of Security*.¹⁵⁴ These non-binding guidelines, which were the result of lengthy discussions between government experts, representatives of the information technology industry, business users and consumer groups, aim to develop a 'culture of security' among all participants who develop, service, manage and use global information networks by raising awareness of security risks and promoting sound security practices. The Guidelines, which were adopted as a Recommendation of the OECD Council in July 2002, have been taken into account by both national and international bodies concerned with improving the security and reliability of information network systems.

The Guidelines encourage governments, businesses and individual users of information networks to take account of nine basic principles. These principles refer to the need to promote awareness, responsibility and co-operation in the matter of information network security and to respect ethical and democratic values. Account should also be taken of the need to reduce vulnerability by regular risk assessment and to incorporate security design in information networks. All participants are urged to review and reassess the security of existing systems and to make the necessary modifications to security policies, measures and practices. Additionally, the promotion of a culture of security requires the implementation of initiatives to encourage international co-operation. These Guidelines formed the basis of a UN Resolution on cybercrime which has been adopted by the 57th session of the UN General Assembly.¹⁵⁵

3.4.4 National initiatives

Drafting specialist legislation that not only provides prosecuting authorities with sufficient coercive powers to investigate and prosecute cybercrime but also adequately preserves fundamental rights has presented national legislative bodies with a significant challenge. Unless legislation designed to combat cybercrime is

153 The OECD is an intergovernmental organisation established in 1961 to facilitate the harmonisation of national economic policies. In order to achieve its main objective of promoting economic growth, trade and development, it makes available to its members information which facilitates the process of rational policy making.

154 DSTI/ICCP/REG (2002) 6.

155 A/RES/57/239.

clear, comprehensive and well focused, competent cybercriminals will be able to exploit loopholes and avoid prosecution. Although several states have created a specific legislative framework to deal with computer and Internet-related crime, including offences designed to protect the integrity of computer data, developments in computer and Internet technology frequently outstrip the legislative process. Recently, the Australian Federal Government introduced legislation which focuses on activities directed at computer technology rather than the more traditional criminal offences which are committed via the computer.¹⁵⁶ The Cybercrime Act 2001, which entered into force in December 2001, contains provisions relating to the dissemination of computer viruses, computer hacking and unauthorised access to or modification of data held in a computer or unauthorised impairment of communications to or from a computer with the intention of committing a serious offence. The offence of unauthorised impairment of electronic communications, which carries a maximum penalty of 10 years' imprisonment, makes it an offence to circulate a diskette containing a computer virus that aims to infect a target computer through an innocent agent. This legislation also makes it an offence to obstruct communication links. Thus sending a high volume of emails to an address with the intention of crashing a computer system is an offence. Further, it is an offence to gain unauthorised access to restricted data held in a computer and assisting others to commit a computer offence. In order to assist police officers gather evidence held on electronic equipment, prosecuting authorities are given the power to access data held on computers at locations other than the address on the search warrant. Encryption and computer passwords can cause problems for police officers seeking access to computer data. The Cybercrime Act 2001 provides the prosecuting authorities with compulsory powers to obtain information or assistance sufficient to enable an officer to gain access to computer data. Thus a person with the requisite knowledge can be compelled, in appropriate circumstances, to provide the authorities with the necessary information. This provision may give rise to problems relating to the privilege against self-incrimination.

Practical challenges to the successful investigation and prosecution of cybercrime can range from lack of technical training for police officers to issues relating to jurisdiction arising from the transnational nature of Internet-related crime. Local police forces may lack the resources to equip personnel with the necessary high level of technical expertise and specialist investigative skills necessary to tackle computer and Internet-related crime. In common with many other states, the UK's approach to this problem has been to establish specialist units which are staffed by personnel equipped with the necessary investigative, forensic and computer skills. These units not only deal with the investigation and prosecution of cybercrime but also provide advice and support at the local level. Police forces throughout the UK now have computer crime units which deal with computer-based fraud and other computer-related crime. These units work in conjunction with other specialist police units including the National Infrastructure Security Co-ordination Centre which provides

156 For further discussion see S Chidgey, 'Australia's Approach to Legislating against Cybercrime', paper delivered in the Commonwealth Secretariat Oxford Conference on the Changing Face of International Co-operation in Criminal Matters in the 21st Century, 2002, Christ Church, Oxford.

an emergency response team. In addition, law enforcement agencies in the UK have recently established a National High-Tech Crime Unit. This unit is divided into four sections dealing with investigations, intelligence, support, and forensic retrieval. Its jurisdiction is restricted to investigations into the distribution of illegal and offensive material, computer hacking and computer-related fraud, offensive electronic communications and the dissemination of computer viruses. Personnel from the National Crime Squad, HM Customs & Excise and the NCIS staff the unit, which became operational in April 2001. Its function is to provide police forces and businesses throughout the UK with information, advice and assistance on computer crime and crime prevention. In addition to offering support to local police computer crime units, it aims to develop intelligence and co-ordinate operations both nationally and internationally. The forensic retrieval section aims to produce material from digital data in a form which can be tendered as evidence at trial.

3.5 BRIBERY OF FOREIGN PUBLIC OFFICIALS

Corruption and, in particular, bribery of foreign public officials was, until recently, considered merely an issue pertinent to each country's domestic laws and commercial practices. Another reason for industrialised States not extending extra-territorial jurisdiction against nationals or domestically registered corporations known to have bribed public officials of third nations was because the prospects of investments abroad were obviously perceived as boosting national economies, regardless of their unethical acquisition. On a short term scale, this may be true for a local economy, but IMF studies have revealed that corruption is negatively linked to the level of investment and economic growth.¹⁵⁷ Moreover, bribery may also constitute an act of unfair competition¹⁵⁸ and also have a serious impact on the enjoyment of fundamental human rights.¹⁵⁹

The US was the first country to enact extra-territorial legislation prohibiting bribery of foreign public officials by US nationals or corporations of any type, which are either controlled by US nationals, or have their principal place of business in the US, or are organised under US laws.¹⁶⁰ 'Bribery', under the Foreign Corrupt Practices Act (FCPA) 1977, is the offer of payment of money or anything in value to an official of a foreign government or a political party with corrupt intent for business purposes. This definition excludes so called 'facilitating payments' intended to expedite otherwise lawful government action, as well as any payments permitted in accordance with the laws of the foreign State.¹⁶¹ This legislation, although a bright light in the darkness of

157 V Tanzi and H Davaodi, 'Corruption, Public Investment and Growth', IMF Working Paper 97/139, 1997.

158 International Chamber of Commerce, *Revisions to the International Chamber of Commerce Rules of Conduct on Extortion and Bribery in International Business Transactions*, 35 ILM (1996), 1306, p 1307.

159 *Report of the Working Group on Contemporary Forms of Slavery*, UN Doc E/CN4/Sub2/1999/17 (20 July 1999), para 53, which describes corruption as an inescapable element in the struggle against contemporary forms of slavery.

160 1977 FCPA, 15 USC, §§ 78a, 78dd-1, 78dd-2 (Supp 1997).

161 See LH Brown, *The Extra-Territorial Reach of the US Government's Campaign Against International Bribery*, 22 *Hastings Intl & Comp L Rev* (1999), 407, pp 410-16; MK Hurst, 'Eliminating Bribery in International Business Transactions', 6 *JLLP* (1997), 111.

international business corruption, was rightly seen by US corporations and their foreign subsidiaries as placing them at an onerous disadvantage against their international competitors who were not susceptible to such laws.

US-led efforts to achieve global normative consensus on the international criminalisation of foreign bribery prompted various organisations to confront this issue for the first time. In 1975, the General Assembly of the UN passed Resolution 3514, condemning bribery by transnational and multinational corporations and the United Nations Economic and Security Council directed ECOSOC to formulate a code of conduct regarding payments in international trade. Although an ad hoc Working Group on Corrupt Practices was established and produced a draft Agreement on Corrupt Practices, lack of support from developed nations eventually shelved this project. At the same time, the OECD established a Committee on International Investment and Multinational Enterprises (CIME) with the purpose of drafting a relevant code of conduct. On 21 June 1975, the OECD Ministerial Conference adopted a Declaration on International Investment that prohibited the solicitation and payment of bribes to foreign officials, as well as other unlawful political contributions.¹⁶² However, it was not until 1994, and the adoption by the OECD Council of a Recommendation on Bribery in International Business Transactions,¹⁶³ that mounting pressure had paved the way for establishing concrete normative guidelines on international corruption. This Recommendation called upon OECD Member States to deter bribery through their national legislation and practice, especially by amendment of any tax laws that permit or favour bribery and further urged them to facilitate international co-operation. CIME was designated as a monitoring body, ordered to review the status of the Recommendation after three years. On the instigation of the US, the OECD Council adopted, on 11 April 1996, a Recommendation calling upon States to re-examine their laws on tax deductibility concerning bribes paid to foreign public officials, which were often listed as commissions or fees, preferably by treating such bribes as illegal.¹⁶⁴ In accordance with its mandate, on 23 May 1997, CIME submitted a Revised Recommendation on Combating Bribery in International Business Transactions, which the OECD Council subsequently adopted.¹⁶⁵ This instrument recommended the adoption of specific legislative proposals in every field of national laws—criminalisation of bribery, non-recognition of tax deductibility, enforcement of adequate accounting, independent external audit, internal company controls, transparency in public procurement and international co-operation—and eventually formed the basis for the OECD's 1997

162 Likewise, the International Chamber of Commerce issued a report in 1977 containing Rules of Conduct to Combat Extortion and Bribes, in connection with retaining or obtaining business, requiring the adoption of codes of conduct and rigorous accounting controls by participating States. These Rules were revised in 1996, reprinted in 35 ILM (1996), 1306.

163 OECD Doc C(94)75/FINAL (27 May 1994), 33 ILM (1994), 1389.

164 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, OECD Doc C(96)27/FINAL (17 April 1996), 35 ILM (1996), 1311; following publication in May 1997 of the OECD's Committee on Fiscal Affairs (CFA) *Report on the Recommendation on Tax Deductibility*, which noted that in 12 Member States bribes to foreign officials were 'in principle' deductible offences; the majority of these States re-examined their tax legislation. See *op cit*, Brown, note 161, p 494.

165 OECD Doc C(97) 123/FINAL (29 May 1997), 36 ILM (1997), 1016.

Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention).¹⁶⁶

Article 1(1) of this Convention makes it a criminal offence for any person:

Intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that public official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

It is also an offence under the Convention to be involved in instances of bribery through acts of complicity, incitement, aiding or abetting, attempts or conspiracy.¹⁶⁷ This definition of bribery of foreign public officials is entirely consistent with similar international instruments, such as the 1996 Organisation of American States (OAS) Inter-American Convention Against Corruption,¹⁶⁸ the 1997 EU Convention on the Fight Against Corruption Involving Officials of the EC or Officials of Member States of the EU,¹⁶⁹ the 1999 Council of Europe Criminal Law Convention on Corruption,¹⁷⁰ and the 2000 CATOC.¹⁷¹ Although illicit enrichment is an offence in two of the above instruments,¹⁷² advantages collected by foreign public officials are generally recognised as not constituting bribery if they are permitted by statute or case law of the official's country, or are in fact 'facilitation payments'.¹⁷³ The 1997 OECD Convention renders legal persons responsible for acts of bribery and subject to financial and administrative sanctions,¹⁷⁴ and the 1997 EU Convention makes explicit reference to the criminal liability of the heads of businesses—defined as the people having power to exercise control or take decisions—where an act of bribery was performed by a person under their authority acting on behalf of the business.¹⁷⁵ The offence contemplated is an extraditable one,¹⁷⁶ subject to the usual qualification of bilateral extradition treaties between the parties concerned.

Besides the stress on interstate co-operation, treaties and non-binding instruments alike either urge or oblige parties to adopt sound economic regulatory and disclosure procedures, auditing, surveillance of public officials and be prepared to initiate

166 37 ILM (1998), 1; the most significant changes to the FCPA 1977 made by the International Anti-Bribery and Fair Competition Act 1998, which is intended to implement into US law the OECD Convention, are that it adds officials of public international organisations to the definition of 'foreign officials' and expands US jurisdiction both to acts committed by US nationals wholly abroad, without a nexus requirement to US interstate commerce, and also to acts committed by non-US nationals while in the USA: Pub L No 105-366, 112 Stat 3302 (1998). See SD Murphy, 'Contemporary Practice of the US Relating to International Law', 93 *AJIL* (1999), 161.

167 1997 OECD Convention, Art 1(2).

168 Art 4(1).

169 Arts 2 and 3, distinguishing between 'passive' and 'active' corruption. 1997 OJ C195/1, 37 ILM (1998), 12.

170 ETS 173.

171 Art 8, UN Doc A/55/383 (2 November 2000).

172 1996 OAS Convention, Art 11; GA Res 51/191 (16 December 1996), containing the UN Declaration against Corruption and Bribery in International Commercial Transactions.

173 'Commentaries on the 1997 OECD Convention', 37 ILM (1998), 8, p 9.

174 1997 OECD Convention, Arts 2 and 3(2).

175 1997 EU Convention, Art 6.

176 1997 OECD Convention, Art 10; 1997 EU Convention, Art 8.

prosecutions in cases of corruption.¹⁷⁷ The 1997 OECD Convention established a monitoring mechanism under the supervision of the Working Group on Bribery in International Business Transactions, incorporating both a reporting system and an examination procedure for each Member State.¹⁷⁸ In 1996, the World Bank's Board of Executive Directors revised the organisation's Guidelines for Loans and Credits by requiring that all parties to a transaction that is financed by the bank observe the highest standards of ethics, and that, in case of corrupt practice, the bank is to reject financing proposals.¹⁷⁹ The World Bank has taken concrete action regarding bribes allegedly paid to win contracts for the Lesotho Highlands Water Project, a dam construction venture partly funded by the bank. It has provided financial assistance to the Lesotho Government's investigation into the corruption allegations, stating further that, if a company were discovered to have paid bribes, it could be excluded from participating in any World Bank projects elsewhere.¹⁸⁰ It is worth noting the existence of a non-profit non-governmental organisation established in 1993 dedicated to the curbing of corruption, Transparency International.¹⁸¹ This organisation has actively participated in building international support for the 1997 OECD Convention and works closely with governments on developing national anti-corruption programmes and adequate domestic legislation. Among its enormous research resources and database, most impressive are its annual *Corruption Perception and Bribe Payers Indexes*.

It is obvious that bribery of foreign public officials has been finally recognised as a contemporary scourge, an international offence being a threat to commerce, stability and the enjoyment of human rights. Whatever may be the domestic practice with regard to other international offences, the application of the 'Act of State' and similar doctrines is incompatible with the purposes of the above anti-corruption treaties, as these instruments are, by their nature, intended to regulate acts of public officials. It would, thus, be absurd to hold that solicitation and receipt of bribes constitutes a public act of a foreign State committed on its territory, and, hence, not susceptible to the criminal jurisdiction of other States, as this defeats the object and purpose of the relevant conventions. What is more worrying is that although the performance element of certain contracts has been premised on corruption of foreign officials, subsequent arbitral awards dealing with other contractual matters were enforced in third countries, with the courts of the enforcement State refusing to examine the relevance of the corruption.¹⁸²

177 International Chamber of Commerce, *Revisions to the Rules of Conduct on Extortion and Bribery in International Business Transactions*, 35 ILM (1996), 1306; 1997 OECD Convention, Art 8; GA Res 51/191 (16 December 1996).

178 1997 OECD Convention, Art 12.

179 The World Bank, *Guidelines for Procurement under IBRD Loans and IDA Credits*, 1996, p 7.

180 'Dam Builders Charged in Bribery Scandal', BBC News, 19 November 1999.

181 See J Pope and F Vogl, 'Making Anti-Corruption Agencies more Effective', *37 Finance and Development* (2000), 1.

182 See I Bantekas, 'Some Aspects of Enforcement of Foreign Arbitral Awards in the United Kingdom: Financial Fora, Public Policy and *Jus Cogens*', in I Greshnikov (ed), *International Commercial Arbitration*, 2002, Arbitration Centre IUN.

3.6 INTERNATIONAL POSTAL OFFENCES

Although channels of postal communication had been established since at least 255 BC, it was not until the 17th century that the first postal treaty was agreed, consisting of bilateral agreements governing the transit of mail within several European countries. The enormous growth in postal communications which subsequently ensued at a global level was later regulated on the basis of bilateral arrangements, using a multitude of postal rates, units of measurements and currencies, which by the mid-19th century warranted a radical reform in order to ensure some uniformity. At a conference convened in Berne between September and October 1874 and attended by representatives from 22 nations, an agreement establishing the General Postal Union was adopted. In 1878, and in reflection of growing membership, the organisation's name was changed to Universal Postal Union (UPU).

Although the aim of the UPU Conventions was to unify the regulation of postal activities, the 1878 Convention expressed the Union's concern over the unlawful use of the mails by private individuals.¹⁸³ Article 11 forbids the public to send by mail letters or packets containing gold or silver substances, pieces of money, jewellery, or precious articles, as well as any packets containing articles liable to customs duty. The successive UPU Conventions since 1878, each terminating its predecessor, clearly established two categories of offences: (a) the fraudulent use of counterfeit postage stamps or used stamps, as well as the fraudulent manufacture and distribution of forged or imitated stamps; and (b) the illegal use of the mails.¹⁸⁴ The list of objects falling in this latter category included, besides articles subject to customs duty and precious items, any other articles which by their nature would expose postal officials to danger, or damage the correspondence, as well as explosive, inflammable or other dangerous substances.¹⁸⁵ The list was later expanded to include narcotic drugs and obscene articles.¹⁸⁶ The wording of Arts 18(5) and 20 of the 1920 UPU Convention strongly suggests that only the acts of counterfeiting postage stamps and the insertion of narcotic drugs in the mails were recognised as constituting international offences, since, with respect to all other unlawful usages, there did not exist an express obligation to prevent and punish the offenders. This wording has been consistently applied in subsequent UPU Conventions,¹⁸⁷ and the 1964 Final Protocol to the Universal Postal Union Constitution obliged Member States additionally to prevent and punish the insertion of explosives or other easily inflammable substances in postal articles.¹⁸⁸ With the adoption of the 1994 UPU Postal Parcels Agreement, it is clearly discernable that under customary international law it is an offence to: (a) counterfeit stamps or international reply coupons, as well as to fraudulently manufacture or imitate such stamps and coupons;¹⁸⁹ (b) insert narcotic drugs and

183 1 Bevans 51; 1885 Additional Act to the 1878 Convention, Art VIII, elaborated that the sending by mail of precious articles was prohibited only in case the legislation of the countries concerned forbade their being placed in the mails or being forwarded. Reprinted in 1 Bevans 97.

184 Eg, 1906 UPU Convention, Arts 16(3) and 18, 1 Bevans 492.

185 1906 UPU Convention, Art 16(3).

186 1920 UPU Convention, Art 18(1), 2 Bevans 282.

187 1924 UPU Convention, Arts 41 and 79, 2 Bevans 443; 1929 UPU Convention, Arts 45 and 80, 2 Bevans 873; 1939 UPU Convention, Arts 46 and 81, 3 Bevans 539; 1964 Final Protocol to UPU Constitution, Art 14, TIAS 5881.

188 1964 UPU Constitution Final Protocol, Art 14(e).

psychotropic substances in postal items;¹⁹⁰ and (c) insert explosive, flammable or other dangerous substances in postal items where their insertion has not been expressly authorised by UPU Conventions.¹⁹¹ As regards all other objects that are prohibited from being placed in postal items, the penalisation of the act itself is not addressed in the UPU Conventions and Protocols and is, therefore, dependent on the regulations employed by each individual country.¹⁹² In any case, the sender of such objects incurs civil liability as a result of the UPU Conventions and Protocols, as long as the relevant instrument has been transposed into domestic law. Although no relevant mention is made in the UPU Conventions, jurisdiction over the aforementioned international postal offences is based primarily on the subjective territorial principle (that is, the place where the illegal postal item was mailed, or where the stamps were counterfeited), but also on objective territoriality (that is, the country of destination or the country of transit if the illegal item was discovered there, and the country where economic loss was suffered as a result of the counterfeiting). Other legitimate bases of jurisdiction cannot be excluded. In all cases of illegal use of the mails, it will hardly seem appropriate to national Prosecutors to charge an accused with a postal offence usually carrying a lighter penalty, especially where other domestic provisions relating to drug offences or offences against the person can be applied instead.

Other postal offences such as mail fraud,¹⁹³ which in the US alone is responsible for defrauding private individuals of over US\$100 million annually, constitute domestic crimes, albeit with a transnational character.¹⁹⁴ The combating of this type of activity is at present pursued at an interstate level through the co-operation of the afflicted States. The UPU recognising the need for postal security established the Postal Security Action Group in 1989 with the aim of developing worldwide security standards, promoting the creation of internal security units in national postal administrations and establishing co-operation with other international organisations. For this purpose, it has been working closely with Interpol, drawing special emphasis on illicit drug-trafficking, child pornography and paedophile networks, as well as mail fraud and money laundering.

3.7 CIRCULATION AND TRAFFICKING IN OBSCENE PUBLICATIONS

Although most countries had, by the 19th century, enacted legislation outlawing trafficking and possession of obscene publications,¹⁹⁵ it was not until 1910 that the

189 1994 UPU Postal Parcels Agreement, Art 58(1.1)–(1.3).

190 *Ibid*, Art 58(1.4); this is confirmed in the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art 19, which obliges parties to adopt appropriate legislation in order to apply investigative and control techniques designed to detect illicit consignments of narcotic drugs in the mails. Reprinted in 1988 UST LEXIS 194.

191 *Ibid*, Art 58(1.4).

192 US federal law, eg, penalises the mailing of obscene or crime inciting matter. See Obscenity Act 1948, 18 USC § 1461; similarly, UK Postal Services Act 2000, s 85(3)–(5).

193 Mail Fraud Act 1948, 18 USC § 1341.

194 'US crackdown on Nigerian mail fraud', BBC, 11 November 1998.

195 Eg, UK Obscene Publications Act 1857.

first relevant treaty was adopted: the Agreement for the Suppression of the Circulation of Obscene Publications (the 1910 Agreement).¹⁹⁶ Prior to this Agreement, however, Member States to the 1906 UPU Convention could have relied on its Art 16(3)(2)(d) which prohibited the mailing of any articles whose importation or circulation was forbidden in the country of destination. This prohibition on the mailing of obscene material was later made explicit in Art 18(2)(d) of the 1920 UPU Convention, and has been incorporated ever since in the international agreements of that organisation.¹⁹⁷ Despite the absolute prohibition in distributing obscene material established by the UPU Conventions and the 1910 Agreement, the elastic nature of the concept of obscenity from region to region has precluded international lawmakers from reaching a binding definition. The 1910 Agreement simply obliges parties to establish or designate a national authority charged with the duty of centralising and supplying information which would facilitate the repression of infringements under domestic law relative to obscene writings, drawings, pictures or articles, whose constitutive elements bear an international character.¹⁹⁸ The 1910 Agreement, therefore, did not intend to create an international offence, but merely to combat a transnational offence through domestic mechanisms. On the same basis, Art 1 of the 1923 Convention for the Suppression of the Circulation of and Traffic in Obscene Publications made it a punishable offence:

- (1) for purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects;
- (2) for the purposes above mentioned, to import, convey or export or cause to be imported, conveyed or exported any of the said obscene matters or things, or in any manner whatsoever to put them into circulation;
- (3) to carry on or take part in a business, whether public or private, concerned with any of the said obscene matters or things, or to deal in the said matters or things in any manner whatsoever, or to distribute them or to exhibit them publicly or to make a business of lending them;
- (4) to advertise or make known by any means whatsoever, in view of assisting in the said punishable circulation or traffic, that a person is engaged in any of the above punishable acts, or to advertise or to make known how or from whom the said obscene matters or things can be procured either directly or indirectly

It is evident that, although the participating States possessed a general understanding on what constituted obscenity, they were reluctant in reaching a definition, which, even if agreed upon, would involve such compromises that would only limit the scope of the Conventions.¹⁹⁹

The complexity of this topic has subsequently raised threshold questions vis-à-vis the right to freedom of expression and legitimate commercial interests. In the

196 1 Bevens 748.

197 1994 UPU Postal Parcels Agreement, Art 26(2), (5.3).

198 1910 Agreement, Art 1.

199 This did not change even with the latest instrument, the 1949 Protocol Amending the 1910 Agreement for the Suppression of the Circulation of Obscene Publications, TIAS 2164.

Handyside case, a publisher was convicted under the UK's Obscene Publications Act (OPA) 1959 for distributing a children's book containing anti-authoritarian passages. Under Art 10(2) of the 1950 European Convention on Human Rights²⁰⁰ the freedom of expression may be restricted, *inter alia*, as may be necessary in a democratic society for the protection of morals. The European Court of Human Rights held that, since it was impossible to find a uniform European conception of morals, Art 10(2) afforded national authorities a margin of appreciation, which, in the particular case, was legitimately aimed at protecting the morals of the young.²⁰¹ Likewise, the ECJ has held that, although Member States to the 1957 Treaty Establishing the European Economic Community²⁰² are free to make their own assessments of the indecent or obscene character of certain articles, they may not rely on the public morality provisions in the Treaty to prohibit the import of goods from other Member States when their own legislation contains no prohibition on the manufacture or marketing of the same goods on their territory.²⁰³

As a transnational offence, individual countries are best suited to define obscenity and repress its distribution and circulation. In the UK the test of obscenity under s 1(1) of the OPA 1959 has been whether the contested article tends to deprave and corrupt persons who are likely to read, see or hear the matter contained or embodied in it. It is an offence under s 1(3) of the Act to publish an obscene article—including distribution, circulation, selling, letting on hire, giving, or lending—whether for gain or not.²⁰⁴ Although not a strict liability offence, persons found to possess obscene material for the purpose of publication must prove that they had not examined them and had no reasonable cause to suspect their nature.²⁰⁵ This statutory defence is limited to persons who were in possession of such material for a legitimate reason, or to individuals who were ignorant of and had no reason to believe that they were in possession of or distributing indecent material, as well as persons that had received it unsolicited and had got rid of it with reasonable promptness.²⁰⁶

Under US federal law, it is unlawful for anyone to bring into that country any 'obscene, lewd, lascivious, or filthy book, pamphlet, picture or other matter of indecent character...recording, [or] electrical transcription of the same nature'.²⁰⁷ The test of obscenity procured by the Supreme Court is whether work taken as a whole appeals to prurient interest in sex, display of which is patently offensive, not serious literary, artistic, political or scientific value, based on community standards,

200 213 UNTS 221.

201 *Handyside* case (1976) 58 ILR 150.

202 298 UNTS 11.

203 *R v Henn and Darby* [1979] ECR 3795; *Conegate Ltd v HM Customs and Excise* [1986] ECR 1007.

204 OPA 1959, s 2(1). An 'article' under s 1(2) of the Act can be anything embodying matter to be read or looked at, any sound recording and any other film or picture. Video cassettes were later found to fall within the ambit of this section. See *AG's Reference (No 5 of 1980)* [1985] 3 All ER 816.

205 *Ibid*, s 2(5); see also OPA 1964, s 1(3).

206 *Pepper v Hart* [1993] AC 593; this defence is not available to individuals who created the material or advertised its availability: *R v Land* (1998) 1 CAR 301.

207 Obscenity Act 1948, 18 USC § 1462 (importation or transportation of obscene matters).

not national.²⁰⁸ Knowledge need only be of the general nature of the matter imported or transported, not whether it was known to be illegal.²⁰⁹

The growth of interstate communications and, especially, the potential which the Internet offers for the international transmission of pornography, has necessitated a re-examination of definitions and criminal jurisdiction. In the UK, s 84(3)(b) of the Criminal Justice and Public Order Act 1994 expanded the definition of photograph to include data stored on a computer disk or by other electronic means which is capable of conversion into a photograph. International repugnance against child pornography has developed a dynamic impetus as regards the suppression and criminalisation of all related activities.²¹⁰ Although child pornography constitutes a serious offence under the laws of all nations,²¹¹ its circulation through the Internet poses jurisdictional problems where the offender is involved in transmitting material to a website which can be accessed by persons anywhere in the world. In a recent judgment, where the accused challenged the jurisdiction of UK courts on the basis that he had uploaded obscene material on a website in the US and, hence, there was no actual publication in England, the English Court of Appeal was of the opinion that publication could take place when uploaded onto a website abroad and downloaded elsewhere.²¹² It is obvious that States wishing to suppress and prosecute child and other forms of pornography on the Internet can legitimately assert their jurisdiction based on the objective territorial principle, as all data uploaded on a website may be accessed from any national terminal, although other principles may alternatively be used.²¹³ Ratification of the 2000 Optional Protocol will undoubtedly make a significant impact in this regard, especially if participating States adhere to its provisions on effective co-operation.

208 *Miller v California*, 413 US 15 (1973).

209 *USA v Groner*, 494 F 2d 499 *cert denied*; similarly, persons who mailed prohibited material need not have produced it, being sufficient that they only knew of the general nature of the material when it was mailed. *USA v Thomas*, 726 F 2d 1191 (1982) *cert denied*.

210 See 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Art 3(1)(c); on 6 February 1999 the EU adopted an Action Plan to combat illegal and harmful Internet contents such as child pornography and hate speech. Decision No 276/1999 (OJ L33).

211 See, eg, *Osborne v Ohio*, 495 US 103 (1990).

212 *R v Graham* (2000) LTL, 6 April.

213 The 1923 Obscene Publications Convention, Art 2, permits both objective and subjective territorial jurisdiction, as well as nationality jurisdiction. The 2000 Optional Protocol, Art 4, establishes, in addition, broad jurisdictional competence following the language of the various anti-terrorist treaties.

INTERNATIONAL CRIMINAL LAW OF THE SEA

4.1 INTRODUCTION: THE LAW OF THE SEA

Before we set out to explore maritime crime it is useful to remember the sources of the law of the sea, namely customary law and treaty law. Most of the former has been codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), as well as its precursor, the 1958 Geneva Conventions. Other treaties, however, both bilateral and multilateral, address issues relating to the seas. States have certain rights and duties regarding the seas, depending on the maritime belt under consideration. UNCLOS clearly sets out the various maritime belts. The measurement of maritime belts seawards commences from what are known as baselines. UNCLOS provides for two types of baselines, normal and straight. Where a coastline is not heavily indented, the officially recognised low water mark point represents the normal baseline, and thus the starting point for measuring the breadth of the various maritime belts. In the case of indented coastlines, the method of drawing straight lines between points on the coast or at sea may be used. The territorial sea may extend up to 12 nautical miles seaward from the baselines, whereas all waters landward from the baselines are considered internal waters. States retain sovereignty in both internal waters and territorial sea but there is an obligation to grant a right of 'innocent passage' in the latter, provided that such passage is not detrimental to the security of the coastal State. UNCLOS also introduced a regime for archipelagic States, that is States made up of a group of closely spaced islands, such as Indonesia. For those States, the territorial sea is a 12 mile zone extending from a line drawn joining the outermost points of the outermost islands of the group that are in close proximity to each other. The waters between the islands are declared archipelagic waters, where ships of all States enjoy the right of innocent passage. As regards international straits, the regime of 'transit passage' retains the international status of the straits and gives naval powers the right to unimpeded navigation and overflight. In all matters other than transient navigation, straits are considered territorial waters. Coastal States are also empowered to implement certain rights in an area beyond the territorial sea, extending 24 nautical miles from their baselines, for the purpose of preventing certain violations and enforcing police powers. This area, known as the 'contiguous zone', may be used to curtail offenders violating the laws of the coastal State within its territory or its territorial sea. The exclusive economic zone (EEZ) extends up to 200 nautical miles from the baselines. The coastal State retains sovereign rights but not sovereignty in the EEZ. The continental shelf comprises the seabed and its subsoil that extend beyond the limits of the territorial sea throughout the natural prolongation of the coastal State's land territory to the outer edge of the continental margin, or to a distance of 200 miles from the baselines, where the outer edge of the continental margin does not extend up to that distance. In cases where the continental margin extends further than 200 miles, States may claim a continental shelf up to 350 miles from the baseline or 100 miles from the 2,500 metre depth isobath. The coastal State possesses exclusive rights of exploration and exploitation of the continental shelf's natural resources. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent

waters or of the air space above those waters. Finally, the high seas are open to all States and for a number of purposes, such as navigation, overflight, laying of submarine cables and fishing, subject to certain restrictions. The international seabed, too, is not subject to the sovereignty of any State, and is part of the 'common heritage of mankind'.

In this chapter we examine the crimes of piracy *jure gentium*, mutiny, damage to submarine cables, unauthorised broadcasting and the right of hot pursuit—although the last relates to enforcement, it was included in this chapter for reasons of coherency. Maritime crime is also explored in other chapters, especially those dealing with jurisdictional issues (Chapter 7), the transport of slaves and the smuggling of migrants on the high seas by organised criminal groups (Chapters 5 and 3), as well as the transport of illicit narcotic substances (Chapter 3).

4.2 PIRACY *JURE GENTIUM*

To those who believe that sea piracy is a romantic remnant of past centuries, it may come as a surprise to discover that the International Maritime Organisation's (IMO) statistics on piracy and armed robbery at sea from 1984 to 31 December 1999 reported 1,751 known incidents.¹ The areas that are currently most affected by piratical attacks are: the Far East, in particular the South China Sea and the Malacca Strait;² South America and the Caribbean; the Indian Ocean; and West and East Africa. The increase in piracy can be explained on several grounds, such as the need for small crews on large technologically advanced vessels, which renders them vulnerable, lack of adequate diplomatic representation where vessels fly flags of convenience, and poor countries with large coastlines not being able to afford adequate patrol of their territorial waters, let alone the adjacent high seas.

Contemporary pirates can be classified into two categories: first, those who operate on a small scale, interested either in the possessions of the crew (the captain usually keeps a substantial amount of money for payroll, maintenance and port fees), or various equipment on board the vessel. The majority of such pirates operate when ships are anchored in, or pass through, territorial waters. The second category involves well organised groups whose operations go far beyond random attacks at sea. Organised piracy aims either at the cargo of merchant vessels or the vessel itself. When ships are stolen in this way they are repainted, renamed and reregistered. Temporary registration certificates may be obtained through consulate offices, whether by bribery or presentation of false documents, or both. The pirates will then look for a shipping agent with a letter of credit that has almost expired and will offer the services of their ship, upon which the ship is loaded and the shipper receives the bill of lading. The pirates then sail to a different destination than the one specified on the bill of lading. There they may unload the cargo to an accomplice, or an unsuspecting buyer, and change the temporary registration certificate again. Low

1 *Reports on Acts of Piracy and Armed Robbery Against Ships*, First Quarterly Report (January–March 2000), IMO Doc MSC/Circ 944 (1 April 2000), p 1; see International Chamber of Commerce (ICC), *Piracy and Armed Robbery Against Ships: 2002 Annual Report*, 2002, London: ICC, which recorded an increase in incidents from 253 in the first nine months of 2001 to 271 for the corresponding period in 2002.

2 T Arbuckle, 'Scourge of Piracy Returns to Southeast Asia', 29 *Jane's International Defence Review* (1996), 26.

freight rates and financial recession has created an upsurge in organised piracy in South East Asia, not only in the form of attacks against merchant vessels, but also in defrauding insurance companies through acts of piracy against ships owned by criminal groups such as the Chinese Triads.³ Contemporary organised piracy is also believed to be heavily involved in the illicit traffic of narcotic drugs and arms, while reports indicate that corruption in a number of countries is responsible for both the lack of prosecutions and enforcement, as well as for facilitating the disposal of stolen vessels and cargo.⁴

4.2.1 Definition of piracy under international law

Piracy under international law, otherwise known as piracy *jure gentium*, is the oldest international offence. Until the 1536 Statute of Henry VIII,⁵ piracy was punished in England only when committed within the realm of the Admiralty of the Crown and, then, merely as a civil offence. The 1536 Statute changed the jurisdictional element of piracy but not the nature of the offence as robbery at sea. It was well recognised by the 17th century that the common law definition was in no essential respect different from that of the law of nations.⁶

Although jurisdiction for piracy *jure gentium* under customary law was acknowledged as belonging to all States,⁷ no authoritative definition existed as to its substantial elements.⁸ Hence, until the adoption of an international definition in the 1958 Geneva Convention on the High Seas,⁹ national statutes, the majority of which purported to incorporate the concept of piracy under customary international law,¹⁰ were interpreted in accordance with each domestic judiciary's understanding of the prevailing elements of piracy.¹¹

The earliest element in the definition of piracy was *animus furandi*, the intention to rob a vessel on the high seas—or, as the case at hand, in any waters within the jurisdiction of UK admiralty.¹² It was later held, in other plagued jurisdictions, that robbery or an intention thereof was not an essential element and that acts of revenge, hatred or abuse of power against another ship were tantamount to piracy. In the *Malek Adhel* case, the rather mentally disturbed captain of a commercial ship made

3 'Upsurge in South East Asia Cases of Piracy' (1998) *Lloyd's List*, 3 December, p 3; 'Rogue Owners Colluding in Piracy Attacks' (1999) *Lloyd's List*, 13 May, p 5.

4 J Hitt, 'Bandits in the Global Shipping Lines' (2000) *New York Times Magazine*, 20 August, where the author furnishes information implicating Chinese authorities in the release of captured pirates.

5 Offences at Sea Act 1536, Chapter 15.

6 *USA v Smith*, 18 US 153 (1820), p 159, *per Story J*.

7 *Talbot v Jansen*, 3 US 153 (1795); *Turkey v France (Lotus case)* (1927) PCIJ Reports, Ser A, No 10, p 10, *per Moore J*.

8 M Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety', 82 *AJIL* (1988), 269, p 272.

9 450 UNTS 82, Arts 13–22.

10 This is true for the vast majority of contemporary statutes, if not all. See the US Piracy and Privateering Act 1948, 18 USC, § 1651.

11 In some countries slave-trading was considered an act of piracy (Imperial Act, 5 Geo IV, Chapter 113, §§ 9 and 10), but there was no such consensus between the international community. See Paust *et al*, *International Criminal Law: Cases and Materials*, 1996, Durham, NC: Carolina Academic Press, p 1229.

12 *Rex v Dawson* (1696) 13 St Tr 451.

it a habit of aggressively forcing other merchant vessels on the high seas to halt their course, without however robbing or looting them, except only to claim the gunpowder used to force them to stop.¹³ The US Supreme Court stressed that a piratical act is an act of aggression unauthorised by the law of nations, being hostile and criminal in character and commission, and without sanction from public or sovereign authority. This was so irrespective of whether the aim of the perpetrator was plunder, hatred, revenge, or wanton abuse of power.¹⁴

Since the time of Grotius, a pirate has been considered to be *hostis humanis generis*, an enemy of mankind. This is not a rhetorical statement, it carries legal substance; for, if a person commits otherwise unlawful acts against persons and property of one country on the high seas, that person cannot readily be characterised as an enemy of mankind, only of that specific country. This issue was encountered when courts determined cases involving interference with maritime commerce not for private ends but as part of political or ideological struggles. The law in the 19th century, as it also stands today, was that insurgents fighting for a political cause should not be treated as pirates, as long as, in their struggle against the target government, they attack only vessels and persons of that State.¹⁵ This did not mean, of course, that the existence of political motives justified any act of insurgency. It was clear that common crimes, regardless of their motive, would result in the liability of the perpetrator.¹⁶ Although now obsolete with the advancement of international humanitarian law, especially common Art 3 of the 1949 Geneva Conventions, the recognition of insurgency or belligerency status was of seminal importance both for the relations between belligerents, but also for the law of neutrality. Insurgency referred to a state of conflict where the dissident group, even though of considerable strength, did not receive international recognition as a legal entity under international law. Belligerency, on the other hand, existed when an armed conflict was recognised as taking place between two legal entities.¹⁷ Having established a set of criteria for its recognition,¹⁸ it was accepted by the end of the 19th century that belligerency was viewed as a question of fact rather than as one of law.¹⁹ The relevant jurisprudence seems to suggest that the absence of belligerency did not render politically motivated acts by rebel groups piratical. In the *Ambrose Light*, the New York District Court held that unrecognised insurgents (that is, belligerents) were deemed to be pirates, even though, in that case, there was no proof of violence or depredation beyond that required for the group's political aims against the Venezuelan Government.²⁰ This

13 *USA v Cargo of the Brig Malek Adhel*, 43 US 210 (1844).

14 *Ibid*, p 230; in *Re Piracy Jure Gentium* [1934] AC 856, the Privy Council held that actual robbery was not an essential element, as a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*.

15 See C Hyde, *International Law Chiefly as Interpreted by the United States*, 1945, Boston: Little, Brown, Vol 2; *Dole v New England Mutual Marine Insurance Co* (1864) 7 F Cas 838, p 847; *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785, p 795.

16 *Magellan Pirates* (1853) 1 A & E 81.

17 A Arend and R Beck, *International Law and the Use of Force*, 1993, London: Routledge, pp 81–82.

18 These consisted of the existence of a generalised armed conflict, occupation and administration of a substantial portion of territory, organised armed forces under a responsible leadership and circumstances justifying recognition. H Lauterpacht, *Recognition in International Law*, 1948, Cambridge: CUP, p 176.

19 L Moir, *The Historical Development of the Application of Humanitarian Law in NonInternational Armed Conflicts to 1949*, 47 ICLQ (1998), 347.

judgment was vociferously rejected by the US executive and overturned by its judiciary shortly after it was issued, having no standing in international law.²¹ The Harvard Draft Convention on Piracy, which was relied upon heavily by the International Law Commission (ILC) rapporteur for the 1958 Convention on the High Seas, found that under customary law an attack by an unrecognised group is not piratical if, had the group received recognition, the contested act would not have been one of piracy.²²

The elements described constitute the offence of piracy *jure gentium* under customary law and, as such, they were incorporated in the relevant definition in Arts 14 and 101 of the 1958 Geneva Convention on the High Seas and the 1982 UNCLOS respectively. The latter provides that:

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;²³
- (c) any act of inciting or of intentionally facilitating an act described in paras (a) or (b).

This definition is in line with customary law as explained above. The *actus reus* of the offence is not dependent on factors such as gravity or an intention to act openly. Hence, in *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association Ltd*, the court erred when it held that a clandestine attempt to rob a ship anchored three miles from the coast of Bangladesh did not constitute piracy simply because the culprits intended to steal without recourse to violence.²⁴ It is also clear that the offence requires two vessels or aircraft: the piratical and the victim vessel or aircraft. It is, thus, evident that piracy under international law cannot be born through an act of mutiny, unless the mutineers subsequently engage in acts of violence or depredation against other vessels or aircraft on the high seas. Likewise, the perpetration of piratical acts, as defined in Art 101 of UNCLOS, by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.²⁵

20 (1885) 25 Fed 408.

21 See LC Green, 'The Santa Maria: Rebels or Pirates', 37 *BYIL* (1961), 496, p 502; *op cit*, Hyde, note 15, p 774.

22 Harvard research in international law, comment to the Draft Convention on Piracy, 26 *AJIL* (1932 Supp) 749, p 857; see 1 *Yearbook ILC* (1955), p 41.

23 *Talbot v Jansen*, 3 US 153 (1795), p 156, *per* Paterson J.

24 [1983] 1 All ER 590. The court would have been right, however, had it stated that the incident did not constitute piracy *jure gentium* because it occurred in territorial waters.

25 UNCLOS, Art 102.

Unlike in the 19th century, the contemporary interpretation of the 'private ends' proviso logically suggests that illegal violence, detention or depredation against another vessel or its passengers on the high seas, even for political ends of any kind, entails the criminal liability of the perpetrators if they violate any of the universal anti-terrorist conventions. However, an act of violence on the high seas for political ends cannot be characterised as piratical, because it lacks the required private aim; it may, nonetheless, fall within the ambit of a specialised terrorist offence, as these treaties contain clauses specifically renouncing the political character of the crimes contained therein.

Finally, it should be stressed that UNCLOS only addresses the repression of acts of piracy taking place on the high seas and, owing to the reference in Art 58(2) of UNCLOS, also, those acts which are perpetrated in the EEZ. Individual countries may freely limit or expand the international definition as regards acts of piracy committed in their territorial sea. The United Nations (UN) General Assembly and IMO usually refer to such incidents as 'armed robbery'.

4.2.2 Mutiny and other violence against ships not amounting to piracy

As is evident from the definition of Art 101 of UNCLOS and, indeed, customary law, illegal acts of violence, detention or depredation originating from within a vessel, or other acts of interference with maritime commerce not involving an attacking ship, do not constitute piracy *jure gentium*.²⁶ The same is true with regard to acts of mutiny.²⁷ Such incidents, although of some concern, did not attract the attention of international institutions because they were perceived as existing on a small local scale, which did not pose too serious a threat to maritime safety. This perception radically altered in October 1985 when the Italian cruise ship *Achille Lauro* was seized by members of a Palestinian militant organisation while the ship was on route from Alexandria to Port Said. The hijackers boarded the cruiser in Genoa and threatened to blow it up and kill the passengers unless the Government of Israel released 50 Palestinian prisoners. When their demands were not met, they killed a Jewish American passenger who was in a wheelchair and threw his body overboard.²⁸ Despite the branding of the whole incident as piratical by the US President,²⁹ this was a case of vessel hijacking or 'boatjacking', which was not regulated by international law. The offences committed could well have been punished on the basis of domestic statutes prohibiting interference with maritime safety, but terrorist acts on board private vessels did not constitute an international offence.

In March 1988, the IMO adopted a Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,³⁰ which covered offences against maritime safety not falling under UNCLOS. Individuals are liable under the

26 See *USA v Palmer*, 16 US 610 (1818), p 635.

27 *The Creole* (1841); IA Moore, *Moore's Digest of International Law*, 1906, Vol 2, pp 352, 358.

28 See *op cit*, Halberstam, note 8, pp 269–70.

29 24 ILM (1985), 1515.

30 27 ILM (1988), 668; see also 'Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf', 27 ILM (1988), 685.

Convention if they unlawfully seize or exercise control over a ship or endanger its safe navigation by either violence against persons on board, destruction or damage to a ship or its cargo, destruction of its navigational facilities or interference with their operation, placing of a device likely to destroy a ship, or by communicating false information to a ship.³¹ This wide ranging international crime in fact resembles a combination of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft³² and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,³³ applicable to merchant vessels on the high seas. Article 11 of the IMO Convention obliges Member States to render the contemplated offences extraditable ones, thus, removing any doubt that politically motivated acts of seizure and violence could be justified. Unfortunately, the Convention has not received wide ratification, despite calls to that effect from IMO and the General Assembly.³⁴

4.2.3 Mechanisms for the prevention and eradication of piracy

It cannot be overemphasised that piracy can only be combated by interstate co-operation. Parties to UNCLOS, in particular, are under an express obligation to this effect.³⁵ On the high seas, any State may seize a pirate ship and prosecute its crew,³⁶ as well as assert a right of visit upon vessels suspected to be engaged in piracy.³⁷ Both seizure and visit can be enforced solely by warships, or other governmental vessels that are authorised to do so.³⁸ Article 27 of UNCLOS further entitles coastal States to exercise criminal enforcement jurisdiction over foreign ships passing through their territorial sea, in order to conduct an investigation or to make arrests, if a crime committed on board that ship is of a kind to disturb the peace of the country or the good order of the territorial sea.

Close co-operation in matters of piracy was never a priority in State agenda. The rapid increase in attacks has resulted in the mobilisation of maritime employees, shipowners and insurance agencies, calling for the implementation of mechanisms safeguarding the shipping industry and its people. At a meeting on piracy convened by the International Chamber of Commerce's International Maritime Bureau (IMB) in 1992, it was proposed that a Piracy Reporting Centre (PRC) be set up, whose aim would be to assist in the reporting of incidents and the collation of information for the benefit of both the maritime industry and law enforcement agencies worldwide. As a result, the IMB with the support of IMO and the International Mobile Satellite Organisation (INMARSAT)—the latter is now a private corporation—established the PRC on 1 October 1992, which it based in Kuala Lumpur. The Centre is financed by voluntary contributions from shipping and insurance agencies, and its services are free of charge to all vessels irrespective of ownership or flag. The Centre receives

31 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Art 3(1).

32 860 UNTS 105.

33 974 UNTS 177.

34 See GA Res 53/32 (24 November 1998) and 54/31 (18 January 2000).

35 UNCLOS, Art 100.

36 *Ibid.*, Art 105.

37 *Ibid.*, Art 110.

38 *Ibid.*, Art 107.

information on suspicious or unexplained craft movement as well as piracy reports from around the world, and broadcasts daily accounts of piracy on secured satellite channels. It further liaises with enforcement agencies, collates and analyses relevant information and issues quarterly reports to interested bodies.

The Maritime Safety Committee, an organ of the IMO, has studied the problem of piracy and has passed two significant recommendations; one is addressed to governments³⁹ and the other to shipowners, shipmasters and crews.⁴⁰ The former stresses the need for governments to establish incident command systems for both tactical and operational responses, integrated with other security matters, such as smuggling, drug-trafficking and terrorism. This should be followed by the development of sound Action Plans, the establishment of necessary infrastructure and operational arrangements, as well as detailed and accurate databases of relevant incidents and statistics with a view to disseminating this information to interested parties in a format that is understandable and usable. It is strongly advised moreover that the victim ship not be detained unnecessarily for investigation purposes. The latter recommendation calls for reducing pirate temptations by avoiding the use of cash for the ship's businesses, and by not transmitting through the radio information regarding the ship's cargo and other valuable items on board, because attackers are able to intercept communications. It further advises ships operating in waters where attacks have occurred to adopt a security plan, which should cover matters such as: the need for enhanced surveillance and the use of lighting and detection equipment; crew responses; radio alarm procedures;⁴¹ reports to be made after an attack. This circular recommends against the use of firearms, but favours the employment of evasive manoeuvres and water hoses, only in situations where the captain is convinced he or she can use them to his or her advantage and without risk to those on board.

In recent years proposals have suggested the establishment of an international naval force under the auspices of the UN to patrol danger areas. Others have proposed more realistic action, such as the employment of private security forces, highly equipped and acting as rapid response forces in cases of piracy.⁴²

4.3 OFFENCES AGAINST SUBMARINE CABLES AND PIPELINES

The era of submarine transmission cables was launched in 1850 when the first telegraph cable was laid across the English Channel, connecting England with France. Within days, however, a French fisherman who had stumbled upon it proceeded to carve it assuming he had discovered a peculiar seaweed. Although a boom in the laying of submarine cables followed, it was not until August 1858 that a third attempt

39 IMO Doc MSC/Circ 622/Rev 1 (16 June 1999).

40 *Ibid.*

41 The International Telecommunications Union and INMARSAT have included 'piracy/armed robbery attack' as a category of distress message which ships can now transmit through either their digital selective calling or INMARSAT equipment by pressing a button. The message can be received automatically by shore stations and ships in the immediate vicinity. See IMO Doc MSC/Circ 805 (6 June 1997); *op cit*, the 2002 ICC Piracy Report, note 1, mentions a newly introduced device, called 'Secure-Ship', which consists of a 9,000 volt, non-lethal electrifying fence surrounding the ship, specifically adapted for maritime use.

42 PT Bangsberg, 'Gurkhas Offered for On-board Protection' (2000) *Journal of Commerce Online*, 28 January.

to lay the first trans-Atlantic cable was crowned with success. The cable was operational for only a month and it was in 1866 that the first enduring trans-Atlantic cable was finally laid. For a period of 30 years since the 1920s, radio carried the bulk of the globe's communications, but was unreliable in adverse weather conditions and had a limited capacity. The development in the 1950s of a lightweight co-axial cable, which was reinforced with a high-tensile steel core and a polythene outer skin, meant that it did not require armouring in deep water. Since the first fibre optic submarine cable was laid in the 1980s, underwater cables have overtaken satellites as the leading means of overseas communication. Cables now carry more than two-thirds of all telephone, fax and data transmissions crossing oceans, with over 150,000 miles of fibre optic cable already laid on the seabed, and rapidly increasing.⁴³

The general freedom to lay submarine cables beneath the high seas and on the seabed thereof is expressly recognised under UNCLOS,⁴⁴ as well as its predecessor, the 1958 Geneva Convention on the High Seas,⁴⁵ and was acknowledged as such under customary international law prior to the 20th century. No such freedom exists with regard to another State's territorial sea and internal waters, or, indeed, in archipelagic waters in accordance with Art 51 of UNCLOS, except with the coastal State's consent. For the purposes of legal protection, two types of submarine cable exist: 'transterritorial' systems, which transcend the oceans and are, therefore, deployed on the high seas and 'festoon' systems, which are laid along several coastlines and, thus, are in large part contained in territorial or internal waters. The 1884 Convention for the Protection of Submarine Cables (1884 Convention),⁴⁶ which has not been superseded by other instruments and is still the basis for most national statutes, was adopted to suppress, punish and compensate breaking or injury to cables outside of territorial waters. Article 2(1) of the 1884 Convention made it a punishable offence to:

...wilfully or through culpable negligence, [commit any act] resulting in the total or partial interruption or embarrassment of telegraphic communication.

In accordance with Art 2(2) of the 1884 Convention, any injuries to cables inflicted with the sole purpose of saving one's life or vessel, after all necessary precautions have been taken to avoid such occurrences, lift the criminal character of the act.⁴⁷ The application of Art 2(1) extends also to cable owners, presumably through the actions of their agents, who wilfully or negligently break or injure another cable while laying or repairing their own.⁴⁸ Both the 1958 Geneva Convention on the High Seas⁴⁹ and UNCLOS⁵⁰ encapsulated the *actus reus* and *mens rea* contained in Art 2(1)

43 See HM Field, *The Story of the Atlantic Telegraph*, 1972, New York: C Scribner; LB Tribolet, *The International Aspects of Electrical Communications in the Atlantic Area*, 1929, Baltimore: John Hopkins University; see International Cable Protection Committee website: www.iscpc.org.

44 UNCLOS, Arts 87(1)(c) and 112. Art 58 further extends this freedom to the EEZ, although strictly speaking this does not form part of the high seas.

45 Geneva Convention on the High Seas, Arts 2(3) and 26(1).

46 1 Bevens 89.

47 Similarly, 1958 Geneva Convention on the High Seas, Art 27 and UNCLOS, Art 113.

48 1884 Convention, Art 4, 1958 Geneva Convention on the High Seas and UNCLOS, Arts 28 and 114 respectively, removed reference to criminal liability in such cases, but this should not be viewed as absolving them of such if they act wilfully or negligently.

49 *Ibid*, 1958 Convention, Art 27.

50 UNCLOS, Art 113.

of the 1884 Convention and extended it to cover also submarine pipelines and high-voltage power cables. Significantly, Art 113 of UNCLOS features an additional sentence, whereby it penalises not only wilful commission and negligence, but also 'conduct calculated or likely to result in such breaking or injury'.⁵¹

Unlike piracy *jure gentium*, which too, is an offence committed on the high seas, judicial jurisdiction for injuries to submarine cables under Art 8 of the 1884 Convention and, indeed, customary law, is not universal but belongs to the Flag State, or that of the nationality of the offender, in cases where the Flag State is unable to act.⁵² The same is true with respect to Art 113 of UNCLOS. Article 10(2) of the 1884 Convention makes a minor departure from the rule of exclusive enforcement jurisdiction of the Flag State on the high seas, by granting the limited right to other States parties to approach but not board suspected vessels in order to determine their nationality.⁵³ Both the British Submarine Telegraph Act 1885,⁵⁴ and the US Submarine Cable Act 1888,⁵⁵ enacted to implement the 1884 Convention, reproduce almost verbatim the elements of the offence, as well as its jurisdictional clause under the Convention. The light penalties provided in the British and US statutes, which have remained the same since their enactment, may well account for the lack of criminal prosecutions and reluctance to engage in costly financial litigation with little benefit on the horizon.

In time of armed conflict, although it is permissible to sever the adversary's submarine cables,⁵⁶ it is prohibited to seize or destroy submarine cables connecting an occupied territory with a neutral State, except in situations of absolute necessity.⁵⁷ In a case tried by a British-American Claims Arbitral Tribunal in 1923, a British corporation claimed compensation for repairs incurred in repairing the Manila-Hong Kong and the Manila-Cadiz submarine telegraph cables cut by the US naval authorities during the Spanish-American War in 1898. The tribunal dismissed the claim by stating that not only was the cutting of cables not prohibited by the rules of international law applicable to warfare at sea, but 'such action may be said to be implicitly justified by that right of legitimate defence which forms the basis of the rights of any belligerent nation'.⁵⁸

Protection and prosecution of cases involving injury to submarine cables and pipelines is dependent on each individual State, both by application and adaptation of domestic statutes to contemporary exigencies, as well as by international co-operation and rigid police enforcement action. State action has unfortunately proven

51 In a Supplementary Declaration to the 1884 Convention, signed in 1886, the parties to the former construed the term 'wilfully' contained in Art 2(1) of the 1884 Convention as not imposing penal responsibility 'to cases of breaking or of injuries occasioned accidentally or necessarily in repairing a cable, when all precautions have been taken to avoid such breakings or damages'. Reprinted in 1 Bevens 112.

52 MS McDougal and WT Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, 1962, New Haven: Yale UP, p 1079.

53 See RR Churchill and AV Lowe, *The Law of the Sea*, 1999, Manchester: Manchester UP, p 175.

54 Chapter 49, ss 3, 6(5).

55 47 USC §§ 21, 22, 33.

56 1884 Convention, Art 15.

57 1907 Hague Regulations, Art 54.

58 *Eastern Extension, Australasia and China Telegraph Co Ltd Claim* (1923–24) 2 AD 415, p 417; see also *Cuba Submarine Co Ltd Claim* (1923–24) 2 AD 419, p 419, whose facts and judgment were similar to the previous case.

inadequate. For this purpose an International Cable Protection Committee (ICPC) was established in 1958 by cable owners with the purpose of promoting the protection of submarine cables against natural and man-made hazards. Since the largest threat to cables is encountered from fisheries activities, especially trawl fishing and shellfish dredging, the ICPC has issued and distributed cable warning and cable awareness charts, as well as notices to mariners, and has developed standard procedures for activities such as cable routing and cable/pipeline crossing, in an effort to foster cable awareness in the fishing and offshore industries.

4.4 UNAUTHORISED BROADCASTING FROM THE HIGH SEAS

The rigid regulation of broadcasting in Western Europe in the early 1960s and the inability of private individuals to be granted broadcasting licences, resulted in the establishment of 'pirate' radio stations outside the jurisdiction of coastal States, in the high seas. Because of the customary rule permitting only Flag State jurisdiction on the high seas for offences other than piracy *jure gentium*, Member States of the Council of Europe adopted in record time in 1965 the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories (1965 Agreement).⁵⁹ Article 2 of the 1965 Agreement, which was widely ratified, criminalises the establishment or operation of broadcasting stations, as well as any acts of collaboration knowingly performed, such as the provision of services concerning advertising for the benefit of the stations.⁶⁰ The 1965 Agreement provided for jurisdiction based on the nationality and territoriality principles.⁶¹ The entry into force of the 1965 Agreement and its enforcement by Member States caused most stations to cease their operations.⁶²

Article 109 of UNCLOS has a broader spectrum than the 1965 Agreement. It defines unauthorised broadcasting as:

... the transmission of sound, radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.

It provides for the following bases of judicial jurisdiction: (a) Flag State, depending on whether the broadcasting emanates from a vessel or a structure not amounting to a vessel; (b) nationality; (c) the State receiving the unauthorised transmissions, or that whose authorised radio communications suffer as a result. States that enjoy judicial jurisdiction further enjoy enforcement jurisdiction, including a right of visit as well as a right to seize the offending vessel and crew. In accordance with Arts 109(4) and 110 of UNCLOS, only warships of the States having jurisdiction are permitted to visit and seize the offending vessels and crew members, but if it is proven that the vessel under suspicion was not in fact at fault, it is entitled to compensation.

59 ETS 53.

60 1965 Agreement, Art 2(2)(e).

61 *Ibid.*, Art 3.

62 See JC Woodliffe, 'The Demise of Unauthorised Broadcasting from Ships in International Waters', 1 *IJECL* (1986), 402; NM Hunnings, 'Pirate Broadcasting in European Waters', 14 *ICLQ* (1965), 410.

Although it is only the States listed in Art 109 that have jurisdiction over offending vessels, para 1 of this Article obliges all States parties to UNCLOS to co-operate in the suppression of this particular offence. This would not, obviously, involve any enforcement action, but it would necessitate police co-operation, extradition procedures, etc. With the privatisation and private licensing of all types of telecommunications transmissions, 'pirate' stations seem to have disappeared. However, as Churchill and Lowe correctly point out, UNCLOS retains its importance, as it may be applicable to other forms of illegal broadcasting, such as unofficial propaganda broadcasts from the high seas.⁶³ Under these circumstances and depending on the severity of the underlying offence under repression, the obligation for all States to co-operate may involve the use of radio-jamming techniques that would interfere with the illegal broadcasts and render the message inaudible.⁶⁴ In the extreme case where the broadcast is deemed to attempt to incite a group of people to commit genocide, it is possible for every State to seize the vessel and prosecute the offenders. This would not be premised on the 1948 Genocide Convention, which does not expressly provide for universal enforcement jurisdiction, but on the basis of customary law, to the extent that no significant objections to such jurisdiction are posited by interested States.⁶⁵

4.5 THE RIGHT OF HOT PURSUIT

4.5.1 Introduction

The right of hot pursuit is well established under customary law, as well as the 1958 Geneva Convention on the High Seas and UNCLOS.⁶⁶ It gives coastal States the right to pursue and arrest foreign vessels that have committed an offence within their maritime zones onto the high seas, as one of the exceptional measures departing from the rule of exclusive Flag State jurisdiction on the high seas. Before considering the details of this right, it is useful to scrutinise its justificatory basis. Under the relevant treaties, it is not only an exceptional measure; its exercise is also subject to certain limitations, such as that the pursuit must be continuous and uninterrupted. Moreover, other sea-trafficking treaties stress the primacy of Flag State jurisdiction, the security of the foreign vessel, safety of life at sea, as well as the commercial interests of the Flag State.⁶⁷ On the other hand, hot pursuit operates as a right of necessity for the enforcement of the laws and regulations of the coastal State, which would otherwise be unpunished in accordance with the aforementioned general rule.⁶⁸ It

⁶³ *Op cit*, Churchill and Lowe, note 53, p 212.

⁶⁴ JF Meltz, 'Rwandan Genocide and the International Law of Radio Jamming', 91 *AJIL* (1997), 628.

⁶⁵ See I Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law*, 2002, Manchester: Manchester UP, pp 57–62.

⁶⁶ 1958 Geneva Convention on the High Seas, Art 23; Art 111 UNCLOS; see *op cit*, Churchill and Lowe, note 53, pp 214–16. States are increasingly concluding bilateral or regional multilateral treaties providing for co-operation in the exercise of the right of hot pursuit, such as the 1993 Conakry Convention on Sub-regional Co-operation in the Exercise of Hot Pursuit and Protocol.

⁶⁷ 1988 UN Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art 17, 28 ILM (1989), 493; Council of Europe Agreement on Illicit Traffic by Sea, Implementing Art 17 of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ETS 156.

would seem that, unless otherwise explicitly permitted by new rules of customary law or unilateral acquiescence, hot pursuit must be exercised only in accordance with the strict requirements of UNCLOS.

It is clear from the text of Art 111 of UNCLOS, and the *travaux* of the 1958 Geneva Convention on the High Seas,⁶⁹ that States are not restricted in the list of offences that may be subject to hot pursuit. This is a matter for the coastal State's domestic law. This general freedom is subject to two limitations. First, hot pursuit may be exercised in any one of the coastal State's areas of maritime jurisdiction—including the continental shelf—provided that the pursuit is in response to a violation for the protection of which the particular maritime belt was established. For example, since Art 33 of UNCLOS permits the establishment of a contiguous zone in order to prevent the infringement of the coastal State's customs, fiscal, immigration or sanitary laws, hot pursuit is available only if the foreign vessel has, while in the contiguous zone, violated any such laws. Similarly, the non-prescribed but limited sovereign rights granted to coastal States under Art 56 of UNCLOS restrict hot pursuit to a small range of environmental, illegal fishing, and similar offences. Secondly, while international comity suggests that hot pursuit should be avoided with regard to trivial infringements,⁷⁰ violation of less serious offences such as illegal fishing has in the past given rise to legitimate pursuit.⁷¹ Irrespective of whether a crime has in fact been committed by a foreign vessel in a maritime belt, hot pursuit is lawful only where the pursuing vessel 'has good reason to believe'⁷² that the particular violation has taken place. What is thus required is either actual knowledge or reasonable suspicion, but mere suspicion would not suffice.⁷³ This proposition that mere suspicion is an insufficient basis for asserting a right of hot pursuit was reinforced by the judgment in the *M/V Saiga (No 2)* case, where the International Tribunal for the Law of the Sea (ITLOS) stated that when the Guinean pursuing ship made its 'initial decision to pursue, it had insufficient grounds for hot pursuit. Guinea could have had no more than a suspicion that the *Saiga* had violated its laws in the EEZ'.⁷⁴ The argument that the flight of a foreign vessel to the high seas upon its visual or radar contact with a ship belonging to the authorities of the coastal State constitutes reasonable suspicion of committing a crime,⁷⁵ is incompatible with the justificatory principle of hot pursuit enunciated above. In any event, the test of reasonable suspicion should be interpreted to encompass particular criminal activity, as opposed to suspicion about general criminal activity.

Hot pursuit represents enforcement action by the coastal State, and as such the use of force is permissible in two cases: (a) for the purposes of self-defence; and (b) in order to stop the offending vessel and arrest those on board. Force, however, must

68 RC Reuland, *The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention*, 33 *Va J Int'l L* (1993), 557, p 558.

69 *YBILC* (1956), Vol II, p 285.

70 *Op cit*, Reuland, note 68, p 558.

71 *The North case*, 11 Ex Rep (1905) 141, Canada.

72 UNCLOS, Art 111(1).

73 *Op cit*, McDougal and Burke, note 52, p 896; NM Poulantzas, *The Right of Hot Pursuit in International Law* (1969), p 155; *op cit*, Reuland, note 68, p 569.

74 *Saint Vincent and the Grenadines v Guinea (The M/V Saiga) (No 2)*, Judgment (1 July 1999) (Merits), 38 ILM (1999), 1323, para 147.

75 *Op cit*, Reuland, note 68, p 570.

conform with the principles of proportionality and reasonableness. In the *I'm Alone* case,⁷⁶ a Canadian ship was pursued by a US Customs vessel onto the high seas, and upon refusing to surrender, she was fired upon with more than 100 shots resulting in her sinking and the death of one crew member. The Mixed Committee of Arbitration ruled that the sinking of the pursued vessel must be incidental to the exercise of necessary and reasonable force. Similarly, in the *M/V Saiga* case, the ITLOS observed that considerations of humanity must apply in the law of the sea, pointing out that since the *Saiga* was fully laden and its maximum speed was 10 knots it could have easily been overrun and boarded by the Guinean warship, without excessive force.⁷⁷

4.5.2 Commencement and continuous nature of hot pursuit

Under Arts 111 of UNCLOS and 23 of the 1958 Geneva Convention on the High Seas respectively, the right of hot pursuit commences where a foreign vessel has committed an offence in a maritime belt, is moreover present therein and the pursuing public ship has ordered the foreign vessel to stop at a distance which enables it to be seen or heard by the foreign vessel. Refusal to stop would give rise to pursuit onto the high seas. As Art 111 of UNCLOS speaks only in terms of 'ship' and not persons, hot pursuit would be available for offences committed by passengers on board a foreign ship only where they are acting under the authority of those in charge of the ship. The coastal State may thereafter lay claim for the offenders to be tried before its courts on the basis of the law of extradition.⁷⁸ Moreover, although the wording of both UNCLOS and the 1958 Geneva Convention on the High Seas suggest that only a completed offence justifies pursuit, the *travaux* to the 1958 Geneva Convention on the High Seas clearly illustrate that the special rapporteur perceived any reference to 'attempts' as superfluous, as they were implied in the text.⁷⁹

Once the pursuit commences, it must remain continuous and uninterrupted. A pursuit is deemed to have been interrupted in the following cases: (a) where the pursued vessel has entered the territorial sea of a third State,⁸⁰ although other maritime belts are assimilated to high seas for the purposes of hot pursuit;⁸¹ (b) where the warship has abandoned pursuit, pursuit cannot be thereafter resumed. Although UNCLOS is silent, case law suggests that only significant interruptions can invalidate a right of hot pursuit. Thus, if the warship momentarily stops to pick the mother ship's dories, this should not terminate pursuit;⁸² (c) finally, since UNCLOS requires

76 *I'm Alone* case (*Canada v USA*) (1935) III UNRIAA 1609.

77 *M/V Saiga* Judgment (Merits), paras 153–57; see also *The Red Crusader* case (1962) 35 ILR 485, and 1995 Agreement for the Implementation of the Provisions of UNCLOS, Art 22(1)(f), Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 34 ILM (1995), 1542.

78 *Op cit*, Reuland, note 68, p 570.

79 *Op cit*, Poulantzas, note 73, p 154.

80 In *R v Mills* (unreported), Croydon Crown Court adopted a more liberal view. See WC Gilmore, 'Hot Pursuit: The Case of *R v Mills and Others*', 44 ICLQ (1995), 949.

81 YBILC (1956), vol I, p 52. *Op cit*, Poulantzas, note 73, p 580 argues that a short stay of passage through a third State's territorial waters, with the aim of evading the law, does not preclude the resumption of hot pursuit. He notes, however, that in all other instances, where the fleeing vessel has entered the territorial waters of a third State, at that moment the jurisdictional link between the pursuing and pursued vessel has been broken.

82 *The North* case, 11 Ex Rep (1905), 141, Canada.

that the foreign vessel be given an audible or visual signal to stop, it is necessary that the pursuing ship maintain some sort of visual observation of the foreign vessel. This requirement of visual observation would have to be fulfilled despite the existence of radars which make observation possible without the need for visual proximity.⁸³ Pursuit is possible by either a warship or aircraft duly authorised. UNCLOS permits a warship to take over the pursuit from an aircraft, but is silent on whether an aircraft can continue the pursuit commenced by a warship. Juristic opinion generally takes the view that this is possible.⁸⁴ Furthermore, in accordance with UNCLOS, it is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the warship or aircraft giving the order be within the territorial sea or the contiguous zone.

A pursuit is lawful only where, as already stated, the foreign vessel does not respond to a clearly audible or visual signal to stop. In *USA v Postal*,⁸⁵ the fifth circuit court ruled that the arrest of a foreign vessel on the high seas was unlawful because, *inter alia*, the giving of visual or auditory signals to stop did not occur until after a second boarding of the fleeing vessel, by which time the foreign vessel was outside US territorial waters. It is argued that since the signal requirement is intended to give the foreign vessel time to heave and await inspection, it may be dispensed with where the foreign vessel attempts to flee upon sighting the warship or aircraft.⁸⁶ Although Art 111(4) of UNCLOS allows only visual or auditory signals, recent case law has accepted the use of signals given by radio.⁸⁷

4.5.3 The doctrine of constructive presence

The practice of States has, at least since the latter part of the 19th century, accepted that the presence of a mother ship beyond the crucial maritime belt—or on the high seas—would still give rise to a right of hot pursuit against it where boats belonging to, or associated with, the mother ship commit offences in the coastal State's maritime zones of jurisdiction.⁸⁸ This is known as the doctrine of constructive presence, whereby for the purposes of hot pursuit the mother ship, otherwise not lawful prey, is deemed to be within the enforcement jurisdiction of the coastal State.⁸⁹ The doctrine has been codified in both UNCLOS and the 1958 Geneva Convention on the High Seas, and Art 111(4) of UNCLOS provides that hot pursuit is not deemed to have commenced:

...unless the pursuing ship has satisfied itself...that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf.

Although the doctrine of constructive presence was born to challenge situations involving a mother ship and smaller boats operating from the mother ship (eg,

83 *Op cit*, Poulantzas, note 73, p 212.

84 *Op cit*, Churchill and Lowe, note 53, p 215.

85 589 F 2d 862 (1979).

86 *The Newton Bay* case, 36 F 2d 729 (1929). The recent Judgment (Merits) in the *M/V Saiga* case, however, supports a stricter view, para 148.

87 *R v Mills* (unreported); *R v Sunila and Soleyman*, (1986) 28 DLR 450.

88 *Araunah* (1888) Moore, *Int Arb* 824; *Grace and Ruby*, 283 F 475 (1922).

89 See WC Gilmore, 'Hot Pursuit and Constructive Presence in Canadian Law Enforcement', 12 *Marine Policy* (1988), 105.

Araunah involved canoes engaged in sealing within Russian territorial waters and operating from a British Columbian schooner on the high seas), in recent years it has become common practice for a number of large vessels to be co-operating in illegal activities (especially drug-trafficking and smuggling) without the existence of a mother ship in the traditional sense. Thus, in the case of *R v Mills*, a ship registered in St Vincent was smuggling cannabis into the UK by transferring the drugs through the high seas to Ireland and from there to a British trawler which subsequently sailed into British waters. Croydon Crown Court was not troubled by the fact that the British trawler was not one of the boats of the pursued St Vincent vessel. Although this case does not conform to the spirit of Art 111 of UNCLOS, its evolution will undoubtedly depend on relevant State protests and consensus emanating from recent international criminal co-operation initiatives in the spheres of organised crime, drug-trafficking and terrorism.

OFFENCES AGAINST THE PERSON

5.1 INTRODUCTION

This chapter examines offences against the person with an international or transnational element. Many of these, however, constitute *erga omnes* obligations, and as such their violation even within a single State creates a legal interest for every State in the world. Here we examine the following offences: slavery and related practices; torture; apartheid; and enforced disappearances. Other offences against the person, such as grave breaches, war crimes, crimes against humanity and genocide are covered in other chapters, in accordance with the judicial institution in which they are framed. Other international offences that offend the person, albeit where the effect on the person is incidental to the primary aim of the perpetrator, which is either financial or socio-political, such as piracy, terrorism and organised crime are covered in other distinct chapters. All of these offences, by their very nature, constitute serious human rights violations. Although reference is made to the various international human rights instruments, these were not designed to deal with the individual responsibility of the perpetrators. This does not mean that they are irrelevant in the international criminalisation process; rather, caution should be exercised when human rights notions are transplanted in the international criminal process, as will be evident throughout this chapter.

5.2 SLAVERY AND RELATED PRACTICES

A study conducted by the non-governmental organisation Anti-Slavery International revealed the conclusion of some 300 international agreements concerning the suppression of slavery between 1815 and 1957. These were, however, largely ineffective mainly due to the lack of national mechanisms in evaluating incidences of slavery between States parties.¹ Although by the late 18th century many States had formally abolished slavery² and considered such practice as being contrary to the law of nations, they nonetheless tolerated the slave trade in countries where it was permitted by law and by nationals of such countries on the high seas.³ In the dispute arising between the US and Great Britain in the *Creole* cases, the arbiter assigned to settle the ensuing claims held that, in cases of *force majeure*, which force a slave vessel to put in in the territorial waters of an abolitionist State, the latter is obliged to respect the law of the Flag State.⁴ The arbitral award was, nonetheless, criticised on humanitarian grounds. National courts refused to recognise that slave

1 *Report of the Working Group on Contemporary Forms of Slavery*, UN Doc E/CN4/Sub2/1999/17 (20 July 1999), para 41.

2 See Abolition of Slavery Act 1833, which by abolishing slavery in the British colonies rendered the slaves apprentices and ordered their compensation by public funds paid by their owners.

3 *The Fortuna* (1811) 165 ER 1240; *The Diana* (1813) 165 ER 1245; *San Juan Nepomuceno* (1824) 166 ER 94; *The Antelope*, 23 US 66 (1825).

4 *The Creole* (1853); IA Moore, *Moore's Digest of International Law*, 1906, Vol 2, p 352; see DP O'Connell, *The International Law of the Sea*, 1984, Oxford: Clarendon, pp 854–55.

trade on the high seas was tantamount to the offence of piracy.⁵ At the time, search and seizure of private vessels on the high seas was dependent on bilateral treaties granting reciprocal rights and, so, it is of no surprise that the first multilateral treaties of this kind, the 1885 General Act of the Conference of Berlin Concerning the Congo,⁶ as well as the 1890 Brussels General Act Relative to the African Slave Trade,⁷ contained limited enforcement prerogatives. Despite the limitations in search and seizure arising from these instruments and the continuation of unrestricted engagement in the slave trade in certain countries, the above mentioned agreements and relevant State practice suggested in unequivocal terms that, by the late 19th century, the slave trade was an international offence that was treated as such by national criminal legislation.⁸

As a matter of customary law, it is now settled that all persons are entitled to be free from slavery or servitude,⁹ as well as from forced or compulsory labour.¹⁰ It is equally true that all persons have a right to be free from institutions and practices similar to slavery, and that the enjoyment of such rights constitutes an obligation *erga omnes*, that is, all States have a legal interest in the fulfilment of these rights worldwide.¹¹ Article 1(1) of the 1927 Slavery Convention defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are attached’. The plethora of anti-slavery conventions and the detailed framework of rights contained in each obfuscates the distinction that should be drawn in every case between the granting of a right and the intentional promulgation of an offence to be implemented at either national or international level. In this treatise, an act is deemed to acquire criminal character either when explicit reference to this effect is made in a relevant treaty, or when through sustained State practice or by reasonable implication a right can only be enforced through the penalisation of the behaviour that impedes it. Such reasoning implies, further, that although a form of behaviour may not have been treated in the context of an international treaty, it could, nonetheless, as a rule of customary law, be defined as an international offence on account of its penalisation in a large number of States. Alternatively, marginal ratification of a treaty containing express criminal provisions may render the said provisions ineffective in terms of producing a general rule of international law, but slightly ratified treaties which prohibit reservations do not necessarily evince absence

5 *Le Louis* (1817) 2 Dods 213, p 218, *per* Scott J.

6 Declaration Concerning the Slave Trade, Art 9, allowed interdiction on land and sea in the territories forming the conventional basin of the Congo. Reprinted in 82 BFSP 55.

7 1890 Brussels General Act Relative to the African Slave Trade, Art XXII granted reciprocal rights of search and seizure to States parties, but only in the Persian Gulf and the Red Sea (Art XXI), over vessels of less than 500 tonnes (Art XXIII). Reprinted in 1 Bevans 134.

8 Berlin Act, Art 9 and Brussels Act, Arts V and XIX.

9 1927 Slavery Convention, Art 2(b), 60 UNTS 253, amended by 1953 Protocol Amending the 1927 Slavery Convention, 182 UNTS 51; Universal Declaration on Human Rights, Art 4, GA Res 217A (10 December 1948); 1966 International Covenant on Civil and Political Rights (ICCPR), Art 8(1), (2), 999 UNTS 171.

10 1927 Slavery Convention, Art 5; 1966 ICCPR, Art 8(3); 1930 International Labour Organisation (ILO) Forced Labour Convention (No 29), Art 2(1).

11 *Belgium v Spain (Barcelona Traction Light and Power House Co Ltd)* (1970) ICJ Reports 3, Second Phase, p 32.

of general norms, as it is possible that States may refuse to ratify on the basis of an objection to procedural or other provisions unrelated to penalisation.¹²

5.2.1 The slave trade and similar institutions

Article 1(2) of the 1927 Slavery Convention defines the slave trade as including:

...all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

It is also well settled that conveying, attempting, or being an accessory to the conveyance of slaves from one country to another constitutes a serious offence under international law.¹³ Although the definition of slave trade contained in Art 1(2) of the 1927 Slavery Convention seems to encompass a wide range of acts, it, in fact, excluded a number of similar practices that affected and still affect a substantial part of the population of developing countries. Extreme poverty compounded by the lack of social and administrative structures soon revealed a different facet of slavery; one where the individual was forced to submit to exploitation or risk extinction.

The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions Similar to Slavery (Supplementary Slavery Convention) was designed purposely to fill that lacuna. Article 1 prohibits the institutions of debt bondage, serfdom, 'bride-price' and the illegal transfer of children. Debt bondage arises from a pledge by a debtor of his personal services or of persons under his or her control as security for a debt. This transaction becomes unlawful under Art 1(a) of the 1956 Supplementary Slavery Convention, where either the value of those services as reasonably assessed are not applied towards the liquidation of the debt, or the length and nature of those services are not respectively limited and defined. The Ad Hoc Committee established by the Economic and Social Council (ECOSOC) of the United Nations (UN) in 1949 to formulate this Convention was of the view that debt bondage was also constituted where the bondsman and the debtor submit to conditions not allowing the exercise of rights enjoyed by ordinary individuals within the framework of local social custom,¹⁴ as would necessarily be the case of an undefined in nature and unlimited in time contract of servitude. Debt bondage is endemic in the majority of developing nations, and a 1995 study estimates the existence, in India alone, of in excess of 15 million child labourers, incurred by a debt of a parent.¹⁵ These debts cannot be easily paid off as a result of astronomical interest rates and low wages, and so children may work throughout their youth without having managed to repay the loan', which could subsequently be inherited by another family member, typically a younger child. Despite the passing of the

12 Eg, the UK has refused to ratify the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 UNTS 271, although it has passed legislation conforming to most provisions contained in the Convention. The reason for the UK's refusal is that the Convention penalises more acts than are penalised under UK law. See *op cit*, note 1, para 37.

13 1956 Supplementary Slavery Convention, Art 3(1), 266 UNTS 3.

14 JAC Gutteridge, 'The Supplementary Slavery Convention 1956', 6 *ICLQ* (1957), 449, p 452.

15 L Tucker, 'Child Slaves in Modern India: The Bonded Labour Problem', 19 *HRQ* (1997), 572, p 573.

1976 Bonded Labour System (Abolition) Act (No 19), which obliges the governments of the various Indian States to release the bonded labourers and rehabilitate them, further occasioned by similar judgments of the Indian Supreme Court,¹⁶ debt bondage continues with impunity. The penalisation of debt bondage against children below the age of 18 is also prescribed by the 1999 ILO Convention for the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182).¹⁷

The prohibition of bride-price in Art 1(c) of the 1956 Supplementary Slavery Convention penalises the acquisition of girls by purchase disguised as payment of dowry for marriage. This institution becomes a criminal offence where the female is either denied the right to consent and is given to marriage on the basis of a financial transaction of any kind by familial or any other persons, or where upon death of her husband, family or clan members transfer her to another person, thus, basically reducing her to an object of inheritance. Bride-price and, indeed, all the institutions and practices penalised in the 1956 Convention were so deeply rooted in traditional rural societies in the developing world that the western delegates agreed, despite the vehement opposition of many non-governmental organisations (NGOs), to allow for progressive abolition of these practices, rather than impose an immediate prohibition. States are generally free to prescribe a minimum age of marriage and, although the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages¹⁸ is not widely ratified, the principle of full and free consent of both parties declared in Art 1 therein is undoubtedly a rule of customary international law on account of its presence in the widely ratified 1956 Supplementary Slavery Convention.

The practice of bride-price should be distinguished from that of 'bride-wealth'. The latter constitutes a substantial and obligatory payment from the groom's kin to the bride's family, not to the bride. Bride-wealth represented both marital cement and an assurance for both partners against the bad behaviour of the other and was to be returned if the marriage ended on account of the wife's 'fault'. Although the material elements of bride-wealth did not traditionally fit within supply/demand market notions, during the 20th century this institution has been distorted as its ingredients have acquired national currency values. As the material 'gifts' associated with bride-wealth acquired modern money value, the prospect always loomed that bride-wealth would, indeed, become transformed into bride-price. For this reason, many African countries have now regulated the cash value of bride-wealth. As the 1956 Supplementary Slavery Convention only intended to penalise and prevent the downgrading of marriage to a financial transaction lacking the consent of the bride, traditional bride-wealth does not violate the Convention.

The transfer of children under the age of 18 by their natural parents or guardian to another person, whether for financial benefit or not, with a view to exploiting the child or its labour is an international offence under Art 1(d) of the 1956 Convention. A number of international instruments under the same terms expressly prohibit the trafficking, more specifically the sale or exploitation of children in any form, such as the 1989 Convention on the Rights of the Child,¹⁹ the 2000 Optional Protocol II thereto

16 *Chaudhary v State of Madhya Pradesh* (1948) 3 SCC 243, p 255; see *ibid*, Tucker, p 622.

17 1999 ILO Convention, Arts 3(a) and 7, 38 ILM (1999), 1207.

18 521 UNTS 231; see also GA Res 2018(XX) (1 November 1965) endorsing this principle.

on the Sale of Children, Child Prostitution and Child Pornography,²⁰ and the 1999 ILO Worst Forms of Child Labour Convention.²¹ These instruments do not intend to punish those adoptions which the parents earnestly believe are in the best interest of their children and which are moreover completed lawfully and without any personal benefit to the parents, in accordance with Arts 1 and 21 of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoptions²² and the 1989 Convention on the Rights of the Child, respectively. Interpol research suggests that illicit foreign adoptions are carried out through the falsification of birth certificates, followed by abductions or deceit of uneducated mothers by organised criminal rings.²³

It is equally undisputed that the acts of procuring or offering of children in sexual activities for remuneration or any other form of consideration (child prostitution), or for representation of children engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for sexual purposes (child pornography) constitute international offences.²⁴ This would include procurers and clients engaged in sex tourism, as well as distributors and possessors of pornography through postal services or the Internet.²⁵ It should be stressed that the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography identified four causes related to the sexual exploitation of children; namely, ineffective justice systems, the role of the media, lack of education, but foremost she emphasised that, besides cases of kidnapping, it was the family of the children that was responsible for their eventual exploitation in the hands of others.²⁶

Serfdom is also prohibited and is an international offence under Art 1(b) of the 1956 Supplementary Slavery Convention. This refers to the condition of a tenant who is bound to live and labour on land belonging to another person and provide determinate service to the landowner, whether for reward or not, and who is not free to change that condition. In *Van Droogenbroeck v Belgium*, the European Commission of Human Rights observed, *obiter dictum*, that the notion of servitude embraces, in addition to the obligation to perform certain acts for others, 'the obligation for the serf to live on another person's property and the impossibility of altering his condition'.²⁷ Contemporary serfdom resembles the existence of the feudal system in medieval Europe, where, in the absence of an industrial middle class and the accumulation of land by the few rendering it, thus, the basis of economic life,

19 1989 Convention on the Rights of the Child, Arts 35 and 36, 28 ILM (1989), 1448.

20 Contained in GA Res 54/263 (25 May 2000), Art 2(a).

21 ILO Worst Forms of Child Labour Convention, Art 3(a).

22 32 ILM (1993), 1134.

23 Y Bird *The Trafficking of Children for Sexual Exploitation and Foreign Adoption: Background and Current Measures*, 1999, Paris: Interpol; see also 'Adoptions of Smuggled Mexican Babies (1999) Associated Press, 25 July.

24 2000 Optional Protocol II to the Convention on the Rights of the Child, Arts 2(b), (c) and 3; 1999 ILO Worst Forms of Child Labour Convention, Art 3(a), (b); 1989 Convention on the Rights Of the Child, Art 34; ECOSOC Res 1996/26 (24 July 1996), entitled 'Measures to Prevent Illicit International Trafficking in Children and to Establish Penalties Appropriate to Such Offences'.

25 See LM Jones, 'Regulating Child Pornography on the Internet: The Implications of Article 34 of the United Nations Convention on the rights of the Child', 6 *Int'l J Children's Rights* (1998), 55.

26 UN Doc E/CN4/2000/73 (14 January 2000).

27 Application No 7906/77, Decision (5 July 1979) (1982) 4 EHRR 443.

two social classes were established: the dominant class (*domini, nobiles*) and the vassals. The vassals gradually became animate objects tied to the land (*servi terrae*). The same medieval elements are present in cases of contemporary serfdom taking place in developing countries, whose eradication can only be premised on courageous land reform and industrial development. Since, in most cases, the vassal will have consented to his or her status, the institution of serfdom is illegal no matter how it has come about.

Traffic in persons, especially for purposes of sexual exploitation, is a specific form of slavery related institution. One treaty has, in the past, penalised 'trafficking' in persons without defining the term. Article 1 of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention), which supersedes several previous instruments relating to the traffic of women and children ('white slavery'), penalises any person who, in order to gratify the passions of another:

- (1) procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) exploits the prostitution of another person, even with the consent of that person.

This provision aims at eradicating both the initial enticement into prostitution, which usually commences as a result of socio-financial hardships, as well as the eventual procuring of prostitution in urban or other centres. The relevant discussions in the various human rights bodies of the UN have revealed two schools of thought on this issue; one maintains that controlled and lawfully registered prostitution should be allowed and that only the initial trafficking should be punished, while the other argues for a total ban and penalisation of prostitution. This division among States, further reinforced with the penalisation of the financing or maintenance of brothels or places facilitating prostitution in Art 2 of the 1949 Convention, is manifested by the limited ratifications this instrument has received.²⁸ This number should not lead one to believe that prostitution in all its manifestations is lawful, except where it is prohibited by States parties to the 1949 Convention. Rather, although exploitation of the prostitution of others not culminating to a condition of ownership over a person and performed with the prostitute's consent does not draw consensus to warrant its characterisation as an international offence, the procurement or enticement of a person for the purposes of prostitution does constitute an international or transnational offence.²⁹ This conclusion is derived, first, from the fact that the latter facet of prostitution is a criminal offence, if not in all States, then at least in the vast majority, and, secondly, by the declarations of non-parties to the 1949 Convention to the effect that ratification of this

²⁸ Seventy-four parties, as of February 2003.

²⁹ See also 1979 Convention on the Elimination of All Forms of Discrimination Against Women, Art 6 19 ILM (1980), 33 which requires States to suppress all forms of traffic in women and exploitation of the prostitution of others; ECOSOC Res 1999/40 (26 April 1999) urged States to criminalise traffic in women and girls, whether the offence was committed in their own or third countries; para 24 of the Organisation for Security and Co-operation in Europe Charter for European Security prescribes an undertaking by this organisation to eliminate all forms of trafficking and sexual exploitation of human beings, 39 ILM (2000) 255: strategic objective D3 of the Beijing Platform for Action of the Fourth World Conference on Women (Report of 15 September 1995), UN Sales No E96.IV.13, aiming to eliminate trafficking in women.

instrument is problematic only because their national laws permit organised, State controlled prostitution.³⁰

The ineffectiveness of the 1949 Convention necessitated the adoption of a specific instrument in November 2000, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.³¹ The Protocol applies with regard to cases of trafficking involving duress and a transnational aspect (movement of people across borders or exploitation within a country by a transnational organised crime group) and is intended to prevent and combat trafficking, facilitate international co-operation, as well as provide certain measures of protection and assistance to victims. Article 3(a) defines 'trafficking in persons' as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

The term 'exploitation' is further elaborated as exploitation of prostitution and other forms of sexual exploitation, forced labour, slavery and related practices, as well as the removal of organs. There is great expectation that the Protocol, as well as the 2000 UN Convention Against Transnational Organized Crime, will be effective in its preventive and punitive aspects and succeed where its predecessors failed.

There does exist one final form of slavery related practice, which is an offence only when committed by State entities: forced or compulsory labour. Article 2(1) of the 1930 ILO Forced Labour Convention (No 29) (1930 ILO Convention) defines forced labour as:

All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily

This definition of forced labour excludes military service, civic duties, work arising from lawful conviction properly supervised, labour as a result of natural calamities or other emergencies and other cases of minor communal services.³² All forms of forced labour constitute penal offences under the 1930 ILO Convention,³³ and wide ratification of this instrument has rendered the offence a rule of customary international law. In June 1999, the ILO decided to boycott commercial or other activities in Myanmar (Burma) for its 'grave and persistent' violation of the 1930 ILO Convention,³⁴ while in 1998 this country was barred from the Organisation.³⁵ It is estimated that more than 800,000 civilians, particularly from ethnic minorities, have been forcibly recruited by the Myanmar Government to work on public projects,

30 Possible ratification of the 1949 Convention by retentionist States with the inclusion of relevant reservations would run counter to the purpose and object of the treaty and would be null, in accordance with the 1969 Vienna Convention on the Law of Treaties, Art 19(c), 1155 UNTS 331.

31 UN Doc A/55/383 (2 November 2000).

32 1930 ILO Convention, Art 2(2).

33 *Ibid*, Art 25.

34 ILO Resolution, The Widespread Use of Forced Labour in Myanmar of 14 June 1999, 38 ILM (1999), 1215.

35 *Report of the Commission of Inquiry Regarding the Observance by Myanmar of the 1930 Forced Labour Convention* (2 July 1998).

resulting, moreover, in the displacement of between 5 and 10% of the Burmese population.³⁶

The UN Working Group on Contemporary Forms of Slavery stated in its latest reports that slavery, in all its forms and manifestations, is a crime against humanity.³⁷ It is difficult to uphold this statement in every case of slavery, unless there is proof of widespread or systematic action in this regard, whether it originates from agents or organs of a State or from non-State entities. It is evident, however, that most cases of slavery and related institutions are the result of well organised criminal elements with international connections, who exploit vulnerable elements of society and rely heavily in their evil schemes on the corruption of State officials.

5.2.2 Remedies and international enforcement measures

All relevant treaties coincide and prescribe an obligation not only to treat the objects of all forms of slavery as victims, but also and—as far as possible—to rehabilitate them in a way that is beneficial to such persons. This is facilitated by the inclusion of either normative obligations in the relevant treaties, or through the establishment of technical co-operation organisations, such as the ILO's International Program on the Elimination of Child Labour.³⁸ ECOSOC, too, is monitoring the issue closely and has set up a Working Group on Contemporary Forms of Slavery, appointing a Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography. Slavery occupies the agenda of a multitude of other specialised agencies of the UN, while a large number of NGOs, especially Anti-Slavery International, provide comfort to victims and endeavour to inform international as well as national authorities of the magnitude of this scourge.³⁹

States may lawfully extend their domestic criminal legislation to cover extra-territorial offences of those slavery related practices described as offences under international law, as long as prosecution of this kind does not conflict with a more substantial jurisdiction asserted by other States, to which they must give priority. The fact that slavery may be permitted *de facto* or *de jure* in the country of the accused is of no relevance to the rights of the accused, as slavery is an international offence and an *erga omnes* obligation, the suppression of which is in the interest of every State.

As for direct international enforcement, Art 99 of UNCLOS obliges States to prevent and punish transportation of slaves on vessels flying their flag, while Art 110(1)(b) of this Convention confers on warships of all nations a right of visit aboard any vessel on the high seas where there is reasonable ground for suspecting that it is engaged in the slave trade. There does not exist, however, a general right to seize foreign slave trading vessels on the high seas, nor arrest its crew, as this prerogative

36 In *Doe v Unocal*, 963 F Supp 880 (1997), a US District Court held that two American private corporations engaged in commercial activities involving the use of forced labour in Burma could be found liable under the 1789 Aliens Tort Claims Act, 18 USC § 1350.

37 UN Doc E/CN4/Sub2/1997/13 (11 July 1997), para 80 and UN Doc E/CN4/Sub2/1999/17 (20 July 1999), para 103.

38 MJ Dennis, 'The ILO Convention on the Worst Forms of Child Labour', 93 *AJIL* (1999), 943, p 947.

39 With the passing of GA Res 46/122 (17 October 1991), a UN Voluntary Trust on Contemporary Forms of Slavery was established with the aim of funding NGO participation in the meetings of the Working Group and also to provide assistance to victims of slavery.

belongs only to the Flag State, in contrast to piracy.⁴⁰ The only available option is to report such findings to the Flag State, which is thereafter under an obligation to promptly initiate criminal proceedings.

A more appropriate means of deterring recalcitrant States from utilising or tolerating the use of slave labour would be by barring the purchase of goods or services from companies engaged in any such practice. Any scrutiny of this nature, however, would be inconsistent with most countries' obligations under the World Trade Organisation (WTO) Agreement on Government Procurement, thus clearly positing trading interests above fundamental human rights considerations. This obligation under the WTO Agreement is indirectly incompatible and contrary to the *jus cogens* character of slavery and related institutions.

5.3 TORTURE AS A CRIME UNDER INTERNATIONAL LAW

The prohibition of torture in international law is regulated by instruments whose primary purpose is the establishment of appropriate preventive and deterrent mechanisms. This forms part of a wider obligation undertaken by States in the context of human rights law.⁴¹ Although these treaties envisage the application of criminal laws against the perpetrator, the purpose of these instruments is to form the basis of implementing domestic legislation and engage the responsibility of States parties. It should not, therefore, be assumed that these treaties apply *mutatis mutandis* to assess the criminal liability of the perpetrator under international law. The prohibition of torture as laid down in human rights treaties entails a right from which no derogation is permitted, as well as a norm of *jus cogens*. This is confirmed by the fact that: it has been construed as such by domestic and international judicial bodies;⁴² it has not been denied by any country; and, in Europe, at least, States are not permitted to return or extradite to another country persons that are in danger of being subjected to torture, or practices that have the same effect as torture.⁴³ The *Furundzija* judgment logically, therefore, concluded that international law not only prohibits torture, but also '(i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition'.⁴⁴

40 RR Churchill and AV Lowe, *The Law of the Sea*, 1999, Manchester: Manchester UP, p 171.

41 ICCPR, Art 7.

42 Human Rights Committee, General Comment No 24 (4 November 1994), para 10; *Siderman de Blake v Argentina*, 965 F 2d 699 (1992) *cert denied*; *Argentina v De Blake*, 507 US 1017; *Xuncax and Others v Gramajo*, 886 F Supp 162 (1995); *ICTY Prosecutor v Furundzija*, Judgment (10 December 1998), 38 ILM (1999), 317, paras 153–57.

43 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 3, 1465 UNTS 85; 1969 Inter-American Convention on Human Rights, Art 13(4); *Soering v UK*, Judgment (7 July 1989), EurCtHR, Ser A, No 161, para 91; *Chahal v UK*, Judgment (5 November 1996), EurCtHR, Ser A, No 22; *C v Australia*, Human Rights Committee, Com No 900/1999.

44 *Furundzija*, Judgment (10 December 1998), para 148.

5.3.1 Defining torture

The definition of torture under customary international law remains ambiguous. It is of course contained in one universal and a number of regional treaties, but the precise extra-conventional nature of these treaties and the crystallisation of a customary definition is itself doubtful. While the various instruments enjoy common elements, there is divergence generally on two issues: (a) the range of acts and the effect of acts that constitute torture; and (b) whether torture may be committed by persons other than State agents. We shall examine these issues in the following sections. It is useful, first of all, to consider the definition of torture, under the most widely ratified of the aforementioned instruments, the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Torture Convention). Art 1(1) defines the offence to mean:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition coincides to a very large extent with the 1975 General Assembly Declaration on Torture, which was adopted by consensus.⁴⁵ However, the definition contained in Art 3 of the 1985 Inter-American Torture Convention⁴⁶ is broader than that of the 1984 UN Torture Convention, in that it does not require any threshold of pain or other suffering for an act of ill-treatment to constitute torture. In actual fact, neither physical nor mental suffering is required, if the intent of the perpetrator is 'to obliterate the personality of the victim or to diminish his physical or mental capacities'. This definition, moreover, does not contain an exhaustive list of purposes that can be pursued by the perpetrator but instead provides examples of such purposes and adds 'or any other purpose'. The European Court and Commission of Human Rights have construed torture as constituting an aggravated and deliberate form of inhuman treatment which is directed at obtaining information or confessions, or at inflicting a punishment.⁴⁷ This definition echoes Art 1 of the 1975 Declaration on Torture. International Criminal Tribunal for the Former Yugoslavia (ICTY) jurisprudence has put forward the proposition that under customary international law there is no requirement that the conduct be solely perpetrated for one of the prohibited purposes.⁴⁸ Thus, in the *Furundzija* judgment, the Court held that the intentional humiliation of

45 GA Res 3452(XXX) (9 December 1975), Declaration on the Protection of All Persons Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

46 25 ILM (1986), 519.

47 *Ireland v UK*, Judgment (18 January 1978) (1978) 2 EHRR 25, para 167; *Greek case* (1969) ECHR Yearbook 134, p 186.

48 *ICTY Prosecutor v Delalic and Others (Celebici case)*, Judgment (16 November 1998), 38 ILM (1998), 57, para 470; *ICTY Prosecutor v Kunarac and Others*, Judgment (22 February 2001), para 486.

49 *Furundzija*, Judgment (10 December 1998), para 162. The judgment in the same case recognised that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer, as is the presence of onlookers, particularly family members, on the person being raped, para 267.

the victim is among the possible purposes of torture, since this would be justified by the general spirit of international humanitarian law, whose primary purpose is to safeguard human dignity.⁴⁹ The Trial Chamber further justified this proposition by noting that 'the notion of humiliation is, in any event, close to the notion of intimidation, which is explicitly referred to in the [1984] Torture Convention's definition of torture'.⁵⁰ This statement should be approached with extreme caution, since if true it would render the offences of 'outrages upon personal dignity' and 'inhuman and degrading treatment' redundant. This is more so because Trial Chamber II in the *Krnjelac* case rejected the proposition espoused in the above mentioned judgments that intentional humiliation may constitute torture under customary law.⁵¹ The common denominator of all the instruments to which reference was made points to the conclusion that the underlying act must be instrumental to achieve a particular purpose set out by the perpetrator. It is contentious whether customary law permits other forms of ill-treatment to constitute torture, but increasingly the use of rape, in particular, in the course of detention and interrogation as a means of intimidating, punishing, coercing or even humiliating the victim, or for obtaining information, or a confession, from the victim or a third person, has been recognised.⁵² In the *Krnjelac* judgment, the ICTY held that where confinement of the victim can be shown to pursue one of the prohibited purposes of torture and to have caused the victim severe pain or suffering, the act of putting or keeping someone in solitary confinement may amount to torture, and the same would be true in analogy of the deliberate deprivation of sufficient food.⁵³

The distinguishing characteristic between torture and other lesser forms of ill-treatment is the severity of the pain or suffering of the victim. A precise threshold would be impractical to delineate and thus the task of assessment is left to the discretion of the judge. ICTY and European Court of Human Rights (ECHR) jurisprudence does not clearly set out a single test, whether objective or subjective. Rather, they are in agreement that: (a) the severity of the harm rests on an objective test; whereas (b) the mental or physical suffering requires subjective assessment, involving consideration of factors such as the victim's age, health, sex and others.⁵⁴ The objective test regarding the severity of the harm may be triggered by beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives, as well as mutilation of body parts.⁵⁵

Torture in times of armed conflict is specifically prohibited by the 1949 Geneva Conventions⁵⁶ and the two Additional Protocols of 1977.⁵⁷ As we shall see below, the *Kunarac* judgment concluded that whether or not international human rights law

50 *Ibid*, para 162.

51 *ICTY Prosecutor v Krnjelac*, Judgment (15 March 2002), Case No IT-97-25-T, para 186.

52 *Aydin v Turkey* (1998) 25 EHRR 251, paras 82-84; *Fernando and Raquel Mejia v Peru*, Decision (1 March 1996), Report No 5/96, Case No 10,970, Annual Report of the IACHR (1995), Doc OEA/Ser L/V/II 91, pp 182-88; *Furundzija*, Judgment (10 December 1998), para 163.

53 *Krnjelac*, Judgment (15 March 2002), Case No IT-97-25-T, para 183.

54 *Ireland v UK*, Judgment (18 January 1978) (1978) 2 EHRR 25, para 162; *ICTY Prosecutor v Kvočka and Others*, Judgment (2 November 2001), para 143.

55 *Kvočka*, Judgment, *ibid*, para 144; confirmed also in the views of the UN Human Rights Committee in *Grille Motta*, Com No 11/1977; *Miango Muiyo v Zaire*, Com No 194/85; *Kanana v Zaire*, Com No 366/89; *Herrera Rubio v Colombia*, Com No 161/1983.

56 Common Art 3; Arts 12 and 50, Geneva I; Arts 12 and 51, Geneva II; Arts 13, 14 and 130, Geneva III; Arts 27, 32 and 147, Geneva IV.

57 Protocol I, Art 75; Protocol II, Art 4.

generally recognises that only public officials or State agents can commit the crime of torture, international humanitarian law makes no such distinction, thus rendering any individual culpable of the offence, as long as the appropriate *mens rea* and *actus reus* have been satisfied.⁵⁸

5.3.2 The 'public official' requirement of torture

As already examined, the definition of torture in Art 1 of the 1984 UN Torture Convention requires that the offence was perpetrated at the instigation, consent, or acquiescence of a public official. If this constitutes a generally mandatory requirement under treaty and customary law, the ambit of the offence becomes very narrow, with the result of excluding all cases of torture committed by non-State actors, such as guerrillas, paramilitaries and terrorists. We must distinguish between torture in the context of international humanitarian law and torture generally.

Under international humanitarian law, in particular the 1949 Geneva Conventions and the two 1977 Protocols, the presence, involvement or acquiescence of a State official or any other authority-wielding person is not required for the offence to be characterised as torture. The same is true of Arts 3 and 5 of the ICTY Statute. This conclusion was correctly drawn by the *Kunarac* judgment, which examined in detail all the relevant provisions of humanitarian law.⁵⁹ Moreover, Art 7(2)(e) of the International Criminal Court (ICC) Statute, concerning torture as a crime against humanity, does not impose the State actor requirement.

The inclusion, on the other hand, of non-State actors outside the ambit of humanitarian law is less clear. In a recent decision, the UN Committee Against Torture (CAT) held that a civilian pogrom against Roma settlers in Yugoslavia, which was tolerated by the police, constituted a violation of Art 16 of the 1984 UN Torture Convention (inhuman and cruel treatment). In a common dissenting opinion, two Committee members expressed the view that the acts could also be described as torture under Art 1.⁶⁰ The jurisprudence of the ECHR⁶¹ and the UN Human Rights Committee⁶² clearly articulates that Arts 3 and 7 of the European Convention on Human Rights and of the ICCPR respectively may also apply in situations where organs or agents of the State are not involved in the violation of the rights protected under these provisions. Although both the European Convention on Human Rights and the ICCPR are primarily human rights instruments and the jurisprudence of their respective enforcement mechanisms does not directly involve reference to criminal liability, it would be absurd to uphold one definition for human rights purposes and another with regard to international criminal law. The only doubtful issue in this scenario is whether the perpetration of torture by non-State agents would entail the responsibility of the State in which the offence took place. This question has been answered in the

58 *Kunarac*, Judgment (22 February 2001), paras 490–96.

59 *Ibid*; the following concurred with this statement: *Krnjelac*, Judgment (15 March 2002), para 187; *Kvočka*, Judgment (2 November 2001), paras 138–39.

60 *Hajrizi and Others v Yugoslavia*, Com No 161 /2000, CAT Doc CAT/C/29/D/161/2000.

61 *HLR v France*, Judgment (29 April 1997) (1997) 26 EHRR 29, para 40; *Costello-Roberts v UK*, Judgment (25 March 1993) (1993) 19 EHRR 112, paras 27–28; *A v UK*, Judgment (23 September 1998) (1998) 27 EHRR 611, para 22.

62 General Comment No 7/16 (27 July 1982), para 2.

affirmative by the UN Human Rights Committee, in all cases where the State does not protect individuals from interference by private parties.⁶³

Finally, mention should be made to the distinction made by the *Furundzija* judgment between complicity in torture and complicity in other offences. It held that co-perpetrators of torture are persons participating in an integral part of the torture process and who partake in the purpose behind its infliction (that is, confession, punishment, etc), whereas aiders and abettors in acts of torture assist the principal in a way that has a substantial effect on the perpetration of the crime, with knowledge that torture is taking place. In that case, the accused was held liable as co-perpetrator of a rape by virtue of his interrogation of the victim, which was found to constitute an integral part of the rape.⁶⁴

5.4 APARTHEID

The official policy of racial segregation and discrimination practised by the white minority regime of South Africa up until the early 1990s had sparked worldwide repugnancy and condemnation by both the UN General Assembly and the Security Council. Article 3 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁶⁵ first obliged parties to prevent, prohibit and eradicate racial segregation and apartheid, as well as all practices of that nature from territories under their jurisdiction. This general obligation was specifically articulated as entailing a duty to enact legislation criminalising all forms of advocacy of racial superiority or hatred, criminalise groups advocating the aforementioned, as well as personal participation therein, and moreover prevent all public bodies from practising or promoting such forms of discrimination.⁶⁶ Reference in the CERD to apartheid and racial segregation was meant to underline them as particular manifestations of the wider offence of racial discrimination. Moreover, apartheid was practised officially in South Africa, and the CERD emphasised its repugnant nature and the will of the international community to declare it illegal.

Notwithstanding the fact that all forms of racial discrimination constitute offences under international law, the crime of apartheid has established a particular dynamic. The 1974 International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)⁶⁷ recognised it as a crime against humanity.⁶⁸ Although the Convention possesses a universal character, it was drafted solely with South Africa in mind. The offence is completed, in accordance with Art II, by the commission of inhuman acts 'with the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'. Although Art II contains a very broad and detailed list of underlying inhuman acts giving rise to the practice of apartheid, this list is merely

63 General Comment No 20/44 (3 April 1992), para 2.

64 *Furundzija*, Judgment (10 December 1998), paras 257, 267; see I Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law*, 2002, Manchester: Manchester UP, pp 62–66.

65 660 UNTS 195.

66 CERD, Art 4.

67 1015 UNTS 243.

68 Similarly, para 15 of the 2001 Durban Declaration Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

indicative and may encompass other offences. Both the CERD and the Apartheid Convention recognise that apartheid is an institutional policy, borne by the State. This means that private individuals participating in the implementation of a policy of racial segregation—for example, a South African business conforming with domestic law in not recruiting black people or agreeing to use them under conditions of forced labour—do so because this policy has been formally established and institutionalised by State machinery. Article III suggests, however, that even under such circumstances, that is, of apartheid as binding domestic law, not only State agents but also private individuals incur international criminal responsibility. Since apartheid is a crime against humanity, the contours of which are not described in the Apartheid Convention, it must be assumed that the elements of crime against humanity pertaining to apartheid will depend on the judicial context in which it is examined. Thus, the definition of crimes against humanity is different in the ICTY, International Criminal Tribunal for Rwanda (ICTR) (although neither of these makes reference to apartheid) and ICC Statutes, as well as in customary international law and domestic laws. Depending on the forum, determination of apartheid as a crime against humanity will vary. To illustrate its application to the South African experience under existing customary law, the policy of segregation would constitute the ‘attack’ against the indigenous black population. Because of its proclaimed official status, the ‘systematic’ element of crimes against humanity would be clearly established. Perpetrators include not only those persons in government that instituted and formulated the policy, but also all private individuals that implemented the policy to the detriment of the rights of the victims, with knowledge of the overall ‘attack’. The Apartheid Convention establishes broad jurisdictional competence, on the basis of the *erga omnes* obligation, the prevention and punishment of which the offence of apartheid necessarily entails. In any event, crimes against humanity are subject to universal jurisdiction under customary international law.

Apartheid is also recognised as a crime against humanity by Art 7(1)(j) of the ICC Statute. In accordance with para 2(h), it encompasses:

Inhumane acts [intentionally causing great suffering, or serious injury to body or to mental health] committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

The definition is very similar to that contained in the Apartheid Convention, but the concept of crimes against humanity in the ICC context is narrower than that established under customary international law. In conclusion, apartheid constitutes a very specific crime against humanity, based solely on racial discrimination. It is relevant even after the collapse of the South African apartheid State, and much will depend on the anthropological definition of ‘race’, in particular judicial fora.

5.5 ENFORCED OR INVOLUNTARY DISAPPEARANCES

The problem of enforced or involuntary disappearances first received international attention through the UN General Assembly Resolution 33/173 in 1978.⁶⁹ The

69 GA Res 33/173 (20 December 1978); see also ECOSOC Res 1979/38 (10 May 1979).

situation was endemic and an integral part of the South American dictatorships. Despite their demise, however, by at least the mid-1980s, the problem has not only persisted, but has spread all over the world. As a result, the UN Human Rights Commission established in 1980 a Working Group on Enforced or Involuntary Disappearances. The mandate of the work has been renewed ever since, and its latest reports clearly manifest an increase in individual communications with only few cases resolved.⁷⁰ Because of its prevalence in South America, the Assembly and Commission of the Organisation of American States (OAS) have repeatedly referred to the practice of disappearances since 1978, urging all cases be investigated and the practice stopped.⁷¹ In the US, in two civil suits tried under the 1789 Aliens Tort Act, the courts ruled that the prohibition against enforced disappearances had assumed the status of *jus cogens*.⁷²

In 1983 the OAS Assembly stated that the practice of enforced disappearances constitutes a crime against humanity.⁷³ Without a legal instrument criminalising this practice, or mentioned as prohibited under a human rights instrument within its jurisdiction, the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case, although noting that its classification as a crime against humanity may be possible, held that the disappearance of 150 persons in Honduras between 1981 and 1984, and carried out as part of a systematic practice by that country's armed forces, amounted to a violation of three distinct human rights contained in the 1969 Inter-American Convention on Human Rights.⁷⁴ These were: Art 7 (right to personal liberty); Art 5 (right to humane treatment); Art 4 (right to life).⁷⁵ The most comprehensive international definition of the offence of enforced disappearance is that contained in the preamble to the UN General Assembly's 1972 Declaration on the Protection of All Persons from Enforced Disappearance.⁷⁶ Under this instrument, such illegal disappearances occur when:

Persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of government, or by organised groups, or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of the persons concerned, or a refusal to acknowledge the deprivation of the liberty, which places such persons outside the protection of the law.

This definition elaborates with more precision the elements of the offence found in Arts II and 7(2)(i) of the 1994 Inter-American Convention on the Forced Disappearance of Persons⁷⁷ and the ICC Statute respectively. However, although the 1994 Convention and the ICC Statute treat this practice as a crime against

70 UN Human Rights Commission Res 2002/41 (23 April 2002).

71 AG Res 443 (IX-0/79) (31 October 1979); Inter-American Commission on Human Rights, *Annual Report*, 1978, pp 24–27.

72 *Re Estate of Marcos*, 25 F 3d, at 1745; *Forti v Suarez-Mason*, 672 F Supp 1531, at 1542 (1987), *amended*, 694 F Supp 707, at 710–11 (1989).

73 AG/Res 666 (18 November 1983).

74 9 ILM (1970), 673.

75 *Velasquez Rodriguez* case (Merits) (29 July 1988) (1988) 95 ILR 232.

76 GA Res 47/133 (18 December 1992).

77 33 ILM (1994), 1259.

humanity, the 1992 Declaration makes no such statement, but instead provides that it shall be considered as an offence under domestic criminal law (Art 4), to which the defence of superior orders is not applicable (Art 6).

By its very nature, the 'practice' of enforced disappearances is a serious and systematic attack against a dissenting civilian population, within a State, and as such qualifies as a crime against humanity. However, although the jurisprudence of the ad hoc tribunals and the ICC Statute clearly suggest that crimes against humanity can be committed by non-State agents, enforced disappearances can only be committed by public officials or persons authorised by the State. Abduction of persons by non-State actors would constitute the offence of kidnapping or hostage taking, depending on the facts of each case, but not the offence of involuntary disappearances. The *actus reus* of the offence may commence lawfully, that is through initial arrest of the victim by duly authorised government forces. The crime is not completed with the unlawful arrest or abduction of the victim by government agents, but by the intentional and unlawful deprivation of the victim's liberty, coupled with a refusal to disclose his or her whereabouts. The latter component of the crime (that is, non-disclosure) may take place while the victim is otherwise lawfully detained. In its General Comment No 20, the Human Rights Committee held that in order to guarantee the effective protection of detained persons, provision should be made by States for detainees to be held in places officially recognised as places of detention, as well as for the names of persons responsible for their detention to be kept in registers made available to those concerned, including relatives and friends. Furthermore, the time, place and names of all present in the interrogation must be recorded.⁷⁸

Besides qualifying as a crime against humanity, the practice of enforced disappearances may well qualify as torture if the relevant criteria pertaining to the crime of torture are satisfied. As already noted, the crime of torture need not be committed only by State agents, but also by private individuals. Although involuntary disappearances do not constitute a particular violation of the European Convention of Human Rights, the ECHR pointed out in the case of *Kurt v Turkey* that forced disappearance is a violation of Art 3 of the Convention, prohibiting torture, cruel and inhuman treatment, which as a result caused extreme suffering to the victim's mother.⁷⁹ Although all offences against the person have an emotional impact on the family or circle of friends of the victim, this is usually incidental to the underlying crime. In the case of forced disappearances, one of the aims of the perpetrators is to terrorise or otherwise intimidate those close to the victim but also, in a significant number of cases, a larger segment of the population. Thus, the practice of disappearance as torture could be substantiated not only vis-à-vis the victim, but also against his or her relatives or friends.

Finally, mention should be made of the jurisdictional aspects of the offence. Both the Draft Convention on Enforced Disappearances, currently contemplated by the United Nations, and the 1994 Inter-American Convention proclaim a broad

78 General Comment No 20, UN Doc CCPR/C/21/Rev 1/Add 3 (7 April 1992), para 11; similar provision is stipulated in Arts 8–12 of the 1992 Declaration.

79 *Kurt v Turkey*, Judgment (25 May 1998), Case No 15/1997/799/1002, para 134.

jurisdictional basis, which however falls short of universal jurisdiction. Much like Art 14 of the 1992 Declaration, these instruments at best provide for the exercise of permissive rather than compulsory jurisdiction.⁸⁰ Only one of these instruments is legally binding, the 1994 Inter-American Convention on the Forced Disappearance of Persons, and that is limited to eight States. On the other hand, if a particular case of enforced disappearances is classified as a crime against humanity, universal jurisdiction would be available under customary international law. Whereas the same is not true with regard to the same practice characterised as torture, the broad exercise of jurisdiction, akin to universal, would be permissible as long as other States claiming closer links with the case do not raise objections.

80 N Rodley, *Treatment of Prisoners*, 1999, Oxford: Clarendon, p 269.

DEFENCES IN INTERNATIONAL CRIMINAL LAW

6.1 THEORETICAL UNDERPINNINGS OF CRIMINAL DEFENCES

The concept of 'defence' in international criminal law is neither self-evident, nor does it clearly possess an autonomous meaning. Instead, it derives its legal significance as a result of its transplantation from domestic criminal justice systems through the appropriate processes of international law. Nonetheless, its definition, elaboration, evolution or application do not depend on the relevant processes of any single criminal justice system—nor combinations thereof—although these may have persuasive value. This is even more so in the context of a self-contained, highly elaborate and sophisticated legal system, such as the International Criminal Court (ICC), where reliance on domestic rules is the exception—or at least, a judicial act of last resort—rather than the norm.¹ Despite these observations, however, the fact remains that the underlying theoretical underpinnings of the concept of 'defences' is premised on well established notions of criminal law, originating from both the common law and the civil law traditions. Despite the elaborate character of the ICC Statute, its drafters have been wise in detecting the inadequacy of the fledgling international criminal justice system, thus necessitating recourse to national legal concepts and constructs. This is well evident as far as defences are concerned.²

In its most simple sense, a defence represents a claim submitted by the accused by which he or she seeks to be acquitted of a criminal charge. The concept of defences is broad, and this may encompass a submission that the prosecution has not proved its case. Since a criminal offence is constituted through the existence of two cumulative elements, a physical act (*actus reus*) and a requisite mental element (*mens rea*), the accused would succeed with a claim of defence by disproving or negating either the material or the mental element of the offence charged. Domestic criminal law systems generally distinguish between defences that may be raised against any criminal offence (so called general defences), and those that can only be invoked against particular crimes (so called special defences).³ Another poignant distinction is that between substantive and procedural defences. The former refer to the merits, as presented by the prosecutor, while the latter are used to demonstrate that certain criminal procedure rules have been violated to the detriment of the accused, with the consequence that the trial cannot proceed to its merits. This distinction is not always clear cut, but one may point to the following often claimed procedural defences: abuse of process,⁴ *ne bis in idem*,⁵ *nullum crimen nulla poena sine lege scripta*,⁶ passing of statute of limitations,⁷ retroactivity of criminal law.⁸ This chapter will

1 ICC Statute, Art 21(1)(c).

2 *Ibid*, Art 31(3).

3 An example of a special defence is that of the 'battered wife syndrome'. See C Wells, 'Battered Woman Syndrome and Defences to Homicide: Where Now?', 14 *LS* (1994), 266.

4 See *Barayagwiza v Prosecutor*, Appeals Decision (3 November 1999), Case No ICTR-98-34-S, as well as the reversal of parts of the latter decision by the Appeals Chamber in its decision of 31 March 2000.

5 ICC Statute, Art 20.

6 *Ibid*, Arts 22 and 23.

focus only on substantive defences. Although our analysis covers substantive defences as these have evolved through domestic and international developments, the detailed ICC legal framework will serve as the basis of discussion.

Another seminal aspect of any discussion on defences relates to the allocation of the burden of proof. Article 66 of the ICC Statute postulates the 'presumption of innocence' until proven guilty beyond reasonable doubt. This means that, and in accordance with universal standards of justice, the prosecution carries the onus of proving the material and mental elements constituting an offence. On the other hand, facts relating to a defence raised by the accused, and being peculiar to his or her knowledge, must be established by the accused.⁹ Article 67(1)(i) at first glance seems to possibly attack the burden of proof set out in Art 66, by declaring that 'the accused shall be entitled...not to have imposed on him or her any reversal of the burden of proof or any onus or rebuttal'. This would not be a correct interpretation, as it would run contrary to the object and purpose of the ICC Statute and general international law. The correct view is that Art 67(1)(i) should be read in conjunction with Arts 31(3) and 21, which as explained in the following section, give authority to the Court to introduce defences existing outside the Statute, only if they are consistent with accepted treaty and custom or general principles of domestic law. Thus, no defence introduced by the Court in the proceedings under Art 31(3) can ever override the burden of proof established in accordance with Art 66. Essentially therefore, while the accused has the burden of proving the particular claim invoked in his or her defence (for example, that he faced death if he did not execute the order of his superior), the burden is on the Prosecutor to prove the overall guilt of the accused.

All substantive defences represent claims that the material element of the offence was indeed committed by the accused, but for a reason which is acceptable under the relevant criminal justice system. In this respect, domestic legal systems distinguish between two types of defence in which the accused claims to lack the requisite *mens rea* to commit the underlying crime: justification and excuses. Defences operating as justifications usually regard the act as harmful but not as wrong in its particular context, whereas excuses are grounded on the premise that although the particular act was indeed wrongful, its surrounding special circumstances would render its attribution to the actor unjust.¹⁰

7 *Ibid*, Art 29. The crimes contained in the ICC Statute are not subject to a statute of limitations under general international law. See 1968 United Nations (UN) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73.

8 *Ibid*, Art 24.

9 *Prosecutor v Delalic and Others (Celebici case)*, Judgment (16 November 1998), 38 ILM (1998), 57, para 1172. In English law, the burden of proof is always on the prosecution even with regard to defences raised by the defendant, with the exception of insanity and certain statutory exceptions (including diminished responsibility). See R May, *Criminal Evidence*, 1999, London: Sweet & Maxwell, pp 53–60.

10 Several theories have been elaborated in this respect, such as the 'character theory' and the 'fair opportunity theory'. See W Wilson, *Criminal Law*, 1998, London: Longman, pp 206–19; see Draft Code of Crimes against the Peace and Security of Mankind, Art 14 (Comment 2), in *ILC Report on the Work of its Forty-Eighth Session*, UN GAOR 51st Sess, Supp No 10, UN Doc A/51/10 (1996), p 14.

Despite the existence of the aforementioned distinctions in both common and civil law traditions, they were not included in the ICC Statute, whose drafters agreed instead to use the general term 'exclusion of criminal responsibility', thus avoiding the need to insert terminology distinguishing between the two. Whether this intentional omission has any legal significance remains to be seen, judged on the appropriate sources of the court's jurisdiction. The Rules of Procedure and Evidence provide that the accused must lodge his or her defence claim no later than three days before the date of the hearing.¹¹ The next section, therefore, explores the general conception of defences in the ICC Statute, with particular emphasis on primary and secondary sources.

6.1.1 Is there a place for domestic defences in the ICC Statute?

During the preparation of the Preparatory Committee (Prep Com) draft Statute there was strong divergence over the inclusion of an exhaustive or open list of defences. Naturally, the proponents of an exhaustive list were apprehensive of the Court's freedom and latitude were it to be authorised to determine defences beyond those enumerated in the Statute. The opposite side, however, stressed the impossibility of reaching precise definitions of all desired defences, thus necessitating an open list. There was considerable support for a middle ground, whereby although there would be an enumerated list, the Court could under special circumstances introduce viable defences existing outside the Statute, in such a way that it would not make but rather apply the law.¹² Preference for this latter solution was finally reflected in Art 31(3), which reads:

At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 [ie, mental incapacity, intoxication, self-defence, duress] where such a ground is derived from applicable law as set forth in Article 21.

Article 21 sets out the sources available to the Court in its judicial function; in the same fashion this is prescribed for the International Court of Justice in Art 38 of its Statute. Article 21 is premised on a hierarchy of rules, on top of which lie the Statute, supplemented by the Elements of Crimes and the Rules of Procedure and Evidence. Where the aforementioned sources fail to produce an appropriate result, the Court may turn to treaties and the principles and rules of international law, and failing that, to general principles of law derived from the national laws of the world's legal systems. The examination of these sources does not fall within the purview of this chapter, but a brief discussion of the third source (that is, general principles) is warranted, because of the potential use by the Court of defences existing outside the Statute. General principles of municipal law are practices or legal provisions common to a substantial number of nations encompassing the major legal systems (common, civil and Islamic law). Under customary international law, reliance upon principles deriving from national legal systems is justified either when rules make explicit reference to national laws, or when such reference is necessarily implied by the very content and nature of the concept under examination. However, even within these confines, the freedom of extrapolation of general principles by a court is open to

11 Rules of Evidence and Procedure, r 121(9).

12 UN Doc A/CONF 183/C 1/WGGP/L 4/Add 1/Rev 1 (1998), commentary to Art 31(3).

abuse, as was the case in the *Furundzija* judgment, decided by an International Criminal Tribunal for the Former Yugoslavia (ICTY) Chamber.¹³ It is evident that if the court possesses authority to freely employ general principles, the theoretical underpinnings of the distinction between ‘justifications’ and ‘excuses’ (constituting part and parcel of any domestic discussion on defences) is pertinent when general principles are used.

As a result of a compromise reached during the 1998 conference, whereby some delegations insisted that domestic law, especially that of the accused’s nationality or that of the territorial State, should be directly applicable apart from general principles,¹⁴ the Statute extended the sources available to the Court. The compromise was basically a middle ground, whereby such domestic law could, if the Court deemed it appropriate, be included in the pool of sources. Article 21(1)(c) articulates the following sources, failing paragraphs 2 and 3:

[G]eneral principles of law derived by the Court from national laws of legal systems of the world, *including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime*, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and principles [emphasis added].

A logical and realistic interpretation of this clause suggests that in the event the Court is unable to fill a legal lacuna on an issue pertaining to international law—in both a broad and narrow sense—it may turn to individual legal systems. Therein, the Court may not choose a particular law or provision for application or transplantation before the ICC; rather, it is bound to extract relevant principles from the rules of the legal system under consideration. This is an exercise that may turn out to be so cumbersome that it negates the initial utility of recourse to a particular legal system. A more realistic interpretation would reflect ICTY practice such as where the ad hoc tribunals take heed of the sentencing practices and legislation of the former Yugoslavia and Rwanda, unless these conflict with general international law.¹⁵ The ICC could extend the direct application of domestic law to determination of procedural matters that have taken place on the territory of a State, where this is relevant to ICC proceedings (for example, in relation to testimony and other evidence taken by the surrendering State), as well as to elements of defences that are ill-defined in the Statute, as will become apparent in this chapter. Let us now proceed to examine in detail the substantive defences set out in the Statute, that is, superior orders, duress/necessity, self-defence, intoxication, mistake of fact and law, and mental incapacity.

As a matter of safeguard against abuse by the defendant of the rule enunciated in Art 31(3), the Rules of Procedure and Evidence require that the defence give notice to both the Trial Chamber and the prosecutor if it intends to raise a ground for excluding responsibility under Art 31(3). This must be done ‘sufficiently in advance

13 *Prosecutor v Furundzija*, Judgment (10 December 1998), 38 ILM (1999), 317, paras 182–86. See I Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law*, 2002, Manchester: Manchester UP, p 28.

14 See P Saland, ‘International Criminal Law Principles’, in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, 1999, Boston: Kluwer Law International, pp 214–15.

15 Art 24(1) of the ICTY Statute states that ‘[i]n determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia’.

of the commencement of the trial'.¹⁶ Following such notice, the Trial Chamber shall hear the Prosecutor and the defence before deciding whether the defence can raise a ground for excluding criminal liability. If the defence is eventually permitted to raise the ground, the Trial Chamber may grant the Prosecutor an adjournment to address that ground.¹⁷

6.2 SUPERIOR ORDERS

Since discipline is the cornerstone of military doctrine, it follows that obedience to superior orders is paramount. But a subordinate receiving an order may find that the order conflicts with his or her duty to obey criminal or military law. From the point of view of a strict hierarchy of rules, a neutral observer will have little problem in articulating an objection to the order, but for the ordinary military subordinate used to the discipline described, the choice is not obvious. The dilemma is simple: submit to the illegal order and you commit a crime, defy the order and face the wrath and penalties imposed by your superiors.¹⁸ One should not forget that in time of war disobedience often carries a penalty of summary execution, with little time or credence given to the subordinate to make his or her claim during the exigencies of conflict. These thoughts represent personal moral imperatives. What sense does the law make of all this?

From the time that national authorities prosecuted violations of the *jus in bello*, and were subsequently faced with claims of 'superior orders', they themselves first encountered the aforementioned dilemma of the military subordinate. As a result, two schools of thought emerged on the subject. The first, premising its argument primarily on notions of justice, opined the invocation of superior orders to constitute a complete defence,¹⁹ while the second articulated a doctrine of 'absolute liability' which gave no merit to claims of obedience.²⁰ Amidst these two extremes a more conciliatory position was adopted at both a national and international level. From the 1845 Prussian Military Code to the *Leipzig* trials at the close of the First World War a consistent principle has emerged recognising the relevance of 'moral choice' in such circumstances. In accordance with the 'moral choice' principle, a subordinate would be punished, if in the execution of an order, he or she went beyond its scope, or executed it in the knowledge that it related to an act which aimed at the commission

16 ICC Rules of Procedure and Evidence, r 80(1).

17 *Ibid*, r 80(2) and (3).

18 Y Dinstein, *The Defence of Obedience to Superior Orders in International Law*, 1965, Leiden: Stijthoff, pp 5–7. See generally MJ Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War', 86 *California Law Review* (1998), 939; MJ Osiel, *Obeying Orders*, 1999, Brunswick: Transaction.

19 1845 Prussian Military Code; see also the adoption of the doctrine of '*respondeat superior*' by Oppenheim in his early treatises: L Oppenheim, *International Law: Disputes, War and Neutrality*, 1912, pp 264–70; H Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', 31 *California Law Review* (1943), 556–58.

20 *R v Howe and Others* [1987] 1 AC 417, per Lord Hailsham, p 427. See also *op cit*, Dinstein, note 18, pp 68–70. Contemporary expressions of this doctrine, but for the varying reasons described below, are also the Charter of the International Military Tribunal at Nuremberg, Art 8, Control Council Law No 10, Art II(4)(b), as well as the ICTY and ICTR Statutes, Arts 7(4) and 6(4), respectively. In all these instruments, a successful plea of superior orders could serve to mitigate punishment.

of a crime and which the subordinate could avoid.²¹ The German Supreme Court affirmed this principle at the *Leipzig* trials, on the basis of Art 47 of the 1872 German Military Penal Code, which provided that superior orders were of no avail where subordinates went beyond the given order or were aware of its illegality.²² In the *Dover Castle* case, the defendant Karl Neuman, the commander of a German submarine, claimed he was acting pursuant to superior orders when he torpedoed the *Dover Castle*, a British hospital ship, according to which orders the Germans believed that Allied hospital ships were being used for military purposes in violation of the laws of war. The accused was acquitted because he was not found to have known that the *Dover Castle* was not used for purposes other than as a hospital ship.²³ In the *Llandovery Castle* case, however, involving the torpedoing of a British hospital ship and subsequent murder of its survivors, the Supreme Court did not readily accept a defence of superior orders. It emphatically pointed out that although subordinates are under no obligation to question the order of their superior officer, this is not the case where the 'order is universally known to everybody, including also the accused, to be without any doubt whatever against the law'.²⁴

Thus, the 'moral choice' principle encompassed an objective test, whereby an order whose illegality was not obvious to the reasonable man and was executed in good faith could be invoked as a viable defence. This was later also termed 'manifest illegality' principle. Where the subordinate is aware of the unlawfulness of the order, although the order itself is not manifestly illegal, the subjective knowledge of the accused is relevant in the attribution of liability, as any other conclusion would lead to absurdity. It would, moreover, disregard the significance of *mens rea* in the definition of crimes. Similarly, no un rebuttable presumption exists in this field of law suggesting that universal knowledge of the order's illegality will automatically prove the accused's awareness of it.²⁵ Following the end of the Second World War, both the 'moral choice' and the 'manifest illegality' test were abandoned by the Allies in their quest for swift military justice. As already mentioned, the doctrine of absolute liability prevailed in the Nuremberg Charter, Control Council Law No 10, and did not feature either in the Genocide Convention²⁶ or the 1949 Geneva Conventions.²⁷ On this basis alone, it has wrongly been asserted that since 1945 the defence of superior orders has been abrogated.²⁸ The fallacy of this argument will be proven shortly. For one thing, international tribunals constitute self-contained systems, whose sources of law do not necessarily follow the evolution of law outside of that system; rather,

21 *USA v Ohlendorf and Others (Einsatzgruppen case)* (1949) 15 ILR 656; 15 ILR 376.

22 Cited in *USA v Von Leeb and Others (High Command case)* (1949) 15 ILR 376.

23 *Dover Castle* case, 16 AJIL (1921), 704.

24 *Llandovery Castle* case, 16 AJIL (1922), 708.

25 *Op cit*, Dinstein, note 18, p 28.

26 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

27 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (No I), 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Ship-Wrecked Members of Armed Forces at Sea (No II), 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (No III), 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (No IV), 75 UNTS 287.

28 P Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law*, 10 EJIL (1999), 172. For the better view that the ICC Statute provision on superior orders is in conformity with customary law, see C Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied', 836 IRRC (1999), 785.

their legal route is drawn by their drafters. The Nuremberg Tribunal was not an exception to this rule, since the Allies did not want to be faced with mass claims of superior orders, all leading back to Hitler. However, the Tribunal took it for granted that all of the accused were fully aware of the orders received, and stated:

The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether *moral choice* was in fact possible [emphasis added].²⁹

Similarly, subsequent Second World War military tribunals, especially those applying Control Council Law No 10 while upholding the validity of Art II(4)(b), did not also fail to mention that to plead superior orders one must show an excusable ignorance of their illegality.³⁰ The tribunals in these cases made it clear that if a defence was available to an accused under such circumstances, that would be the defence of duress, which would be brought about as a direct consequence of the severity and force of the order. The concept of duress will be examined below in another section. Further evidence of the existence of the duress-related 'moral choice' doctrine re-emerged in 1950, when the International Law Commission (ILC) codified, after a request by the General Assembly, the Principles of the Nuremberg Charter and Tribunal.³¹ Principle IV provided, or more importantly, reaffirmed, that obedience to superior orders did not relieve the subordinate from responsibility, provided a 'moral choice' was in fact available. The concept of 'moral choice' in Principle IV is somewhat removed from the defence of superior orders, constituting as it does a particular defence in its own context.³² Unlike the 'manifest illegality' principle associated with the defence of superior orders, where personal knowledge of the illegal nature of the order is crucial, the application of the 'moral choice' principle assumes from the outset such knowledge, predicating the defence instead on the possibility of action. After an intense Cold War period fuelled by endless disagreements, the final version of the Draft Code of Crimes against the Peace and Security of Mankind,³³ finally shelved in 1996, reverted to the absolute liability doctrine.³⁴ Interestingly, the Draft Code, especially in its final stages from 1981–96, was a significant influence on the ICC Statute, which as shall be seen, did not eventually adopt the stringent absolute liability doctrine.³⁵

The evolution of national case law since the end of the Second World War has seen the domination of the principle of 'manifest illegality'. This was clearly articulated in the judgment of the District Court of Jerusalem in the *Eichmann* trial, confirmed also by that country's Supreme Court.³⁶ Moreover, the US, who is not a party to the ICC Statute, has consistently upheld the defence of superior orders under strict application of the manifest illegality test in both the Korean³⁷ and the Vietnam

29 IMT judgment, 22 (1946), p 466.

30 *Einsatzgruppen* case (1949) 15 ILR 656; 15 ILR 376; *Re Eck and Others (The Peleus)* (1945) 13 AD 248.

31 Reprinted in *Yearbook of the International Law Commission* (2nd session, 1950), Vol II, p 374.

32 This is confirmed by the fact that while the first ILC rapporteur on the Draft Code of Crimes submitted his report in 1950 suggesting the viability or the defence of superior orders under certain circumstances, a subsequent report submitted in 1951 adopted the 'moral choice' principle found in Principle IV. See *op cit*, Dinstein, note 18, pp 241–51.

33 UN Doc A/CN.4/L.522 (31 May 1996).

34 Draft Art 5.

35 ICC Statute, Art 33.

36 36 ILR (1962), 277.

Wars.³⁸ The 1956 US Military Manual, in fact, not only recognises the plea of superior orders as a valid defence,³⁹ it also obliges courts to take into consideration the fact that subordinates ‘cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received’.⁴⁰ Similarly, the Canadian Supreme Court in the *Finta* case recognised the defence of superior orders to war crimes and crimes against humanity as having been incorporated in the Canadian criminal justice system, and firmly accepted the manifest illegality rule.⁴¹

We have already made reference to the fact that Art 33 of the ICC Statute permits, subject to certain stringent conditions, a defence of superior orders. Because of the divergence of doctrine—from absolute liability to manifest illegality before international and domestic tribunals—it is worthwhile examining the process leading to Art 33 from the purview of the participating States. During the 1996 Prep Com it was generally felt that the absence of the defence in three seminal contemporary instruments, that is, the ICTY and International Criminal Tribunal for Rwanda (ICTR) Statutes, as well as the Draft Code, rendered any discussion on the matter redundant. With the insistence of Canada and France as regards the requirement of knowledge, supplemented with the ‘manifest illegality’ criterion, the matter gradually resurfaced.⁴² By December 1997 the inclusion of the defence had gained strong support, but disagreement remained over the quantum of ‘knowledge’ required, whether or not the defence should cover orders received from the Security Council.⁴³ There was strong support, however, in excluding the defence vis-à-vis crimes against humanity and genocide.⁴⁴ During the Rome conference the two opposing schools of thought clashed for the final time. The US and Canada vehemently argued that the defence of superior orders, in those cases where the subordinate was not aware that the order was unlawful or where the order was not manifestly unlawful, was widely recognised in international law.⁴⁵ This proposal was particularly criticised by the UK, New Zealand and Germany who argued that in cases where superior orders could otherwise be invoked, an accused could raise a plea of duress and mistake of fact or law. Although the parties came up with a compromise formula agreed by an informal working group, which became the basis of Art 33, the German as well as other delegations were still unsatisfied as a matter of principle. Having thereafter the support of the US and its NATO allies, the US proposal was adopted by the

37 *USA v Kinder*, 14 CMR 742, 776 (1954).

38 *USA v Calley*, 46 CMR 1131 (1973), *aff'd*, 22 USCMA 534, 48 CMR 19 (1973). See also JJ Paust, ‘My Lai and Vietnam: Norms, Myths and Leader Responsibility’, 57 *Military Law Review* (1972), 99.

39 US Dept of Army FM 27–10, *The Law of Land Warfare*, 1956, US Dept of Army. In accordance with para 509(a) the defence exists as long as the accused ‘did not know and could not reasonably have been expected to know that the act ordered was unlawful’.

40 *Ibid*, para 509(b).

41 *R v Finta* (1994) 104 ILR 284.

42 *Report of the Preparatory Committee*, UN Doc A/51/22 (12–30 August 1996), Art Q, p 518, cited in M Scaliotti, ‘Defences Before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility (Part I)’, 1 *ICLR* (2002), 111, pp 135–36.

43 During the March–April 1998 Prep Com, the proposal absolving subordinates from liability for orders received by the Security Council was dropped. *Ibid*.

44 Decisions Taken by the Preparatory Committee at its Session held from 1–12 October 1997, UN Doc A/AC 249/1997/L 9/Rev 1 (1997), Art M, pp 18–19, cited in Scaliotti, *ibid*.

45 UN Doc A/CONF 183/C 1/WGGP/L 2 (16 June 1998), *ibid*, p 137.

Committee of the Whole by consensus, and finally also by the plenary of the Diplomatic Conference.⁴⁶

What has now emerged as Art 33 of the ICC Statute recognises the defence on the basis of the three qualifications that exist in customary international law. The first presupposes an existing loyalty or legal obligation, while the other two refer to the requisite standards of knowledge, consisting of both the subjective knowledge of the accused, and an objective test based on the 'manifest illegality' rule. The article thus reads as follows:

- 1 The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - (b) The person did not know that the order was unlawful; and
 - (c) The order was not manifestly unlawful.
- 2 For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

The presumption of knowledge inserted in para 2 seems to be unrebuttable. However, since the commission of genocide and crimes against humanity involve large scale action, often requiring minor operations in which the offender cannot always be expected to be aware of the eventual aim, justice necessitates this presumption to be a rebuttable one. Let us now proceed to examine the defence of 'duress', which has a strong affiliation and is closely related to the defence of superior orders.

6.3 DURESS AND NECESSITY

The poor drafting of Art 31(1)(d) has its roots not in the ignorance of its drafters, but rather on the divergent and inflexible views of the negotiating parties. It therefore reflects, like many provisions in the Statute, a clause founded among other things on compromise. What is not clear in the text of sub-para (d) is primarily the definition of 'duress' and 'necessity' as two related but distinct concepts, as well as the question whether this defence is also available to a charge of murder. The legislative history of the Statute suggests that although initially the two concepts were included in different Articles, by 1998 they had been moved to a single provision where moreover 'necessity' had been subsumed within the concept of 'duress'.⁴⁷ Furthermore, during discussions before the Committee of the Whole, it was decided that the combined defence encompassed in Art 31(1)(d) was available also to a charge of murder, since the prior requirement necessitating an intention not to cause death had been deleted.⁴⁸ Some isolated proposals to the effect that duress/necessity apply also in cases of threats to property were unanimously rejected.⁴⁹

46 *Ibid.*

47 *Op cit*, Saland, note 14, pp 207–08.

48 Although under traditional English law, duress may never excuse the killing of an innocent person. See *R v Howe* [1987] 1 AC 417 and *Abbott v R* [1977] AC 755.

49 *Op cit*, Saland, note 14, p 208.

Sub-paragraph (d) offers a definition of an offence caused as a result of duress, where this 'result[s] from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person'. According to this provision, a person is exculpated from the underlying offence where: (a) the threat is not brought about by actions attributed to the accused, but by other persons, or as a result of circumstances beyond the control of the accused (necessity); (b) the accused has taken all necessary and reasonable action to avoid this threat; and (c) the accused does not intend to cause a greater harm than the one sought to be avoided. The ICTY Trial Chamber in the *Erdemovic* case confirmed the conclusion of the post-Second World War War Crimes Commission that duress constitutes a complete defence subject to the aforementioned conditions.⁵⁰ In fact, the ICTY recognised that one of the essential elements of the post-war jurisprudence was the 'absence or not of moral choice'. In the face of imminent physical danger, a soldier may be considered as being deprived of his moral choice, as long as this physical threat (of death or serious bodily harm) is clear and present, or else imminent, real and inevitable.⁵¹ The ad hoc tribunal, moreover, spelled out certain criteria which are to be used by the court in order to conclude whether or not moral choice was in fact available. These are the voluntary participation of the accused in the overall criminal operation, and the rank held by the person giving the order as well as that of the accused, which includes the existence or not of a duty to obey in a particular situation.⁵²

Cassese J has convincingly argued that since law is based on what society can reasonably expect of its members, it 'should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal behaviour falling below these standards'.⁵³ This philosophical approach to duress merits consideration because of its practical implications. In the *Erdemovic* Appeals Decision, the Chamber while agreeing that no special rule of international law existed regulating duress where the underlying crime was the taking of human life, its members strongly disagreed on whether the general rule on duress should apply or whether some other domestic principle should be introduced. Judges McDonald and Vohrah unsuccessfully argued that in the absence of a special rule on duress, common law (as it turned out) was applicable, concluding thus that duress does not afford a complete defence to homicides. Cassese and Stephen JJ made the case that the general rule applies, which based on a case-to-case examination does afford a defence. The dissenting opinion of Cassese J that the general international law rule on duress be applied⁵⁴ was not only internationally respected but moreover influenced ICC developments. One of the essential elements in a successful plea of duress is that of proportionality (doing that which is the lesser of two evils). In practical terms this will be the hardest to satisfy, the burden of proof being on the accused, and may never be satisfied where the accused is saving his own life at the

50 *Prosecutor v Erdemovic*, Sentencing Judgment (29 November 1996), para 17. These were identified in the *Trial of Krupp and Eleven Others*, 10 LRTWC (1949), 147.

51 *Ibid*, para 18, citing post-Second World War case law.

52 *Ibid*, paras 18–19.

53 *Erdemovic* case, Appeals Chamber Decision (7 October 1997), Dissenting Opinion of Judge Cassese, para 47.

54 *Ibid*, paras 12, 40.

expense of his victim. Conversely, where the choice is not a direct one between the life of the accused and that of his victim, but where there is high probability that the person under duress will not be able to save the life of the victim, the proportionality test may be said to be satisfied.⁵⁵ Although duress has been admitted as a defence against homicides,⁵⁶ post-Second World War case law suggests that courts have rarely allowed duress to succeed in cases involving unlawful killing, even where they have in principle admitted the applicability of this defence. This restrictive approach has its roots in the fundamental importance of human life to law and society, from which it follows that any legal endorsement of attacks on, or interference with, this right will be very strictly construed and only exceptionally admitted.⁵⁷ The result would be different where the homicide would have been committed in any case by a person other than the one acting under duress.⁵⁸ This was the case with Erdemovic who argued that had he not adhered to his superiors to execute Bosnian civilians, not only would he have been shot but others would have taken his place as executioners. In such cases the requirement of proportionality is satisfied because the harm caused by not obeying the illegal order is not much greater than the harm that would have resulted from obeying it.⁵⁹ This requirement of proportionality is clearly a subjective one, irrespective of whether the greater harm is in fact avoided.

The concept of necessity is broader than duress, encompassing threats to life and limb generally, and not only when they emanate from another person.⁶⁰ There is a subjective element in the definition of necessity in that the person should reasonably believe that there is a threat of imminent or otherwise unavoidable death or serious bodily harm to him or to another person. This should be combined with an objective criterion, that the person acted necessarily and reasonably to avoid the threat and moreover did not voluntarily expose him or herself to the threat or danger. Since the defence of 'necessity' is encompassed within the general concept of duress in sub-para (d), it necessarily follows that it is used to merely qualify the 'threat or danger' giving rise to a defence of duress. Therefore, duress in sub-para (d) is broader than the equivalent concept found in general international law. This is not, however, the end of the story, since, as already noted, Art 21(1)(c) of the Statute empowers the Court to delve into domestic law in cases where all other sources have failed to extract satisfactory solutions. In such cases the Court would find itself unable to extrapolate general principles because of the divergence of national legislation on necessity

55 *Ibid*, para 42.

56 It was only in the *Holzer* case, cited *ibid*, para 26, that both the prosecutor and the Judge Advocate contended that duress can never excuse the killing of innocent persons, relying however, on English law.

57 *Erdemovic*, Appeals Decision (7 October 1997), para 43.

58 *Ibid*.

59 *Ibid*.

60 *Ibid*, para 14. See also 1958 British Manual of Military Law, *The Law of War on Land*, para 630, which puts forward the case of one who in extremity of hunger kills another person to eat him or her.

between the common law⁶¹ and civil law systems.⁶² Depending on relevant circumstances, and after deeming it appropriate, the Court in a scenario of this type might very well be inclined to decide that the application of the principles of a particular legal system be applicable before the case at hand.

6.4 SELF-DEFENCE

A contemporary international definition of self-defence, provided by an international tribunal, is that propounded by the ICTY in the *Kordic* case. The Tribunal pointed out that the notion of self-defence:

May be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person's property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.⁶³

The Trial Chamber in that case noted that although the ICTY Statute did not provide for self-defence as a ground for excluding criminal responsibility, defences form part of the general principles of criminal law that are binding on the Tribunal. It went on to note that the definition of self-defence enshrined in Art 31(1)(c) of the ICC Statute reflects provisions found in most national criminal codes 'and may be regarded as constituting a rule of customary international law'.⁶⁴

Despite this general definition which is almost identical to that found in the ICC Statute, there are issues related to this defence that are not straightforward. These problem areas include the relationship between the UN Charter and self-defence,⁶⁵ the invocation of self-defence with regard to property, proportionality, and whether force can be used in cases of pre-emptive self-defence or only when the danger is present or imminent. We shall examine each of these issues individually.

Where a State entity commits an act of aggression in violation of Art 2(4) of the UN Charter, that country will incur responsibility pertaining to States. Moreover, under the ICC Statute,⁶⁶ pending a definition on aggression, the initiators of the aggression will be held criminally liable. Since a definition of aggression is bound to be premised on the relevant provisions of the UN Charter, persons in the highest civilian and military echelons of a State apparatus resorting to the use of military force will be able to invoke self-defence (as a claim aiming to exclude criminal liability)

61 The failure of this defence in English law is premised on unclear and ill-defined case law that requires reinterpretation. In the classic case of *Dudley and Stephens* (1884) 14 QBD 273, necessity was not upheld to a charge of murder where a cabin boy was eaten by other shipwrecked crew members. The justification for the decision, however, is not clear. That case did not say that a deliberate killing could not be justified, only that a person could not justifiably kill an innocent to save his life. 'Neither did it say that a deliberate killing could not be excused, only that an excuse would not be available where there was no immediate necessity.' *Op cit*, Wilson, note 10, p 289.

62 Civil law systems generally allow this defence. See, for example, Arts 122–27 of the French Penal Code, and Art 54(1) of the 1930 Italian Penal Code, cited in *op cit*, Scaliotti, note 42, pp 143–45.

63 *Prosecutor v Kordic and Others (Kordic case)*, Judgment (26 February 2001), Case No IT-95–14/2-T, para 449.

64 *Ibid*, para 451.

65 Of particular relevance is the concept of unlawful use of force under Art 2(4) of the UN Charter, as well as legitimate responses to such force in accordance with Arts 42 (collective enforcement action) and 51 (unilateral or collective self-defence).

66 ICC Statute, Art 5(2).

only where the force used is lawful, that is, it is permitted under Arts 42 and 51 of the UN Charter. What is more, such force, even if lawful, will exclude criminal liability only where it satisfies the requirements for self-defence, that is, it is proportionate, the danger is present, and the response does not constitute a crime against humanity or genocide. Art 31(1)(c) is clear that:

The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility [under the rubric of self-defence].⁶⁷

Although most delegations raised reservations as regards the availability of self-defence to defend property, at the insistence of the US and Israel, reference to this effect was eventually included. Sub-paragraph (c) reflects the unanimous feeling of all delegates that the commission of crimes against humanity and genocide can never justify the protection of property. Self-defence with regard to property can only be raised where the defensive action involved the perpetration of war crimes, where the property concerned 'is essential for the survival of the person or another person or property which is essential for accomplishing a military mission'. Thus, stringent and narrow criteria apply. The result is not a happy one, at least as far as the second part of the sentence is concerned, since under customary international law the concept of 'military necessity', which is akin to 'property which is essential for accomplishing a military mission',⁶⁸ does not permit the commission of war crimes.⁶⁹ Since the concept of 'belligerent reprisals' is not encompassed within the notion of self-defence,⁷⁰ it stretches the imagination to conceive of a war crime committed in defence of property essential for military operations, which is moreover proportionate! The only possible scenario would be where an unlawful attack against military property was repelled with unlawful weapons used against the attackers—the defending party possessing no other or appropriate weaponry—or where protected property was counterattacked as a result. The use of unlawful weapons or the perpetration of attacks in defence of such property against innocent civilians is not only contrary to *jus cogens*, it is certainly not warranted by any construction of the principle of 'proportionality'.⁷¹

As far as the decision to engage in defensive action is concerned (which includes the determination that force has been used), the test applied in sub-para (c) is an objective one. The person must act 'reasonably'. This will depend on relevant external circumstances, but the court is not excluded from assessing the personal state and characteristics of the accused, on the basis of domestic law permitting the evaluation of such subjective criteria, in accordance with Arts 31(3) and 21(1)(c). Similarly, the degree of force applied is predicated on the objective test of proportionality.

67 Enunciated also in the *Kordic* judgment (26 February 2001), para 452.

68 *Ibid*, para 451.

69 1977 Protocol I to the Geneva Conventions of 1949 (International Armed Conflicts), Art 51(4) and (5), 1125 UNTS 3. Kalshoven has correctly argued that deviations from the rules contained in Protocol I cannot be justified with an appeal to military necessity, unless a given rule expressly admits such an appeal. See F Kalsnoven, *Constraints on the Waging of War*, 1987, Geneva: ICRC, p 73.

70 It is unlawful to subject civilians to belligerent reprisals, in accordance with the customary rule encapsulated in the 1977 Protocol I, Art 51(6).

71 Y Sandoz *et al* (eds), *Commentary on the Additional Protocols of 8 June 1977*, 1987, Geneva: ICRC, pp 625–26.

6.5 INTOXICATION

Legal systems usually distinguish between voluntary and involuntary intoxication. Moreover, English law differentiates, for the purposes of the present discussion, between *mens rea* offences and non-*mens rea* offences. The former, known also as specific intent offences, are characterised by the requirement of intention in the definition of their mental element, where adducing evidence of voluntary intoxication will negate *mens rea*, although voluntary intoxication does not generally excuse criminal liability. For crimes of negligence, strict liability and crimes of recklessness, adducing such evidence will be ineffective. Likewise, involuntary intoxication does not generally excuse criminal liability, unless the effect of the involuntary intoxication is to negate the *mens rea* of the underlying crime, but this would find application only with regard to crimes of specific or basic intent.⁷² A claim of involuntary intoxication would be unsuccessful with regard to crimes of negligence and strict liability.⁷³ The ICC Statute does not purport to make this distinction, but it is clear that all the offences in the Statute require some form of intent, although depending on the form of participation in these offences strict liability may suffice.⁷⁴ The terms of the defence of intoxication contained in Art 31(1)(b) are simple, and the provision does not make such a distinction of *mens rea* and strict liability offences. Intoxication will be considered involuntary under English law if it is coerced,⁷⁵ or the accused entirely mistakes what he is consuming. Doubt exists whether a self-induced mistake renders intoxication involuntary, or whether the mistake must be induced by the unlawful acts of another person. Both causes should excuse as long as the accused is deprived of a fair opportunity to conform.⁷⁶

The aforementioned state of the law in England reflects in general terms the practice of most States, and hence its inclusion in Art 31(1)(b) of the ICC Statute does not depart from these principles. Thus, involuntary intoxication will excuse liability where *mens rea* is negated as a result, whereas voluntary intoxication will only produce the same effect if 'the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime'.⁷⁷

72 Crimes of basic intent in English law are those that can be committed recklessly, including those forms where foresight or awareness must be proved. This encompasses assault, malicious wounding, manslaughter and rape, among others. See *op cit*, Wilson, note 10, p 258.

73 *Ibid*, pp 253–56.

74 See I Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *AJIL* (1999), 573, p 586, regarding liability of superiors who are commanders of occupied territories.

75 GR Sullivan, 'Involuntary Intoxication and Beyond', *Crim LR* [1994], 272.

76 *Op cit*, Wilson, note 10, pp 254–55.

77 During the preparatory discussions two approaches to voluntary intoxication surfaced: if it was decided that voluntary intoxication should in no case be an acceptable defence, provision should nonetheless be made for mitigation of punishment with regard to persons who were not able to form a specific intent, where required, towards the crime committed due to their intoxication; if voluntary intoxication were to be retained as a valid defence, as was finally accepted, an exception would be made for those cases where the person became intoxicated in order to commit the crime in an intoxicated condition. UN Doc A/CONF 183/2/Add 1 (14 April 1998), p 57.

6.6 MISTAKE OF FACT OR MISTAKE OF LAW

There were widely divergent views on this provision. Two options were initially inserted, whereby delegates were divided over whether mistake of law or fact should be a ground for excluding liability or not. Some delegations were of the view that mistake of fact was not necessary because it was covered by *mens rea*.⁷⁸ The view eventually accepted was that both mistake of fact and law constitute valid grounds for excluding criminal responsibility only if the mistake under consideration negates the mental element required by the crime.⁷⁹ However, a mistake of law 'as to whether a particular type of conduct is a crime' shall not be a ground for excluding criminal responsibility.⁸⁰ Paragraph 2 of Art 32, moreover, makes the necessary connection between mistake of law and superior orders. Where a subordinate receives an unlawful order which is not manifestly unlawful and which he or she is under an obligation to obey, the subordinate will be exculpated where he or she believed the order to lie within the confines of legitimacy.

A situation not covered in Art 32 is that of the doctrine of 'transferred intent'. Where A plans to kill B, but mistakenly assumes C for B, and proceeds to kill C, A's mistake as to a charge of murder is irrelevant. His mistake did not prevent him from forming *mens rea* for the crime of murder. The 'transferred intent' doctrine should also find application before the ICC in situations analogous to the conduct just described. As for the applicable test for either a mistake of fact or of law, the wording of the Statute suggests that this is a subjective one. This is in line with English law, for example, where mistakes as to justificatory/definitional defences⁸¹ need only be honest.⁸²

6.7 MENTAL INCAPACITY

A defence of mental incapacity necessarily develops and evolves alongside medical/psychiatric advances. Although this is recognised in domestic legal systems, in essence because serious mental incapacity negates the mental element of crime, law making institutions and courts are not bound in incorporating such scientific evidence into the criminal law. Article 31(1)(a) of the ICC Statute exculpates from criminal responsibility where the defence of mental incapacity is proven. However, besides a general qualification of the scope of mental incapacity, none of the variants recognised in the different legal systems are employed, and for good reason. In the limited spatial confines of the Prep Com, agreement would have been impossible, and by that time, para 3 of Art 31 had been inserted, or was imminent, whereby the Court could *proprio motu* derive any additional appropriate defence by reference to general principles

78 *Ibid*, pp 56–57.

79 ICC Statute, Art 32.

80 *Ibid*, Art 32(2).

81 That is, defences operating within the parameters of the offence definition, such as consent.

82 *R v Williams* (1984) 78 Cr App R 276; *Beckford v R* [1988] AC 130. See *op cit*, Wilson, note 10, p 203.

of law. In fact, it is very likely that the elaboration of this defence before the ICC will depend almost exclusively on such principles.⁸³

The defence was raised in the *Celebici* case, where an ICTY Trial Chamber established a two-tier test of 'diminished responsibility'. This consists of an 'abnormality of mind' which the accused must be suffering at the time of the crime, which must moreover 'substantially impair' the ability of the accused to control his or her actions.⁸⁴ This test was essentially constructed on the basis of English law.⁸⁵ On the facts of the case, the Court although recognising that the accused Landzo suffered from an abnormality of mind, it rejected his claim because in its opinion he failed to prove that the impairment was substantial. The basis of this judgment does represent at a minimum the incorporation of the defence in the various legal systems, and as such was deemed appropriate for the purposes of the ICC Statute. It may successfully be raised where:

The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.

It is uncertain whether this may serve as a complete or partial defence, but there is no reason why both cannot be applicable. As for the burden of proof, based on discussions in previous sections of this chapter, this is an affirmative defence whose elements must be raised and satisfied by the accused on a balance of probabilities.⁸⁶

In its determination of the factual criteria relating to this defence, the Court will have recourse to expert witnesses, provided by both parties,⁸⁷ and also from a list of experts approved by the Registrar, or an expert approved by the Court at the request of a party.⁸⁸ This intricate interplay between law and psychiatry/forensics, coupled with (a) the relatively wide definition of Art 31(1)(a), and (b) the liberal rules on the production of evidence (as long as probative value can be demonstrated), ensures that technical consultants will be a substantial guide for the Court.⁸⁹

83 The lack of international jurisprudence was also evident during the drafting of the ICTY Statute, where the UN Secretary General's report, although silent on the specific issue, left it to the Tribunal to decide the fate of 'mental incapacity, drawing upon general principles of law recognised by all nations'. UN Doc S/25704 (1993), reprinted in 32 ILM (1993), 1159, para 58.

84 *ICTY Prosecutor v Delalic and Others (Celebici case)*, Judgment (16 November 1998), Case No IT-96-21-T, paras 1165–70.

85 *R v Byrne* [1960] 3 All ER 1, p 4.

86 *Celebici*, Judgment (16 November 1998), paras 78, 1160, 1172.

87 ICC Rules of Procedure and Evidence, r 135(1).

88 *Ibid.*, r 135(3).

89 See generally, P Krug, 'The Emerging Mental Incapacity Defence in International Criminal Law: Some Initial Questions of Implementation', 94 *AJIL* (2000), 317, pp 322–35.

STATE JURISDICTION AND IMMUNITIES

7.1 CRIMINAL JURISDICTION: AN INTRODUCTION

Jurisdiction refers to the power of each State under international law to prescribe and enforce its municipal laws with regard to persons and property. This power is exercised in three forms, which correspond to the three branches of government. Hence, legislative or prescriptive jurisdiction relates to the competence to prescribe the ambit of municipal laws, judicial jurisdiction relates to the competence of courts to apply national laws, and enforcement jurisdiction refers to the ability of States to enforce the fruits of their legislative or judicial labour (for example, gathering of evidence and infliction of sanctions). While prescriptive and judicial jurisdiction may assume an extra-territorial character, enforcement jurisdiction generally cannot.¹ In the sense described, jurisdiction may be both civil and criminal. With the growth of interstate commerce and movement of persons across international borders since the 18th century, Lord Halsbury's assertion that, 'All crimes are local...jurisdiction is only territorial',² must be viewed as obsolete today, and applicable only to a now diminishing British common law notion of co-inciting criminality of conduct with the jurisdiction of the court empowered to try an offence. Until recently, there did not exist even a general set of rules delineating conflicts of criminal jurisdiction. While conduct occurring solely on the territory of one country could logically fall within that country's competence, a conflict of criminal laws existed where harmful conduct, or its effects, were perpetrated or felt in more than one State. At the same time, the application of the general rule, whereby a State may unilaterally lay claim to jurisdiction in a particular case, with the sole proviso that no other rule of international law is opposed to it,³ creates further conflicts.⁴ Not surprisingly, there does not exist a general agreement resolving issues of concurrent criminal jurisdiction. Problems of concurrent legislative jurisdiction, and in particular criminal matters, are satisfactorily dealt with only where they have been regulated by treaty,⁵

1 Exceptionally, some common law countries do not object to foreign consuls serving writs to persons on their territory. Furthermore, visiting Heads of State have been permitted to perform their official functions while abroad, such as signing decrees. See MAkehurst, *Jurisdiction in International Law*, 45 *BYIL* (1972-73), 145, pp 146, 150.

2 *Madeod v AG for New South Wales* [1891] AC 455, p 458, *per* Lord Halsbury.

3 *France v Turkey* (*Lotus case*) (1927) PCIJ Reports, Ser A, No 10; see W Estey, *The Five Bases of Extra-Territorial Jurisdiction and the Failures of the Presumption against Extra-Territoriality*, 21 *Hastings Int'l & Comp L Rev* (1997), 153; R Higgins, *Problems and Process: International Law and How We Use It*, 1994, Oxford: OUP, p 77, who takes the opposite view by contending that the *Lotus* presumption should not be relied on because it is based on a much dissented judgment.

4 It is not clear whether *Nottebohm* (*Guatemala v Liechtenstein*) (1955) ICJ Reports 4 and *Anglo-Norwegian Fisheries* (*UK v Norway*) (1951) ICJ Reports 116, which limited the unilateral competence of States to confer nationality and delimit the territorial sea through the use of straight baselines respectively, have invalidated the *Lotus* presumption in the field of criminal jurisdiction, which now seems firmly established in a plethora of treaties providing for the exercise of national jurisdiction akin to 'universal'.

but even these subject specific treaties provide for a variety of jurisdictional bases with no clear hierarchical order. The jurisdictional principles contained in criminal treaties are the product of national criminal practice and, to the extent they are uniformly applied, they may be regarded, albeit with caution, as reflecting general principles of national law. These are the principles of territoriality, active personality (or nationality), passive personality, universality and the protective principle.

Issues of criminal jurisdiction remain a highly contentious area of international relations. Even where specific conduct has been regulated by treaty, jurisdiction cannot be said to constitute a settled matter, since not only non-States parties might oppose the said rule, but also States parties may disagree over its ambit, execution, or hierarchical status.⁶ This chapter examines the scope and nature of prescriptive and judicial jurisdiction, as well as possible immunities available as exceptions to it being exercised in individual cases.

7.2 TERRITORIAL JURISDICTION

States have traditionally, on account of their sovereignty, exercised a primary right of criminal jurisdiction over offences perpetrated upon their territory.⁷ Assumption of such jurisdiction has the advantage of immediate accessibility to sources of evidence and relevant witnesses and subsequent minimisation of expenses and judicial time. In many cases, it may also prove to be politically expedient, where competing claims for jurisdiction involve delicate questions of interstate relations; especially where the exercise of extra-territorial jurisdiction would be viewed as encroachment of another State's sovereignty. The territoriality principle operates well only when all the elements of an offence have taken place on the territory of the prosecuting State. In the classic example of one person firing a shot across a frontier and subsequently causing the death of a person on the other side, the principle of territoriality proper gives rise to questions of primacy between two competing

5 1998 Amsterdam Treaty Amending the Treaty on the European Union, Art K3(d), reprinted in 37 ILM (1998), 56, provides that European Union (EU) States are to prevent conflicts of criminal jurisdiction arising among themselves; in similar fashion, and for the first time articulated in an anti-terrorist treaty, Art 7(5) of the 2000 United Nations (UN) Convention for the Suppression of the Financing of Terrorism obliges States parties, in cases of jurisdictional conflicts, to strive to co-ordinate their actions appropriately, 'in particular concerning the conditions for prosecution and modalities for mutual legal assistance'. Reprinted in 39 ILM (2000), 270.

6 See FA Mann, 'The Doctrine of Jurisdiction in International Law', 111 *RCADI* (1964), 44, p 82, who formulated the theory of 'reasonable link', according to which jurisdiction should be dependent upon the strongest possible connection between the conduct and the claimant forum; see I Brownlie, *Principles of Public International Law*, 1998, Oxford: OUP, who also adds the general principles of non-intervention and proportionality, p 313; MS McDougal and WM Reisman, *International Law in Contemporary Perspective*, 1981, Mineola, New York: Foundation Press, p 1274, claim that a State may exercise its prescriptive jurisdiction only when it is substantially affected by an act.

7 *Compania Naviera Vascongado v SS Cristina* [1938] AC 485, p 496, per Lord Macmillan. See M Hirst, 'Jurisdiction over Cross-Frontier Offences', 97 *LQR* (1981), 80; in *Bankovic and Others v Belgium and Sixteen Others*, Admissibility Decision (13 December 2001), Application No 52207/99, European Court of Human Rights (ECHR), the Court was seized with a complaint brought by six Yugoslav nationals against North Atlantic Treaty Organisation (NATO) Member States with regard to the bombing campaign against Yugoslavia and the killing of the applicants' family members. The Court found the application inadmissible, holding that the crucial events occurred outside the Convention's juridical space, stating also that under international law, State jurisdiction is primarily territorial, all others being exceptional.

jurisdictions. State practice has illustrated that in such situations, municipal authorities will resort either to extra-territorial principles of jurisdiction, or consider an element of the *actus reus* (firing of the shot) or the ensuing result (death) as having occurred on their territory, thus finding application for the territoriality principle. This latter expansion of the territoriality principle is termed 'qualified'.

With regard to the qualified territorial principle, various tests are operated by different States as to whether this requires the actual commission of the offence or its effects to have occurred in the claimant State. Two principles have generally been applied to address this situation, namely, the subjective and objective principles of territoriality.

7.2.1 Subjective territoriality

States applying this principle assert, in general, that when an element of an offence either commences or in any other way takes place on their territory, they may validly assert jurisdiction over that offence.⁸ This principle was early recognised in two international treaties, although not widely regarded as a general principle of national law.⁹ These were the 1929 Convention for the Suppression of Counterfeiting Currency and the 1936 Convention for the Prevention of Illicit Drug Traffic, which bound the contracting parties to assume jurisdiction over the prescribed offences, irrespective of the locus where the offence materialised, as long as an attempt, commission or conspiracy was perpetrated on their territory.

While, at the interstate level such a rule may be formulated in accordance with the needs of its drafters in order to effectively combat certain illegal activities, such as counterfeiting and drug-trafficking, its application at the national level with respect to municipal offences seems to warrant that not only a significant portion of the offence take place in the claimant State, but also that there exists a 'real and substantial link' between the offence and that State.¹⁰ In *Libman*, the accused committed fraud in Canada by selling worthless shares over the telephone to buyers in the US who, as directed, sent the money to Central America, which was finally received by Libman back in Canada. The Canadian Supreme Court exercised jurisdiction on the basis of the 'real and substantial link' theory and the perpetration of the largest part of the offence in Canada.¹¹

8 See G Gilbert, 'Crimes *Sans Frontieres*: Jurisdictional Problems in English Law', 63 *BYIL* (1992), 415, p 430, who makes reference to the 'doctrine of ubiquity', which allows States to assume jurisdiction over an offence, as well as any connected inchoate offences, if a part of the offence or its effects are felt in the prosecuting State.

9 I Shearer, *Starke's International Law*, 11th edn, 1994, London: Butterworths, p 186; as an example of municipal law, *ibid*, Gilbert, note 8, p 431, cites s 7 of the New Zealand Crimes Act 1961.

10 *Libman v R* (1986) 21 DLR 174, p 200, *per* La Forest J.

11 On the same basis, and without proof of damage to the interests of the prosecuting State, an Australian Criminal Appeals Court assumed jurisdiction over an offence of grievous bodily harm with intention, committed by the mailing of poisoned food from Australia to Germany: *R v Nekuda* (1989) 39 A Crim R 5, NSW, CCA; similarly, an act of murder committed in Mexico by a US citizen was held to fall within the jurisdiction of Arizona courts because the crime had been premeditated in Arizona, this being a substantial element of first degree murder: *State of Arizona v Willoughby* (1995) 114 ILR 586.

It is evident that where the application of this principle pays no attention to the consequences of an offence for the prosecuting State, it resembles more a rule of extra-territorial rather than territorial jurisdiction. A strong argument for territorial jurisdiction would best be served if the claimant State were to demonstrate it had suffered harmful consequences as a result of the crime concerned. This is the basis of objective territoriality.¹² However, the exercise of subjective jurisdiction in some cases may serve as a good deterrent with regard to criminal conduct that is not penalised or adequately policed in the country where its consequences are felt, especially transnational fraud and sex-related offences in developing countries.

7.2.2 Objective territoriality

This principle allows for jurisdiction where conduct committed abroad produces effects in a third State. The classic example associated with this principle involves the *Lotus* case before the Permanent Court of International Justice.¹³ In that case, eight Turkish crewmen perished as a result of a collision on the high seas between a French and Turkish vessel. Upon arrival in Turkish territorial waters, the captain of the *Lotus* was apprehended and charged with the death of the crewmen. The majority of the court ruled that, since the Turkish vessel was flying the flag of that country, it was to be assimilated to Turkish territory. Hence, under this theory, it was as if the ensuing manslaughter was committed on Turkish soil, in which case it was thereafter justified in exercising jurisdiction over the French captain. That part of the judgment was heavily criticised and, in any event, it does not represent the law today.¹⁴

The magnitude of the consequences which different States require is felt in their territory as a prerequisite to exercising objective territorial jurisdiction are issues that have evolved through municipal case law and legislation. In international law, jurisdiction with regard to these inchoate offences could be based, depending on the particular facts, on the protective principle with which it overlaps. US courts consider that the existence of any two of the following, acts (that is, the relevant offence), intent or effects within the US, are sufficient to trigger the application of objective territoriality jurisdiction.¹⁵ US case law has correctly recognised that because criminal acts may be consummated through agents, whether knowing or unknowing, such as through accomplices or postal and telephone services, a defendant will be subject to US jurisdiction if he or she knowingly uses such agents to carry out an act within that country.¹⁶

Another alternative employed by US federal courts, again similar to the protective principle, is the so called 'effects doctrine', which has empowered the courts of that country to assume jurisdiction, especially in anti-trust cases, on the basis that the

12 See generally JJ Paust *et al* *International Criminal Law: Cases and Materials*, 1996, Durham, NC: Carolina Academic Press, pp 123–28.

13 *France v Turkey* (1927) PCIJ Reports, Ser A, No 10.

14 In his dissenting opinion, *ibid*, p 53, Lord Finlay argued that criminal jurisdiction for negligence causing a collision belongs to the Flag State, unless the accused is of a different nationality, in which case it is his or her own country that may also assume jurisdiction. This is the rule adopted in Art 27 of the 1982 United Nations Law of the Sea Convention (UNCLOS), 21 ILM (1982), 1261.

15 *Op cit*, Paust *et al*, note 12, p 124.

16 *Op cit*, Paust *et al*, note 12; *Ford v USA*, 273 US 593 (1927), p 621; *McBoyle v USA*, 43 F 2d 273 (1930).

economic or other consequences of the offence were directly felt in the US.¹⁷ Notwithstanding the municipal merits for such jurisdiction, its far reaching application may be injurious to the trading or other interests of third States,¹⁸ and public economic organisations.¹⁹ International protestation against the broad use of the 'effects doctrine' in the US culminated in *Timberlane Lumber Co v Bank of America*,²⁰ where it was held that jurisdiction under the doctrine had to consider the economic interests of other States and the scope of the relationship between the US and the defendants.²¹ The EU has reacted vociferously to the promulgation of extra-territorial legislation of this kind, calling on its Member States to take appropriate measures to protect themselves.²² If the doctrine is to be applied in accordance with international law, the relevant courts must be satisfied that the 'effect' is not only substantial and direct, but also that the executive has exhausted all consultative or other means with the conflicting State in order to settle the dispute.

A third alternative form of the objective territoriality principle is the 'continuing act' doctrine. This stipulates that a State enjoys jurisdiction over an offence which, although committed abroad, is continuing to produce results within that State. In *DPP v Doot*,²³ the accused were charged with conspiring to import cannabis into the UK. Although the conspiracy was fully carried out abroad, and UK courts would not normally entertain jurisdiction in such case,²⁴ the House of Lords rejected the defendants' plea by stating that the offence continued to occur in England since the result of the conspiracy was ongoing.

Finally, reference should also be made to jurisdiction over legal persons, such as multinational corporations. These are normally constituted by a parent company and a multitude of subsidiaries, the latter acting as independent entities in the country within which they are incorporated. Despite this structure of multinational corporations, US courts have consistently upheld their jurisdiction over local subsidiaries in cases

17 See Sherman (Anti-Trust) Act 1890, 15 USC § 1; *USA v Aluminium Co of America*, 148 F 2d 416 (1945); *Mannington Mills Inc v Congoleum Corp*, 595 F 2d 1287 (1979); *Hartford Fire Insurance Co v California*, 113 S Ct 2891 (1993); see also DHJ Hermann, 'Extra-Territorial Criminal Jurisdiction in Securities Laws Regulation', 16 *Cumberland L Rev* (1985–86), 207; in 1996 Congress passed the US Cuban Liberty and Democratic Solidarity Act (Helms Burton Act), 22 USC § 6021. Title III of the Act concerns nationals of third States 'trafficking' in nationalised US property by the Cuban authorities in 1959, imposing on such persons penalties such as treble damages and denial of entry to the US. See A Qureshi, *International Economic Law*, 1999, London: Sweet & Maxwell, pp 67–69; BM Clagett, Title III of the HelmsBurton Act is Consistent with International Law', 90 *AJIL* (1996), 434; AV Lowe, 'US Extra-Territorial Jurisdiction: The Helms-Burton and D'Amato Acts', 46 *ICLQ* (1997), 378.

18 It is not surprising that such jurisdiction has been ardently opposed by a number of countries. See UK Protection of Trading Interests Act 1980; AV Lowe, 'Blocking Extra-Territorial Jurisdiction: The British Protection of Trading Interests Act 1980', 75 *AJIL* (1981), 257.

19 The EU generally assumes jurisdiction over anti-competitive activities performed outside its boundaries, either on the basis of relevant subsidiaries situated in the EU or by finding that such activity was implemented in the EU, although originating outside it. See *ICI v Commission* (*Dyestuff* case) [1972] ECR 619; *Ahlstrom v Commission* (*Wood Pulp* case) [1988] 4 CMLR 901; DGF Lange and JB Sandage, 'The *Wood Pulp* Decision and its Implications for the Scope of EC Competition Law', 26 *CML Rev* (1989), 137.

20 (1976) 66 ILR 270.

21 Restatement (Third) of the Foreign Relations Law of the USA 1986, § 403 further requires that the exercise of jurisdiction be 'reasonable'.

22 Joint Action 96/668/CFSP (1996 OJ L309, 29 November, p 7).

23 [1973] 1 All ER 940.

24 This requirement no longer applies, on account of the Criminal Justice Act (CJA) 1993, ss 1–2.

where the actions of the parent company produce effects in the US.²⁵ However, as this is an area not yet sufficiently regulated by rules of international law, it is individual countries that have unilaterally formulated jurisdictional competence.

7.2.3 Territorial jurisdiction in the UK

English courts have always been very conservative in their exercise of extra-territorial criminal jurisdiction, as they have with other jurisdictional principles generally.²⁶ Indeed, until the passing in 1993 of the CJA, the courts of England and Wales, in deciding their competence, divided crimes into two categories, conduct and result.²⁷ Conduct crimes, such as blackmail and conspiracy, in contrast to result crimes like murder, are those requiring a further offence in order to reach completion. Under this distinction, jurisdiction over conduct crimes was asserted where an element of the *actus reus* of the (further) offence took place in England or Wales. In *Board of Trade v Owen*,²⁸ the House of Lords held that a conspiracy in England to commit an offence abroad was not indictable in England, unless the said offence was one for which an indictment would lie in England, that is, if an element of the *actus reus* of the concluding offence were committed in England. Similarly, far from the 'effects' doctrine employed by US courts, in the *AG's Reference (No 1 of 1982)*, it was held that economic loss suffered in England or Wales as a result of a conspiracy therein to defraud abroad constituted an incidental consequence of the agreement and was not an indictable crime in England.²⁹ This strict approach with regard to conduct crimes was somewhat relaxed in *Treacy v DPP*.³⁰ There, the posting of a letter from England with the intention to commit blackmail abroad was held to be an indictable offence under s 21 of the Theft Act 1968, because the offence of blackmail through a demand was deemed to have been committed when the accused posted the letter.

Result crimes, on the other hand, fell within the jurisdiction of English courts if the result of the crime occurred in England or Wales. The 'result' has not, however, always been construed in terms of 'effects', as in other jurisdictions. Thus, in *Secretary of State for Trade v Markus*,³¹ the accused, while in England, had fraudulently induced German companies to participate in illegal investment transactions. Although the House of Lords found that the result occurred in Germany, it upheld the jurisdiction of English courts on the basis that the applications for the transactions were received in England.

25 *USA v Aluminium Co of America*, 148 F 2d 416 (1945). The European Court of Justice has adopted an approach that views the parent company and its subsidiary as a single entity, allowing for jurisdiction over the parent company by the State where the subsidiary is incorporated: *United Brands Co v Commission* [1978] ECR 207; 1 CMLR 429.

26 In jurisdictions like England, where the hearsay rule generally prohibits the admission of such testimony, subject to a plethora of specific exceptions, the prosecution would seriously be impeded in cases where witnesses were reluctant to testify in England, it not being competent to compel them to do so. See J Murphy, *Murphy on Evidence*, 1997, London: Blackstone, Chapters 7–9.

27 G Williams, 'Venue and the Ambit of the Criminal Law', 81 LQR (1965), 518; M Hirst, 'Jurisdiction over Cross-Frontier Offences', 97 LQR (1981), 80.

28 [1957] 1 All ER 411. An almost identical ruling was reached in the similar case of *R v Cox* [1968] 1 All ER 410.

29 [1983] 2 All ER 721. Nor, according to the Court of Appeal, did injury to English interests abroad as a result of a conspiracy in England render the conspiracy indictable therein.

30 [1971] AC 537.

31 [1976] AC 35; see also *R v Bevan* (1986) 84 Cr App R 143.

Even before the passing of the CJA 1993, the distinction between conduct and result offences, which limited the extra-territorial jurisdiction of English courts, began to decrease in significance.³² As in *Doot*,³³ the House of Lords held in *DPP v Stonehouse*³⁴ that an attempt abroad to defraud an assurance policy in England was a 'continued' attempt, because the intention of the offender was that news of his death reach England, and, hence, produce an effect there.³⁵ This extension of the territoriality principle was in contrast to the precedent followed earlier concerning inchoate (conduct) crimes. Moreover, in *Liangsiriprasert v Government of USA*,³⁶ the Privy Council made a departure from the traditional English stance on conduct/result crimes. It found that a conspiracy to import a large quantity of heroin in the US, a conduct offence, was an indictable act in the UK, even if no overt act had taken place there, because the extermination of such illegal activity was in the interest of British society.³⁷

The CJA 1993 incorporated the expanding trend of extra-territorial jurisdiction applied by the courts of England and Wales. Section 3(2) and (3) grants jurisdiction with respect to extra-territorial conspiracies and attempts of listed crimes where it is intended that the offence be committed in the UK, irrespective of whether an act has been perpetrated therein.³⁸ Section 5 makes it an offence, in particular circumstances, to conspire or attempt in England to commit certain offences abroad. Finally, the Terrorism Act 2000 is intended to give extra-territorial jurisdiction to UK courts with regard to terrorist acts perpetrated by proscribed organisations abroad.³⁹

7.2.4 The ambit of national territory

For the purposes of normal territorial jurisdiction, national criminal law applies beyond a State's land territory, until the outermost part of its contiguous zone at sea. Under customary international law, the Flag State has been responsible for exercising criminal jurisdiction upon both its merchant and public vessels for acts committed in the territorial waters of a foreign State. While this rule was absolute with regard to public vessels and warships, merchant vessels could fall within the jurisdiction of the coastal State, depending on the reach of local laws, if the act on board the vessel was considered injurious to the safety or other welfare interests of the coastal State.⁴⁰

32 In *Treacy v DPP* [1971] AC 537, Lord Diplock argued that only rules of comity could prevent limitation in the application of extra-territorial jurisdiction.

33 [1973] 1 All ER 940.

34 [1977] 2 All ER 909.

35 See also *R v Baxter* [1971] 2 All ER 359.

36 [1990] 2 All ER 866.

37 *Ibid.*, p 877, per Lord Griffiths; see *R v Sansom and Others* [1991] 2 WLR 366.

38 See C Warbrick and G Sullivan, 'Territorial Jurisdiction: Criminal Justice Act 1993', 43 ICLQ (1994), 460.

39 See Chapter 2.

40 In the *Wildenhus'* case, the murder of a Belgian crewman by his compatriot on board a Belgian merchant vessel in a US port was held by the US Supreme Court to be subject to local prosecution. Reported in 120 US 1 (1887); in *R v Anderson* (1868) 11 Cox Crim Cases 198, the UK Court of Criminal Appeals upheld the jurisdiction of the courts of the Flag State for offences on board its merchant vessels in foreign territorial waters, but recognised that this jurisdiction was concurrent to that of the coastal State.

Merchant vessels are now subject to the regime established under Art 27 of the 1982 UNCLOS. This makes a distinction with regard to the jurisdiction of the coastal State between internal and territorial waters. Internal waters are the landward part of the sea from a State's baseline, which includes ports and river mouths,⁴¹ while territorial waters stretch from the baseline seaward until a distance not exceeding 12 nautical miles.⁴² All merchant vessels enjoy a right of innocent passage through internal waters and territorial sea, but, whereas coastal States enjoy an almost unrestricted criminal competence in internal waters,⁴³ such competence is more limited in their territorial sea. In order to properly justify its exercise of jurisdiction in the latter zone of sea, the coastal State must demonstrate that a crime has either disturbed or affected its land territory, or that the measures taken were intended for the suppression of illicit traffic of drugs, or that it received the consent of the Flag State.⁴⁴

Public ships are generally immune from coastal jurisdiction under the traditional notion of an 'implied licence' to enter internal waters, which secures them immunity.⁴⁵ Exception to this rule may be effectuated only through an express waiver of immunity by the Flag State.⁴⁶ In cases where the coastal State deems the action of foreign public vessels and warships injurious to itself, it has the power to declare them *non grata* and expel them from its territorial sea.⁴⁷ A coastal State has also some limited jurisdiction in a belt of sea, contiguous to its territorial sea, and which does not exceed 24 nautical miles from its baselines. This is known as the 'contiguous' zone.⁴⁸ Coastal jurisdiction in the contiguous zone is limited to powers of preventive enforcement of the coastal State's fiscal, sanitary, immigration or customs laws, as well as offences previously perpetrated within its territorial waters.⁴⁹ Contrary to the ruling in the *Lotus* case, in cases of collision or any other penal or disciplinary incidents on the high seas, jurisdiction lies with the Flag State or the State of which the accused is a national.⁵⁰

As regards offences committed in airspace, without prejudice to specific multilateral conventions and concurrent jurisdiction specified therein, the general rule is that primary jurisdiction lies with the subjacent State.⁵¹ This rule was enforced in the case of the Pan Am flight bombing over Lockerbie, Scotland, through the establishment of a criminal tribunal in The Netherlands with the application of Scottish criminal law.⁵²

41 UNCLOS, Art 8.

42 *Ibid*, Art 3.

43 *Ibid*, Art 27(2).

44 *Ibid*, Art 27(1).

45 *Schooner Exchange v MacFaddon* (1812) 7 Cranch 116.

46 See *Chung Chi Cheung v R* [1939] AC 160.

47 UNCLOS, Art 30.

48 *Ibid*, Art 33.

49 *Ibid*, Art 33(1)(a) and (b).

50 *Ibid*, Art 97(1).

51 See *Smith v Socialist People's Libyan Arab Jamahiriya* (1997) 113 ILR 534, p 541.

52 See 1998 Agreement Between the Government of the Kingdom of The Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning a Scottish Trial in The Netherlands, 38 ILM (1999), 926.

The question of criminal jurisdiction with regard to succession of States is a problematic one. In the *Former Syrian Ambassador to the German Democratic Republic* (GDR) case,⁵³ the Syrian Ambassador to the GDR was charged with fostering and co-ordinating a terrorist bombing in the Federal Republic of Germany. The Federal Constitutional Court upheld the jurisdiction of German courts (after unification), first because the acts had been committed in West Berlin, and secondly because it deemed federal criminal law applicable even prior to German reunification. Whatever the merits of this decision, its application should not offend the general principles of prohibition of retroactive criminal laws and double jeopardy.

7.3 THE ACTIVE PERSONALITY PRINCIPLE

The active personality principle (or nationality) of jurisdiction is based on the nationality of accused persons.⁵⁴ It allows States to prescribe legislation regulating the conduct of their nationals abroad, and in some cases it has also been applied to persons with residency rights.⁵⁵ For such purposes, although the granting of nationality is considered a matter of domestic law,⁵⁶ its application and recognition in international fora is premised on principles of international law.⁵⁷ This competence of States to prosecute their nationals on the sole basis of their nationality is based on the allegiance that is owed to one's country under municipal law.⁵⁸ Although the active personality principle is mostly prevalent in civil law jurisdictions, it is generally recognised also in common law States.⁵⁹ In the UK, the nationality principle applies to a limited number of offences, such as treason,⁶⁰ murder and manslaughter,⁶¹ bigamy,⁶² offences on board foreign merchant vessels⁶³ and, more recently, conspiring or inciting sexual offences against children.⁶⁴

53 (1996) 115 ILR 597, pp 604–05.

54 GR Watson, 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction', 17 *Yale J Int'l L* (1992), 41.

55 UK War Crimes Act 1991, s 1(2) brings to the jurisdiction of English courts persons who are accused of committing war crimes during the Second World War, if at the time of prosecution they are either residents or citizens of the UK. See *R v Sawoniuk* (1999) unreported.

56 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Art 1, 179 LNTS 89.

57 In the *Nottebohm* case (1955) ICJ Reports 4, Second Phase, the International Court of Justice (ICJ) pointed out that a State claiming protection on behalf of one of its naturalised nationals against a respondent State needed to establish an effective and genuine link.

58 Harvard Research, *Draft Convention on Jurisdiction with Respect to Crime*, reprinted in 29 *AJIL* (1935 Supp), 480, p 519.

59 *Blackmer v USA*, 284 US 421 (1932), p 436; *USA v Columba-Colella*, 604 F 2d 356 (1979), p 358.

60 Treason Act 1351 and Official Secrets Act 1989, s 15(1); see also *R v Casement* [1917] 1 KB 98; *Joyce v DPP* [1946] AC 347, where the offence of treason was upheld even though Joyce's allegiance to the UK was made possible through a fraudulently obtained passport.

61 Offences Against the Person Act 1861, s 9.

62 *Ibid*, s 57; *Trial of Earl Russell* [1901] AC 446.

63 Merchant Shipping Act (MSA) 1995, s 281. In *R v Kelly* [1981] 2 All ER 1098, the House of Lords admitted charges under the purely internal Criminal Damage Act 1971 (then under MSA (1894), s 686(1)), against UK passengers for damage caused by them on board a Danish vessel.

64 Sexual Offences Act 1956 and Sexual Offences (Conspiracy and Incitement) Act 1996. See P Alldridge, 'The Sexual Offences (Conspiracy and Incitement) Act 1996', *Crim LR* [1997], 365.

Until recently, the active personality principle was utilised in order to protect State interests from being harmed abroad, the primary example being the offence of treason. With increased efforts in recent years to combat transnational crime, in conjunction with expanding human rights awareness since 1945, the use of the nationality principle has been extended to encompass activities that do not directly endanger individual State interests. Hence, by prosecuting its nationals who organise illegal sexual tourism, the UK adheres not only to pressure from public opinion, but also to its obligations under international human rights law. In this manner, States refuse to portray themselves as facilitating safe havens for those nationals committing crimes abroad.⁶⁵

The application of this principle in civil law jurisdictions is not only a common statutory feature; it has itself also been expansively construed.⁶⁶ In *Public Prosecutor v Antoni*, the Swedish Supreme Court found the criminal provisions of the Traffic Code of that country to be applicable against Swedish nationals abroad.⁶⁷ The reason for such generous construction may be justified by the refusal of civil law States, in accordance with their Constitutions, to extradite their nationals. European experience has demonstrated variations in the application of this principle. Some States impose an obligation of double criminality, others that the act constitute a crime in both itself and the *locus delicti commissi*,⁶⁸ while some States extend their criminal laws against nationals whose acts were committed in places lacking an effective criminal justice system.⁶⁹ The adoption of the UK Sexual Offences (Conspiracy and Incitement) Act (SOA) 1996 is evidence that States are now willing to bring within their jurisdiction offences which, on account of socio-economic reasons in developing countries, would not be prosecuted there. The active personality principle features also, in conjunction with other jurisdictional bases, in a large number of multilateral treaties.⁷⁰ This confirms not only its international acceptance, but, foremost, its effectiveness in combating impunity.

7.4 THE PASSIVE PERSONALITY PRINCIPLE

Criminal jurisdiction under the passive personality principle is exercised by the State of the nationality of the victim, where the offence took place outside its territory.⁷¹ Assumption of jurisdiction under this principle has been criticised, and was not included in the 1935 Harvard Research Draft. Common law States have opposed it ardently, but with the upsurge in transnational terrorist activity such inhibitions have given place to the enactment of statutes entertaining the principle.

65 See *Re Gutierrez* (1957) 24 ILR 265.

66 See LS Green, 'The German Federal Republic and the Exercise of Criminal Jurisdiction', 43 *U Toronto LJ* (1993), 207.

67 (1960) 32 ILR 140.

68 See *op cit*, Gilbert, note 8, p 417.

69 1985 Hellenic Criminal Code, Art 5.

70 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Art 6(1)(c), 27 ILM (1988), 668; 1984 Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Torture Convention), Art 5(1)(b), 1465 UNTS 85.

71 See GR Watson, 'The Passive Personality Principle', 28 *Texas ILJ* (1993), 1.

Justification for exercising it in national fora is each country's interest in protecting the welfare of its nationals abroad, where the *locus delicti* State either neglects, refuses or is unable to initiate prosecution. In this context alone, the passive personality principle may be deemed as a lawful, but auxiliary, form of jurisdiction.⁷² In the *Cutting* case, a US citizen was arrested in Mexico for a libel charge against a Mexican national.⁷³ The action for which the libel was charged had been committed whilst its author was in the US, but his arrest was effectuated much later during the author's subsequent trip to Mexico. The US Government vigorously opposed Mexico's claim of jurisdiction and the case was finally discontinued. The principle later received the same rejection by the Permanent Court of International Justice in the *Lotus* case.

In the early part of the 20th century, when nation States ardently asserted their sovereignty, the application of any extra-territorial principle would have met strong opposition. This is true even more in the above mentioned cases, where passive personality was statute and not treaty based. As noted, the advent of transnational crimes, especially terrorist-related, necessitated the enactment of both statute and treaty based instruments promulgating jurisdiction on the basis of the victim's nationality. Following the *Achille Lauro* incident and the subsequent murder of a US citizen, the US Congress enacted the Omnibus Diplomatic Security and Anti-Terrorism Act 1986, which grants US courts, *inter alia*, jurisdiction over persons charged with the extra-territorial murder of US nationals, where the intention of the perpetrator has been to intimidate, coerce or retaliate against any government or people.⁷⁴ Similar provisions include s 3(4) of the UK Taking of Hostages Act 1982⁷⁵ and Art 689(1) of the French Code of Penal Procedure. Even though it is said that the US does not generally recognise this form of jurisdiction,⁷⁶ in fact, in *USA v Yunis*,⁷⁷ it was unequivocally upheld by a Court of Appeals.⁷⁸ Passive personality jurisdiction over the accused, for hijacking a Jordanian airliner in Beirut with two US citizens on board, was assumed on the basis of the Anti-Hijacking Act 1974,⁷⁹ and the HTA 1984. Despite its recent acceptance in domestic fora, statute based passive personality has not received general consensus regarding its delimitation⁸⁰ and national judiciary should apply it only as an auxiliary form of jurisdiction.

The case is different with treaty based jurisdiction, since this supersedes any domestic provision to the contrary. This is allotted in two ways: either by directly

72 See *op cit*, Shearer, note 9, p 211.

73 IA Moore, *Moore's Digest of International Law*, 1906, Vol 2, p 228.

74 18 USC § 2331. This particular *mens rea* component of the Act may, in fact, render such jurisdiction more akin to the protective, rather than the passive personality, principle.

75 In *Rees v Secretary of State for the Home Department* [1986] 2 All ER 321, the House of Lords accepted extradition to FRG of a British national accused of participating in the kidnapping of a German citizen in Bolivia.

76 *Op cit*, Paust *et al*, note 12, p 121.

77 (1991) 88 ILR 176.

78 Hostage Taking Act (HTA) 1984, 18 USC § 1203. Jurisdiction was based on the passive personality principle under § 1203(b)(1)(A); similarly, *In the Matter of Extradition of Atta* 104 ILR 52, the accused, a US national, was implicated by Israel in an attack against an Israeli bus in the West Bank resulting in the death of two civilians. The accused challenged an Israeli request for extradition, but a US District Court recognised a claim under s 7(a) of the 1977 Israeli Penal Code, providing for passive personality jurisdiction.

79 49 USC App § 1472(n).

80 See *op cit*, Gilbert, note 8, p 419, who points to the relevant provisions in various European penal codes.

granting a concurrent right of jurisdiction based on the nationality of the victims,⁸¹ or indirectly by not excluding any criminal jurisdiction exercised in accordance with national law.⁸² This latter form is necessarily secondary, as can be ascertained from its inclusion and purpose in the relevant treaties.

7.5 THE PROTECTIVE PRINCIPLE

It is unequivocally accepted that every country is competent to take any measures, which are compatible with the law of nations, in order to safeguard its national interests. This implication of State sovereignty is the basis for the protective or security principle.⁸³ The necessity for the protective principle may be demonstrated by the lack of adequate measures in most municipal legal systems through which to criminalise harmful behaviour or prosecute persons for acts which, although committed abroad, are directed against the security of a foreign State.⁸⁴ The problem with this theory is that national parliaments enacting the protective principle may take a very expansive, or at least subjective, view of what is actually injurious to their national interests. For example, State A might consider that avoiding military service by residing abroad harms national security because it decreases its defensive capacity. In contemporary international law, the extent to which the *forum deprehensionis* can extradite a person on the basis of the protective principle is limited by the list of extraditable crimes in extradition treaties and fundamental human rights norms, especially the rule of non-extradition for political offences. If the accused is not in the custody of the prosecuting State, a request for extradition may hinder on a denial to extradite, in case no offence has been committed in the *forum deprehensionis*, in order to safeguard its own national interests. As alliances come and go, a similar situation may be accommodated through the rules of comity, by recognising the requesting State's protective jurisdictional competence.

Case law suggests that the executive and judiciary perceive 'national interests' quite broadly. Espionage and treason are classic examples of the application of the protective principle, since they have traditionally been viewed as acts endangering internal security. In *Re Urios*,⁸⁵ a Spanish national was convicted of espionage on account of his contacts against the security of France but whilst in Spain, during the First World War. In *Joyce v DPP*,⁸⁶ the House of Lords, in a rather confusing judgment, took the view that an alien with a fraudulently obtained British passport owed allegiance to the Crown and was liable for treason with regard to the broadcast of

81 Eg, 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Art 3(1)(c), 13 ILM (1974), 42; 1984 UN Torture Convention, Art 5(1)(c); 1988 UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Art 6(2)(b).

82 Eg, 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Art 5(3), 10 ILM (1971), 1151.

83 See generally I Cameron, *The Protective Principle of International Criminal Jurisdiction*, 1994, Aldershot: Brookfield, VT.

84 *Op cit*, Harvard Research, note 58, p 552.

85 (1920) 1 AD 107.

86 [1946] AC 347, p 372, *per* Lord Jowitt. Jurisdiction was also upheld based on the basis of the active personality principle. See also H Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens', 9 *CLJ* (1947), 330.

propaganda during the Second World War, notwithstanding that nationality is irrelevant in enforcement of the protective principle.⁸⁷ Relying on *Joyce*, the District Court of Jerusalem upheld, *inter alia*, protective jurisdiction in the *Eichmann* case.⁸⁸ The accused was responsible for implementing Hitler's 'Final Solution' programme. After the war, he fled to Argentina and was abducted by Israeli agents to stand trial in Israel under the 1951 Nazi and Nazi Collaborators Law for war crimes, crimes against the Jewish people and crimes against humanity. The judgment of the District Court, which was subsequently affirmed by the Israeli Supreme Court,⁸⁹ held that a country whose 'vital interests' and ultimately its existence are threatened, such as in the case of the extermination of the Jewish people, has a right to assume jurisdiction to try the offenders.⁹⁰

The protective principle was used by western European States during the Cold War in cases involving enlistment or espionage which resulted in a threat to the interests of allied countries. In *Re Van den Plas*,⁹¹ for example, a Belgian national was held liable for acts of espionage against Belgium by a French tribunal, on the basis that his acts were injurious to the interests of both France and Belgium. US jurisprudence has perceived the ambit of 'national interests' under the protective principle as encompassing acts which do not necessarily require a direct or actual effect within the territory of the US.⁹² This has had considerable impact on cases involving the breach of US immigration law, where the breach was perpetrated outside US territory.⁹³ US courts have approached the issue of immigration as vital to the security of a country, especially as regards the executive function determining who should be permitted to enter.⁹⁴ Applying the protective principle in cases involving the extra-territorial apprehension of drug-traffickers⁹⁵ or suspected terrorists⁹⁶ has proved less arduous, since a threat to security or other national interests can be easily discerned and proven. It is generally agreed that, in order to restrict possible abuse, the use of statute based protective principle jurisdiction should be limited to cases where both significant national interests are at stake and, moreover, where its application in each particular case is permissible under international law.⁹⁷

87 Nonetheless, in *R v Neumann* (1949) 3 SA 1238, cited in *op cit*, Paust *et al*, note 12, p 149, a South African Special Court convicted a South African national of treason on account of his participation on the German side during the Second World War. The judgment of the court stated that jurisdiction was obtained due to the impairment of national security caused by the act of treason.

88 *AG of the Government of Israel v Eichmann* (1961) 36ILR 5.

89 (1962) 36 ILR 277.

90 See H Silving, 'In *re Eichmann*: A Dilemma of Law and Morality', 55 *AJIL* (1961), 307; JES Fawcett, 'The *Eichmann* Case', 38 *BYIL* (1962), 181.

91 22 ILR 205; *op cit*, Akehurst, note 1, p 158, argues that such decisions are defensible only where the accused are nationals of allied powers.

92 *USA v Pizzarusso*, 388 F 2d 8 (1968), p 11; *USA v Keller*, 451 F Supp 631 (1978), p 635. See the opposite view espoused *op cit*, by Paust *et al*, note 12, p 129.

93 *Rocha v USA*, 288 F 2d 545 (1961); *USA v Pizzarusso*, 388 F 2d 8 (1968), p 11; *Giles v Tumminello*, 38 ILR 120.

94 See Restatement (Third) of the Foreign Relations Law of the USA 1986, § 402(3).

95 *Rivard v USA*, 375 F 2d 882 (1967); *USA v Bright-Barker*, 784 F 2d 161 (1986).

96 *USA v Yunis* (1991) 88 ILR 176; Omnibus Diplomatic Security and Anti-Terrorism Act 1986, 18 USC § 2331.

97 *Op cit*, Paust *et al*, note 12, p 128.

7.6 UNIVERSAL JURISDICTION

The four forms of jurisdiction discussed above require some kind of link or connection with the prosecuting State, whether that is based on the territory where the offence took place, the nationality of the perpetrator or the victim, or a threat to the interests of the State concerned. The application of universal jurisdiction to a particular offence does not require any such link, and any State may assert its authority over offences subject to universal jurisdiction.⁹⁸ Due to the broad extra-territorial competence encompassed by the exercise of the principle of universal jurisdiction, it is reasonable that only a very limited number of offences can be subject to the application of this principle.

Before we proceed with this analysis, it is imperative that some clarifications be made. A criminal offence, for example, torture, is established as such within a State by its competent authority, namely its parliamentary body. In this sense, torture becomes an offence under national law. The same offence of torture, however, can also be promulgated by the competent sources of international law; that is treaty and custom.⁹⁹ In this latter context, torture is defined as an offence under international law, and even though both its subjective and objective elements may be identical to the national provision, a crime under international law is subject to the interpretation and limitations of the international legal regime which formulates it.

Crimes under international law (international crimes) have customarily attracted universal jurisdiction in two independent ways: (a) based on the heinous, repugnant nature and scale of the offence, as is the case with grave breaches of humanitarian law¹⁰⁰ and crimes against humanity;¹⁰¹ or (b) on the inadequacy of national enforcement legislation with regard to offences committed in locations not subject to the authority of any State, such as the high seas. Extension of universal jurisdiction over piracy under international law (piracy *jure gentium*) has substantially contributed to combating this scourge.¹⁰² It cannot be overemphasised that these two bases for attracting universal jurisdiction are independent and conjunctive. The practical significance of this observation is that to discern whether or not an international crime is subject to universal jurisdiction, one must first ascertain which of the two bases, nature and scale, or that of an act perpetrated on the high seas, is appropriate. Thus, in *Re Rohrig*,¹⁰³ although war crimes of a serious and repugnant nature did and do attract universal jurisdiction, a Dutch Special Cassation Court wrongly assimilated the basis for asserting universal jurisdiction over war crimes to that of piracy. In *Re Pinochet (No 3)*,¹⁰⁴ Lord Millet succinctly argued that international crimes

98 See K Randal, 'Universal Jurisdiction Under International Law', 66 *Texas LR* (1988), 785; ES Kobrick, 'The *Ex Post Facto* Prohibition and the Exercise of Universal Jurisdiction Over International Crimes', 87 *Columbia LR* (1987), 1515.

99 General principles of the law of nations have never in the past been used to establish an international offence, but only to clarify the scope of existing international offences.

100 1949 Geneva Conventions and both Additional Geneva Protocols 1977 to the 1949 Conventions. See also C Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', 59 *LCP* (1996), 153.

101 *Federation Nationale de Deportes et Internes Resistants et Patriotes and Others v Barbie*, 78 *ILR* 125, p 130; see also *Re Pinochet*, 93 *AJIL* (1999), 700, Brussels Tribunal of First Instance, pp 702–03.

102 In *Re Piracy Jure Gentium* [1934] *AC* 586, Lord Macmillan confirmed the application of universal jurisdiction over piracy *jure gentium* and noted that a pirate 'is no longer a national, but *hostis humani generis* and as such he is justiciable by any State anywhere', p 589.

103 (1950) 17 *ILR* 393, p 395.

attract universal jurisdiction where they violate a rule of *jus cogens* and, at the same time, are so serious and perpetrated on such a large scale that they can be regarded as an attack against international legal order.¹⁰⁵ This statement, correct though it may be, lacks a most essential ingredient: the consent of States to subject an offence to universal jurisdiction through treaty or custom. The vast majority of international crimes violate *jus cogens* norms on a large scale. Can it seriously be contended that all States parties to these international criminal law conventions intended to confer universal jurisdiction over the relevant crimes? Furthermore, what is the legal position of non-States parties to these conventions?

The first question can only be answered by contrasting the various international provisions. Article 105 of UNCLOS states:

On the high seas, or in any other place outside the jurisdiction of any State, *every State* may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board [emphasis added].

Notice now the difference in wording in Art 99 of the same Convention, which prohibits the transport of slaves on the high seas:

Every State shall take effective measures to prevent and punish the transport of slaves in ships authorised to fly *its flag* and to prevent the unlawful use of *its flag* for that purpose [emphasis added].

Although it is obvious that Art 99 renders slave-trafficking an international crime, whether by criminalising it, or acknowledging its prior existence, it does not confer on States parties universal jurisdiction as a matter of international law, regardless of the undoubtedly repugnant character of slavery. On the contrary, it is clear that Art 105 does confer universal jurisdiction on States parties with regard to piracy *jure gentium*. The conclusion is, thus, that the repugnant nature or the *locus commissi* of an offence may determine its subjection to universal jurisdiction, but this process also requires the unequivocal consent of the international community.

On the grounds of the preceding analysis, only grave breaches of international humanitarian law (including crimes against humanity) and piracy *jure gentium* are, beyond any doubt, international crimes subject to universal criminal jurisdiction.¹⁰⁶ This conclusion is confirmed by reference to both treaty and customary law. As for non-parties to UNCLOS and the 1949 Geneva Conventions, the *jus cogens* character of the offences involved precludes even persistent objection.¹⁰⁷ It is submitted that

104 *R v Bow Street Metropolitan Stipendiary Magistrate and Others ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97; see H Fox, 'The Pinochet Case No 3', 48 ICLQ (1999), 687.

105 *Ibid.*, p 177.

106 We are, thus, in disagreement with the US Court of Appeals Judgment in *USA v Yunis (No 3)*, 924 F 2d 1086 (1991); 88 ILR 176, p 182, that hijacking is a clear case of an international crime endowed with universal jurisdiction; similarly, Principle 2(1) of the Princeton Principles of Universal Jurisdiction lists the following as serious international crimes subject to universal jurisdiction: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture, without necessarily excluding it with regard to other offences. The Princeton Principles, the final version of which was adopted in 2001, were formulated through a series of meetings by a group of experts claiming to represent current international law.

the *jus cogens* nature of these crimes necessarily entails the peremptory character of the jurisdiction they carry under international law; that is, an international crime is always accompanied by its jurisdiction under international law. This narrow view of universal jurisdiction was confirmed, albeit *obiter dicta*, by the ICJ in the *Belgian Arrest Warrant* case. In that case, a Belgian Investigating Judge issued in April 2000 an international arrest warrant against the then incumbent Congolese Foreign Minister, on the basis of the Belgian 1993 Law Relative to the Repression of Grave Breaches, charging him for grave breaches in violation of the 1949 Geneva Conventions, Protocols I and II of 1977, as well as crimes against humanity. The ICJ did not view universal jurisdiction as central to the issue, but in his Separate Opinion, Judge Guillaume took a narrow view of universal jurisdiction, finding it applicable in limited cases, and certainly not *in absentia*.¹⁰⁸

The fact that an international crime does not attract universal jurisdiction under international law does not necessarily mean that it may not attract broad extra-territorial jurisdiction (similar to universal) under domestic law. In fact, relevant international treaties encourage parties to assert expansive jurisdiction with respect to the offences contemplated, very much akin to universal jurisdiction. Such jurisdiction, even if termed universal, is established after incorporation into municipal law of the international offence. In this case, it is delineated in scope according to domestic legislation. This is evident in, for example, Art 5 of the 1984 UN Torture Convention, which primarily establishes territorial (and State of registration),¹⁰⁹ nationality¹¹⁰ and passive personality jurisdiction.¹¹¹ Article 5 further confers jurisdiction on:

- (2) Each State party [to] 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 to any of the States mentioned in para 1 of this article.
- (3) This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 5(2) and (3) thus permits the exercise of universal jurisdiction with respect to the incorporated domestic offence of torture. Section 134 of the UK CJA 1988 incorporates this type of universal jurisdiction with regard to torture. It is not clear whether such universal jurisdiction is primary or secondary to those mentioned in Art 5(1). In terms of international comity, at least, the *locus delicti* State must enjoy primary jurisdiction, unless the apprehending State asserts its own right over the accused. There is a further natural limitation to the 'universality' espoused in Art 5(2) and (3), which is encountered neither in piracy *jure gentium* nor grave breaches. This is the requirement that the alleged offender actually be on the territory of the

107 1969 Vienna Convention on the Law of Treaties, Art 53, 1155 UNTS 331; see also J Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 *BYIL* (1985), 1.

108 *Democratic Republic of Congo v Belgium* (Arrest Warrant of 11 April 2000), Judgment (14 February 2002), Separate Opinion of Judge Guillaume.

109 1984 Torture Convention, Art 5(1)(a).

110 *Ibid*, Art 5(1)(b).

111 *Ibid*, Art 5(1)(c).

State embarking on an exercise of universal jurisdiction, as enshrined in Art 5(2). Where the alleged offender is apprehended in a State that does not wish to initiate criminal proceedings and is, therefore, obliged to extradite to a third State (if a bilateral extradition treaty exists), extradition will generally take place only to a country with sufficiently close connection to the offence.¹¹² In the case of international crimes subject to universal jurisdiction, on the other hand, any extradition requests must be treated as legitimate by the requested country¹¹³ and are to be dismissed only on account of human rights concerns. Another difference between ‘internal’ and ‘international’ universal jurisdiction is that, in order for the former to be lawfully prescribed by the national legislature, it must not conflict with any other generally agreed rule of international law.

The traditional common law view seems to have been that no presumption of universal jurisdiction be read in criminal statutes,¹¹⁴ but both English and US courts assert that they have always enjoyed jurisdiction for personal violations of international norms.¹¹⁵ The best approach is that adopted by § 443 of the Restatement (Third) of the Foreign Relations Law of the USA, which provides that:

A State’s courts may exercise jurisdiction to enforce the State’s criminal laws which punish universal crimes (§ 404) or other non-territorial offences within the State’s jurisdiction to prescribe (§§ 402–03).

Indeed, unless a prohibitory international rule to the contrary exists, a State may assert any form of jurisdiction over an alleged offence. In fact, some States have gone so far as to prosecute aliens for common offences, perpetrated in, and subject to, the ordinary criminal law of third countries. In the *Austrian Universal Jurisdiction* case,¹¹⁶ the accused had fled his native Yugoslavia and was convicted in Austria for offences committed there. While serving his sentence, Yugoslavia requested his extradition for common crimes perpetrated while he was still a resident of that country, but Austria refused because the accused was in danger of being subjected to political persecution in Yugoslavia. Instead, the Supreme Court of Austria argued that the judicial authorities of that country could exercise universal jurisdiction over the accused’s alleged offences in Yugoslavia, because it deemed them punishable under Austrian law if committed in Austria. The exercise of such jurisdiction was based on Art 40 of the Austrian Criminal Code, which provides that where competent foreign authorities refuse to prosecute, or prosecution by them is impossible, this task will be undertaken by Austrian courts in accordance with its criminal law.¹¹⁷ In similar fashion, in the *Universal Jurisdiction Over Drug Offences* case,¹¹⁸ the FRG Federal Supreme Court upheld universal jurisdiction over drug-trafficking offences committed abroad on the basis of Art 6(5) of the 1998 Federal Criminal Code, which

112 *Ibid*, Art 8(4).

113 Obviously, in the event of conflicting extradition requests, the executive may reach its conclusion on the basis of relevant connecting factors.

114 *R v Jameson* [1896] 2 QB 425, p 430, *per* Lord Russell, who noted that ‘an act will not be construed as applying to foreigners in respect of acts done by them outside the dominions of the sovereign power enacted’. See also *USA v Baker* (1955) 22 ILR 203.

115 *Ex p Quirin*, 317 US 27 (1942); *Re Pinochet (No 3)* [1999] 2 All ER 97, p 177, *per* Lord Millet.

116 28 ILR 341.

117 *Ibid*, pp 341–42.

118 28 ILR 166.

made the criminal law of that country applicable to drug-trafficking abroad and regardless of the law of the *locus delicti commissi*. The Supreme Court found Art 6(5) compatible with international law in the absence of a contrary special treaty provision, and as implementing Art 36 of the 1961 Single Convention on Narcotic Drugs, which calls on States parties to ensure that every relevant offence receives appropriate punishment.¹¹⁹

In similar manner, national courts have upheld the universality principle with regard to crimes defined under municipal criminal statutes, for a number of offences, such as war crimes,¹²⁰ crimes against humanity¹²¹ and genocide.¹²² These statutes incorporate into national law the obligations undertaken by a particular treaty.¹²³ As the *Austrian Universal Jurisdiction* case has indicated, some States are willing to prosecute offences under the universality principle not on the basis of their international obligations, but on a desire to combat impunity or protect prospective future interests, even where the offences concerned do not violate *jus cogens* norms.¹²⁴ Nonetheless, not all countries are willing to apply the universality principle in every case. In *Re Munyeshyaka*, a French court asserted that no universal jurisdiction was directly established by the 1949 Geneva Conventions and that Art 689 of the French Penal Code was not a basis for the application of universal jurisdiction in the French legal order.¹²⁵ Principle 3 of the Princeton Principles of Universal Jurisdiction rather wishfully asserts the right of national courts to rely on universal jurisdiction in the absence of national legislation. Certainly, the application of universal jurisdiction by a domestic court in defiance of the laws of that country would nullify its judgment as a matter of domestic law. To reverse this result, it must be proven either that: (a) the judge is applying unimplemented treaty obligations; or (b) that customary law is automatically incorporated in the internal law of that country, that the offence in question is subject to universal jurisdiction, and that the court was applying that rule.

7.7 AUT DEDERE AUT JUDICARE PRINCIPLE

The vast majority of multilateral conventions dealing with international crimes contain a special clause, through which the *forum deprehensionis* is under an obligation

119 In similar reasoning, it was held in *USA v Marino-Garcia*, 679 F2d 1373 (1982), that USC § 955(a), s 21 gives the federal Government criminal jurisdiction over all stateless vessels on the high seas engaged in the distribution of controlled substances, noting that this exercise of jurisdiction is not contrary to international law.

120 *Public Prosecutor v Djajic* (German), 92 AJIL (1998), 528; *Public Prosecutor v Grabec* (Swiss), 92 AJIL (1998), 78.

121 *AG of Israel v Eichmann*, 36ILR 5; *In re Demjanjuk*, 457 US 1016 (1986).

122 *Re Pinochet*, 93 AJIL (1999), 690, Spanish National Court, Criminal Division. Judicial Branch Act of 1985, Art 23(4) establishes universal jurisdiction of Spanish courts over genocide, terrorism, piracy, unlawful seizure of aircraft, as well as any other international crime which must be prosecuted in Spain.

123 UK Geneva Conventions Act 1957 and Geneva Conventions (Amendment) Act 1995. See P Rowe and M Meyer, 'The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach', 45 ICLQ (1996), 476; US War Crimes Act 1996, 18 USC § 2401.

124 In *Giles v Tumminello*, 38 ILR 120, the Supreme Court of South Australia upheld jurisdiction over aliens for common offences committed on the fringe of its territorial sea, 'for the control and protection' of its residents.

125 *Re Javar and Re Munyeshyaka*, 93 AJIL (1999), 525.

to either prosecute or extradite those persons who are suspected of having committed the prescribed offence. The *aut dedere aut judicare* principle is, itself, subject to the conventional and customary limitations attached to extradition.¹²⁶ This principle, which is established only by treaty,¹²⁷ creates an affirmative obligation on parties to multilateral criminal law conventions to prosecute, but the treaties which contain it do not *per se* constitute an independent legal basis for extradition. Extradition is dependent on the existence of specific bi- or multilateral treaties. Under the various international criminal law conventions, Member States enjoy a discretion as to which extradition request will be satisfied upon refusal to prosecute. As the *Lockerbie* case has demonstrated, the *aut dedere* component of the principle requires that prosecution be carried out independently of the executive and in accordance with international standards. In that case, Libya refused to extradite two of its nationals accused by the US and UK of detonating an explosive device on a Pan Am flight over Lockerbie, Scotland, arguing, instead, that it had discharged its obligation under Art 7 of the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) to investigate the liability of the accused. Although the subsequent Libyan investigation acquitted the two accused, there was ample evidence to suggest that both were agents of the Libyan Government, which it is believed was the orchestrator of that terrorist attack.¹²⁸

It is very likely that this principle constitutes an obligation *erga omnes* arising from the status of the offences to which it is applied, as being universal crimes.¹²⁹ It follows from this discussion that failure to enforce the *aut dedere aut judicare* obligation entails the international responsibility of the apprehending State. This would not be the result where either no extradition request existed, or if it did, it was not compatible with extradition law or the general rights of the accused. In such situations, prosecution does not seem to be obligatory even if in abuse of a State's ability to do so. It should also be noted that because the *aut dedere aut judicare* principle is established solely through treaty, it is only applicable as between States parties to a multilateral convention in which it is contained, regardless of the customary nature of the offence concerned. Two recent anti-terrorist treaties have facilitated extradition of nationals with respect to those countries whose Constitution forbids such extradition. Articles 8(2) and 10(2) of the 1998 UN Convention for the Suppression of Terrorist Bombings¹³⁰ and the 2000 UN Convention for the Suppression of the Financing of Terrorism,¹³¹ respectively, release a State from its obligation to extradite

126 CM Bassiouni and EM Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, 1995, Dordrecht: Martinus Nijhoff. The earliest multilateral treaty to encourage the prosecution of non-extradited nationals was the 1929 Convention for the Suppression of Counterfeiting Currency, 112 LNTS 371.

127 The House of Lords in *T v Secretary of State for the Home Department*, 107ILR 552, p 564, noted that the *aut dedere* principle was to a limited extent a feature of the 1937 League of Nations Convention for the Prevention and Suppression of Terrorism (Arts 9 and 10); surprisingly, the Australian Federal Court in *Nulyarimma v Thompson* [1999] FCA 1192; 39 ILM (2000), 20, p 23, stated that the *aut dedere aut judicare* principle was imposed by customary law on Australia in connection to the crime of genocide.

128 *Libya v USA*, 'Questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (interim measures)' (1992) ICJ Reports 3.

129 CM Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', 59 LCP (1996), 63,

130 37 ILM (1998), 249.

131 39 ILM (2000), 270.

where it does not prosecute, agreeing, instead, to extradite a national on the condition that such person will be returned to the requested State to serve the sentence.

7.8 JURISDICTION WITH RESPECT TO CRIMES AGAINST CIVIL AVIATION

The widespread seizure or hijacking of civil aircraft in the 1960s, mainly for political purposes, culminated in the adoption of several treaties regulating specific aspects of air terrorism. These agreements do not abandon the customary rule granting criminal jurisdiction to the subjacent State; they merely supplement it by conferring competence also to third countries. The first major attempt to combat a specific aspect of terrorism was made by the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.¹³² Article 4 of this instrument endowed the State of registration with competence over the prescribed offences and, further, permitted jurisdiction under the nationality (including the State of the lessee where the aircraft was leased without a crew) and passive personality principles, as well as to the State where the accused took refuge. Similarly, Art 4(1) of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970 Hague Convention)¹³³ confers criminal jurisdiction over hijacking and associated acts of violence to the State of registration, the State of landing (when the accused is on board)¹³⁴ and the State of the lessee's nationality. Paragraph 2 of Art 4 permits the exercise of criminal jurisdiction by any State on whose territory the alleged offender is present, but only in respect of acts of hijacking, and para 3 allows the exercise of criminal jurisdiction on any national legal basis.

The 1971 Montreal Convention adds two new jurisdictional elements in comparison to the 1970 Hague Convention. First, it covers relevant acts perpetrated not only 'in flight', but also 'in service'.¹³⁵ Secondly, because the objective of the 1971 Montreal Convention was to supplement the provisions of the 1970 Hague Convention in order to encompass, beyond acts of hijacking, also armed attacks, sabotage and other forms of violence and intimidation against civil aviation, Art 5(1)(a) provides a further ground of jurisdiction when the offence is committed in the territory of a contracting State.

7.9 INTERNATIONAL CRIMINAL JURISDICTION

The five principles discussed above address the ambit of the prescriptive competence of States, as this emanates from treaties, custom and national legislation. As a corollary, judicial and enforcement jurisdiction is limited in accordance with the scope of municipal prescriptive competence. International criminal tribunals are

132 704 UNTS 219.

133 S Shubber, 'Aircraft Hijacking under the Hague Convention 1970—A New Regime?', 22 *ICLQ* (1973), 687, p 714.

134 This was the basis of jurisdiction asserted by a Dutch District Court regarding the hijacking of a British aircraft, whose crew was forced to land in Amsterdam: *Public Prosecutor v SHT*, 74 *ILR* 162.

135 Under the 1971 Montreal Convention, Art 2(b), an aircraft is considered to be in service from the beginning of pre-flight preparation until 24 hours after landing.

not susceptible to all these limitations. Their competence is derived from their constitutive instrument and is not at all confined by the jurisdictional principles and constraints applicable to municipal courts. This form of jurisdiction is termed 'international'.

Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR) are the product of Chapter VII Security Council resolutions. In theory, the Security Council could have prescribed a very wide jurisdictional competence, whether *ratione materiae* or *ratione temporis*, which would otherwise have been *ultra vires* for national courts, but not for a tribunal established under a Security Council resolution. The same would apply to a tribunal established through treaty, such as the International Criminal Court (ICC), but only where its Statute received global ratification. Since every international tribunal is a self-contained system, its jurisdictional powers can only be limited by its constitutive instrument, but only to the extent that such limitation does not endanger its judicial character.¹³⁶ Although the ICTY is a subsidiary organ of the Security Council, the Appeals Chamber in the *Tadic Jurisdiction* case correctly pointed out that it is a special kind of subsidiary organ, a tribunal endowed with judicial functions.¹³⁷ By implication of its judicial nature, a tribunal enjoys a certain degree of 'inherent' or 'incidental' jurisdiction. One element of this inherent jurisdiction, which is exercisable even if not mentioned in its Statute, is an international tribunal's competence to determine its own jurisdiction.¹³⁸ The ICTY has further held that it may, in the exercise of its incidental jurisdiction, examine the legality of its establishment by the Security Council, but only so far as this is needed to ascertain the scope of its 'primary' jurisdiction.¹³⁹

We have already seen that even where a treaty delimits the prescriptive competence of States, there is no clear jurisdictional hierarchy. International tribunals do not face such conflicts. Article 9(1) of the ICTY Statute provides for concurrent jurisdiction with national criminal courts. However, para 2 emphatically establishes primacy for the ICTY, by stating:

The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

It is evident that the ICTY enjoys primacy in an emphatic manner.¹⁴⁰ This is not however the case with the ICC. The ICC's jurisdiction is premised on the concept of complementarity with national courts, whose primary competence it may exceptionally override only where a State is shielding an accused,¹⁴¹ or where it is

136 *ICTY Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Tadic decision on jurisdiction), 105 ILR 453, para 11; see also *ICTR Prosecutor v Kanyabashi*, Decision on Jurisdiction, 92 AJIL (1998), 66.

137 *Ibid*, Tadic decision on jurisdiction, para 15.

138 *Advisory Opinion on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954) ICJ Reports 47, p 51. This power is termed 'KompetenzKompetenz'.

139 *Tadic* decision on jurisdiction, para 21.

140 See G Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia', 90 AJIL (1996), 64.

141 ICC Statute, Arts 17(1)(a), (b) and 2(a).

142 *Ibid*, Art 17(1)(a), (b).

genuinely unable to carry out an investigation or prosecution.¹⁴² The ICC is burdened with further limitations. Upon becoming a party to its Statute, a State automatically accepts the jurisdiction of the Court with respect to the four core crimes,¹⁴³ subject to the qualification of Art 124 regarding the transitional period.¹⁴⁴ Under Art 12, the court may exercise jurisdiction if it has the consent of the State on whose territory the offence was perpetrated, *or* of which the accused is a national. However, if a situation is referred to the Court by the Security Council, the Court will have jurisdiction even if the acts concerned were committed on the territory of non-parties or nationals of non-parties and in the absence of consent by the territorial State or the State of nationality of the accused.¹⁴⁵ In any other case, non-States parties must make a declaration accepting the Court's jurisdiction, as a precondition to the exercise of jurisdiction.¹⁴⁶

The difference in the powers vested in the ICTY and ICC can be explained by the fact that the former was the product of a Security Council resolution under Chapter VII of the UN Charter, whereas the ICC was established as a result of a multilateral treaty, which necessarily entailed a great deal of compromise. The enforcement jurisdiction of the ICTY under Art 29 of its Statute is, thus, significantly enhanced, since it has the power, *inter alia*, to order the arrest and surrender of persons and the production of documents irrespective of nationality of persons or the location of documents or other evidentiary material.¹⁴⁷ Because international tribunals are limited by their Statute, the application of the *Lotus* rule by national courts, whereby national criminal jurisdiction under any basis is permissible subject only to a contrary binding rule of international law, does not apply to the subject matter jurisdiction of the ICTY nor the ICC. The subject matter jurisdiction of these international tribunals cannot be extended through construction of their Statutes under the jurisdictional principles applicable to municipal courts, nor as part of the courts' incidental jurisdiction.

'International jurisdiction' is enjoyed by tribunals established through interstate agreements and Security Council resolutions. Unlike the International Military Tribunal at Nuremberg (IMT) the various 'subsequent' tribunals established by the allies in Germany after 1945 were not the product of treaty making. Despite the application of international law by some of them, their legal basis was domestic legislation, such as the Allied Control Council Law for Germany No 10, the British Royal Warrant and various US Theatre Regulations and Directives. These tribunals were, therefore, obliged to observe the internationally acceptable rules pertaining to the exercise of national judicial jurisdiction.

143 *Ibid*, Art 12(1).

144 According to Art 124, a State party may declare its non-acceptance of the Court's jurisdiction for a period of seven years after the entry into force of the Statute, with respect to war crimes alleged to have been committed by its nationals or on its territory.

145 M Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *AJIL* (1999), 22, pp 26–27.

146 ICC Statute, Art 12(2) and (3).

147 *ICTY Prosecutor v Blaskic*, Appeals Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II (1997) 110 ILR 607.

7.10 IMMUNITIES FROM CRIMINAL JURISDICTION

7.10.1 General conception of immunity in international law

As a general rule, a State enjoys absolute and complete authority over persons and property situated on its territory. Indeed, without directly intervening in the internal affairs of another country it is difficult to see how a sovereign may assert authority over persons or property situated in a foreign land. Even before the establishment of the modern sovereign States, it was recognised that if State-like entities were effectively to interact in commercial, diplomatic and other fields, there was a need for a formula ensuring their official representatives freedom from arrest or suit in the receiving State. The granting of such privileges and immunities are, in fact, limitations on State sovereignty, whose reciprocal nature is, nonetheless, beneficial for the receiving State in the exercise of its foreign relations.

If it is agreed that a State enjoys absolute territorial competence, immunity from civil or criminal suit is possible only by the forum's waiver of competence over certain persons or property located on its territory. This State-centred concept can be discerned as early as *Schooner Exchange v McFaddon*,¹⁴⁸ where Marshall J explained that a foreign public vessel would not enter the ports of another State if it was not satisfied that it benefited from not being sued in the courts of the coastal State. This voluntary waiver of jurisdiction amounts to an 'implied licence' from the judicial, executive and enforcement claws of the receiving State. This is the primary legal basis for the concept of immunity. The fact that sovereign States are juridically equal under international law does not alone suffice as a basis for granting an 'implied licence', despite the maxim *par in parent non habet imperium*.¹⁴⁹ In an era where a significant number of humanitarian norms have attained *jus cogens* and *erga omnes* character, equality has not prevented suits against States and their officials before municipal courts.¹⁵⁰ Similarly, although designed to enhance interstate relations and limit the reach of the receiving State's judicial and executive machinery the concept of State immunity is not based on comity. State practice at the international level suggests that what was once an implied licence has now evolved to a legal obligation on the part of the receiving sovereign. A realist approach to immunity may elucidate some of the reasons associated with it, but not its basis in law.

The fact that adjudication of a case by a domestic court would raise issues of policy involving a foreign State¹⁵¹ may explain why national judiciary has on many occasions been reluctant to exercise jurisdiction. It does not of itself evince waiver of jurisdiction. Notwithstanding this observation, the nature of some sovereign acts, under the rule of equality of States, cannot become the subject of municipal judicial

148 (1812) 7 Cranch 116.

149 One sovereign cannot exercise authority over another by means of its legal system.

150 *Re Pinochet (No 3)* (1999) 17 ILR 393; *Prefecture of Voiotia and Others v Federal Republic of Germany*, 92 AJIL (1998), 765, where acts of atrocity committed by German troops during their occupation of Hellas in the Second World War were held to be violations of *jus cogens* norms, hence susceptible to the civil jurisdiction of Hellenic courts (subsequently upheld in cassation by the Hellenic Supreme Court in 2000). Reported in 95 AJIL (2001), 375.

151 *Rahimtoola v Nizam of Hyderabad* [1958] 3 All ER 961.

proceedings. Thus, in *Buck v AG*,¹⁵² the Court of Appeal refused to make a declaration on the validity, or not, of the Constitution of Sierra Leone. Other similar sovereign acts which would be excluded from the consideration of national courts have included governmental acts dealing with purely internal issues or issues pertinent to a State's external affairs.¹⁵³ These issues have fallen under the umbrella of non-justiciable acts and have precluded national courts from asserting their jurisdiction. Immunity, on the other hand, refers to those situations where, although the court would normally enjoy competence over a particular case, it is averted from doing so because one of the litigants is a sovereign State or a legitimate extension thereof.

It seems doubtful, however, that all traditional non-justiciable acts are beyond the ambit of national courts, since, if the prevention or punishment of specific conduct is classified as an *erga omnes* obligation, it necessarily follows that if a violation of such a norm were embodied in a parliamentary act, the courts of a third State would be under an obligation to declare that act unobservable in the forum. For example, if a case comes before the courts of State A, whereby an alien has acted in accordance with a law in State B allowing the practice of torture, the courts of State A may declare that law to be contrary to international law and invalidate any legal effects arising within the territory of State A. In *Oppenheim v Cattermole*, for example, one issue that arose was whether a decree adopted in Nazi Germany in 1941 depriving Jews who had emigrated from Germany of their citizenship should be recognised by the English court. Lord Chelsea pointed out that the courts should be very reluctant to pass judgment on foreign sovereign acts, but because the Nazi law was not only discriminatory but deprived German Jews of their property and citizenship, 'a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all'.¹⁵⁴

Until very recently, States could not be sued at all before the courts of other States. This rule of absolute immunity rested on the customary assimilation of the sovereign and its officials with the represented State, regardless of the function served in each particular case. The personal dignity of the monarch, thus, precluded impleading him or her before a foreign jurisdiction. Before the 1920s, this rule of absolute immunity suggested that every State act was immune from domestic litigation. With the rapid growth of interstate commerce, there was a need to procure guarantees to private enterprises that trading with State entities would be on an equal basis. Indeed, the erosion of absolute immunity rested on financial considerations. Sovereign immunity has since been premised only on the public nature of the act (acts *jure imperii*), thus excluding those acts serving private functions, such as commercial activities (acts *jure gestionis*). With the dissolution of the USSR and the communist system generally in Europe, only China and a few South American States continue to apply a doctrine of absolute immunity. Each State is free to develop its own criteria determining whether an act serves a public or private function, as is the case with

152 [1965] Ch 745; 42 ILR 11. The same has been held as regards the validity of treaties where the issue does not raise questions of national law. *Ex p Molyneux* [1986] 1 WLR 331.

153 See *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 WLR 1147.

154 *Oppenheim v Cattermole* [1976] AC 249, p 277; in *The Queen on the Application of Abbasi and Another v FCO Secretary of State and Others*, Judgment (6 November 2002), the Court of Appeal agreed with this position, but on the facts of the case, it had no power to compel the US to grant habeas corpus relief to the applicant, who was a British national held at Guantanamo Bay as a suspected Al-Qaeda member.

the UK State Immunity Act (SIA) 1978. However, since the distinction is not always clear cut, several theories have subsequently been adopted by national courts. Examining the ‘purpose of the act’, that is, whether or not it was intended for a commercial or a public transaction, has not attracted favour from UK and US courts.¹⁵⁵ It is, nonetheless, incorporated in a subsidiary role in Art 2 of the International Law Commission (ILC) Draft Articles on Jurisdictional Immunities, since its role as a complementary test in a number of jurisdictions cannot be overlooked.¹⁵⁶ Although the ‘nature of the act’ test has found some support,¹⁵⁷ it is unambiguous that certain commercial contracts can only be made by States and not by private parties, such as the supply of military material. The more common approach seemed to suggest that a list of detailed exceptions was preferred by municipal courts in order to avoid making personal determinations on the basis of either test.¹⁵⁸ This, to a large extent, is reflected in the UK SIA 1978. Section 3 of the Act provides for a catalogue of exceptions to State immunity as follows:

- 3(1) A State is not immune as respects proceedings relating to—
 - (a) commercial transactions entered into by the State; or
 - (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not), falls to be performed wholly or partly in the United Kingdom.
- (2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and sub-s (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.
- (3) In this section ‘commercial transaction’ means—
 - (a) any contract for the supply of goods or services;
 - (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
 - (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority, but neither paragraph of sub-s (1) above applies to a contract of employment between a State and an individual.

The 1978 Act represents a good example of restrictive immunity statutes since it is not only similar to the US Foreign Sovereign Immunities Act (FSIA) 1976, but it also implements the 1972 European Convention on State Immunity.¹⁵⁹ A foreign sovereign

155 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 All ER 881; *I Congresso del Partido* [1981] 2 All ER 1064; *Victory Transport Inc v Comisaria General De Abastecimientos y Transportes*, 35 ILR 110.

156 *USA v The Public Service Alliance of Canada*, 32 ILM (1993), 1.

157 *Trendtex* [1977] 1 All ER 881.

158 In the *Victory Transport* case, 35 ILR 110, the District Court of Appeals listed as acts *jure imperil*, internal administrative acts, such as the expulsion of aliens and the passing of national laws, acts concerning military and diplomatic affairs, and public loans.

159 ETS 74.

may waive its immunity privileges either expressly or by conduct. Such waiver need not necessarily extend to measures of execution.¹⁶⁰ US and UK courts require genuine submission to the competence of their judiciary and have rejected the invocation of 'implied waivers', even with respect to conduct constituting a violation of *jus cogens*.¹⁶¹ Thus far, we have briefly examined the general conception of immunity in international law. These rules are useful in discerning whether or not a foreign State may be impleaded in civil suits before the courts of other nations. We will now proceed to examine the international law of immunity from criminal jurisdiction afforded specifically to natural persons.

7.10.2 Immunity from criminal jurisdiction

In general terms, immunity from jurisdiction means that a court cannot entertain a suit, not that the defendant is immune from criminal liability altogether.¹⁶² In practical terms, this means that once the procedural bar is removed (ie, immunity from suit because the person is an incumbent office holder), the person is liable for criminal prosecution. In customary law, there are two reasons as to why foreign nationals have been granted immunity from municipal courts for alleged perpetration of criminal offences. The first reason relates to the status of certain persons. Thus, it is recognised that individuals who hold certain public office enjoy absolute criminal immunity. Its basis is not the nature of the action, but the official status of the person concerned. This type of immunity is known as *ratione personae*, and is available to a limited number of individuals: serving Heads of State, heads of diplomatic missions, their families and servants.¹⁶³ It is not available to serving Heads of Government who are not also Heads of State, nor to military commanders and their subordinates.¹⁶⁴

Immunity *ratione materiae*, on the other hand, is subject matter immunity. It serves to protect governmental acts of one State from being adjudicated before the courts of another and, therefore, only incidentally confers immunity on the individual. It is immunity from the civil and criminal jurisdiction of foreign national courts, but only in respect of governmental or official acts. Subsequently, it is open to any person exercising official functions, from a former Head of State to the lowest public official. The reason for granting this type of immunity is to protect the person of the foreign dignitary in order to carry out his or her state functions and to represent that country

160 *Op cit*, Brownlie, note 6, p 343; J Crawford, 'Execution of Judgments and Foreign Sovereign Immunity', 75 *AJIL* (1981), 75, p 86.

161 *Hirsch v State of Israel and State of Germany*, 113 *ILR* 543; in *Smith v Socialist People's Libyan Arab Jamahiriya* (1997) 113 *ILR* 534, the Court of Appeals stated further that FSIA, § 1605, did not contemplate a dynamic expansion whereby immunity could be removed by action of the UN Security Council; *Kahan v Pakistan Federation* [1951] 2 *KB* 1003, rejecting a claim that a waiver had been established from a prior contract to submit to the jurisdiction of UK courts.

162 *Dickinson v Del Solar* [1930] 1 *KB* 376, p 380, *per* Lord Hewart CJ; similarly, *Belgian Arrest Warrant judgment* (14 February 2002), paras 47–55.

163 SIA 1978, s 14(1) extends immunity *ratione personae* to: (a) the sovereign or other Head of that State in his public capacity; (b) the government of that State; and (c) any department of that government [but not every executive entity]. In *Propend Finance Pty Ltd and Others v Sing and Others* (1998) 111 *ILR* 611, the UK Court of Appeals held that the correct interpretation of the word 'government' in s 14(1) be in light of the concept of sovereign authority, thus, encompassing police functions.

164 See SIA 1978, s 20(1).

abroad without any hindrance. This means that once the person is removed from office and no longer represents State interests abroad, he or she may thereafter become subject to criminal prosecution for offences committed at any time in the past. The fact that such immunity may be abused while the holder is in office is regrettable, but does not alter that person's protected status, as this remains a well established rule of international law. In the *Belgian Arrest Warrant* judgment, the ICJ confirmed that no distinction could be drawn between acts undertaken by the Congolese Foreign Minister as falling within an official or private capacity, because his immunity was *ratione materiae*. It clearly noted that customary international law did not provide an exception to the granting of immunity *ratione materiae*, even in cases of war crimes and crimes against humanity.¹⁶⁵ The case is obviously different where such immunity is removed by the State of the protected person's nationality, or by treaty—including Security Council resolutions—as was the case with the prosecution of former President Milosevic before the ICTY, within the context of international criminal jurisdiction exercised by an international judicial body.

These immunity rules have emerged as a result of State practice in the form of domestic immunity statutes and case law. They are not relevant to a discussion on immunity with respect to the jurisdiction of international criminal tribunals, to whom separate mention will be made further below. We will now proceed to analyse the contemporary scope of subject matter and personal immunity.

7.10.3 Act of State doctrine

This has been developed mainly by common law courts, who have generally refused to pass judgment on the validity of acts of foreign governments performed within their national territory.¹⁶⁶ This doctrine is akin to the concept of 'non-justiciability', having been viewed as a function of the separation of powers with the aim of not hindering the executive's conduct of foreign relations.¹⁶⁷ The difference between the doctrines of State immunity and 'act of State' is that the former being a procedural bar to the jurisdiction of a court can be waived, while the latter being a substantial bar cannot.

The classic expression of the doctrine was stated in *Underhill v Hernandez*¹⁶⁸ and reaffirmed by US courts on several occasions. In *Banco Nacional de Cuba v Sabbatino*,¹⁶⁹ the Court refused to examine the legality of the Cuban Government's expropriation of US property in that country. The doctrine requires the defendant to establish that the performed activities were undertaken on behalf of the State and not in a private

165 *Belgian Arrest Warrant* judgment (14 February 2002), paras 47–55.

166 For a discussion of a civil law approach, see *Border Guards Prosecution* case, 100 ILR 364, where the German Federal Supreme Court found the act of State doctrine to be a rule of domestic law concerning the extent to which the acts of foreign States were assumed to be effective. See also JC Barker, 'State Immunity, Diplomatic Immunity and Act of State: A Triple Protection Against Legal Action?', 47 ICLQ (1998), 950.

167 See *Kirkpatrick v Environmental Tectonics*, 493 US 403 (1990).

168 168 US 250 (1897), p 252; see also the earlier decision of *Hatch v Baez* 7 Hun 596 (1876), where the New York Supreme Court was prevented from reviewing acts of the former President of the Dominican Republic in his official capacity.

169 376 US 398 (1964).

capacity. While any personal commercial transactions would clearly not be attributable to the State,¹⁷⁰ the extent to which individuals may purport to be acting for their sovereign has been limited in recent years. What is relevant for the purposes of the present analysis is the refusal of courts to accept the sovereign character of criminal acts in furtherance of personal aims. In *Jimenez v Aristeguieta*,¹⁷¹ the accused had used his position as former President and dictator of Venezuela to commit financial crimes for his own benefit. He claimed that, criminal though these actions may have been, they were, nonetheless, acts that should be attributable to Venezuela. The Fifth Circuit court rejected this claim stating that offences perpetrated for private financial benefit constitute 'common crimes committed by the Chief of State in violation of his position and not in pursuance of it. They are as far from being an act of State as rape'.¹⁷²

Similarly, in *USA v Noriega*,¹⁷³ the District Court held that acts of drug-trafficking committed even by a *de facto* leader of a country do not constitute sovereign acts, on the same basis as *Jimenez*. The District Court further correctly noted that, because the doctrine was designed to preclude the hindrance of foreign relations, if the executive, as in the case of *Noriega*, had indicted the defendant no danger of conflict would exist, and could, therefore, decide the case. More recently, in *Doe v Unocal*, it was held that the act of State doctrine did not preclude US courts from considering claims based on legal principles on which the international community had reached unambiguous agreement, such as slavery.¹⁷⁴ It should be noted that, besides the prosecution of *Noriega*, all the aforementioned cases concerned actions in tort.

7.11 IMMUNITY UNDER DOMESTIC LAW AND *JUS COGENS* NORMS

As explained above, foreign Heads of State have customarily enjoyed immunity from criminal prosecution as a matter of the respect afforded to their person and the State they represent.¹⁷⁵ This was true, irrespective of the criminal offence they were alleged to have committed. For crimes ordered or tolerated in a leader's own State, the rule on non-intervention in the domestic affairs of other States, as enshrined in Art 2(7) of the UN Charter, precluded considerations of criminal liability even where fundamental human rights were seriously abused.

It seems that with the erosion of an unfettered absolute discretion previously associated with Art 2(7) in the sphere of human rights, immunity *ratione materiae* has also suffered considerable limitation. The majority of the House of Lords in the *Pinochet (No 3)* case¹⁷⁶ admitted that while the immunity of a former Head of State

170 *Alfred Dunhill of London Inc v Republic of Cuba*, 425 US 682 (1976).

171 311 F 2d 547 (1962).

172 *Ibid*, pp 557–58; similarly, in *Sharon v Time Inc*, 599 F Supp 538 (1984), it was held that the Israeli Defence Minister's alleged support of a massacre could not constitute the policy of the Israeli Government and, therefore, an act of State.

173 99 ILR 143.

174 963 F Supp 880 (1997).

175 In *Lafontant v Aristide* (1994) 103 ILR 581, the Eastern District Court of New York held that a recognised Head of State enjoys absolute immunity even in exile, unless such immunity has been explicitly waived.

176 [1999] 2 WLR 827, pp 880, 906.

persists with respect to official acts, the determination of what constitutes an official act is to be made in accordance with customary law. It held that international crimes, such as torture, cannot constitute official acts of a Head of State.¹⁷⁷ Indeed, since Art 1(1) of the 1984 Torture Convention defines torture as an act that can only be inflicted by a public official, the mere invocation of immunity *ratione materiae* would render the Torture Convention redundant. Article 1(1) has to be read, hence, as excluding such immunity. Similarly, an acting Head of State cannot invoke the gross violation of human rights as a public act in order to avoid prosecution. More recently, in February 2000, a court in Senegal indicted Hissene Habre, the Head of State in Chad from 1982–90, for acts of torture during his reign in that country, but on 20 March 2001 the Cour de Cassation of that country held that Habre could not be tried under torture charges in Senegal.¹⁷⁸ Whatever the precise scope of Head of State immunity, in *USA v Noriega* it was held that illegitimate assumption of power does not carry immunity benefits.¹⁷⁹ This statement, welcomed as it may be, should be approached with caution, because the US Government has not hesitated in the past to afford full immunities and support to illegitimate dictatorial regimes. Interestingly, the ECHR, in the *Al-Adsani* case, took the view that even *jus cogens* norms, such as the prohibition against torture, must be construed as existing in harmony with other recognised principles of international law, namely state immunity. The applicant was tortured by government agents in Kuwait and pursued civil claims before British courts for a period of 10 years, which rejected his claims on the basis of immunity afforded under the SIA 1978. Thereafter, he sought refuge before the ECHR, arguing that the SIA violated his right of access to judicial remedies. The Court rejected his claim, arguing that immunity is inherent in the operation of international law, and cannot be regarded as imposing a disproportionate restriction on the right of access to court.¹⁸⁰

As already noted, until very recently, human rights abuses were perceived as issues exclusive to the domestic jurisdiction of the concerned State. US courts have attempted to detach human rights violations from the range of official acts which may lawfully be attributed to the State, but only where public officials acted independently, either in pursuance of personal interests as in the case of Noriega and Marcos, or beyond the level of abuse authorised by the State they represent. In *Forti v SuarezMason*, acts of torture and disappearances committed by an Argentine General, who was an official of the military regime, did not, *ipso facto*, assimilate his actions to the Argentine State.¹⁸¹

177 *Ibid*, p 899, *per* Lord Hutton and p 903, *per* Lord Saville; similarly held in *Re Estate of Marcos*, 25 F 3d 1467 (1994). See G Garnett, 'The Defence of State Immunity for Acts of Torture', 18 *Australian YIL* (1997), 97.

178 F Kirgis, 'The Indictment in Senegal of the Former Chad Head of State' (February 2000) *ASIL Insight*; in the *Honecker Prosecution* case, 100 ILR 393, the issue of the criminal liability of a former Head of State for human rights violations authorised while in office was not considered because of the ill health of the accused.

179 99 ILR 143, pp 162–63.

180 *Al-Adsani v UK*, Judgment (21 November 2001) (2002) 34 EHRR 11, paras 55–66; for an excellent overview, see E Voyakis, 'Access to Court v State Immunity', 52 *ICLQ* (2003), 279.

181 672 F Supp 1531 (1987). These cases have been brought under the Aliens Tort Claims Act 1789, 18 USC § 1350, and so the criminal elements involved are incidental to the principal character of such claims, which is tortious.

It has been widely advocated that States are obligated under international law to punish serious human rights breaches by a former regime.¹⁸² As in the case of Chile, the promulgation of amnesty laws exonerating the offences of prior regimes is incompatible with the duty of States to investigate human rights infractions and provide appropriate remedies. This is true, at least, of amnesties granted after crimes have been perpetrated,¹⁸³ and those favouring State security forces (self-amnesties).¹⁸⁴

In order for the judicial authorities of a State to waive immunity with respect to human rights abuses, they must first determine whether there is a national law in place regulating the relevant conduct and whether or not they may lawfully exercise judicial jurisdiction. The House of Lords in the *Pinochet (No 3)* case upheld its subject matter jurisdiction over acts of torture committed after 1988 when the Torture Convention was enacted into British law. Another route would have been to recognise the prohibition of torture under customary law and avoid limiting the temporal scope of the charges. As regards jurisdiction, where the offence in question is subject to universal jurisdiction under international law, as in the case of piracy *jure gentium* and grave breaches, the prosecution of public officials by any State should not be a very difficult exercise. It would seem that where immunity is excluded from multilateral treaties, such as in Art IV of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and in respect of offences that do not attract universal jurisdiction under treaty or customary law, any State is free to assert criminal jurisdiction as long as this does not conflict with the competence afforded to other States under the relevant treaty or custom.

Customary law favours adherence to the restrictive principle of former Head of State immunity.¹⁸⁵ It seems fair to suggest that we are witnessing an emerging international rule whereby immunity from national criminal jurisdiction is excluded in all cases of serious human rights violations, regardless of the place where they have been committed.¹⁸⁶ This is also true of privileges and rights usually granted under international human rights instruments.¹⁸⁷

182 D Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale LJ* (1991), 2537; M Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?', 31 *Texas ILJ* (1996), 1; nonetheless, in *Azanian Peoples Organisation v President of the Republic of South Africa*, 91 *AJIL* (1997), 360, the RSA Constitutional Court held that international human rights law did not compel domestic criminal prosecution of human rights abuses.

183 UN Human Rights Committee, General Comment No 20, UN Doc CCPR/C/21/Rev 1/Add 3 (7 April 1992), para 15, regarding the interpretation of Art 7 of the ICCPR; see also N Roht-Ariaza and L Gibson, 'The Developing Jurisprudence on Amnesty', 20 *HRQ* (1998), 843.

184 K Ambos, 'Impunity and International Law', 18 *HRLJ* (1997), 1, pp 7–8.

185 A Watts, 'The Legal Position in International Law of Heads of State', 247 *RCADI* (1994 III), 88.

186 This is further reinforced, although in the sphere of torts, with the passage by Congress of the Anti-Terrorism and Effective Death Penalty Act 1996, amending the FSIA 1976 by adding what is now 28 USC § 1605(a)(7). Under this section, foreign States that have been designated as State sponsors of terrorism are denied immunity from damage actions for personal injury or death resulting from certain specific offences. See *Rein v The Socialist People's Libyan Arab Jamahiriya*, 38 *ILM* (1999), 447.

187 In *Re Duvalier and Madame Duvalier*, 111 *ILR* 528, the French Conseil d'Etat held that a former Head of State could not claim refugee status where grave human rights violations occurred under his authority, in accordance with Art 1(F)(c) of the 1951 Convention Relating to the Status of Refugees, 189 *UNTS* 137.

7.12 FOREIGN AND MULTINATIONAL ARMED FORCES ABROAD

Since time immemorial, foreign armed forces have been allowed to pass or station on the territory of allied or other States. Where a State allows a foreign force passage or sojourn on its territory, it does so, in the words of Justice Marshall in the *Schooner Exchange* case, under an implied waiver of jurisdiction.¹⁸⁸ The rationale for such a waiver by the receiving State is justified for the maintenance of the efficiency and integrity of the foreign force.¹⁸⁹ In the absence of a specific agreement, the law seems to be that immunity from the receiving State's criminal jurisdiction is not absolute. The sending State exercises exclusive jurisdiction over internal disciplinary or other offences committed by its forces when on duty, while the receiving State enjoys jurisdiction in respect of all other offences.¹⁹⁰ In cases where the distinction is not clear cut, in connection to an offence committed by a member of the force out of duty, Brownlie suggests that immunity should be complemented by principles of interest or substantial connection.¹⁹¹ It is usual, however, for States to regulate such matters through the conclusion of special agreements and make detailed arrangements. The 1951 NATO Status of Forces Agreement (NATO Agreement)¹⁹² provides in general for the exercise of concurrent jurisdiction over the civilian and military personnel of a NATO visiting force. The sending State enjoys primary criminal jurisdiction over offences and persons falling within the ambit of its military law, as well as over any act or omission done in the performance of official duty, whereas the receiving State has jurisdiction with respect to persons and offences under its own municipal law. In *Public Prosecutor v Ashby*, a US Army aeroplane, part of a NATO contingent in Italy, crashed in a residential area causing substantial material damage and killing several civilians.¹⁹³ The Italian court held that, in cases where jurisdiction is concurrent, priority goes to the sending State where the offence is solely against the interests of that State (Art VII, § 3(a)(i) of the 1951 NATO Agreement) or committed in the performance of official duty (Art VII, § 3(a)(ii)). In the case at hand, the offence in question, brought about by a flight in the course of a training mission, was determined to have arisen in the performance of official duty under Art VII, § 3(b)(ii) of the 1951 NATO Agreement.

As for UN peace-keeping forces, other than those constituted as a means of enforcement action, deployment is based only on the consent of the receiving State, unless there is an absence of government authority to grant such consent, as was the case with Somalia in 1993. In the post-1945 era, peace-keeping agreements have secured broad terms of immunity for UN forces.¹⁹⁴ As a matter of internal

188 (1812) 7 Cranch 116. This case concerned the passage of foreign troops.

189 *Wright v Cantrell* (1943–45) 12 AD 37; *Chow Hung Ching v R* (1948) 77 CLR 449; 15 AD 47.

190 *Op cit*, Brownlie, note 6, p 374; *op cit*, Shearer, note 9, p 208.

191 *Op cit*, Brownlie, note 6, p 374.

192 48 *AJIL* (1954 Supp), 83; H Rouse and GB Baldwin, 'The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement', 51 *AJIL* (1957), 29; J Woodliffe, 'The Stationing of Foreign Armed Forces Abroad in Peacetime', 43 *ICLQ* (1994), 443. See also the UK Visiting Forces Act 1952.

193 93 *AJIL* (1999), 219.

194 See DS Wijewardane, 'Criminal Jurisdiction over Visiting Forces with Special Reference to International Forces', 41 *BYIL* (1965–66), 122.

organisation, with respect to UN and other multinational forces, jurisdiction over offences committed in the context of such operations remains with the State of the nationality of the accused. This represents well established customary law,¹⁹⁵ and is recognised in s 4 of the UN Secretary General's 'Observance by United Nations Forces of International Humanitarian Law', which subjects all infractions to national prosecution.¹⁹⁶ As already explained in another chapter, following the adoption of the 1998 ICC Statute, the US sought to immunise its armed forces from the jurisdiction of the ICC by concluding so called 'Impunity Agreements' with other countries, by which these countries agreed to refrain from prosecuting or transferring to the jurisdiction of the ICC any US nationals accused of relevant offences. These agreements clearly violate Art 86 of the ICC Statute, which obliges member states to co-operate with the Court in investigating and prosecuting alleged perpetrators. In any event, these bilateral immunity agreements would not bind third States.

7.13 DIPLOMATIC AND CONSULAR IMMUNITIES¹⁹⁷

According to the more correct view, the immunity enjoyed by diplomatic envoys is functional, its rationale being to allow them to perform their duties without interference or other hindrance.¹⁹⁸ In fact, under Art 29 of the 1961 Vienna Convention on Diplomatic Relations (Vienna Convention)¹⁹⁹ the receiving State has an obligation to safeguard the freedom and dignity of diplomatic agents.²⁰⁰ Their immunity from local criminal jurisdiction under Art 32 of the 1961 Vienna Convention does not render them also immune from liability under the law of the receiving State.²⁰¹ The practical significance of this observation is that if the sending State waives the diplomatic immunity of its agent, as it may under Art 32 of the 1961 Vienna Convention, criminal liability may thereafter arise.²⁰²

Diplomatic immunity, in accordance with Art 39(1) and (2), exists from the moment the person enters the territory of the receiving State until such time as the privileges and immunities are revoked by the sending State. Under Art 39(2) the diplomatic agent enjoys continuing immunity for acts performed 'in the exercise of his or her functions as a member of the mission'. However, since the conferment of diplomatic immunity is dependent on the consent of the receiving State, the correct view is that any immunity granted by the latter will not bind third States. In the *Former Syrian Ambassador to the GDR* case, the German Federal Constitutional Court found no

195 I Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *AJIL* (1999), 573, p 579.

196 Secretary General's Bulletin ST/SG-B/1999/13 (6 August 1999), reprinted in 836 *IRRC* (1999), 812.

197 See J Brown, 'Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations', 37 *ICLQ* (1988), 53.

198 See SE Nahlik, 'Development of Diplomatic Law: Selected Problems', 222 *RCADI* (1990 III), 187.

199 500 UNTS 95.

200 Affirmed by the ICJ in *USA Diplomatic and Consular Staff in Tehran (USA v Iran)* (1980) ICJ Reports 3.

201 *Dickinson v Del Solar* [1930] 1 KB 376, p 380, per Lord Hewart CJ; similarly, *Empson v Smith* [1966] 1 QB 426.

202 1961 Vienna Convention, Art 32(2) requires that the waiver be express. See Diplomatic Privileges Act 1964, s 2(3); *Engelke v Musmann* [1928] AC 433; *R v Madan* [1961] 2 QB 1.

general rule of customary international law whereby this principle of continuing immunity would be binding on third States, other than the receiving one, and, therefore, have *erga omnes* effect.²⁰³ This immunity *ratione materiae*, the court further held, was effective in the receiving State even after the termination of diplomatic status, but only in respect of acts performed in the exercise of official duties, with the provision of assistance in a bomb attack being excluded from such official function.

It is not rare for persons entitled to diplomatic immunity under Art 37 of the 1961 Vienna Convention to abuse their status.²⁰⁴ In these cases, the receiving State is free to declare such persons *non grata*. Things become problematic when diplomatic agents are known to be in the course of committing an offence injurious to the interests of the receiving State, since Art 29 of the 1961 Vienna Convention prohibits any arrest or detention. The privileges in Art 29 are distinct from the absolute immunity from criminal jurisdiction contained in Art 31(1). Furthermore, there does not seem to exist any rule restraining the receiving State from maintaining internal order through the arrest or detention of diplomatic agents that violate local criminal law. No criminal proceedings may thereafter be instituted against protected diplomatic personnel and the only subsequent avenue is to expel them by declaring them undesirable in the host State.²⁰⁵

The law applicable to consular agents, who as a rule perform purely administrative functions, is quite different from that applied to their diplomatic counterparts.²⁰⁶ Under Art 41 of the 1963 Vienna Convention on Consular Relations,²⁰⁷ consular agents do not enjoy absolute immunity from the criminal jurisdiction of the receiving State, since in cases of 'grave crimes' they may be liable to arrest and judicial proceedings. Nonetheless, under Art 43 they are entitled to immunity in respect of acts performed in the exercise of consular functions.²⁰⁸

Persons attached to special international missions are also subject to a regime of privileges and immunities. This is dependent on the consent of the receiving State either on an *ad hoc* basis, or as a result of a relevant treaty obligation. In its *Advisory Opinion on Interference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*,²⁰⁹ the ICJ held that a UN rapporteur was immune from the criminal jurisdiction of the receiving State for the contents of an interview premised on the subject matter of his investigation. This obligation incumbent on

203 115 ILR 597, pp 605–12.

204 See R Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience', 79 *AJIL* (1985), 641; JS Parkhill, 'Diplomacy in the Modern World: A Reconsideration of the Bases for Diplomatic Immunity in the Era of High-Tech Communications', 21 *Hastings Int'l & Comp L Rev* (1998), 565.

205 E Denza, *Diplomatic Law*, 1976, New York: Oceana, p 135; *op cit*, Brownlie, note 6, p 358; *op cit*, Shearer, note 9, p 201; JS Beaumont, 'Self-Defence as a Justification for Disregarding Diplomatic Immunity', 29 *Can YIL* (1991), 391.

206 CJ Milhaupt, 'The Scope of Consular Immunity Under the Vienna Convention on Consular Relations: Towards a Principled Interpretation', 88 *Col L Rev* (1988), 841.

207 596 UNTS 261.

208 *Waltier v Thomson*, 189 F Supp 319 (1960); see *Honorary Consul of X v Austria*, 86 ILR 553.

209 93 *AJIL* (1999), 913.

Malaysia to recognise the immunity of the rapporteur was based on Art VI, s 22(b) of the 1946 Convention on the Privileges and Immunities of the United Nations.²¹⁰

7.14 IMMUNITY FROM INTERNATIONAL CRIMINAL JURISDICTION

As already noted, the jurisdiction of an international judicial body is dependent on its constitutive instrument. Although this instrument will adhere to international human rights and fundamental principles of international law, it need not follow those principles which, although firmly established, generally bind only national institutions, such as immunities and other privileges. This has had primary application as regards subject matter jurisdiction and immunity *ratione materiae* and *ratione personae*. The invocation of official status of any kind was rejected in the Charter of the International Military Tribunal at Nuremberg. Article 7 read:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.²¹¹

This position was also adopted in Art II(4)(a) of the 1945 Control Council Law for Germany No 10, which was the legislation utilised by allied military tribunals acting in Germany at the end of the Second World War. The ILC's formulation of the Nuremberg Principles and the 1996 Draft Code of Crimes Against the Peace and Security of Mankind also followed this approach, although it is true that the Nuremberg Principles did not explicitly preclude this defence in mitigation of punishment.²¹² Similarly, Arts 7(2) and 6(2) of the Statutes of the ICTY and ICTR respectively, rejected this plea as a defence.²¹³ In the instruments enumerated in this section, a claim of Head of State or of other official status was categorised as a defence assertion, which if sustained would have the effect of precluding the liability of the accused. It is clear, therefore, that any claim to official status in international criminal litigation would not be directed against the jurisdiction of the relevant tribunal, as this can only be served by invoking one's immunity. Immunity constitutes a procedural bar to the jurisdiction of a court; it does not waive or excuse an accused's potential liability. Although the rejection of the defence of official status is found in Art 27(1) of the ICC Statute, para 2 of that Article further provides that:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person.

This is the first instance of an international criminal tribunal addressing the issue of immunity and also distinguishing its legal nature from a defence claim on similar grounds. There is no doubt, however, that Art 27(2) is a superfluous provision, even

210 1 UNTS 15.

211 Charter of the International Military Tribunal for the Far East, Art 6 provided that, although an individual's official position did not constitute a defence, it could be used in mitigation of punishment.

212 See M Ratner and J Abrams, *Accountability for Human Rights Atrocities in International Law*, 1997, Oxford: OUP, pp 124–25.

213 Similarly rejected in the 1948 Genocide Convention, Art IV.

for an elaborate Statute such as that of the ICC, since if official status cannot constitute a defence to criminal liability, it necessarily follows that immunity regarding jurisdictional competence will have already been denied.

It should not be thought that because international tribunals are capable of exercising broad jurisdictional powers and rejecting immunity pleas, the same can by implication apply before national courts. It is the consent of States that has shaped the relevant mechanisms in national and international judicial institutions. Until there is a clear and unambiguous statement that a rule has developed rejecting Head of State immunity before national courts, the presumption is that the preservation of such immunity, albeit in light of the developments noted, represents the law.

EXTRADITION AND ABDUCTION

8.1 INTRODUCTION

Extradition is the formal process whereby a fugitive offender is surrendered to the State in which an offence was allegedly committed in order to stand trial or serve a sentence of imprisonment. There is no general rule of international law that requires a State to surrender fugitive offenders and extradition arrangements proceed on the basis of a formal treaty or a reciprocal agreement between States. The increase in the mobility of suspects has resulted in the increased willingness of States to use this form of mutual legal assistance to enforce their domestic criminal law. While the US continues to prefer bilateral treaties as the legal basis for extradition, European States are increasingly reliant upon multilateral regional treaties. The process of extradition, which is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions,¹ aims to further international co-operation in criminal justice matters and strengthens domestic law enforcement. The absence of effective extradition arrangements can result in law enforcement agencies using extra-judicial and irregular forms of extradition. The law of extradition, which is a branch of international criminal law, is based on the assumption that the requesting State is acting in good faith and that the fugitive will receive a fair trial in the courts of the requesting State.² With regard to the principle *aut dedere aut judicare*, States embracing the civil law tradition generally apply extra-territorial jurisdiction and prosecute persons for crimes committed in other jurisdictions in which their own nationals are either the offender or the victim. Thus, while the majority of Council of Europe States refuse to extradite their nationals, and some will also refuse to extradite their residents, States in the common law tradition such as the UK and Ireland cannot generally prosecute offences committed outside the jurisdiction.³

8.2 THE EXTRADITION PROCESS: GENERAL PRINCIPLES

While requests for extradition are traditionally made through diplomatic channels, extradition proceedings usually involve input from both the executive and the judiciary. Although a few States prefer to give exclusive control of the process to either the judiciary or the executive, most States prefer a hybrid system. In the UK,

1 *Kindler v Canada* (1991) 84 DLR (4th) 438, p 488.

2 However, in *Re Saifi* [2001] 4 All ER 168 the English Divisional Court was satisfied that it would be unfair and unjust to return the applicant to India on the ground that evidence supporting the request for extradition appeared to have been obtained in bad faith. See also *Gulay Asliturk v Government of Turkey* [2002] EWHC 2326, in which the English court held that it would be unjust or oppressive to return the applicant to Turkey in the absence of a denial by the Turkish Government that the accusation made against the applicant was political and not made in good faith. In *R v Secretary of State ex p Peter Elliot* [2001] EWHC 559, the court accepted that unless there was a real risk of denial of fair trial in the requesting State, issues affecting the fairness of the trial were best left to the trial itself.

3 The issue of jurisdiction was discussed in more detail in Chapter 7.

Canada and the US, for example, extradition is a two-step process involving a hearing at which a magistrate or judge considers whether the requesting State has complied with the formalities.⁴ Provided the court is satisfied that a legal basis for extradition exists, the fugitive will be committed to await surrender to the requesting State. The ultimate decision to surrender the fugitive is an act of executive discretion.⁵ This decision lies with the Secretary of State in the UK and the US⁶ and with the Minister of Justice in Canada. Arguably the law of extradition is procedural not substantive, and extradition proceedings are the means by which domestic criminal proceedings can be pursued abroad. The procedure governing the granting of extradition is subject to national law and is administered by national courts. States have adopted different rules with regard to the quality of evidence required before agreeing to a request for extradition. Some States adopt the rule of non-inquiry and refuse to inquire into the good faith or motive behind a request for extradition.

In order to facilitate international co-operation in the fight against serious crime, national courts have generally adopted a liberal interpretation of extradition treaties. In *R v Governor of Ashford ex p Postlethwaite*,⁷ for example, the House of Lords considered that extradition legislation ought to be interpreted generously in order to facilitate extradition. Lord Bridge, referring to the *dictum* of Lord Russell in *Re Arton*,⁸ considered this case to be good authority for the proposition that the court should not, unless constrained by the language used in the instrument, interpret any extradition treaty in a way that would hinder the working and narrow the operation of most salutary international agreements. This broad approach to the interpretation of treaties is consistent with current English practice. In *Re Ismail*,⁹ for example, the German Government sought the return of a British national in connection with international fraud and issued a request for his extradition. Under the terms of the EA 1989 extradition can be granted in respect of an accused person.¹⁰ It was submitted on behalf of the appellant that he was not a person accused within the meaning of the Act because he had not been formally charged. Lord Steyn considered that in transnational matters it was wrong to approach the construction of extradition treaties from the perspective of English criminal procedure. Without

4 Currently, extradition from the UK is governed by the Extradition Act (EA) 1989, Pt III, which provides that a committal hearing must be held before either the metropolitan magistrate at Bow Street Magistrates Court in England, or the sheriff of Lothian and Borders in Scotland. Following an examination of the extradition documents, the magistrate is required under the EA 1989, s 9, to commit the fugitive to await the Secretary of State's decision on whether to order his return. This legislation consolidates the extradition provisions in the Criminal Justice Act (CJA) 1988, the Fugitive Offenders Act 1967 and the Extradition Act 1870. Government proposals to reform the law on extradition can be found in the Extradition Bill 2002 which is discussed below. Extradition from Canada is governed by the Extradition Act 1999 (SC 1999, c 18), which has maintained the two-step extradition process but has made changes to the rules of admissibility of evidence in extradition proceedings.

5 Acknowledging that the ultimate decision lay with the executive, in *St John v Governor of HM Prison Brixton* [2001] EWHC 543, the English Divisional Court observed that in extradition proceedings the potential issue of a violation of the European Convention of Human Rights arose when the Secretary of State decided to allow the request and not at the committal hearing.

6 The President delegates his authority to the Secretary of State.

7 [1988] AC 924, pp 946–47.

8 [1896] 1 QB 108.

9 [1999] AC 320.

10 EA 1989, s 1(1)(a).

defining the term accused, their Lordships chose to adopt a purposive interpretation in order to accommodate differences between civil and common law systems.¹¹

In some circumstances, States will refuse a request for extradition. Traditionally, extradition procedures have sought to offer a balance between judicial co-operation in the fight against crime and the need to protect the fundamental rights of the individual. Exemption from extradition generally provides the fugitive with some protection against unfairness. However, the rationale for exemption is often linked to the fact that extradition is still considered a sovereign act. Most modern extradition treaties seek to balance the rights of the individual with the need to ensure the extradition process operates effectively and are based on principles, regarded now as established international norms, which are designed not only to protect the integrity of the process itself, but also to guarantee the fugitive offender a degree of procedural fairness.¹² These principles include: the requirement that the fugitive has committed an extraditable offence, which is linked to the principle of double criminality; the rule of specialty; the political offence exception; the restriction on return for military and religious offences; the prohibition on return in death row cases; and the principle of double jeopardy.

8.2.1 Double criminality

The majority of extradition treaties require the double criminality rule to be satisfied. Traditionally, extradition proceedings have been reserved for persons who have allegedly committed a serious offence and thus, based on the maxim *nulla poena sine lege*, a request for extradition will only be granted if the alleged conduct of the fugitive amounts to a crime in both the requesting and the requested State. This is known as the double criminality rule. The principle of reciprocity has resulted in most States complying with the principle of double criminality, ensuring that a requested State is not forced to extradite a fugitive for conduct which it does not regard as criminal. Extradition can be challenged during the extradition proceedings on the basis that the offences mentioned in the request are not extradition crimes. While European extradition treaties generally define an extradition crime by reference to the minimum level of punishment in both States, it has been the usual practice in the UK and the US for extradition treaties to provide a list of specific extradition crimes. The list method has many drawbacks. Extradition can only be granted for offences included in the list, thus, treaties require constant updating to keep abreast of new offences. Furthermore, generally the requested State has no jurisdiction to inquire into the substantive criminal law of the requesting State to determine whether the conduct amounts to an extraditable offence.¹³ In order to avoid problems, most modern treaties adopt the practice of defining extradition offences by reference to a minimum level of punishment. Accordingly, in order to determine whether the double criminality requirement has been satisfied, the requested State need only consider the seriousness of the penalty and is not required to examine whether the conduct amounts to a crime in both jurisdictions. In the UK, for example, s 2 of the EA 1989 limits extradition

11 This approach to the meaning of 'accused' in an extradition treaty has also been applied by the Privy Council in *Rey v Government of Switzerland* [1998] 3 WLR 1.

12 See C Gane and S Nash, 'Illegal Extradition: The Irregular Return of Fugitive Offenders', 1 *Scottish Law & Practice Quarterly* (1996), 277.

13 English courts are restricted to an examination of English law: see *Re Nielsen* [1984] AC 606.

to conduct in the territory of a foreign State which, if it occurred in the UK would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment and which, however described in the law of the foreign State is so punishable under that law. The requesting State is required to provide information that enables the requested State to assess whether the principle of double criminality is satisfied. However, there is no obstacle to prevent a fugitive who returns voluntarily from being tried for non-extradition crimes. Having been advised, erroneously, that the offences in the extradition request were extradition crimes, the applicant in *Neil Walker v Governor of HM Prison Nottingham*¹⁴ waived his right to an extradition hearing and agreed to return to the UK. The court found that he had returned voluntarily and thus had not been extradited. On arrival in the UK, he was in the same position as anyone arriving unescorted on a self-purchased ticket and there was no obstacle preventing him from being tried for the offences charged.

Where States exercise jurisdiction on the basis of territoriality, the double criminality rule can be problematic in respect of extra-territorial and transnational offences.¹⁵ While civil law States generally prosecute regardless of whether the fugitive's conduct took place wholly or partially outside their territory, common law States have traditionally taken a different view. Difficulties arising in respect of extradition for extra-territorial offences have been addressed in some States by domestic legislation. In the UK, for example, Pt III of the EA 1989 provides that extradition can be granted provided the fugitive's conduct would constitute an extra-territorial offence against the law of the UK.¹⁶ However, unless cases come under Pt III of the EA 1989, the concept of jurisdiction based on territoriality still places a limitation on extradition from the UK. In *Al-Fawwaz v Governor of Brixton Prison and Another*,¹⁷ the US sought the applicant's extradition alleging that he conspired with others in an Islamic terrorist organisation to murder US citizens, diplomats and other internationally protected persons. The applicant objected to his extradition on the grounds that while it was accepted that the offence was within the jurisdiction of the US, the offence took place outside the territorial jurisdiction of the English court. The respondent submitted that, in order to be classed as an extraditable crime it was sufficient for the offence to be indictable in the UK, even if on an extra-territorial basis. The Divisional Court observed that Sched 1 to the EA 1989, which requires that an extradition offence must be an offence under the domestic law of the requesting State and English law, governed extradition to the US. Accordingly, in this case it was not sufficient that the conduct alleged was indictable under the extra-territorial jurisdiction of the UK.¹⁸ However, the court noted that, in special cases, English courts do have jurisdiction over crimes of an international

14 [2002] EWHC 39.

15 See G Mullan, *The Concept of Double Criminality in the Context of Extra-Territorial Crimes*, *Crim LR* [1997], 17.

16 See EA 1989, Pt III.

17 [2001] UKHL 69.

18 EA 1989, Sched 1, provides that where an Order in Council under the EA 1870, s 2, was in force in a foreign State, EA 1989, Sched 1, had effect in relation to that State subject to the limitations contained in the Order. The relevant Order was the USA (Extradition) Order 1976 SI 1976/2144 which provides that fugitives liable to be surrendered were persons accused or convicted of an extradition crime committed within the jurisdiction of the relevant foreign State.

nature. Section 1(3) of the Internationally Protected Persons Act 1978, for example, provides that it is an offence under domestic law for any person anywhere in the world to do prohibited acts in relation to an internationally protected person. Provided extradition was sought for this type of offence, domestic legislation provided for extradition in respect of offences committed within the jurisdiction of the requesting State. In dismissing this application, the Divisional Court was satisfied that the acts relied on by the US Government to found a case of conspiracy sufficed to establish the required jurisdiction.

The House of Lords was called upon to consider the double criminality principle in respect of extra-territorial offences in *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (Amnesty International and Others Intervening) (No 3)*.¹⁹ The applicant was a former Head of State of Chile. Following his arrival in the UK in 1998, the Spanish Government issued a request for his extradition in respect of offences of torture and conspiracy to torture committed against Spanish citizens in Chile. The House of Lords was asked to consider, *inter alia*, whether the applicant had been accused of any extradition crime within the meaning of s 2 of the EA 1989. Their Lordships observed that none of the acts of torture were committed by or against citizens of the UK or occurred in the UK. Further, the court noted that whilst most of the charges had no connection with Spain, the Spanish courts were satisfied that they had jurisdiction over all the crimes alleged. Having considered the correct interpretation of the EA 1989, the House of Lords was satisfied that the principle of double criminality required the fugitive's conduct to be a crime under both the law of Spain and the UK at the date it was committed, not merely at the date of the request for extradition. Since torture committed outside the UK was not a crime under UK law until 29 September 1988, only conduct occurring after this date could be considered to amount to an extraditable crime. This decision has been criticised on the ground that the court's interpretation of the relevant legislation was questionable and hindered international co-operation in criminal matters.²⁰

Prior to granting a request for extradition, many treaties require the requested State to hold a judicial hearing at which the requesting State can be required to produce sufficient evidence to establish a *prima facie* case. While the requesting State is the sole arbiter²¹ of the quantity and quality of the evidence that it places before the court, the requested State generally has no power to seek further evidence as a condition precedent to committal for extradition. Unless the extradition treaty states otherwise, the procedure with regard to extradition is governed by the law and practice of the requested State. Failure to produce sufficient evidence to satisfy the relevant domestic extradition legislation will result in the request being refused. In extradition proceedings, the requested State applies national rules when considering the admissibility of evidence. In *Al-Fawwaz v Governor of Brixton Prison and Another*, the examining magistrate admitted evidence from an anonymous witness after finding that the witness's evidence was not so inherently incredible that no jury could properly convict on it and that it corroborated the remaining evidence.²² The

19 [1999] 2 All ER 97. This case is discussed in further detail at the end of this chapter.

20 See further C Warbrick, 'Extradition Law Aspects of Pinochet 3', 48 ICLQ (1999), 958.

21 *R v Governor of Pentonville Prison and Another ex p Lee* [1993] 3 All ER 504, p 508.

Divisional Court was satisfied that the magistrate had exercised his discretion correctly according to English law and practice. Notwithstanding a preference in common law jurisdictions for oral testimony, extradition proceedings usually involve consideration of documentary evidence and only in a minority of cases will witnesses be called. In the event of a witness giving oral testimony inconsistent with a sworn statement, it may still be appropriate for the court to recommend extradition on the basis of the statement.²³ Under the 1957 European Convention on Extradition,²⁴ Member States are not required to furnish evidence of a *prima facie* case unless the requested State has entered a reservation to this effect. Arguably, the *prima facie* evidence requirement adds an unnecessary complexity to the extradition process.²⁵ Prior to granting a request for extradition from a Member State, the requested State is only required to determine whether the alleged conduct constitutes an extradition crime.

8.2.2 Specialty

The majority of extradition treaties contain reciprocal specialty provisions requiring States to undertake to prosecute the fugitive only in respect of extradition crimes set out in the extradition request. The specialty rule aims to provide the fugitive with protection against unfair treatment in the requesting State and is linked historically to the political offence exception. In order to comply with the rule, the requesting State must give the fugitive an opportunity to leave the country before instituting criminal proceedings for any other offence. Under Art 14 of the 1957 European Convention on Extradition, for example, a person has 45 days to leave before being charged with a new offence. The specialty principle is so broadly recognised in international law and practice that it has customary international law status, and applies to treaty based extraditions as well as to extraditions predicated on other bases.²⁶ Traditionally, specialty provisions have been applied strictly. In *USA v Rancher*, for example, the fugitive had been surrendered for murder but was tried for offences of cruelty.²⁷ Notwithstanding that the allegation of cruelty was founded on identical facts, the Supreme Court refused to allow the prosecution to proceed on the ground that cruelty was not an extraditable crime under the treaty. However, generally, the addition or substitution of further offences is permitted without violating the specialty rule provided the new offence arises from the same set of facts as the original offence and is an extraditable crime.

In some circumstances, the specialty rule appears to offer fugitives minimal practical protection. Notwithstanding the existence of specialty assurances in extradition treaties, changes in the political complexion of the requesting State can have unforeseen consequences. In *R v Governor of Brixton Prison ex p Osman (No 3)*²⁸ it

22 (2001) *The Times*, 4 February.

23 *Alves v DPP* [1992] 4 All ER 787.

24 ETS 24 (1957).

25 See, eg, *Re Nielsen* [1984] AC 606.

26 CM Bassiouni, *International Criminal Law: Procedural and Enforcement Mechanisms*, 1999, New York: Transnational, p 236.

27 119 US 407 (1886).

28 [1992] 1 All ER 122.

was suggested that the application of the specialty provision requires the requested State to focus not only on the date of the extradition request, but also to consider any political changes which could occur in the future. At the time of the hearing, the People's Republic of China was preparing to resume sovereignty over Hong Kong and the UK did not have an extradition arrangement with China. The applicant argued that the Government of Hong Kong could not guarantee his continued enjoyment of the specialty protection provided by the current extradition treaty with the UK. Accepting that no State can give an undertaking beyond its sovereign powers, nor could the UK require a State to give an undertaking to bind a different State, Russell LJ considered it wholly inappropriate to look beyond the specialty provision given by the current Government of the requesting State. Similarly, in *R v Governor of Pentonville Prison ex p Lee*,²⁹ the applicant was reluctant to return to Hong Kong fearing that protections in extradition arrangements would not survive the change of sovereignty. He argued that the changing political situation was relevant to the application of the specialty principle. Noting that this approach would drive a coach and horses through the principle of comity and reciprocity, which underlies the basis of extradition,³⁰ the court should not look outside the framework of the protection undertaken at the time of the request.³¹ Generally the issue of undertakings given by the requesting State is not a matter for the courts but for the executive during the surrender stage of the extradition process. Thus, a request can be made to the Secretary of State to exercise his or her discretion to refuse the request for extradition on the ground that the specialty rule fails to offer the defendant sufficient protection.

8.2.3 Re-extradition

The problem of re-extradition to a third State can also arise in connection with the specialty principle. Article 15 of the 1957 European Convention on Extradition provides that a person should not be re-extradited to a third State in respect of offences committed before surrender without the consent of the requested State. In *Bozano v France*,³² for example, an Italian court convicted the applicant in his absence of the murder of a 13 year old Swiss girl. He was eventually arrested in France. Notwithstanding the refusal by a French court to surrender Bozano to the Italian authorities on the ground that French law did not allow extradition following a conviction *in absentia*, the French Government ordered his deportation. He was taken to the Swiss border and handed over to the Italian authorities. Although the European Court of Human Rights upheld the applicant's complaint that his abduction was neither lawful nor compatible with his right to security of the person,³³ provided there has been no collusion between the trial State and the State of refuge, this method of returning a fugitive offender does not seem to violate the 1957 Convention. In *R v Secretary of State ex p Johnson*,³⁴ the English Divisional Court was called upon to consider, *inter alia*, whether it could conduct an

29 [1993] 3 All ER 504.

30 *Ibid*, p 510.

31 *Ibid*, p 511.

32 (1986) 9 EHRR 297.

33 As guaranteed by the European Convention on Human Rights, Art 5.

34 [1999] 2 WLR 932.

inquiry into the requested State's consent to re-extradite the fugitive. In 1992, the applicant was extradited from Austria to the UK on charges of fraud. During the course of the criminal proceedings in the UK, the Australian authorities requested the applicant's extradition for offences allegedly committed in Australia between 1988 and 1990. In 1994, the UK authorities obtained the consent of the Austrian authorities to the applicant's re-extradition in the form of a diplomatic note. Notwithstanding his subsequent acquittal on the fraud charges, the applicant was arrested in anticipation of a formal request from the Australian authorities, which was made in 1995. An order was eventually made in 1997 for the applicant's return to Australia to face charges of conspiracy to defraud. In rejecting the applicant's appeal, the court was satisfied that the UK authorities were entitled to extradite the fugitive to Australia provided consent had been obtained from the Austrian authorities prior to surrender as required by Art 15 of the 1957 Convention. Article 14 dealt solely with the issue of speciality and did not explicitly or implicitly forbid re-extradition. Indeed, the wording was sufficiently wide to permit the requested State to remove the fugitive from its territory by way of re-extradition or deportation. While Art 15 required that requested States consent to re-extradition, the requesting State had no obligation to inquire into the validity of this consent. To do so would transgress the principle which prevents assessment of validity of the act of a sovereign State done abroad by a sovereign authority.³⁵

8.2.4 Political offence exception

Traditionally, a State is not obliged to surrender persons wanted in connection with an offence which it considers to be of a political nature.³⁶ The political offence exception is a universally recognised principle of extradition law and is related to the principle of sovereignty.³⁷ It is justified by the need for States to remain detached from political conflict and protects the right of States to grant asylum to political refugees.³⁸ While the inclusion of the political offence exception in extradition treaties has offered some protection to fugitives from States seeking to silence political opponents, arriving at a satisfactory definition of political offence is frequently fraught with difficulties.³⁹ Although extradition treaties do not necessarily define the term political offence, the phrase offence of a political character has generally been accepted as suggesting some opposition on the part of the fugitive to the requesting State. Thus, in determining whether the offence amounts to an offence of a political nature, the requested State may be required to consider both the motive of the requesting State, and the fugitive, before deciding whether the request for extradition is *bona fides*.⁴⁰ This process might conflict with the rule of non-inquiry.⁴¹

35 *Ibid*, p 942.

36 For a general discussion of this topic see C Van Den Wyngaert, 'The Political Offence Exception to Extradition: How to Plug the Terrorists' Loophole Without Departing from Fundamental Human Rights', in J Dugard and C Van De Wyngaert (eds), *International Criminal Law and Procedure*, 1996, Aldershot: Dartmouth, p 524.

37 See, eg, its inclusion as a mandatory ground for exclusion in the United Nations (UN) Model Treaty on Extradition 1990, Art 3(a).

38 For further discussion, see H Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', 21 *BYIL* (1944).

39 For further discussion, see B Swart, 'Human Rights and the Abolition of Traditional Principles', in A Eser and O Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law*, 1991, Freiburg: Herstellung Barth, pp 505–34.

Although courts in the UK have for some years demonstrated some consistency in their approach to the problem of interpretation,⁴² the definition of political offence has now been further refined. Following the decision in *Ex p Dunlayici*,⁴³ to qualify as a political offence the fugitive's political purpose must be directed against the government of the requesting State and linked to an existing or contemplated political struggle.

Arguably, States should not be obliged to surrender persons for extradition if the offence mentioned in the extradition request is incidental to civil unrest. However, US extradition treaties have traditionally limited this exception to purely political offences, which have been described as offences of opinion, political expression or those which otherwise do not involve the use of violence.⁴⁴ Nevertheless, in several high profile cases involving members of the Irish Republican Army the political offence exception was applied successfully in respect of offences of violence, and extradition denied. In *USA v Mackin*,⁴⁵ for example, the UK requested the return of the applicant from the US for offences related to the attempted murder of a British soldier in Northern Ireland. Extradition was refused on the basis that the offences listed in the extradition request amounted to political offences. Similarly, in *Re McMullen*, the US court refused to extradite the applicant, who was wanted in connection with the bombing of an army installation in England, on the grounds that the offence came within the political offence exception.⁴⁶ The political offence exception has also been applied by the Irish Supreme Court in extradition proceedings involving terrorist activities in Northern Ireland. In *Finucane v Mahon*⁴⁷, for example, the defendant was wanted in connection with offences relating to the escape of prisoners from the Maze prison in Northern Ireland. In refusing the UK's request for extradition, the court held that if the offences were committed in furtherance of the campaign to create a united Ireland, the political offence exception would apply.

However, the increase in international terrorism has led to the willingness of States to limit the extent of the political offence exception, which is generally no longer applicable to crimes against international law. Accordingly, while the political offence exception has been described as the most venerable of the mandatory exceptions to extradition,⁴⁸ there are so many offences excluded from consideration in most extradition treaties that in practice it is rarely used successfully. Within Member States of the Council of Europe, for example, the scope of the political offence exception has been reduced by the European Convention on the Suppression of Terrorism,⁴⁹

40 *R v Governor of Pentonville ex p Cheng* [1973] AC 931.

41 See 8.2.9, below.

42 See, eg, *Re Castioni* [1891] 1 QB 149; *Re Meunier* [1894] 2 QB 415; *R v Governor of Brixton Prison ex p Kolczynski* [1955] 1 QB 540; *R v Governor of Brixton Prison ex p Schtraks* [1964] AC 556; *R v Governor of Pentonville ex p Cheng* [1973] AC 931; *T v Secretary of State for the Home Department* [1996] 2 All ER 865.

43 (1996) *The Times*, 22 August.

44 *Op cit*, Bassiouni, note 26, p 241.

45 Case No 3-78-1899 MG (ND Cal 11 May 1979). For further discussion of this and the case below, see *op cit*, Bassiouni, note 26, pp 195 and 241.

46 668 F 2d 122 (1981), 2nd Cir.

47 [1990] IR 165.

48 C Gane, 'Human Rights and International Co-operation in Criminal Matters', in P Cullen and W Gilmore (eds), *Crime Sans Frontieres: International and European Legal Approaches*, 1998, Edinburgh: Edinburgh UP, p 162.

which lists a range of offences associated with terrorism that are precluded from being regarded as political offences, and the 1975 Additional Protocol to the 1957 European Convention on Extradition, which specifically excludes war crimes and crimes against humanity from the definition of political offence.⁵⁰ The reduction in the scope of the political offence exception is also reflected in the current approach taken by the judiciary towards terrorism and other politically motivated offences. In *T v Immigration Officer*,⁵¹ for example, Lord Mustill observed:

...during the 19th century those who used violence to challenge despotic regimes often occupied high moral ground, and were welcomed in foreign countries as true patriots and democrats. Now, much has changed. The authors of violence are more ruthless, their methods more destructive and indiscriminating; their targets are no longer ministers and heads of state but the populace at large. What I regard as the exceptional difficulty of this appeal is that the courts here, as in other legal systems, must struggle to apply a concept which is out of date.

8.2.5 Capital punishment

Many extradition treaties do not oblige requested States to surrender persons to States which enforce the death penalty, unless the requesting State gives an undertaking not to implement it. The 1957 European Convention on Extradition, for example, provides that contracting parties may refuse to surrender a person if the offence for which extradition is requested is punishable by death under the law of the requesting party, and if in respect of such offence the death penalty is not provided for by the law of the requested party or is not normally carried out unless the requesting party gives such assurance as the requested party considers sufficient that the death penalty will not be carried out.⁵² However, as a consequence of the decision of the European Court of Human Rights in *Soering v UK*⁵³ contracting parties to the European Convention on Human Rights are required not to surrender persons to States where the death penalty could be applied, unless the requested State is satisfied that it will not be carried out. In this case, the US requested the extradition of the applicant from the UK on charges of capital murder. If the UK agreed to surrender the applicant, he faced the possibility of spending a long time on death row. Exposure to the death row phenomenon, he argued, would amount to inhuman and degrading treatment and would violate a right guaranteed by Art 3 of the European Convention on Human Rights.⁵⁴ In finding for the applicant, the Court held that liability was incurred by the extraditing contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment. This case raises the vexatious question of conflicting treaty

49 ETS 90 (1977).

50 ETS 86 (1979).

51 [1996] AC 742, pp 752–53.

52 See 1957 European Convention on Extradition, Art 1, ETS 24 (1960).

53 (1989) 11 EHRR 439.

54 The Convention for the Protection of Human Rights and Fundamental Freedoms was signed at Rome on 4 November 1950 and is known as the European Convention on Human Rights, ETS 5 (1950); UKTS 71 (1953).

obligations.⁵⁵ In order to avoid problems with extradition to the US, contracting States have been willing to accept assurances from the US authorities. These undertakings have been sufficient to satisfy the European Court of Human Rights. Nevertheless, the position regarding parties to the European Convention on Human Rights and extradition to death penalty states is clear. There is an obligation on contracting parties to refuse a request for extradition where there are substantial grounds for believing that a person would face a real risk of being subjected to torture or ill-treatment in the receiving State.⁵⁶ A similar approach to death penalty States is taken by the Canadian Supreme Court in respect to Art 7 of the Canadian Charter. Thus in *USA v Burns and Rafay*,⁵⁷ a potential death penalty case, the Court disapproved a decision of the Minister of Justice to surrender a fugitive without first seeking assurances that the death penalty would not be carried out. The death penalty issue is less of a problem for States adhering strictly to the rule of non-inquiry, which prohibits courts in the requested States from inquiring into matters taking place outside the jurisdiction and, thus, prevents consideration of the treatment of offenders in the requested State.⁵⁸

8.2.6 Fiscal offences and offences under military law

Arising from a reluctance to become involved in the enforcement of another State's fiscal law, extradition was traditionally refused in respect of tax and customs offences unless contracting parties had expressly agreed to the inclusion of fiscal offences in the treaty. However, the growth in financial crime generally, and drug-trafficking and money laundering specifically, has led to the increased willingness of States to include fiscal offences in extradition treaties.⁵⁹ States continue to be reluctant to extradite persons for offences under military law which are not also offences under ordinary domestic criminal law.⁶⁰

8.2.7 Double jeopardy

Many extradition treaties acknowledge the principle of double jeopardy and include exemptions for persons who have already been tried and discharged or convicted and punished for the same offence in another State.⁶¹ Under the 1957 European Convention on Extradition, for example, Art 9 provides that extradition shall be refused if the competent authorities of the requested State have passed final judgment. While this principle has been held to apply to the actual trial, courts in the UK have

55 For further discussion of this matter, see C Van Den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box', 39 ICLQ (1990), 212.

56 *Hilal v UK* (2001) 33 EHRR 2.

57 QL (2001) SCJ 8.

58 For discussion of the position in the US, see *op cit*, Bassiouni, note 26, p 247.

59 See, eg, Second Additional Protocol to the 1957 European Convention on Extradition and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, Art 2, 30 ILM (1991), 148. See also Chapter 3.

60 See, eg, the UN Model Treaty on Extradition, Art 3 and the 1957 European Convention on Extradition, Art 4, ETS 24 (1960).

61 See *Atkinson v US Government* [1971] AC 197.

considered that it does not apply to the extradition hearing.⁶² In the US it has been held that a prosecution for the same offence in a foreign State does not necessarily infringe the principle of double jeopardy.⁶³ The Additional Protocols to the 1957 Convention created exemptions for persons who had been acquitted or pardoned⁶⁴ and in respect of offences of which an amnesty had been declared.⁶⁵ Extradition may also be refused if prosecuting authorities in the requested State have commenced a prosecution in respect of the offence for which extradition is sought. Similarly, extradition treaties generally contain provisions limiting the return of persons if it would be unjust or unfair to do so because of time considerations. Thus, if there is an unreasonable delay in seeking extradition, it is considered oppressive to agree to the request for extradition and extradition will not be granted if the prosecution is barred by a statute of limitations. Under Art 10 of the 1957 Convention, for example, contracting parties are not obliged to extradite when the person has, according to the law of either the requesting or the requested party, become immune by reason of lapse of time from prosecution or punishment.

8.2.8 Surrender of nationals

Many civil law States prefer to exercise criminal jurisdiction over their nationals whether an offence was committed on their own territory or abroad. The rationale for this exception is linked to sovereignty, and in some States it is considered to be a fundamental right. In order to determine whether a person is a national, reference should be made to the relevant national law on nationality. Adopting a flexible approach, Nordic States, for example, consider all registered residents as nationals raising concern that suspected terrorists seeking refuge in one of these States could avoid extradition on the grounds of residency. The preference for trying the offender in his or her own State is acknowledged in Art 6 of the 1957 European Convention on Extradition, which gives contracting parties the right to refuse extradition of its nationals. In the UK, nationality is not a bar to extradition and arguments in favour of exempting nationals from surrender have consistently been rejected. In *Re McAliskey*, for example, the German Government sought the extradition of a UK citizen from the UK. The Divisional Court refused to accept that extradition should be refused on the basis that Germany would not extradite its nationals to face trial in the UK. Adopting a purposive approach to the terms of the 1957 Convention, the court held that if extradition proceeds on the basis of reciprocity, a State only has an obligation to do what it would do itself.⁶⁶ These opposing views are explained by the differing practice of the exercise of jurisdiction in Member States.⁶⁷ Refusal to extradite a national can limit the chances of bringing a successful prosecution against an offender who flees the country and may compromise the promotion of international co-operation of States in criminal matters. Cherif Bassiouni noted that

62 *Rees v Secretary of State for the Home Department* [1986] 2 All ER 321.

63 For further discussion of the position in the US, see *op cit*, Bassiouni, note 26, p 246, in which he cites *Blockburger v USA*, 52 S Ct 180 (1932).

64 1975 Additional Protocol to the European Convention on Extradition, Art 2, ETS 86.

65 Second Additional Protocol, Art 4, ETS 98 (1978).

66 (1997) *The Times*, 22 January.

67 For further discussion on jurisdiction, see Chapter 7.

States who refuse to extradite their own nationals have served as a consistent source of consternation to the US Congress, and suggests that such a denial of extradition should be conditional on the requested State prosecuting its national under the principle *aut dedere aut judicare*.⁶⁸ Although extradition can highlight the procedural diversity between civil law and common law jurisdictions, Member States in the European Union (EU) have demonstrated a reluctance to let procedural differences restrict international co-operation.⁶⁹ However, the optional clause in many extradition treaties which permits States to refuse a request for extradition of their own nationals is seen as a disincentive to cross-border law enforcement. The recent EU Council Framework Decision on the European arrest warrant which effectively removes the need for extradition between EU States is predicted to solve any remaining problems relating to the surrender of nationals within the EU.

8.2.9 The rule of non-inquiry⁷⁰

The rule of non-inquiry is a rule of customary international law which has been defined as a rule that the courts will not inquire into the good faith of or motive for a request, or the treatment that a fugitive may receive upon surrender.⁷¹ The decision not to enquire too closely into conduct taking place outside the jurisdiction reflects the traditional approach taken by courts in extradition cases. States engaging in strict observance of this rule do not allow the fugitive to produce any evidence to show that the requesting State will violate fair trial rights.⁷² In jurisdictions adopting the rule of non-inquiry, the courts assume that the requesting State is acting in good faith and in the interests of justice. In *Jhirad v Ferrandina*, for example, the US Court of Appeals considered that it was not the business of their courts to assume responsibility for supervising the integrity of the judicial system of another sovereign nation.⁷³ The argument for adopting this rule stems from the assumption that States enter into extradition arrangements on the basis that the criminal justice system in the requesting State observes minimum standards of procedural fairness. While the US appears resistant to any relaxation of the rule,⁷⁴ there are developments in the UK which indicate a move away from a strict policy of non-inquiry. Since the enforcement of the EA 1989, courts in the UK have assumed a limited role of inquiry into human rights issues, including consideration of events taking place outside the jurisdiction.⁷⁵

68 *Op cit*, Bassiouni, note 26, pp 245–46. For further discussion of the principle, see C Bassiouni and EM Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite in International Law*, 1995, Dordrecht: Martinus Nijhoff.

69 See 8.3.1, below.

70 In the UK, an inquiry is permitted for specific reasons: see EA 1989, ss 6(1)(c), (d) and 11(3).

71 C Nicholls, 'The Rule of Non-Inquiry in Extradition Cases', paper presented to the Oxford Conference on International Co-operation in Criminal Matters, 24–28 August 1998.

72 For discussion of the rule of non-inquiry, see CM Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', 59 LCP (1996), 63; CM Bassiouni, *International Extradition: United States Law and Practice*, 3rd edn, 1996, New York: Oceana; see also *op cit*, Nicholls, note 71.

73 536 F 2d 478 (1976), pp 484–85.

74 *Ahmad v Wigen*, 910 F 2d 1063, 1967 (1990), 2nd Cir.

75 EA 1989, s 6(1), places restrictions on return which arguably permits an inquiry into the requesting State's motive for the prosecution and requires the court to carry out a limited inquiry into the risk of prejudice at trial in the requesting State on the ground of race, religion, nationality or political opinion.

In *Re Saifi*, for example, the English Divisional Court was satisfied that it would be unfair and unjust to return the applicant to India on the ground that evidence supporting the request for extradition appeared to have been obtained in bad faith. The case against the applicant depended upon the evidence of one witness who said his allegations had been obtained under circumstances of extreme duress. The court expressed concern that there was a significant risk that misbehaviour by the Indian police had so tainted the evidence as to render a fair trial impossible. Similarly, in *R v Secretary of State for the Home Department ex p Rachid Ramda*⁷⁶ the English court considered that the Secretary of State would effectively be bound to refuse extradition if satisfied that evidence supporting the request may have been obtained by oppression and that the requesting State would refuse to hear argument on the matter. This case involved an application for judicial review of a decision to order the extradition of an Algerian national to France for trial in relation to a series of terrorist bombings. The French Government's case was based almost entirely on the confession of a third party which had allegedly been obtained as a direct result of brutality.

8.3 INTERNATIONAL INITIATIVES

The escalation of both national and transnational crime and the acknowledgment that effective law enforcement is increasingly dependent upon international co-operation mechanisms has led to several important international initiatives which aim to standardise and simplify extradition procedures. The rise in terrorist-related offences has been an added incentive for States to negotiate efficient surrender mechanisms. Although some States have traditionally preferred bilateral treaties, there is a move amongst States in close geographical proximity to each other to make use of multilateral treaties.⁷⁷ Undoubtedly multilateral extradition treaties between States that share a common legal and cultural heritage generally present fewer procedural difficulties than extradition arrangements between States that are culturally, politically and geographically miles apart.

8.3.1 The UN Model Treaty on Extradition⁷⁸

The UN Model Treaty on Extradition was adopted by the General Assembly of the UN in 1990 and is supplemented by the Complementary Provisions for the Model Treaty on Extradition. These instruments have been prepared as part of a general UN initiative to promote the development of effective international co-operation in criminal matters and to encourage the implementation of national and international measures to tackle organised crime. The Model Treaty has been designed to provide a useful framework for States negotiating bilateral, regional and multilateral extradition arrangements. It also aims to encourage States to update existing extradition treaties in the light of recent developments in international law. In the

⁷⁶ [2002] EWHC 1278; [2001] 4 All ER 168.

⁷⁷ See, eg, the 1957 European Convention on Extradition, ETS 24 and the 1981 Inter-American Convention on Extradition, OASTS no 60.

⁷⁸ Resolution 45/116, 30 ILM (1990), 1410.

preamble, the treaty emphasises that when drafting extradition treaties, States must take account of the protection of human rights. The provisions in the Model Treaty are similar to those found in the 1957 European Convention on Extradition.⁷⁹ Thus, subject to several mandatory and optional exceptions, States are obliged to extradite persons wanted for the extradition offences set out in Art 2 of the Model Treaty. In line with the modern approach, extradition offences are defined in terms of the minimum level of punishment.⁸⁰ The Model Treaty contains several mandatory and optional exceptions to extradition. The mandatory exceptions include the political offence exception, offences under military law and offences for which there has been a final judgment. States must also refuse to extradite if there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex, or status.⁸¹ Extradition is also prohibited if the person extradited would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment. The optional exceptions include a provision which allows States to refuse to extradite their own nationals, provided the offence is dealt with by appropriate action in the requested State. Further, in appropriate circumstances, States can refuse a request for extradition to a death penalty State and can reject a request for extradition on account of the fugitive's age, health or other personal circumstances.⁸² Extradition may also be refused if the offence was committed outside the territory of the requested State, or if the requested State has made the decision not to prosecute.⁸³ The Model Treaty also includes provisions addressing specialty and simplified extradition procedures. In an attempt to introduce some flexibility for States negotiating extradition treaties, several provisions have optional clauses which allow for some modification to be incorporated into the text of a specific treaty.

8.3.2 1957 European Convention on Extradition⁸⁴

In the early 1950s, the Committee of Ministers, the decision making body of the Council of Europe, appointed a Committee of Experts to develop a scheme to facilitate extradition between Member States. Some concern had been raised in a memorandum from the Secretariat General in respect of the refusal of most European States to extradite nationals and the reluctance to extradite for fiscal offences. Following extended discussions, it was agreed to introduce a multilateral treaty, which, in addition to setting out procedures designed to simplify the process of extradition, contained several humanitarian provisions. The European Convention on Extradition was opened for signature in Paris on 13 December 1957. Contracting parties undertake to extradite any person wanted in the requesting State for prosecution in respect of an extraditable offence, which is defined by reference to the minimum level of punishment in both States.⁸⁵ Parties are not obliged to extradite in respect of political offences, offences under military law or fiscal offences.⁸⁶

76 [2002] EWHC 1278; [2001] 4 All ER 168.

77 See, eg, the 1957 European Convention on Extradition, ETS 24 and the 1981 Inter-American Convention on Extradition, OASTS no 60.

78 Resolution 45/116, 30 ILM (1990), 1410.

Contracting parties have the right to refuse to extradite their own nationals⁸⁷ and, in certain circumstances, may refuse to extradite persons for offences which are punishable by death under the law of the requesting State.⁸⁸ The Convention prohibits extradition if a final judgment has been passed for the offence mentioned in the request. Contracting States agree to abide by the rule of specialty and will not, without the consent of the requested party, re-extradite a person to a third State.⁸⁹ If extradition is requested by more than one State, the requested State should communicate to the State to which the person is being surrendered indicating whether it consents or refuses to the re-extradition of the fugitive.⁹⁰ In order to supplement these provisions, an additional protocol was opened for signature in 1975, which added to the definition of political offence and addressed the effect of the *ne bis in idem* rule. Subsequently, a second additional protocol replaced Art 5 of the 1957 European Convention on Extradition, inserting provisions in relation to fiscal offences and addressing the matter of judgments *in absentia* and amnesty.⁹¹ Extradition is also available under the 1977 European Convention on the Suppression of Terrorism. Although many European States were willing to sign and ratify the 1957 Convention, several entered reservations to some of its provisions which reduced its effectiveness. The UK did not ratify until February 1991. While this Council of Europe initiative undoubtedly assisted in simplifying extradition between European States, closer union within the EU resulted in moves to make the extradition process even easier.

8.3.3 EU initiatives⁹²

To assist effective legal co-operation in combating criminal activity, the Justice and Home Affairs Council of the EU has concluded two new conventions to simplify and improve extradition procedures between Member States of the EU.⁹³ In doing so, the Council set in motion a process whereby existing arrangements for extradition were examined with a view to making them more flexible.⁹⁴ In 1995, the Council recommended that a convention on simplified extradition be adopted in order to fulfil the aim of efficiency in the field of criminal justice. Its aim was to speed up extradition in cases where persons consented to be extradited. However, after further discussion concerning other aspects of extradition the Council eventually

86 *Ibid*, Arts 3, 4 and 5.

87 *Ibid*, Art 6.

88 *Ibid*, Art 11.

89 *Ibid*, Arts 14 and 15.

90 *Ibid*, Arts 17 and 15 and see Recommendation No R (96) 9.

91 ETS 98 (1978).

92 For further discussion, see M Mackarel and S Nash, 'Extradition and the European Union', 46 *ICLQ* (1997), 948.

93 Convention on Simplified Extradition Procedure Between Member States of the European Union, adopted on 10 March 1995, 1995 OJ C78/1 (the 1995 Convention); Convention Relating to Extradition Between the Member States of the European Union, adopted 27 September 1996, 1996 OJ C313/11 (the 1996 Convention).

94 While extradition in Europe is currently largely based on the 1957 Convention and its two protocols, other arrangements have been formed under the 1990 Convention Implementing the Schengen Agreement (Schengen Implementing Convention) and regional agreements such as the 1962 Benelux Convention on Extradition and Mutual Assistance in Criminal Matters.

recommended that Member States adopt far more radical procedures. The 1996 Convention appears to bypass several procedures designed to offer a degree of protection for the fugitive offender. Traditionally, extradition procedures have sought to offer a balance between judicial co-operation in the fight against crime and protecting the fundamental rights of the individual, and these concerns are acknowledged within the preambles to both the new EU Conventions. However, the new Conventions make several alterations to what can be regarded as established extradition procedures. It has been suggested that these developments may have shifted the balance too far in favour of law enforcement at the expense of fundamental legal protections.⁹⁵

In order to extend arrangements already established under the Council of Europe, in 1977 France suggested proposals to extend European judicial co-operation. However, these proposals were largely unsuccessful and in 1990, in answer to a written question about the harmonisation of extradition arrangements, the European Community (EC) Commission accepted that there were still no plans for community legislation in this area. Measures to co-ordinate extradition procedures, which were necessary to compensate for the removal of border controls would be greatly assisted if the Member States were to ratify the 1957 Council of Europe European Convention on Extradition and its two Protocols.⁹⁶ The European Ministers of Justice declared the improvement of extradition arrangements between EU States a priority⁹⁷ and a working group was established shortly after the Maastricht Treaty.⁹⁸ While the drafting of the EU Conventions progressed quickly and the 1995 Convention was completed in March 1995, discussions relating to more comprehensive developments proved to be more protracted. However, in September the 1996 Convention was drawn up.

8.3.4 1995 Convention on Simplified Extradition Procedure

This Convention aims to facilitate extradition between Member States by supplementing the 1957 Convention by increasing the efficiency of current procedures without affecting the application of more favourable arrangements already in force in some Member States. In cases where the arrested person consents to extradition and the requested State gives its agreement, formal extradition procedures are avoided. The Convention is designed to simplify extradition by providing a flexible legal framework among EU Member States that reduces delays produced by the present systems. Providing the conditions of the Convention are complied with, contracting parties agree to apply the simplified provisions for surrender of fugitives. The simplified process begins once the request for provisional arrest is received or, if the Schengen agreement applies, when a person was reported in the Schengen information system.⁹⁹ Adequate information should be communicated both to the fugitive and the requested State to enable them to consider

95 *Op cit*, Mackarel and Nash, note 92, p 948.

96 Joint Answer to Written Questions Nos 1072 and 1236/90 OJ C303/38.

97 G Vermeulun and G Vander Beken, 'Extradition in the European Union: State of the Art and Perspectives', 4 *Eur J Crime Cr L Cr J* (1996), 200, pp 207–08.

98 31 ILM (1992), 247.

99 1990 Schengen Implementing Convention, Art 96, 30 ILM (1991), 68.

the question of consent. This information should include the identity of the person sought and details of the offence. In cases of consent to extradition, the Convention also provides for renunciation of the specialty rule.

The person wanted for the purpose of extradition must be informed of the simplified procedure and its consequences. To ensure that the arrested person was adequately informed and consent obtained voluntarily, they should have access to legal representation. Consent and renunciation of the right to specialty cannot be revoked and, thus, will be recorded formally in accordance with national procedures. If the arrested person consents to be extradited, the requested State must notify the requesting State so that a request for extradition can be submitted. However, notwithstanding the consent of the arrested person, once an arrest is effected, the request for extradition must be received within 10 days. The requested State is required to consider the request in accordance with the usual national procedures. Notification of the decision to extradite should be communicated directly between the competent State authorities and surrender of the fugitive must be within 20 days of the notification of the decision. In the event of unavoidable delay, a new surrender date can be agreed; however, the person must be released after the expiry of this new date. In cases where the arrested person consents to extradition, the simplified procedure would be available. The 1995 Convention is generally intended to apply to two types of cases. The first type involves a request for provisional arrest, consent to extradition being obtained within 10 days of arrest. In these cases, the requested State has no other reason for detaining the fugitive. The other type of case would involve consent between 10 and 40 days after arrest, but before receipt of the formal request for extradition under the 1957 Convention.¹⁰⁰

8.3.5 1996 Convention Relating to Extradition

The 1996 Convention also supplements the 1957 Convention and makes a number of significant adjustments to standard extradition procedure. Interestingly, States need not have signed the 1957 European Convention on Extradition as a prerequisite to being a party to the 1996 Convention. The preamble states that Member States seek to improve judicial co-operation 'with regard both to the prosecution and to the execution of sentences, and recognise the need for efficient extradition procedures in compliance with democratic standards and the European Convention on Human Rights'. However, some of the preamble statements are not reflected in the substance of the Convention. The 1957 Convention allows for extradition to be granted in respect of offences punishable with a term of imprisonment of at least one year under the law of the requesting and the requested State.¹⁰¹ The 12 month threshold was designed to ensure that extradition was not used for minor offences. This threshold has been lowered by the 1996 Convention which allows for extradition provided the offence attracts a term of imprisonment of at least one year under the law of the

100 See in general *Select Committee on the European Communities (House of Lords)*, 17th Report, 1996–97, pp 27–32.

101 1957 European Convention on Extradition, Art 2(1), subject to reservations, see Art 2(3) and (4).

requesting State, and at least six months in the requested State.¹⁰² The practical benefit of this development is uncertain.¹⁰³

The 1996 Convention addresses a problem relating to the application of the double criminality rule between common law and civil law systems. Under Art 3, extradition applies to offences which are considered by the requesting State to be offences of conspiracy or an association to commit offences. The requirement is that the offence is punishable by a term of detention of at least 12 months and that they are offences referred to in Arts 1 and 2 of the 1976 European Convention on the Suppression of Terrorism,¹⁰⁴ or that they are offences in the field of drug-trafficking and other forms of organised crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons.¹⁰⁵ Extradition may not be refused on the ground that the facts would not amount to an offence in the requested State. This provision is an attempt to address the lacuna which exists under the present arrangements.¹⁰⁶ The drafting of Art 3(1)(b) is noteworthy for its vagueness¹⁰⁷ and will require some Member States to change their domestic law in order to ratify this Convention.

With regard to the political offence exception, the 1996 Convention provides Member States with two options. Article 5(1) provides that 'no offence may be regarded by the requested Member State as a political offence, as an offence connected with a political offence or an offence with political motives'. Article 5(2) provides that Member States may enter a reservation to Art 5(1) declaring that only offences, including conspiracy or association to commit offences, referred to in Arts 1 and 2 of the 1976 European Convention on the Suppression of Terrorism will not be regarded as political offences, a substantial limitation. Article 5(4) states that reservations made by Member States under Art 13 of the European Convention on the Suppression of Terrorism do not apply to extradition between Member States. Article 6 provides that extradition may be granted for fiscal offences. However, Art 6(3) allows any Member State to declare that it will grant extradition in connection with a fiscal offence, only where it relates to acts or omissions which may constitute an offence in connection with excise, value added tax or customs. This is in accordance with the approach adopted by the 1990 Schengen Implementing Convention.¹⁰⁸

Article 7 provides that extradition may not be refused on the ground that the accused is a national within the meaning of Art 6 of the 1957 European Convention

102 1996 Convention, Art 2(1).

103 Two reasons given for needing to define extraditable offences are that the inefficiencies of extradition for minor offences are avoided along with the political problems caused by States refusing extradition on public policy grounds. Bassiouni has observed that the requirement of classifying an offence within a category of extraditable offences is curious. He asks why, subject to the offence meeting the requirements of double criminality and not being a political offence, should the requested State have a concern as to the seriousness of the offence? C Bassiouni, *International Extradition and World Public Order*, 1974, New York: Oceana, p 319.

104 1996 Convention, Art 3(1)(a).

105 *Ibid*, Art 3(1)(b).

106 Eg, the rules relating to conspiracy to commit an offence are significantly different in The Netherlands from in England and Wales.

107 What is the extent of offences in the field of drug-trafficking and other forms of organised crime? Since there is no accepted legal definition of organised crime in the UK, one awaits the publication of the explanatory report to the 1996 Convention with interest.

108 1990 Schengen Implementing Convention, Art 63, 30 ILM (1991), 68.

on Extradition. However, Art 7(2) permits any Member State to declare that it will not grant extradition of its nationals. Similarly, under the 1957 European Convention on Extradition, Member States could enter a reservation in respect of the non-extradition of nationals. The principle of specialty has been modified in Art 10. Whereas, under Art 14(1)(a) of the 1957 Convention, the specialty provision could be waived by the requested State, provided offences are not punishable by deprivation of liberty, the new Convention permits the requesting State to prosecute for offences other than those mentioned in the extradition request. Further, if offences are punishable by deprivation of liberty, the accused can expressly waive the benefit of the rule of specialty. However, Member States are expected to adopt 'the measures necessary to ensure that this waiver is established in such a way as to show that the person has given it voluntarily and in full awareness of the consequences.'¹⁰⁹ This development reflects a change in the status of individuals within the extradition process.¹¹⁰ Article 16(2) of the 1995 Convention and Art 18(3) of the 1996 Convention provide for entry into force 90 days after the last Member State has notified the Council of their ratification. However, until the Conventions enter into force, any Member State may declare that the treaty shall apply to its relations with Member States that have made the same declaration.¹¹¹ Such a system gives the Conventions a rolling ratification and should mean that the treaties become operational, albeit on a limited basis, sooner rather than later.¹¹²

Thus the 1996 Convention represents a re-examination of the traditional restrictions on extradition. It effectively removes or reduces restrictions on the return of a fugitive offender. Some traditional limitations on extradition are concerned with protecting fundamental rights of the fugitive and prohibit extradition if a person is likely to be punished on account of race, religion, or ethnic origin, or where they might be subjected to torture, denied a fair trial or executed.¹¹³ While the preamble acknowledges that all the systems of government of the Member States are based on democratic principles and comply with obligations laid down by the European Convention on Human Rights, there is no express obligation in the text to ensure that the new procedures conform to the human rights commitments contained within the European Convention on Human Rights or the International Covenant on Civil and Political Rights. The new procedures undoubtedly improve legal co-operation between Member States and increase the efficiency of existing extradition procedures. The question remains whether these developments reduce to an unacceptable level the procedural guarantees that provide fugitives with some protection from over-zealous States.

The UK Government did not immediately ratify the new extradition treaties. However, in September 2001 the EU Justice and Home Affairs (JHA) Council proposed that all EU States would ratify the treaties by 1 January 2002. By virtue of

109 1996 Convention, Art 10(3).

110 See A Eser, 'Common Goals and Different Ways in International Criminal Law: Reflections from a European Perspective', 31 *Harvard Intl LJ* (1990), 125; *op cit*, Swart, note 39, p 505.

111 1995 Convention, Art 16(3); 1996 Convention, Art 18(4).

112 The Council and some Member States annexed a number of declarations to the Convention text, including adopting the dispute settlement mechanism of the 1969 Vienna Convention on the Law of Treaties, Art 65.

113 All of these restrictions have received the tacit approval of the UN by way of their inclusion in the UN Model Treaty on Extradition. UN GA Res 45/116 (14 December 1990).

the UK's dualist¹¹⁴ approach to international law, treaty obligations are generally binding only on the State and do not confer rights, or create obligations, which are justiciable within the State. Domestic legislation is required to allow international obligations to have 'direct effect'. Accession to both EU Conventions was given approval by both Houses of Parliament on 19 December 2001. The Conventions were implemented under powers in the Anti-Terrorism, Crime and Security Act 2001 which enable measures approved by the EU JHA Council to be introduced by secondary legislation.¹¹⁵ The EU Extradition Regulations,¹¹⁶ which give effect to the 1995 and the 1996 Conventions, entered into force in March 2002. Parliament noted with approval the reduction in the extradition crime threshold, the abolition of the political offence exception, the removal of the exemption for fiscal offences and the modification to the specialty rule. Although the new Conventions facilitate extradition between EU States, they do not completely remove the right of States to refuse to extradite their own nationals, which is at times a significant limitation to international co-operation. However, formal extradition procedures between EU States will no longer be necessary when arrangements are in place to implement the European Commission proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States.¹¹⁷ This framework decision is a follow up to the adoption at the Tampere Special European Council 1999 of the principle of mutual recognition of judicial decisions by Member States of the EU. It is anticipated that the European arrest warrant will come into force on 1 January 2004.

8.3.6 The Council Framework Decision on the European arrest warrant¹¹⁸

The Tampere European Council conclusions stated that:

...the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast-track extradition procedures, without prejudice to the principle of fair trial.¹¹⁹

This statement is in line with other EU initiatives to expedite the extradition process including Recommendation 28 of the strategy of the EU for the next millennium as

114 There are two approaches that States may take with respect to the position of international law. Dualist States recognise a schism between national and international law, whereas monist States recognise only one legal order, in which international law is usually of a higher order than national law. Rather than being an abstruse matter of public international law, the position taken by a State will have a fundamental impact on the methods by which international law is incorporated into the national system.

115 The 1995 and the 1996 Conventions are Third Pillar measures for the purposes of s 111 of the Anti-Terrorism, Crime and Security Act 2001. Section 111 provides that an authorised minister may by regulations make provision for the purpose of implementing any obligation of the UK created or arising by or under any third pillar measure.

116 SI 2002/419, as amended by EU Extradition (Amendment) Regulations 2002 SI 2002/1662.

117 COM (2001) 0522.

118 For further discussion of the European arrest warrant, see Chapter 10.

119 Tampere European Council, item 35.

regards the prevention and control of organised crime. However, the initiatives to reform the surrender mechanisms within Member States have themselves been expedited by the events that took place in the US in September 2001. At an Extraordinary European Council meeting held on 21 September 2001, the Heads of State of the EU, the President of the European Parliament and the President of the European Commission called for the creation of a European warrant for arrest and extradition in accordance with the conclusions reached at the Tampere meeting. Consequently, the European Commission presented a Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States.¹²⁰ It is intended that the European arrest warrant will replace extradition within the EU with a system of surrender on the basis of mutual recognition of the warrant. This system, which sets out to facilitate law enforcement in the EU, will only apply to Member States. The European Commission has given its assurance that persons detained under an EU warrant will not be surrendered to a third State.¹²¹

The purpose of the European arrest warrant, which is based on the mutual recognition of court judgments, is the enforced transfer of a person from one Member State to another. A warrant will be issued in respect of the prosecution of all offences carrying a sentence of imprisonment of at least 12 months, or for persons already sentenced to a custodial or detention order exceeding four months. Having received a request from a judicial authority for the surrender of a convicted person or a person wanted for prosecution, Member States must arrange transfer. Grounds for refusal to execute a warrant will be very limited. It is anticipated that the whole process will be judicial with no executive or administrative discretion to refuse surrender and there will be no exception for nationals. Persons arrested under a warrant cannot rely on either the double criminality rule or the specialty rule. However, provision will be made for States to create a list of offences for which they will refuse to execute an arrest warrant. The mechanism of the arrest warrant is intended to replace many of the instruments authorising extradition within the EU including provisions of the 1990 Schengen Implementing Convention. In its response to the Council Framework proposal, the English Criminal Bar Association concluded that:

If the new European Warrant scheme rids us of a system the public perceive to be unnecessarily slow and cumbersome, we welcome it. We particularly endorse a system based on the principles of recognition. We caution, of course, against any new system, however, which deprives a defendant or requested person, of the proper opportunity to arrange his defence or fairly scrutinise the case against him. We accept and encourage these proposals which allow the Courts to continue to supervise and uphold individual rights, such as bail and access to a lawyer and court. Most importantly, as paragraph 11 of the preamble to the Framework proposal makes clear, a key condition is that the execution of the warrant does not lead to a violation of fundamental rights.¹²²

8.3.7 The UK Extradition Bill 2002

In addition to making provision for new extradition procedures in the UK, this legislation will contain provisions which implement the Council Framework Decision

120 COM (2001) 0522.

121 E-3359/01EN. Answer given by Mr Vitorino on behalf of the Commission.

122 www.criminalbar.co.uk/reports/dec01.cfm.

on the European arrest warrant and the surrender procedures between the Member States.¹²³ The Bill which was introduced in the House of Commons in November 2002 gives effect to proposals set out in a UK Government consultation document entitled *The Law on Extradition; A Review* which was published in March 2001. This consultation exercise, which began in 1997, set out to consider the implications of the new EU Conventions on extradition and to review the operation of extradition law in the UK generally. The Bill makes provision for a range of new extradition procedures, the adoption of the Framework Decision on the European arrest warrant, the retention with some modification to current arrangements for extradition to non-EU States, the abolition of the *prima facie* requirement in some cases and a simplified appeal process. Thus the Bill places States in two categories. States in the first category are EU States, including candidate countries due to join the EU in 2004. All other States having existing extradition arrangements with the UK are placed in the second category. Part 1 of the Bill deals with extradition arrangements from the UK to States in the first category and its provisions will implement the Framework Decision on the European arrest warrant. The bars to extradition under this part of the Bill include the rule against double jeopardy, the person's age, the death penalty, specialty and the person's earlier extradition to the UK from either another first category State or a non-first category State. There is provision under this part of the Bill for the judge to decide whether the person's extradition is compatible with the rights set out in the European Convention on Human Rights. The Bill imposes strict time limits for hearings. Without doubt the most contentious part of the Bill is the implementation of the European arrest warrant. However, the creation of a two-tiered system for extradition has also been subject to some criticism. This instrument has been described as 'a lengthy, cumbersome, ill-considered and badly drafted piece of legislation which will sacrifice a number of human rights without providing any substantial benefits in return'.¹²⁴

8.4 EXTRADITION AND EC LAW

In *R v Secretary of State for the Home Department ex p Launder*,¹²⁵ the applicant argued that an order for his extradition from the UK would be an infringement of his right to free movement as guaranteed by the EC Treaty. The court considered that extradition was outside the scope of Community law. EC law takes precedence over national law and the European Court of Justice (ECJ) has wide powers to ensure that national implementing measures conform strictly with the requirements of EC Directives and decisions. EC law is directly applicable in the national courts of the Member States. In *Amministrazione delle Finanze v Simmenthal*,¹²⁶ the ECJ held that 'every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals'. Whilst there are no specific provisions on human rights in the Treaty of Rome, the instrument that created the European Economic Community, the ECJ has consistently

123 COM (2001) 0522.

124 *Liberty's Response to the Draft Extradition Bill*, October 2002, para 4.

125 [1997] 1 WLR 864.

126 [1978] ECR 629.

emphasised its use of human rights principles as 'an independent means of developing Community policy'.¹²⁷ However, the ECJ is only concerned with national legislation which comes within the scope of Community law. Over the years, the ECJ has developed a jurisprudence of fundamental human rights drawn from general principles common to Member States¹²⁸ or embodied in international human rights instruments such as the European Convention on Human Rights.¹²⁹ Although, when drawing up the Treaty on European Union (TEU), Member States acknowledged the role played by the Convention,¹³⁰ it is questionable whether the TEU provisions add significantly to this general principle jurisprudence. The Treaty of Maastricht in 1992 provided that Member States of the EU would respect the rights guaranteed by the European Convention on Human Rights as general principles of Community law. Whilst, in 1997, the Amsterdam Treaty¹³¹ extended the power of the ECJ to oversee some justice and home affairs matters, which traditionally had been Third Pillar activities not subject to the jurisdiction of the Court, the issue of human rights and the TEU remains uncertain. The 1997 Amsterdam Treaty, for example, continues to state that the EU is founded on principles which include respect for human rights and fundamental freedoms, principles which are common to the Member States. AG Toth expressed his disquiet at this situation:

...an individual can bring alleged human rights violations before the Court on the basis of vague and unwritten general principles of law, but cannot do so by relying on the written provisions of a treaty which is supposed to be the Union's constitution!... It is, on the whole, unacceptable that there are no written, binding and enforceable rules on human rights in the Treaty on EU other than these vague references to another international instrument which is not part of Community law.¹³²

A draft Charter of Fundamental Rights has been prepared which addresses this issue and is due to be placed before the European Council for approval.

The ECJ has confirmed that the Community has no competence to accede to the European Convention on Human Rights.¹³³ In the opinion of the ECJ 'no treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field'.¹³⁴ Thus, the Community is not a contracting party to the Convention. This opinion has resulted in the ECJ addressing human rights issues by way of reference to European Court of Human Rights case law as general principles of Community law. If the matter is outside the scope of Community law, an individual may of course file a complaint

127 M Furse and S Nash, 'Free Movement, Criminal Law and Fundamental Rights in the European Community', 3 *Juridical Review* (1997), 148.

128 See generally J Copple and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?', 29 *CML Rev* (1992), 669; J Weiler and N Lockhart 'Taking Rights Seriously: The European Court and Its Fundamental Rights Jurisprudence—Pt I', 32 *CML Rev* (1995), 51; pt II, 32 *CML Rev* (1995), 579; G De Burca, 'Fundamental Human Rights and the Reach of EC Law', 13 *OJLS* (1993), 283; see also, eg, *J Nold v Commission* [1974] ECR 491.

129 All Member States are parties to the European Convention on Human Rights.

130 1992 TEU, Art 6(2) provides: 'The Union shall respect fundamental rights, as guaranteed by the European Convention.'

131 37 *ILM* (1998), 56.

132 AG Toth, 'The European Union and Human Rights: The Way Forward', 34 *CML Rev* (1997), 491, p 494.

133 Opinion 2/94 [1996] ECR I-1759.

134 *Ibid*, para 27.

against a Member State with the European Court of Human Rights. Furthermore, if a Member State has infringed a right guaranteed by Community law which also amounts to a violation of the Convention, then an individual has recourse to both the ECJ and the European Court of Human Rights. Toth is right to suggest that this situation is unsatisfactory particularly as in many instances it is by no means certain whether a matter falls within or outside the scope of Community law.¹³⁵

Provided national rules fall within the scope of Community law, the ECJ can determine whether these rules 'are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights'.¹³⁶ However, the ECJ has no power to examine the compatibility of national rules if they fall outside the ambit of Community law. Whether an issue is within the scope of Community law is often a matter for the national court to determine. If the national court refuses to accept that Community law has application to their case, then the ECJ will have no power to offer any protection against possible infringements of human rights.¹³⁷ Moreover, community rights can generally only be exercised by nationals of the Member States, thus, non-EC nationals¹³⁸ will be excluded from any protection of fundamental rights afforded by Community law.

8.4.1 Expulsion of nationals

There can be no doubt that the ECJ is competent to examine national rules concerning entry or expulsion of EC nationals¹³⁹ from the territory of Member States and can determine whether these rules accord with the fundamental rights as laid down in the Convention. In *R v Bouchereau*,¹⁴⁰ an English court was required to consider deportation in respect of a French national following his conviction for possession of a small quantity of a proscribed drug. The defendant wished to challenge his deportation by reference to Community law and a preliminary ruling was sought under Art 234. He argued that deportation would restrict his right of free movement within the Community. The ECJ considered this case fell within the Art 39(3) exception to free movement of workers. Article 39 of the EC Treaty, which secures free movement within the Community, also provides for derogation from this basic principle. Thus, Member States are entitled to expel EC nationals from their territory in a limited number of circumstances. Article 48(3) provides:

[Freedom of movement for workers] shall entail the right, subject to limitation justified on grounds of public policy, public security or public health... (b) to move freely within the territory of Member States for this purpose.

These provisions have been interpreted narrowly. Council Directive 64/221 explains in greater detail the substance and procedure for derogation. The Directive applies to

135 *Op cit*, Toth, note 132, p 947.

136 *Elliniki Radiophonia Tileorassi AE v Ypourgeio Pliroforissis and Kouvelas*, Case C-260/89, ERT [1991] ECR I-2925, para 42.

137 It is possible to write to the European Commission complaining that a national court has failed to fulfil an obligation under the EC Treaty, Art 100. See Art 226.

138 Nationals of non-EU States.

139 A national of one of the 15 Member States.

140 Case 30/77 [1977] ECR 1999; [1977] 2 CMLR 800.

'all measures concerning entry into their territory...or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health'.¹⁴¹ In *Bouchereau*,¹⁴² the ECJ decided that a recommendation for deportation made by a criminal court was a 'measure' within the meaning of the Directive and, thus, could only be made on grounds of public policy. In this case, it was decided that Bouchereau must present a 'sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'¹⁴³ to merit deportation.

8.4.2 The right to free movement

In the UK, the courts have consistently refused to accept that Community law has any application to extradition cases. Recently in *R v Secretary of State for the Home Department ex p Launder*,¹⁴⁴ the applicant argued that the effect of his arrest and any subsequent order for his extradition would be an infringement of his right to free movement as guaranteed by the EC Treaty. He had business interests in Germany which required him to travel between the Member States. Whilst primarily relying on Art 39, he also referred to Arts 43 and 49 which extend the rights of free movement beyond workers to include free movement of the self-employed who wish to set up a business or provide a service in another Member State.¹⁴⁵ The issue raised by the applicant in this appeal was that his extradition could not be justified on grounds of public policy. He argued that his extradition to Hong Kong would expose him to the risk of violations of the European Convention on Human Rights. He submitted that under Community law this violation of his fundamental rights would never be permitted on the grounds of public policy.

The House of Lords accepted that Launder was entitled, by virtue of s 2 of the European Communities Act 1972, to apply to his national court to ensure his rights under Community law were enforced. However, the court would not accept that Community law applied to extradition cases. In rejecting the respondent's argument that the Secretary of State needed to justify his decision to extradite him on the grounds of public policy, Lord Hope said:

The decision in *Ex p Budlong* was not that extradition could always be justified on grounds of public policy, but that the relevant provisions of the EC Treaty did not apply to extradition cases at all. As I consider that *Ex p Budlong* was correctly decided on this point, I consider it unnecessary to examine the scope of the public policy exception in this case.

In arriving at its decision, the House of Lords relied upon the reasoning of Griffiths J in *R v Governor of Pentonville Prison ex p Budlong*.¹⁴⁶ Following a request by the US for her extradition, the applicant sought a reference to the ECJ for a preliminary ruling on the question whether her extradition had to be justified on public policy grounds under Art 39(3). In her submission, she had relied upon the decision of the

141 Council Directive 64/221, Art 2.

142 [1977] 2 CMLR 800.

143 *Ibid*, para 35.

144 [1997] 1 WLR 864.

145 As with Art 39, these rights can only be limited if justified on grounds of public policy, public security or public health.

146 [1980] 1 WLR 1110.

ECJ in *R v Bouchereau*,¹⁴⁷ which held that a recommendation for deportation could only be made on public policy grounds. The basis of the argument in *Ex p Budlong* was that under Community law an order for her extradition would need to be supported on public policy grounds. In rejecting this submission, Griffiths J noted that to accept this argument would impose a formidable fetter on extradition. It is often the case in extradition proceedings that the fugitive does not represent a threat to the fundamental interests of the requested State:

Does that then mean he is not to be extradited to face justice where he has committed the crime? I cannot believe that it can have been the intention of those who drew the Treaty of Rome that it should have the effect of emasculating the process of extradition.¹⁴⁸

He was also concerned that to justify extradition on the basis of public policy grounds would produce anomalies between Member States who had entered into extradition treaties before the Treaty of Rome and those whose treaties had been entered into or amended after that date. In rejecting the applicant's submission in this case the court decided that Community law had no relevance to extradition cases. Furthermore, the issues were reasonably clear and free from doubt and no reference was made to the ECJ.

Griffiths J's reasoning may be open to question. As a matter of international law, community obligations override all previous treaty obligations, and it would be a breach of community constitutional law for a Member State to accept conflicting obligations following accession to the community. However, the decision in *Ex p Budlong*¹⁴⁹ has been followed in subsequent cases. In *Re Habeas Corpus Application of Navinder Singh Virdee*,¹⁵⁰ for example, the applicant was facing extradition to a State outside the EC under the Visiting Forces Act 1952 and the court held that Art 39 did not apply in these circumstances. Further, in *In re Habeas Corpus Application of Carthage Healy*,¹⁵¹ the court was of the opinion that Art 39 was not relevant when considering the detention of an Irish national pending extradition from the UK. This issue has now had another airing in *Ex p Launder*.¹⁵² Their Lordships accepted that Griffiths J's reasoning in *Ex p Budlong* was entirely satisfactory. There can be no doubt that the relevant provisions of the EC Treaty have no application to cases involving extradition from the UK. As a consequence, fugitive offenders in the UK will not have recourse to Community law as a source of protection from the risk of violations of fundamental rights.

8.5 EXTRADITION AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

While most modern extradition treaties appear to seek a balance between protecting the fundamental rights of the requested person and the need to ensure that the

147 [1978] QB 732.

148 [1980] 1 WLR 1110, p 1127.

149 *Ibid.*

150 [1980] 1 CMLR 709.

151 [1984] 3 CMLR 575.

152 [1997] 1 WLR 864.

extradition process operates efficiently and effectively, it is doubtful whether there is a rule of international law requiring extradition procedures to take account of general principles of human rights.¹⁵³ Nevertheless, in practice, many extradition treaties do impose procedural protections restricting extradition if surrender would lead to gross violations of human rights. Although, on occasion, human rights instruments do not contain specific provisions dealing with extradition, reluctance to include an express provision has not placed extradition beyond the scope of human rights treaties. Thus, fundamental human rights principles have been found to apply to extradition.

8.5.1 European Convention on Human Rights¹⁵⁴

The European Convention on Human Rights was signed in Rome on 4 November 1950 and entered into force on 3 September 1953. It takes the form of a treaty, binding in international law, which sets out minimum international standards for the protection of human rights and provides effective enforcement procedures. The Convention established the first international complaints procedure and the first international court dealing exclusively with human rights. The substantive rights and freedoms guaranteed by the Convention and the procedures for enforcing these rights have subsequently been extended by the adoption of a series of protocols. It was not intended that the Convention should replace the protection of human rights at national level; indeed, before there is recourse to proceedings under the Convention all remedies at the domestic level must have been exhausted. In the event of an alleged breach of the Convention, the European Court of Human Rights (ECHR) can now receive applications from both States and individuals claiming to be a victim of a violation. Although the UK was one of the first States to sign and ratify the Convention, it refused to recognise the right of individual petition and the jurisdiction of the ECHR until 1966. The right of individual complaint and recognition of the ECHR's jurisdiction are now mandatory.

The ECHR has acknowledged that contracting States have a right, subject to their various treaty obligations, to control entry, residence and expulsion of non-nationals. Moreover, the right to political asylum is not contained within the Convention or any of its protocols. Article 5(1)(f) of the European Convention on Human Rights specifically permits the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or a person against whom action is being taken with a view to deportation or extradition. Further, provided there is a legal basis for the fugitive's arrest deportation in the disguise of extradition would not necessarily be contrary to the Convention.¹⁵⁵ Thus, the Convention does not guarantee the right not to be expelled from the territory of a contracting State. However, it is well established in the jurisprudence of the ECHR that extradition may give rise to consequences that adversely affect the enjoyment of a right guaranteed by the Convention.¹⁵⁶ It has also been accepted that in some circumstances an order for

153 For further discussion, see *op cit*, Van den Wyngaert, note 55, pp 757–79.

154 ETS 5, UKTS 71 (1953).

155 *Illich Sanchez Ramirez v France*, Application No 28780/95.

156 *Soering v UK* (1989) 11 EHRR 439.

157 *Cruz Varas v Sweden* (1991) 14 EHRR 1.

deportation would, if executed, give rise to a violation of the Convention.¹⁵⁷ The ECHR has demonstrated a willingness to resolve a conflict between obligations under an extradition treaty and obligations under the Convention in favour of protecting fundamental rights.¹⁵⁸ It would appear that the protection provided by Art 3 is wider than that provided by other international human rights instruments.¹⁵⁹ While there is a need to seek a balance between protecting the fundamental rights of the individual and the public interest, if the ECHR is satisfied that the applicant is at risk of being subjected to any of the forms of treatment proscribed by Art 3, the balance must be in favour of non-extradition. Accordingly, Art 3 of the European Convention on Human Rights can impose significant limitations on the use of the extradition process.

8.5.2 Prohibition against torture and inhuman and degrading treatment

In the landmark case of *Soering v UK*,¹⁶⁰ the ECHR was of the opinion that to surrender a person to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, inhuman or degrading treatment would be a violation of Art 3 of the European Convention on Human Rights. In this case, the UK sought to extradite a German national from the UK to the US under the terms of an extradition treaty that had been incorporated into the law of the UK.¹⁶¹ The applicant was accused of committing a murder in Virginia, in the US, and argued that his extradition would amount to a violation of Art 3 of the Convention. In capital murder cases, the State of Virginia could impose the death penalty which generally involved a prisoner spending long periods of time on 'death row'. The applicant accepted that the death penalty was not *per se* contrary to the Convention as Art 2(1) permits capital punishment under certain conditions. However, he argued that exposure to the death row phenomenon would amount to inhuman and degrading treatment and infringe Art 3. The UK Government submitted that the Convention should not be interpreted so as to impose responsibility on a contracting State for acts which occur outside its jurisdiction. The basis for this argument was that such an interpretation would interfere with international treaty rights and lead to a conflict with the norms of the international judicial process. Further, it would involve adjudication on the internal affairs of a foreign State and its domestic criminal justice system. In support of this argument, the UK Government relied upon traditional principles of extradition which respect the rule of non-inquiry. In rejecting this argument, the ECHR accepted that liability is incurred by the extraditing contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.¹⁶² Furthermore, it was noted that:

158 For further discussion of this case and extradition and human rights generally, see *op cit*, Swart, note 39, pp 505–34.

159 In *Ahmed v Austria* (1996) 24 EHRR 278, para 41, it was noted that: 'The protection afforded by Art 3 is thus wider than that provided by Art 33 of the UN 1951 Convention on the Status of Refugees.'

160 (1989) 11 EHRR 439.

161 By Orders in Council, namely, the USA (Extradition) Order 1976 SI 1976/2144 and the USA (Extradition Amendment) Order 1986 SI 1986/2020.

162 (1989) 11 EHRR 439, para 91.

...Art 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.¹⁶³

Since *Soering*, the ECHR has consistently reiterated its position regarding Art 3, which it accepts encapsulates the most fundamental right of an individual. Despite acknowledging the risk of establishing safe havens for fugitive offenders which could undermine the foundations of extradition, the ECHR has steadfastly maintained that there was no room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Art 3 is engaged.¹⁶⁴ Indeed, in *Hilal v UK*¹⁶⁵ the ECHR observed that notwithstanding the State's right to control entry, Art 3 implies an obligation not to expel if there is a real risk of torture. In *Jabari v Turkey*,¹⁶⁶ the ECHR observed that having regard to the absolute nature of Art 3 States must undertake a rigorous scrutiny¹⁶⁷ of claims that expulsion to a third country will expose that individual to treatment prohibited by Art 3. The applicant, an Iranian national, alleged that she would face a real risk of ill-treatment and death by stoning if expelled by Turkey and returned to Iran. Finding for the applicant, the ECHR held that the Turkish authorities had failed to engage in any meaningful assessment of the application. Following the terrorist attacks in the US in September 2001, concerns have been expressed regarding the problems which may result if Council of Europe States are reluctant to extradite to the US on the basis of the death row phenomenon. However, the ECHR has generally indicated its willingness to accept undertakings from the United States as evidence that extradition will not give rise to a breach of Art 3.

The *Soering* principle requires that applicants show that there are 'substantial grounds' for their argument that they would be exposed to inhuman and degrading treatment. In the absence of convincing evidence to this effect, extradition to States with poor human rights records will not necessarily be contrary to the Convention. In *Mamatkulov and Abdurasulovic v Turkey*,¹⁶⁸ for example, the applicants complained that following their extradition from Turkey to Uzbekistan their lives were at risk and they were in danger of being subjected to torture. The complaint also related to the unfairness of Turkish extradition proceedings and criminal proceedings in Uzbekistan. The ECHR reiterated that while contracting States have the right to control the entry, residence and expulsion of aliens, States may incur responsibility where substantial grounds exist for believing that a person would face a real risk of being subjected to treatment which is contrary to Art 3. Noting that the applicants in this case had already been expelled, the ECHR held that Turkey failed to comply with procedures designed to assist the ECHR carry out an effective examination of the application. However, while the evidence in this case indicated concern relating to the general situation in Uzbekistan, it did not confirm the specific allegations. In addition, allegations that the applicants had been subjected to torture were not

163 *Ibid*, para 88.

164 *Ibid*, para 81.

165 (2001) 33 EHRR 2.

166 (2000) 9 BHRC 1.

167 *Ibid*, para 39.

168 Application Nos 46827/99 and 46951/99.

corroborated by medical examinations conducted by prison doctors. Accordingly, the ECHR found that there was insufficient evidence to warrant a finding of a violation of Art 3. Referring to the complaint regarding the fairness of proceedings, the ECHR emphasised that proceedings relating to the entry and expulsion of aliens do not invoke fair trial rights under Art 6.

8.5.3 The *Soering* principle and deportation

Subsequent developments illustrate that the ECHR is prepared, within the context of Art 3, to extend the *Soering* principle to other forms of expulsion. In *Chahal v UK*,¹⁶⁹ the ECHR observed that the prohibition against expulsion in Art 3 cases was absolutely irrespective of the applicant's conduct and applied to deportation. The applicant, a leading figure in the Sikh community in the UK, was detained in 1985 under the Prevention of Terrorism (Temporary Provisions) Act 1984 in respect of a conspiracy to assassinate the Indian Prime Minister.¹⁷⁰ The Secretary of State ordered his deportation to India on the grounds that his continued presence in the UK was not conducive to the public good for reasons of national security.¹⁷¹ The applicant sought asylum on the basis that he could establish the well founded fear of persecution test as required under the terms of the 1951 UN Convention on the Status of Refugees.¹⁷² His application was rejected. Following Chahal's successful application for judicial review, the Secretary of State was required to re-examine the case. Again asylum was refused and the deportation order confirmed. The applicant complained that his deportation would result in a violation of Art 3 of the European Convention on Human Rights. The majority of the ECHR was satisfied that the order for the applicant's deportation would, if executed, give rise to a violation of Art 3, and where there are substantial grounds for believing that expulsion would result in ill-treatment, the national interests of the State could not be invoked to override the interests of the individual. The European Court observed that it was entitled to conduct its own examination of the existence of a real risk of ill-treatment and considered reports supplied by Amnesty International and the UN's special rapporteur on torture. Notwithstanding the efforts of the Indian authorities to bring about reform, the European Court was sufficiently satisfied that the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem¹⁷³ and it was accepted that the applicant's return would amount to a violation of Art 3.

While the guarantees provided by Art 3 have generally been held to apply to risks created by public authorities in the receiving State, in *D v UK*,¹⁷⁴ the ECHR was prepared to assess the risk resulting from the State's inability to prevent a violation of Art 3. On his arrival in the UK, the applicant was found in possession of a large

169 (1996) 23 EHRR 413.

170 He was eventually released without charge. In 1986, he was convicted of assault and affray and served concurrent sentences of six and nine months; however, these convictions were eventually quashed by the Court of Appeal.

171 See Immigration Act 1971, s 3(5)(b).

172 189 UNTS 150.

173 (1996) 23 EHRR 413, para 105.

174 (1997) 24 EHRR 423.

quantity of a proscribed drug and sentenced to six years' imprisonment. He was discovered to be suffering from an AIDS-related condition and by mid-1996 his prognosis was poor. Shortly before his release from prison, the immigration authorities ordered his removal from the UK. The applicant complained that the receiving State could not provide the medical care needed to treat his condition and his health would deteriorate. While the ECHR accepted that the expulsion of alien drug couriers was a justified response to drug-trafficking, it must be balanced against the absolute prohibition on torture and inhuman or degrading treatment. Where there was a real risk that the applicant's deportation would result in a violation of Art 3, the balance must be in favour of non-expulsion. Persons can be lawfully detained pending a deportation hearing. In *Ex p Saadi*¹⁷⁵ the House of Lords held that detention for a short period in order to bring about a speedy decision making process was not necessarily unlawful where the power is exercised to prevent unauthorised entry.

The *Soering* principle was further extended in *HLR v France*,¹⁷⁶ when the ECHR was called upon to consider whether the inability of the receiving State to protect the applicant from the acts of a third party would infringe Art 3. Having been found in possession of cocaine, the applicant was sentenced to imprisonment by a French court and permanently excluded from French territory. During the criminal proceedings, he gave evidence against members of a Colombian drug cartel and as a consequence feared for his safety. He claimed that his deportation to Colombia would give rise to a violation of Art 3 on the grounds that the Colombian authorities were incapable of giving him adequate protection from reprisals by members of the drug cartel. Whilst the Commission found for the applicant, the European Court was not satisfied that there were substantial grounds for believing his deportation would expose him to a real risk of the treatment prohibited by Art 3. Furthermore, this claim must be assessed against the background of the general situation regarding the protection of human rights in Colombia and the applicant failed to show that his personal situation would be worse than that of other Colombians were he to be deported. Notwithstanding the outcome of this case, the European Court acknowledges that Art 3 of the European Convention on Human Rights absolutely prohibits torture or inhuman or degrading treatment, irrespective of the victim's conduct or the source of the ill-treatment and, if extradition treaties fail to protect the person adequately, a minimum level of protection is provided by the Convention. However, many of the other substantive clauses in the Convention and its protocols make provision for exceptions and derogations in the event of a public emergency.¹⁷⁷ The Convention does not in principle prohibit contracting States from regulating the length of stay of aliens and, in some circumstances, an expulsion motivated by concern to regulate the labour market will be justified.¹⁷⁸ Accordingly, the ECHR is not always willing to accept that Convention rights provide a bar to extradition.

175 [2002] UKHL 41.

176 (1998) 26 EHRR 29.

177 See *Ireland v UK*, Ser A, No 25, para 65.

178 *Berrehab v The Netherlands* (1988) 11 EHRR 322.

8.5.4 International Covenant on Civil and Political Rights

The *travaux préparatoires* reveal that during the drafting of the Covenant a proposal to include a provision addressing extradition was expressly rejected. However, while the Covenant may not specifically provide for a right not to be extradited, the effects of extradition can give rise to issues under other provisions of the Covenant. The surrender of a person to another State in circumstances in which it was foreseeable that torture would take place, for example, would place the contracting party in violation of its obligation under Art 7 of the Covenant. The foreseeability of a prohibited consequence would mean that there was a present violation of the Covenant, even though the consequence did not occur until later. Communications alleging violations of the International Covenant on Civil and Political Rights are considered by the Human Rights Committee, which was established under Art 28. Whilst the Committee will consider whether the author of the communication was granted the necessary procedural safeguards provided in the Covenant, it has consistently maintained that it is not competent to reassess the facts and evidence considered by national courts. The Committee can request that a contracting party does not deport to States which carry out the death penalty.¹⁷⁹

In *Kindler v Canada*,¹⁸⁰ the author complained that the decision to extradite him under the Extradition Treaty of 1976 between the US and Canada violated several articles of the Covenant. Following his conviction for murder in the US, the jury recommended the imposition of the death penalty. However, prior to sentence he fled to Canada where he was arrested and eventually extradited to the US. The issue in this case was whether extradition exposed the author to a real risk of a violation of his rights under the Covenant. The Committee decided that the communication was admissible with respect to Art 6, which addresses capital punishment, and Art 7, which prohibits torture and cruel, inhuman and degrading treatment and found that the material submitted by the parties did not support a complaint based on the absence of procedural guarantees during the course of the extradition process. The Committee did not find that the terms of Art 6 necessarily require Canada to refuse to extradite to death penalty States. Furthermore, on previous occasions the Committee found that 'prolonged periods' of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment.¹⁸¹ Accordingly, the facts of this case did not reveal a violation of either Art 6 or 7 of the Covenant.

In *T v Australia*,¹⁸² the author claimed that her husband's deportation to Malaysia, where she alleged there was a real risk that he would face the death penalty, was a violation of Australia's obligation to protect his right to life. He had been convicted in Australia of importing heroin from Malaysia. Although the Australian Government sought his deportation on the grounds that he had no entitlement to remain in Australia, Malaysia had not requested his return. It was noted that deportation differs from extradition in that 'the purpose of extradition is to return a

179 International Criminal Tribunal for the Former Yugoslavia (ICTY) Rules, r 86.

180 Case No 470/1991.

181 See *Howard Martin v Jamaica*, Application No 317/1988, para 12.2.

182 Case No 706/1996.

person for prosecution or to serve a sentence, whereas no such necessary connection exists between expulsion and possible prosecution'.¹⁸³ The Committee acknowledged that deportation to a State where there is a real risk that a person's rights under the Covenant will be violated may result in a violation of the Convention. Whilst a real risk can be deducted from the intent of the receiving State, as well as from a general pattern in similar cases, in this case, the author failed to substantiate the claim that there was a real risk that, on his return to Malaysia, her husband would be charged, prosecuted and sentenced to death. Accordingly, the facts of this case did not reveal a violation by Australia of any of the provisions of the Covenant.

8.5.5 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

This Convention was drafted by the UN Commission on Human Rights and adopted by the UN General Assembly in 1984.¹⁸⁴ Contracting parties are under an obligation to take steps to prevent acts of torture 'in any territory under its jurisdiction'.¹⁸⁵ Article 3 of the Convention requires that Member States undertake not to expel, return or extradite persons to States if there are substantial grounds for believing they would be at risk of being subjected to torture. In determining whether there are such grounds, the requested States may take account of a consistent pattern of human rights violations. Allegations of violations are considered by the Committee Against Torture, which is established under Art 17 of the Convention. The Committee can request that a State party refrain from expelling or extraditing a person whilst a communication is being considered.¹⁸⁶ Compliance with this provision is considered to be essential in order to protect a person from serious harm. In *Nunez Chipana v Venezuela*,¹⁸⁷ the author of the communication claimed that her extradition to Peru placed her in danger of being subjected to torture by the Peruvian authorities and was in violation of Art 3 of the Convention. It was relevant to her claim that she was wanted in connection with terrorist offences. She also maintained that proceedings in Peru for offences in connection with terrorism did not comply with fundamental fair trial principles. The Committee observed that it had received many allegations from reliable sources detailing the use of torture by Peruvian authorities in relation to the investigation of terrorism. The Committee Against Torture considered that in view of the nature of the accusations set out in the extradition request, the author was indeed in a situation where her return to Peru placed her in danger of being subjected to torture. The Committee found that in surrendering the author to the Peruvian authorities, Venezuela failed to fulfil its obligation under Art 3 of the Convention.

183 *Ibid*, para 5.6.

184 GA Res 29/46.

185 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 1.

186 ICTY Rules, r 108, para 3.

187 Case No 110/1998; CAT/C/21/D/110/1998.

8.6 EXTRADITION PROCEEDINGS AND DOMESTIC FAIR TRIAL SAFEGUARDS

Traditionally courts in the UK, Canada and the US have taken the view that it is not the duty of the committal court to enquire into the adequacy or otherwise of procedural safeguards afforded to a defendant in the requesting State. In *Re Arton*,¹⁸⁸ the English court considered it inappropriate to:

...enter into the question of whether the action of the executive of a foreign country at peace with us is honest or dishonest; we must assume that the French courts will administer justice in accordance with their own law; and so long as they do that, or whether they do it or not, we cannot interfere beforehand to prevent them from exercising in this particular case the procedure which they exercise with regard to any criminals who may be brought within their jurisdiction.

However, this viewpoint is now somewhat outmoded and in appropriate circumstances national courts will consider the issue of fair trial in the requesting State. Thus in *R v Secretary of State for the Home Department ex p Rachid Ramda*,¹⁸⁹ the court considered that the Secretary of State should refuse extradition if satisfied that evidence supporting the request may have been obtained by oppression and that the requesting State could refuse to hear argument on the matter. This case involved an application for judicial review of a decision to order the extradition of an Algerian national to France for trial in relation to a series of terrorist bombings. The French Government's case was based almost entirely on the confession of a third party which had allegedly been obtained as a direct result of brutality. Similarly, in *Re Saifi*¹⁹⁰ the English Divisional Court was satisfied that it would be unfair to return the applicant to India on the ground that evidence supporting the request for extradition had been obtained in bad faith. The case against the applicant depended upon the evidence of one witness which had been obtained under circumstances of extreme duress. The court expressed concern that there was a significant risk that misbehaviour by the Indian police had so tainted the evidence as to render a fair trial impossible. The ECHR has acknowledged, on many occasions, that the right to a fair trial holds a prominent place in a democratic society, and in the *Soering* case observed that the matter of fair trial might exceptionally be raised by an extradition decision in circumstances where the fugitive has suffered, or risks suffering, a flagrant denial of a fair trial in the requesting country.¹⁹¹ However, the Court emphasised that there would need to be a serious infringement of procedural rights before this matter could amount to a bar to extradition. The Court found that the circumstances of *Soering* did not disclose such a risk. Nevertheless, in order to arrive at a decision on this issue the Court would need to consider aspects of the criminal justice system of a foreign State. An investigation of this nature would be contrary to traditional principles of non-inquiry.¹⁹² It may be that the Court is willing to risk the possible political consequences of interference in Art 3 cases.

188 [1896] 1 QB 108, pp 115–16.

189 [2002] EWHC 1278.

190 [2001] 4 All ER 168.

191 (1989) 11 EHRR 439, para 113.

192 For further discussion of this point, see *op cit*, Van den Wyngaert, note 55, p 771.

8.7 APPLICABILITY OF DOMESTIC EXCLUSIONARY RULES OF EVIDENCE

While extradition law remains within the field of international law, extradition proceedings take place in national courts, and are thereby subject to national procedural rules. Until recently, domestic legislation specifically prohibited magistrates in the UK from considering whether evidence produced by the requesting State for the purpose of an extradition hearing would be admissible at the trial in the requesting State.¹⁹³ In *Ex p Chinoy*,¹⁹⁴ the English Divisional Court was prepared to accept that normal rules of procedure and evidence applied to extradition proceedings. In this case, the court found no fault with the magistrate's decision, in the context of his discretionary powers to exclude evidence, that the methods employed by the US agents were appropriate to the situation which they were investigating and did not require the exclusion of evidence.¹⁹⁵ Although accepting that the doctrine of abuse of process applied to extradition proceedings,¹⁹⁶ the fact that committal proceedings were based on evidence obtained by means which are criminal in France and, according to French law, are in breach of the European Convention on Human Rights did not constitute an abuse of process of the magistrates' court. Accordingly, the magistrate was entitled to decline jurisdiction. Similarly, in *Ex p Martin*,¹⁹⁷ the court did not consider it necessary to inquire into whether evidence obtained outside the UK was in accordance with foreign law. The US Government sought the applicant's extradition on the basis of evidence obtained by intercepting telephone calls in the US. The court was satisfied that a foreign telephone intercept obtained in the US, by US Government agents, could be adduced in evidence in England because the Interception of Communications Act 1985 has no extra-territorial jurisdiction.¹⁹⁸

In *Ex p Levin*,¹⁹⁹ the House of Lords held that since extradition proceedings are criminal proceedings, albeit of a special type, the committing magistrate was entitled to apply the provisions of the Police and Criminal Evidence Act 1984 (PACE). Prior to this decision, there was some uncertainty in the UK as to whether normal domestic rules of criminal evidence and procedure applied to extradition proceedings. In holding that a magistrate's duty is limited to ensuring compliance with the EA 1989,²⁰⁰ the Divisional Court in *Ex p Lee*,²⁰¹ had taken the view that the committing magistrate had no common law discretion to refuse to admit admissible evidence.²⁰²

193 EA 1870, s 10.

194 [1992] 1 All ER 317.

195 *Ibid*, p 333.

196 See *Ex p Sinclair* [1990] 2 All ER 789.

197 [1995] 1 WLR 412.

198 Telephone intercepts obtained in the UK were, by virtue of the Interception of Communications Act 1985, inadmissible in proceedings in the UK.

199 [1997] 3 WLR 117.

200 Eg, EA 1989, s 1, the magistrate must be satisfied that the offence is an extradition crime within the meaning of the Act.

201 [1993] 3 All ER 504.

202 This was consistent with the rule at common law in domestic criminal proceedings. See *R v Horsham Justices ex p Bukhari* (1981) 74 Cr App R 291; *R v Highbury Magistrates' Court ex p Boyce* (1984) 79 Cr App R 132; and *R v Conway* (1990) 91 Cr App R 143.

It is relevant to note that, in this case, the court limited itself to considering whether certain aspects of domestic criminal procedure such as the duty to make available relevant unused material applied to extradition proceedings. Based on current practice in domestic criminal proceedings,²⁰³ the applicant argued that in extradition cases the prosecution had a duty to furnish the defence with all unused material. Failure to do so was unfair because it deprived the magistrate of the opportunity to assess all the evidence.²⁰⁴ Rejecting this submission, the court held that the inherent power of the judge at common law to ensure a fair trial did not extend to extradition proceedings because fairness was not a criterion relevant to the function of the committing court.²⁰⁵ Maintaining that the character of extradition proceedings is essentially different from domestic criminal proceedings, the court noted that, whilst s 9(2) of the EA 1989 gave the committing court jurisdiction and powers, as nearly as may be to its powers in domestic criminal proceedings, it construed this 'as nearly as may be consistent with the terms and purpose of extradition legislation'. Citing *Kindler v Canada*,²⁰⁶ as lending support for this view, the court expressed concern that imposing principles of fairness could interfere with obligations established under the treaty. The majority of the Supreme Court of Canada accepted that extradition proceedings were fundamentally different from domestic criminal proceedings in form and function. McLachlin considered that while the extradition process is: '...an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for difference in other jurisdictions.'²⁰⁷

The principal safeguard for the fugitive against unfairness in the UK is the Secretary of State's discretion to refuse to surrender the applicant conferred by s 12 of the EA 1989. In holding that the High Court has no inherent supervisory power at common law to intervene in extradition proceedings,²⁰⁸ Lord Jauncey of Tullichettle, in *Re Schmidt*,²⁰⁹ said:

In my view the position in relation to a pending trial in England is wholly different to that in relation to pending proceedings for extradition from England. In the former case, the High Court in its supervisory jurisdiction is the only bulwark against any abuse of process resulting in injustice or oppression which may have resulted in the accused being brought to trial in England. In the latter case, not only has the Secretary of State power to refuse to surrender the accused in such circumstances but the courts of the requesting authority are likely to have powers similar to those held to exist in *Reg v Horseferry Road Magistrates' Court ex p Bennett*. An accused fugitive is, thus, likely to have not one but two safeguards against injustice and oppression before being brought to trial in the requesting State.

203 See *R v Ward* [1993] 2 All ER 577 and the *Practice Note* [1982] 1 All ER 734.

204 EA 1989, s 9(8)(a), requires that the magistrate be satisfied 'that the evidence would be sufficient to warrant his trial if the extradition crime had taken place within the jurisdiction of the court'.

205 [1993] 3 All ER 504, p 510.

206 (1991) 84 DLR (4th) 438.

207 *Ibid*, p 488.

208 The jurisdiction of the High Court is limited to the powers conferred by the EA 1989, s 11.

209 [1995] 1 AC 339.

In *Ex p Francis*,²¹⁰ the Divisional Court found no appellate authority to support the view that the committing magistrate could exercise discretionary exclusionary powers conferred by statute.²¹¹ Relying upon *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government*,²¹² the applicant argued that there was no distinction between criminal proceedings and a criminal cause or matter. While acknowledging that in a number of extradition cases, including *Ex p Chinoy*,²¹³ the court proceeded on the basis that s 78 of PACE 1984 applied to extradition proceedings, the Divisional Court rejected the appellant's submission. However, one year later the Divisional Court decided that *Ex p Francis* was wrongly decided and should not be followed.

While the decision in *Ex p Levin*²¹⁴ lends support for the view that fugitives are entitled to similar considerations as a defendant charged with an offence under national law, the court thought the discretion to exclude evidence would be applied rarely. Magistrates should work on the assumption that the judge in the requesting State would ensure that the trial would be fair. During extradition proceedings, the magistrate was only required to consider whether the admission of the evidence would have an adverse effect on the fairness of the decision to commit or extradite the accused.²¹⁵ Furthermore, if the court applied the same principles of fairness applicable to domestic criminal proceedings it would undermine the effectiveness of international treaty obligations.²¹⁶ Seemingly, their Lordships are suggesting that the threshold for excluding evidence in extradition proceedings is lower than in domestic committal proceedings. In this case, the court was satisfied that this threshold had not been reached and accepted that no reasonable magistrate would have excluded the evidence.

8.8 REVIEW BY DOMESTIC AUTHORITIES

The conduct of extradition proceedings in the UK is entirely the creature of statute²¹⁷ which raises a number of important issues in relation to the protections available to the fugitive. The EA 1989 gives specific powers to the court and to the Secretary of State to refuse to surrender a person if it appears that it would be unjust or oppressive to do so. In the exercise of its supervisory jurisdiction, the court has powers to review a decision taken by the Secretary of State. However, the judiciary has demonstrated a reluctance to become embroiled in politically sensitive issues fearing that it may become involved in matters in which it is in no position to penetrate.²¹⁸ In *R v Governor of Brixton Prison ex p Kotronis*,²¹⁹ Lord Reid identified the problem and thought it

210 [1995] 1 WLR 1121.

211 PACE, s 78.

212 [1943] AC 147.

213 [1992] 1 All ER 317.

214 [1997] 3 WLR 117.

215 *Ibid*, p 123.

216 *Ibid*.

217 *Ex p Lee* [1993] 3 All ER 504, p 508.

218 [1997] WLR 839, p 857.

219 [1971] AC 250.

would be impossible for the courts or for the judges to assume that any foreign government with which Her Majesty's Government has diplomatic relations may act in such a manner. In this case, the applicant was a Greek national who had been convicted and sentenced in a Greek court. He was an opponent of the Greek Government and feared that he would be detained for matters other than those for which extradition was sought.

In extradition and deportation cases in England and Wales, the question has arisen whether judicial review, the process whereby a court may review an executive discretion on the basis that it was irrational, could provide an effective remedy as required by Art 13 of the European Convention on Human Rights. The effect of Art 13 is to require the provision of a domestic remedy allowing a competent national authority to address the complaint and to grant appropriate relief. In the *Soering* case, the ECHR accepted the English court did have the power to review the reasonableness of an extradition decision and, thus, was satisfied that judicial review proceedings provided the applicant a remedy. Prior to *Soering*, the English court had refused to review any decision of the Secretary of State on the grounds that he failed to consider whether or not there was a breach of the European Convention on Human Rights.²²⁰ However, in *R v Secretary of State for the Home Department ex p Launder*,²²¹ the House of Lords accepted that, although the Convention had not yet been incorporated into the law of the UK, it was appropriate in this case to take account of its principles.²²² The applicant submitted that if he were returned to Hong Kong after transfer of sovereignty to the People's Republic of China his rights under the European Convention on Human Rights would be violated. Accepting that arguments under the Convention were directly relevant, Lord Hope considered that 'if the applicant is to have an effective remedy against a decision which is flawed because the decision maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument. The risk of an interference with the applicant's human rights was itself a ground for subjecting the decisions to the most anxious scrutiny, in accordance with the principles laid down by this House in *R v Secretary of State for the Home Department ex p Bugdaycay*'.²²³ The decision in *Exp Launder*²²⁴ illustrates the restrictive approach generally taken by the English court and confirms that in extradition proceedings the court accepts its function is limited by legislation. Thus, the question whether it was unjust or oppressive to order the applicant's return to Hong Kong:

...must in the end depend upon whether the PRC can be trusted in implement of its treaty obligations to respect his fundamental rights, allow him a fair trial and leave it to the courts, if he is convicted, to determine the appropriate punishment. It cannot be stressed too strongly that the decision in this matter rests with the Secretary of State and not at all with the court. The function of the court in the exercise of its supervisory jurisdiction is that of review. This is not an appeal against the Secretary of State's decision on the facts. His decision has had to be taken amidst an atmosphere of mistrust and

220 See *R v Secretary of State ex p Kirkwood* [1984] 1 WLR 913.

221 [1997] WLR 864.

222 Following the enforcement of the Human Rights Act (HRA) 1998, courts in the UK must take account of decisions of the ECHR when determining a question arising in connection with a Convention right.

223 [1987] AC 514.

224 [1997] 1 WLR 839.

suspicion which a court is in no position to penetrate. The visible part is the framework of law which I have described. That part can be explained and analysed. The invisible part is about the hearts and minds of those who will be responsible for the administration of justice in Hong Kong after the handover. This is not capable of analysis. It depends, in the end, upon the exercise of judgment of a kind which lies beyond the expertise of the court. That, no doubt, is why the decision whether or not to grant the warrant has been entrusted to the Secretary of State by Parliament.²²⁵

In allowing this appeal, their Lordships accepted that on the evidence before them, it was not irrational for the Secretary of State to find that there was no case on human rights grounds for refusing extradition to Hong Kong. Accordingly, the decision to surrender the fugitive was reasonable.

8.9 EXTRADITION AND ABDUCTION²²⁶

Extradition procedures are often so cumbersome and time consuming that frequently they are either ignored or intentionally circumvented by the authorities. The legality of the procedures used to secure the presence of the suspect is generally not the concern of the receiving State. An examination of the differing approaches taken by the courts to the irregular return of suspects by unlawful methods demonstrates little uniformity in principle and practice. Traditionally, national criminal courts have adhered to the *male captus, bene detentus* rule and have been prepared to hear criminal proceedings without regard to the circumstances by 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. Recently, courts in several jurisdictions have questioned whether adherence to the traditional rule may result in an abuse of the court process. Judges have been particularly critical of the involvement of their own national authorities in the blatant and extremely serious failure to adhere to the rule of law²²⁷ with regard to extradition arrangements and have declined to exercise jurisdiction.

8.9.1 The *male captus, bene detentus* rule

Reluctant to inquire into circumstances occurring outside the jurisdiction, courts in England, Scotland and the US chose for many years to follow an early English authority. In *Ex p Scott*,²²⁸ Lord Tenterden CJ granted a warrant for the arrest of Susannah Scott on a charge of perjury. Following the applicant's arrest in Brussels, she applied to the British ambassador for assistance, but he refused to interfere. The arresting officer brought her to England. On an application for habeas corpus, the court was called upon to consider whether, in the circumstances, account could be taken of the manner in which the accused was brought within the jurisdiction. The Lord Chief Justice held that, in considering whether to try the accused, the court

225 *Ibid*, p 857.

226 For a more detailed discussion of abduction and extradition see *op cit*, Gane and Nash, note 12; C Warbrick, 'Judicial Jurisdiction and Abuse of Process', 49 *ICLQ* (2000), 489; A Choo, 'International Kidnapping, Disguised Extradition and Abuse of Process', 57 *MLR* (1994), 626.

227 *Mullen* [1999] 2 Cr App R 143, p 157.

228 (1829) 9 B & C 446.

should not concern itself with acts that occurred in a foreign country. In *Sinclair v HM Advocate*,²²⁹ the High Court in Scotland adopted a similar approach to the same problem. It held that when a fugitive is brought before a court in Scotland on a valid warrant, the magistrate has jurisdiction, and is bound to exercise it without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction.²³⁰ Courts in the UK continued to support the traditional rule and in *O/C Depot Battalion, RASC, Colchester ex p Elliott*,²³¹ Lord Goddard CJ observed that Lord McLaren's speech in *Sinclair*:

...is a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may be brought here.

However, in an apparent *volte face*, the court, in *Ex p Mackeson*,²³² and in *Ex p Healy*²³³ considered it did have the power to inquire into the manner in which the accused had been brought within the jurisdiction and could, at its discretion, stay proceedings. After some consideration of the authorities, Stephen Brown LJ held in *Ex p Driver*²³⁴ that *Ex p Mackeson* had been decided *per curiam* and the court reverted to its policy of non-inquiry into pre-trial irregularity.

In *AG of the Government of Israel v Eichmann*,²³⁵ the District Court of Jerusalem noted that courts in both the UK and the US did not take account of violations of customary international law when deciding whether to try an accused. In this case, Eichmann had been abducted from Argentina and brought to Israel for trial for crimes committed during the Second World War. The District Court found very little authority to support the proposition that the prosecution should be dismissed on the ground of unlawful arrest. However, reference was made to the Harvard Research project²³⁶ which states in Art 16:

In exercising jurisdiction under the Convention, no State shall prosecute or punish a person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

The court held that, despite being satisfied that Eichmann had been abducted, it had jurisdiction to try him for crimes against humanity, a decision that was subsequently confirmed by the Supreme Court.

8.9.2 Approach taken by courts in the US

The US Supreme Court has adopted an approach which is substantially in line with the doctrine established by the early English authorities. Consistently refusing to regard

229 (1890) 17 R(J) 38.

230 *Ibid*, p 43.

231 [1949] 1 All ER 138.

232 (1982) 75 Cr App R 24.

233 [1983] 1 WLR 108.

234 [1986] QB 95.

235 (1961) 36 ILR 5; 36 ILR 277.

236 Supplement: Research in International Law, 29 *AJIL* (1935), 623–32.

forcible abduction from a foreign State as a violation of the right to a fair trial, which is guaranteed by the 14th Amendment to the Constitution, courts in the US have been content to permit the trial of fugitives despite a clear indication that their presence within the jurisdiction was achieved by kidnapping. In *Ker v Illinois*,²³⁷ the appellant who was wanted in the US on charges of larceny was kidnapped in Peru by a US envoy. Contrary to the President's instructions, the envoy failed to present the request for extradition to the Peruvian authorities and put the accused on a ship bound for the US. In holding that the US courts had jurisdiction to try the accused, the Supreme Court was satisfied that there had been no violation of the extradition treaty between Peru and the US. Any unlawful activity took place outside the jurisdiction and did not concern the trial court. A similar view has been taken in relation to interstate abduction. In *Frisbie v Collins*,²³⁸ the Supreme Court considered that the accused's constitutional right to due process had not been violated by his forcible abduction from Illinois by Michigan agents and, thus, there was nothing to prevent the court from exercising jurisdiction. In this case, there was no international extradition treaty to consider.

However, this position was challenged in *USA v Toscanino*.²³⁹ The defendant alleged that he was brought into the US from Uruguay by abduction. He appealed to the US Court of Appeals for the Second Circuit from a decision of the lower court that provided he was physically present at the time, allegations of torture and kidnap were immaterial to the exercise of its jurisdiction. The court held:

...that federal district court's criminal process would be abused or degraded if it was executed against the defendant Italian citizen, who alleged that he was brought into the USA from Uruguay after being kidnapped, and such abuse could not be tolerated without debasing the processes of justice, so that defendant was entitled to a hearing on his allegation ... Government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, court's acquisition of power over his person represents the fruits of the Government's exploitation of its own misconduct.

In *USA v Verdugo-Urquidez*,²⁴⁰ the US Court of Appeals for the Ninth Circuit adopted the same approach. A Mexican citizen was kidnapped in Mexico by US agents and taken to the US. The Mexican authorities were not party to the abduction, which was in violation of the 1978 US-Mexico Extradition Treaty, and argued that the fugitive should be returned to Mexico. When the fugitive was produced before the Court of Appeals, the indictment was dismissed on the ground that the court lacked jurisdiction to try the accused because he had been brought within the jurisdiction in violation of an international treaty. However, in *USA v Alvarez-Machain*,²⁴¹ the Supreme Court refused to follow this principle and held that, in the absence of a specific term in the extradition treaty prohibiting abduction, the fugitive's forcible abduction by State agents did not prevent courts in the US from exercising jurisdiction in respect of a criminal offence. This case concerned a Mexican citizen wanted for the murder of a Drug Enforcement Administration agent. The District Court was satisfied that other agents were responsible for his kidnap and abduction, which

237 119 US 436 (1886).

238 342 US 519 (1952); L Ed 541.

239 500 F 2d 267 (1974).

240 939 F 2d 1341 (1990).

241 112 S Ct 2188 (1992).

was in violation of the extradition treaty between Mexico and the US, and that the defendant should be discharged and returned to Mexico. This decision was affirmed by the Court of Appeals but reversed by the Supreme Court by a majority of 6:3. Rejecting the suggestion that abduction was prohibited by international customary law, the court held that to 'imply from the terms of the Treaty that it prohibits obtaining the presence of an individual by means outside the procedures of the Treaty requires a much larger inferential leap, with only the most general of international principles to support it'. Although the English court has been referred to these decisions on several occasions, it considers that they are not helpful on the ground that 'they deal with the issue of whether or not an accused acquires a constitutional defence to the jurisdiction of the US courts and not to the question whether, assuming the court has jurisdiction, it has a discretion to refuse to try the accused'.²⁴²

8.9.3 Approach taken by the European Court of Human Rights

The ECHR contains no provisions concerning the circumstances in which extradition may be granted or the procedures to be followed. However, the applicant in *Öcalan v Turkey*²⁴³ relied on authorities from the UK, the US, New Zealand and South Africa to support his argument before the ECHR that arrest pending his removal from Kenya for trial in Turkey for terrorist-related offences amounted to an abduction which rendered his detention contrary to Art 5(1)(c) of the Convention, and his trial null and void. The applicant maintained that there was *prima facie* evidence that the Turkish authorities, operating overseas and beyond their jurisdiction, had acted in collusion with their Kenyan counterparts, many of whom had been bribed, to deprive him of the substantive and procedural protections provided by the extradition process. Thus, he argued, failure by the authorities to follow formal extradition procedures resulted in his unlawful detention which was contrary to Art 5 of the European Convention on Human Rights. The Turkish Government submitted that the applicant's arrest and detention arose as a result of co-operation between the Turkish and Kenyan authorities. The Government denied that this case involved a disguised extradition and pointed out that no extradition treaty was in force between Kenya and Turkey. Further, prior to his arrest, the Turkish court had issued seven warrants for his arrest and Interpol had circulated a Red 'wanted' notice.²⁴⁴ The applicant, who was an illegal immigrant in Kenya, had been handed over to the Turkish authorities under arrangements for co-operation between the two States for the prevention of terrorism. The ECHR observed that the Convention does not prevent States co-operating to obtain the extradition or deportation of fugitive offenders, provided that the co-operative procedures do not infringe any specific rights protected by the Convention.²⁴⁵ The Court also noted that, provided there was a legal basis for the applicant's arrest, even deportation in the disguise of extradition would not necessarily be contrary to the Convention. Noting that inherent

242 *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138.

243 Application No 46221/99.

244 See Chapter 10.

245 *Stocke v Germany*, Ser A, No 199, opinion of the Commission.

in the Convention is a search for a fair balance between the public interest and the protection of an individual's fundamental rights, the Court reiterated its observations in the *Soering* case that as crime:

...takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the States obliged to harbour the protected persons but also tend to undermine the foundations of extradition.²⁴⁶

Thus the rules established in an extradition treaty, or in the absence of a treaty, the level of co-operation between States are relevant to a complaint regarding unlawful arrest. However, handing a fugitive over as a result of informal co-operation between States does not necessarily make an arrest unlawful. The Court considered that it must decide on the basis of the evidence whether the acts of the Turkish and Kenyan officials had violated Kenyan sovereignty and international law or had resulted from co-operation between the respective authorities. Finding for the Turkish Government the Court considered that it had not been established beyond reasonable doubt that the activities of the Turkish and Kenyan Governments were in violation of international law; the Court held that the applicant's arrest and detention were in accordance with the law for the purposes of Art 5(1)(c).

8.9.4 The doctrine of abuse of process²⁴⁷

In recent years, English and Australian judges have expressed concern that the abduction of persons in disregard of specific international agreements may contaminate any subsequent proceedings. The need to discourage such conduct by law enforcement agencies has been perceived as an issue of public policy. In *Connelly v Director of Public Prosecutions*,²⁴⁸ the House of Lords held that the court has a residual, discretionary jurisdiction to stay criminal proceedings. This has become known as the doctrine of abuse of process and has been used in England to stay criminal proceedings in cases where the court considers the actions of prosecuting authorities threaten the moral integrity of the criminal process itself. In *Bennett v Horseferry Road Magistrates' Court*,²⁴⁹ the House of Lords held that the doctrine could also apply to the issue of the unlawful return of fugitive offenders. In the exercise of its inherent power to prevent an abuse of process, the court could inquire into how the accused had been brought before the court and, if satisfied that the procedures adopted in bringing the accused before the court involved a serious abuse of power, the court could express its disapproval by refusing to act upon it.²⁵⁰ However, the court considers applications based on abuse of process very carefully and in *Lodhi v Governor of Brixton Prison; Government of the UAE*²⁵¹ held that it would be very rare that a second

246 Application No 46221/99, para 90.

247 For a discussion of abuse of process, see A Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, 1993, Oxford: OUP and A Choo, 'Halting Criminal Proceedings: The Abuse of Process Revisited', *Crim LR* [1995], 846–74. This aspect of abduction is discussed further in *op cit*, Gane and Nash, note 12, p 291.

248 [1964] AC 1254.

249 [1993] 3 All ER 138.

250 *Ibid*, p 150.

extradition request would trigger proceedings that would amount to an abuse of process. The application of the doctrine of abuse of process to the problem of abduction appears to have originated in the New Zealand case of *Hartley*,²⁵² and has subsequently been accepted by the Supreme Court of New South Wales in *Levinge v Director of Custodial Services, Department of Corrective Services and Others*.²⁵³ In this case, an Australian court decided that it had jurisdiction to prevent an abuse of process by staying proceedings where it was established that an existing extradition treaty had knowingly been circumvented to secure the presence of the defendant within the jurisdiction. The appellant had been unlawfully taken from Mexico to the US by US law enforcement officers and extradited to Australia. There was no evidence connecting the Australian authorities with any unlawful activity. The Australian court acknowledged that, whilst it had jurisdiction to deal with the fugitive, it also had a discretionary power not to do so. The power of the court to grant this type of relief was, in the view of the court, based on, '...[a] conception of the necessary purity of the "temples of justice" and the undesirability that the administration of justice itself should become contaminated by involvement (or the perception of involvement) in unlawful or wrongful activities on the part of the authorities'.²⁵⁴

8.9.5 Collusion by law enforcement agencies

Following a similar line of argument, the House of Lords, in *Bennett v Horseferry Road Magistrates' Court*,²⁵⁵ decided as a matter of principle that maintenance of the rule of law in these matters ought to prevail over the public interest in the prosecution of crime. If it could be shown that the defendant had been forcibly abducted and brought to the UK to face trial in disregard of the extradition laws, the court was prepared to stay proceedings as an abuse of process. Lord Griffiths observed that this power was predicated on the judiciary accepting responsibility for maintaining the rule of law:

In the present case, there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.²⁵⁶

Lord Bridge, in agreeing with Lord Griffiths, considered executive lawlessness to be a critical factor:

There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another State... I think that respect for the rule of law demands that the court take cognisance of that

251 [2002] EWHC 2029.

252 [1978] 2 NZLR 199.

253 (1987) 9 NSWLR 546.

254 *Ibid*, p 557.

255 [1993] 3 All ER 138.

256 *Ibid*, p 150.

circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted.²⁵⁷

Lord Lowry's concerns were directed to the involvement of British authorities:

If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law prevailed.²⁵⁸

Having been discharged by the English court, Bennett was immediately arrested on a warrant issued by the sheriff of Aberdeen. In *Bennett, Petitioner*,²⁵⁹ a suspension of the Scottish arrest warrant was sought on the ground that the case of *Sinclair v HM Advocate*²⁶⁰ should be reviewed in the light of *Bennett v Horseferry Road Magistrates' Court*.²⁶¹ The Lord Justice General held that, whilst in an appropriate case the Scottish court would reconsider its position, he was satisfied that in this case there was no collusion between the British and South African authorities. Furthermore, the Lord Advocate, as Public Prosecutor in Scotland, had had no involvement in Bennett's return to the UK. When considering the question 'whether to enforce the warrant would be an abuse of the processes of the Scottish court',²⁶² in the absence of evidence of collusion with foreign authorities to flout extradition procedures, the court answered in the negative.²⁶³ However, it is arguably not inconsistent with the principles of Scots law to hold that it would be oppressive to allow a case to proceed if the production of the accused involved breaches of international law and human rights abuses.²⁶⁴

8.9.6 Seriousness of the crime

Mindful of its obligation to uphold the rule of law in the face of gross violations of international law and human rights standards, the English court continues to endorse a wide view of the scope of the doctrine of abuse of process in extradition cases. In *Mullen*,²⁶⁵ British authorities initiated the appellant's deportation by unlawful means in disregard of extradition arrangements, and, in order to prevent Mullen from contesting his deportation, denied him access to legal advice. In exercising its discretionary powers, the court was prepared to balance the seriousness of the crime against the 'need to discourage such conduct on the part of those who are responsible for criminal prosecutions'.²⁶⁶ Following the enforcement of the HRA 1998, the denial

257 *Ibid*, p 155.

258 *Ibid*, p 163.

259 [1994] SCCR 902.

260 (1890) 17 R(J) 38.

261 [1993] 3 All ER 138.

262 [1994] SCCR 902, p 923.

263 Whilst 'abuse of process' is not a term generally used by the Scottish courts, many of the matters regarded by the English court as an abuse of process are addressed in Scotland by use of the term 'oppression'. See *op cit*, Gane and Nash, note 12, p 292.

264 *Ibid*, p 304.

265 [1999] 2 Cr App R 143.

266 *Ibid*, p 157.

of rights guaranteed by the Convention assumes even greater importance in respect to the exercise of the court's discretionary powers to stay proceedings. There is some support for the argument that compliance with the HRA 1998 prevents courts from relying upon evidence obtained in violation of fair trial rights.²⁶⁷ However, misconduct with regard to the production of the accused may not warrant a mandatory stay of proceedings. Whilst the ECHR has focused on the impugned pre-trial conduct of prosecuting authorities to determine whether a trial was fair,²⁶⁸ it is still uncertain whether fair trial guarantees provide the right not to stand trial.

8.10 EXTRADITION AND THE CASE OF SENATOR PINOCHET²⁶⁹

In refusing to afford immunity to Senator Pinochet, a former Chilean Head of State, on the ground that there could be no immunity from prosecution for certain international crimes, the House of Lords aroused considerable public curiosity and created renewed interest in the law of extradition. These proceedings demonstrated the linkage between the judicial and political elements of the extradition process. The arrest of Pinochet for conduct amounting to gross abuse of human rights was heralded worldwide as a triumph for international law and human rights. It was argued on behalf of the Government of Spain that, first, the crimes alleged against Pinochet were so horrific that an exception must be made to the international law principle of State immunity and, secondly, that the crimes with which he was charged are crimes against international law, in respect of which State immunity is not available. The House of Lords was also called on to consider problems arising in relation to the principle of double criminality. This case illustrates the problems facing domestic courts when dealing with serious human rights abuses and raises several important issues relating to international criminal law.

8.10.1 The facts

On 11 September 1973, a right wing coup removed the left wing regime of President Salvador Allende, who was arrested and subsequently murdered. A military junta led by General Pinochet, who later became Head of State, was responsible for organising and carrying out the coup. It is without doubt that during this regime thousands of people were arrested, tortured and murdered. Although it is not suggested that Pinochet personally carried out any acts of torture, it is alleged that they were done at his instigation and with his knowledge. None of the conduct alleged was committed by or against UK nationals or in the UK. Human rights violations continued throughout the period of military rule until the late 1980s. The Pinochet regime ended in March 1990. In October 1998, Senator Pinochet visited a London

267 See *Allan v UK*, Application No 48539/99, judgment of 5 November 2002, in which the ECHR considered that the use at trial of evidence obtained in breach of the privilege against self-incrimination violated Art 6 of the European Convention on Human Rights.

268 See discussion of *Saunders v UK* (1997) 23 EHRR 313, and *Teixeira v Portugal* (1998) 28 EHRR 101 and in A Choo and S Nash, 'What's the Matters with s 78?', *Crim LR* [1999], 929, p 939.

269 *R v Bow Street Metropolitan Stipendiary Magistrate and Others ex p Pinochet Ugarte (Amnesty International and Others intervening)* (No 3) [1999] 2 All ER 97.

hospital to receive medical treatment. Spanish judicial authorities sought to extradite him in order to stand trial on a number of charges. Following a complaint filed on 15 October 1998 by the Human Rights Secretariat of Izquierda Unida, the second largest left wing political party in Spain, the investigating court of the Audiencia Nacional Espanola, the National Criminal Court, filed a petition in the UK requesting Pinochet's arrest. An international arrest warrant was issued in Spain. Although most of the charges had no connection with Spain, the Spanish court held that they have jurisdiction to try crimes of genocide, torture and hostage taking committed abroad by virtue of the principle of universal jurisdiction and not merely in respect of Spanish victims. Spain also sought to exercise jurisdiction under the nationality principle in respect of the offences committed against Spanish nationals.

A magistrate in London issued two provisional arrest warrants under s 8 of the EA 1989. Following his arrest, Pinochet started proceedings for habeas corpus and for leave to move for judicial review of the warrants. The Divisional Court quashed both warrants on the ground that, as former Head of State, Pinochet was entitled to State immunity in respect of the offences with which he was charged. The Divisional Court also considered whether the crimes alleged in the second warrant, which were not crimes under UK law at the date they were committed, were 'extradition crimes' within the meaning of the EA 1989. Torture committed outside the UK could not be prosecuted before UK courts until 29 September 1988, the date s 134 of the CJA 1988 entered into force. This provision, which reflects Art 1 of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, provides that:

A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the UK or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

Lord Bingham CJ was satisfied that provided the fugitive's conduct amounted to a crime in the UK at the date of the request for extradition, the offences amounted to 'extradition crimes' for the purposes of the EA 1989. Leave was given to the Crown Prosecution Service to appeal to the House of Lords.

8.10.2 *Pinochet (No 1)*²⁷⁰

Their Lordships were asked to consider, as a preliminary issue, the proper interpretation and scope of the immunity enjoyed by a former Head of State from arrest and extradition proceedings in the UK in respect of acts committed while he was Head of State. Prior to this hearing, the Spanish Government added genocide, murder, and hostage taking to the second warrant. In addition to the Crown Prosecution Service and counsel for Pinochet, their Lordships agreed to hear submissions from Amnesty International as interveners and an independent *amicus curiae* and considered written submissions from Human Rights Watch. The prosecution's appeal was allowed by a majority of 3:2 on the grounds that Pinochet was not entitled to claim immunity in relation to crimes under international law. Any argument surrounding the double criminality issue was minimal. Indeed, there

270 [1998] 3 WLR 1456.

is some suggestion in the judgments that their Lordships accepted that all charges constituted extradition crimes. This judgment was set aside on the ground that the committee was not properly constituted. It was thought that the links between Lord Hoffmann, a member of the appeal committee, and Amnesty International Charity Ltd, of whom he was a director and chairperson, were such as to give the appearance of bias. Although there was no suggestion that he was in fact biased, it was considered that in any case where the impartiality of a judge is in question, the appearance of the bias is as important as the reality. This was the first time the House of Lords had set aside one of its own decisions.

8.10.3 *Pinochet (No 3)*²⁷¹

Before the second hearing, leave was granted to the Republic of Chile to intervene and the ambit of the charges against Pinochet widened. The House of Lords was now asked to consider the following charges: conspiracy to torture committed between 1 January 1972 and 20 September 1973 and between 1 August 1973 and 1 January 1990; conspiracy to take hostages between 1 August 1973 and 1 January 1990; conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal, between 1 January 1972 and 1 January 1990; torture between 1 August 1973 and 8 August 1973 and on 11 September 1973; conspiracy to murder in Spain between 1 January and 31 December 1976 and in Italy on 6 October 1975; attempted murder in Italy on 6 October 1975; torture on various occasions between 11 September 1973 and May 1977; and torture on 24 June 1989. The addition of charges relating to conduct occurring before Pinochet assumed power required the House of Lords to turn their attention to the double criminality rule.²⁷² Arguably, the issue of double criminality is in any event preliminary to questions relating to immunity *ratione personae*. Unless the charges specified in the warrants constitute extradition crimes, their Lordships would not be required to consider claims of immunity.

In considering whether it was necessary for the fugitive's conduct to constitute an offence in the UK at the date of the request for extradition, or the actual date the conduct occurred, Lord Browne-Wilkinson examined Sched 1 to the EA 1870, a precursor to the current legislation which adopted the 'list' approach to extradition crimes, and observed that the preamble required the list to be interpreted at the date of the alleged crime. In construing the EA 1989, which repealed the 1870 Act and introduced an extradition scheme based on conduct, he noted references to the conduct date. Whilst acknowledging that there was an anomaly with respect to the relevant date when criminality is assessed, Lord Browne-Wilkinson considered that for the purposes of the double criminality rule, the relevant date was the 'conduct date' and not the 'request date'. He considered that 'it would be extraordinary if the same Act required criminality under English law to be shown at one date for one form of extradition and at another date for another'.²⁷³ Interestingly, the *travaux préparatoires* relating to the 1957 European

271 [1999] 2 WLR 827.

272 For further discussion of this point, see M Birnbaum, 'Pinochet and Double Criminality', *Crim LR* [2000], 127.

273 [1999] 2 All ER 97, p 107.

Convention on Extradition and the departmental papers relating to the EA 1989 are silent on the relevant date. The decision that criminality was to be assessed at the conduct date and not at the request date excluded from consideration the majority of the charges preferred against Pinochet.

In respect of the crime of torture, Lord Browne-Wilkinson observed that the international law prohibiting torture had the character of *jus cogens*, from which there can be no derogation. Nevertheless, in the absence of an international tribunal to punish torture and no general jurisdiction to permit prosecution in domestic courts, he doubted whether this was sufficient to justify the conclusion that torture ranked as 'a fully constituted international crime'.²⁷⁴ However, in providing a universal jurisdiction for the crime of torture, the UN Torture Convention supplied the missing link and made State torture 'an international crime in the highest sense'.²⁷⁵ As a consequence, there could be no safe haven for torturers. In enacting s 134 of the CJA 1988, Parliament recognised the international obligation of States in respect of the crime of torture, and that acts of torture and conspiracy to torture committed after the enforcement of this legislation were extraditable crimes. As a consequence of requiring conduct to be a crime under UK law at the date it was committed, acts of torture occurring before 29 September 1988, the date of enforcement of the CJA 1988, could not be classed as extraditable crimes.

Lord Hope noted that prior to the enforcement of the Suppression of Terrorism Act (STA) 1978, the presumption against the extra-territorial application of criminal law would have precluded a prosecution for murder and conspiracy to murder. The STA 1978 provides for the prosecution of specified offences committed in States which are party to the European Convention on the Suppression of Terrorism, provided the conduct would amount to an offence under UK law.²⁷⁶ Murder is a specified offence. However, the charges against Pinochet related to murders committed in France, Portugal and the US. These could not be 'extradition crimes' on the ground that the conduct took place prior to the enforcement of the STA 1978. Hostage taking was also excluded from the extradition proceedings on the ground that the only charge relating to this offence did not disclose any offence under the Taking of Hostages Act 1982.

It is a basic principle of international law that one sovereign State does not adjudicate on the conduct of another and, as a consequence, the Head of a foreign State is entitled to personal immunity in respect of criminal and civil liability. This immunity is said to be granted *ratione personae*. Lord Browne-Wilkinson observed that no other domestic court had refused to afford immunity to a Head of State on the grounds that there can be no immunity against prosecution for certain international crimes. He was of the opinion that whilst the State Immunity Act 1978 made some modifications to the complete immunity afforded by the common law, a former Head of State remained immune from prosecution in relation to acts performed in his capacity as Head of State. However, he believed there to be strong ground for concluding that State torture, which is an international crime against humanity, could not be considered to be an act done in an official capacity. Observing

274 [1999] 2 All ER 97, p 114.

275 *Ibid*, p 109.

276 STA 1978, s 4.

that the Torture Convention requires all Member States to ban torture, he considered that it could not be an official function to do something which international law prohibits. Accordingly, if Pinochet authorised acts of torture he was acting contrary to international law and his actions did not give rise to immunity *ratione personae*.

Their Lordships' decision with respect to the double criminality principle required Pinochet to claim immunity only in relation to charges of torture and conspiracy to torture committed after 29 September 1988 and conspiracy to murder in Spain and murder in Spain. Immunity was raised successfully with respect to the charges of murder and conspiracy to murder. Accordingly, extradition proceedings were allowed to proceed solely in respect of the allegation that Pinochet organised and authorised torture after 8 December 1988, the date at which the House of Lords held that he was not acting in any capacity which gave rise to immunity because his actions were contrary to international law. This decision illustrates some of the problems that arise when domestic courts are called upon to deal with matters involving serious human rights violations, and demonstrates the advantages of having recourse to the International Criminal Court.

MUTUAL LEGAL ASSISTANCE

9.1 INTRODUCTION

The international exchange of evidence in criminal matters through formal mutual legal assistance arrangements is a fairly recent phenomenon.¹ Realising that participation in formal arrangements would provide prosecuting authorities with increased access to evidence located abroad, States have become increasingly willing to negotiate mutual legal assistance treaties (MLAT).² Whilst most forms of assistance can proceed on the basis of the principle of international comity, mutual assistance increasingly takes place by way of bilateral or multilateral treaty. Many States have demonstrated a preference to enter into bilateral agreements which allow for greater specificity.³ Generally, MLATs require contracting parties to undertake to provide assistance in: taking written testimony; conducting searches for and seizing material for use as evidence; serving summonses and tracing witnesses and suspects.⁴ Conventionally, mutual assistance arrangements abide by the *locus regit actum* rule, which permits the requested party to execute letters rogatory in accordance with its national law and practice. While some MLATs encourage requesting States to indicate their preferred method of conducting the inquiry,⁵ in practice, they exert little control over the manner in which requests are executed. To increase the effectiveness of MLATs and to combat admissibility problems, assistance mechanisms are placing increasing emphasis on compliance with the procedural requirements of the requesting State.⁶

Requests are subject to judicial authorisation in the requested State. In the UK, the Home Office Mutual Legal Assistance Section checks all letters rogatory and

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- 1 For a discussion of the development of mutual legal assistance in criminal matters, see A Ellis and R Pisani, 'The United States Treaties on Mutual Assistance: A Comparative Analysis', *The International Lawyer* (1985), 189; W Gilmore (ed), *Mutual Assistance in Criminal and Business Regulatory Matters*, 1995, Cambridge: CUP; A Jones, *Jones on Extradition and Mutual Legal Assistance*, 2001, London: Sweet & Maxwell; C Murray and L Harris, *Mutual Assistance in Criminal Matters*, 2002; E Nadelmann, 'Negotiations in Criminal Law Assistance Treaties', 33 *AJCL* (1985), 467; E Nadelmann, *Cops Across Borders: The Internationalisation of US Criminal Law Enforcement*, 1993, Pennsylvania: Pennsylvania State UP.
 - 2 The UK, eg, has ratified the 1959 European Convention on Mutual Assistance in Criminal Matters and its Protocol, ETS 30; the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, 30 *ILM* (1991), 148; the 1988 United Nations (UN) Convention Against Illicit Traffic in Narcotic and Psychotropic Substances, 28 *ILM* (1989), 493; and has adopted the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters.
 - 3 The 1973 USA-Switzerland Treaty, 12 *ILM* (1973), 916, for example, addresses the specific problem relating to the depositing of 'dirty' money into Swiss bank accounts.
 - 4 See, eg, the 1990 UN Model Treaty on Mutual Assistance which was adopted by GA Res 45/117 (1990).
 - 5 See, eg, 1973 USA-Switzerland Treaty.
 - 6 See, eg, 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.

submits them for endorsement to the relevant judicial authority.⁷ This is to ensure that the requests for assistance comply with both UK and international law. The process of administrative and judicial supervision can be cumbersome and time consuming. However, judicial input undoubtedly assists in maintaining a balance between competing interests and safeguards against an abuse of the mutual legal assistance process by governments.⁸ While most MLATs do not contain specific human rights provisions, many have traditionally provided reservations and safeguards designed to protect the accused. These provisions are similar to those found in extradition treaties. Thus, Art 1(2) of the 1959 European Convention on Mutual Assistance in Criminal Matters, for example, provides that assistance may be refused, if the offence is of a political nature, or if the execution of a request will prejudice the sovereignty of the requested State. However, in contrast with extradition treaties there is usually no specific double criminality requirement. Requests may also be refused if evidence would need to be taken under compulsion or from a witness who would be non-compellable in the requested State.⁹ States may also refuse requests if the evidence is protected by the rules of privilege. While some treaties state that the requesting State shall not, without the consent of the requested State, use information or evidence provided by the requested State for investigations other than those stated in the request,¹⁰ others allow evidence to be used in the prosecution of non-treaty offences.¹¹ Despite moves to introduce measures designed to offer the defence some procedural protection, criticism has been directed towards the lack of corresponding mechanisms for the accused needing to seek assistance from foreign authorities.¹² Concerns have also been raised regarding the potential for misusing mutual assistance provisions to obtain evidence from abroad which would be unobtainable under national law.¹³

7 Under Art 53 of the 1990 Convention Implementing the Schengen Agreement (Schengen Implementing Convention), 30 ILM (1991), 68, the central authority can be bypassed and requests for assistance made directly between judicial authorities.

8 See, eg, *R v Secretary of State for the Home Department ex p (1) Mohammed Sani Abacha (2) Abubakar Baguda & Federal Republic of Nigeria* [2001] EWHC 787.

9 In *Re Request from L Kasper-Ansermet* 132 FRD 622 (1990), US Dist, the US District Court was called upon to consider the validity of a request from the Swiss authorities who sought assistance in taking testimony from two suspects in order to 'pronounce indictment' on behalf of the Swiss magistrate. The suspects objected on the ground that the Swiss proceedings would not conform with principles of due process because of the possibility of trial *in absentia*, and the Swiss provision which allowed silence under questioning to be inferred as guilt was contrary to their rights under US law. Adopting a purposive approach to the Swiss request, the court found that the treaty permitted the use of a civil subpoena to compel the suspects' presence in court. The court adhered to the rule of non-enquiry in respect of the trial *in absentia* and considered that the argument based on inferences drawn from silence was, at the moment, hypothetical. However, compelling suspects to appear before the court in order to 'pronounce indictment' amounted to a Swiss judicial function which exceeded the ambit of the treaty.

10 See, eg, UN Model Treaty, Art 7; USA-Switzerland Treaty, Art 5; UK-USA Treaty, Art 7; Mexico-USA Treaty, Art 6.

11 See, eg, *USA v Johnpoll*, 739 F 2d 702 (1984). US prosecuting authorities had used evidence obtained under the USA-Switzerland Treaty, in relation to a conspiracy to transport stolen securities, to convict him of additional customs offences, offences which were not covered under the Treaty.

12 C Gane and M Mackarel, 'The Admissibility of Evidence Obtained from Abroad into Criminal Proceedings—The Interpretation of Mutual Legal Assistance Treaties and Use of Evidence Irregularly Obtained', 4 *Eur J Crime Cr L Cr J* (1996), 98.

13 For further discussion, see *op cit*, Murray and Harris, note 1.

9.2 UN INITIATIVES

9.2.1 UN Model Treaty on Mutual Legal Assistance

Using features common to existing agreements, the 1990 UN Model Treaty on Mutual Legal Assistance (Model Treaty) creates a simple framework which can be used as a guide for States negotiating bilateral or multilateral agreements.¹⁴ Each party is required to establish a 'competent authority' through which assistance should be directed¹⁵ and the parties undertake to provide 'the widest possible measure of mutual assistance' with regard to taking evidence from witnesses, carrying out searches and seizures, serving documents and supplying documents and records.¹⁶ While areas of judicial co-operation such as the transfer of prisoners, proceedings and the execution of judgments are outside the remit of the 1990 Model Treaty, it includes a provision relating to co-operation in fiscal cases.¹⁷ States may refuse to comply with a request for assistance on grounds similar to those found in extradition treaties.¹⁸ Thus, a request may be refused in respect of investigations into political offences and offences arising out of discrimination on grounds of race, sex, religion, nationality or political opinions, or if the request offends against the principle of double jeopardy.¹⁹ Although there is no double criminality requirement in the 1990 Model Treaty, it does contain a specialty provision. Thus, evidence may only be used in connection with matters for which the request was made, and documents and original records must be returned to the requested State as soon as possible, unless the requested State waives the right to have the material returned.²⁰ The requested State can be asked to provide assistance to enable a witness to travel to the requesting State to assist in a criminal investigation or to testify in criminal proceedings.²¹ However, the requesting State must undertake to provide the witness with 'safe conduct'.²² The 1990 Model Treaty complies with standard MLAT practice in that evidence must be obtained in accordance with the law of the requested State. Provided the requested State concurs, parties to the proceedings, their representatives and representatives of the requesting State may, subject to the law and procedure of the requested State, be present during the taking of statements.²³ The requested State can, in so far as national law and procedure allows, carry out requests for search and seizure of material for use as evidence in proceedings in the requested State. However, any procedures used during the search for and seizure of evidence should not violate

14 1990 UN Model Treaty on Mutual Assistance in Criminal Matters, 30 ILM (1991), 1419.

15 *Ibid*, Art 3.

16 *Ibid*, Art 1.

17 *Ibid*, Art 1(2)(g).

18 See Art 4, generally.

19 See, eg, the corresponding limitations included within the UK Extradition Act (EA) 1989, s 6.

20 1990 Model Treaty, Art 7.

21 *Ibid*, Arts 13 and 14.

22 *Ibid*, Art 15. A witness should not be detained, prosecuted or punished in respect of any offence committed on an earlier occasion, and must be free to leave the requesting State when no longer needed.

23 *Ibid*, Art 11.

third party rights.²⁴ The cost of executing a request is generally borne by the requested State.²⁵

9.3 1959 EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

The 1959 Council of Europe Convention on Mutual Legal Assistance in Criminal Matters, which entered into force in 1962, is one of the first multilateral mutual legal assistance treaties and is acknowledged as an important development in international judicial co-operation.²⁶ This initiative complements the 1957 European Convention on Extradition.²⁷ However, matters relating to the transfer of prisoners and the transfer of proceedings are dealt with in different Conventions. The Committee of Experts which was responsible for drafting the 1959 Convention sought to distinguish between judicial assistance and collaborative police operations. Accordingly, policing and law enforcement are outside the scope of this instrument. All Member States of the European Union are now parties to the 1959 Convention, which was ratified by the UK on 29 August 1991.²⁸ Parties undertake to provide each other with 'the widest measure of mutual assistance in proceedings' for offences which fall within the jurisdiction of the judicial authorities of the requesting State. Requests for assistance must be received from a 'judicial authority' and not an administrative authority. Thus requests may not be received from administrative bodies such as HM Customs & Excise. Assistance can be refused if the requesting State considers the offence to be either political or fiscal in nature. Thus States may refuse assistance if the request relates to a tax offence. Further, the requested State may refuse to respond to a request if it considers that the 'execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country'.²⁹ The 1959 Convention has been supplemented by an Additional Protocol, which was signed in 1978 and entered into force in 1982. This instrument widens the scope of the 1959 Convention by including fiscal offences and relaxing the double criminality rule. Article 1 of the Additional Protocol provides that States shall not refuse assistance solely on the ground that the request relates to a tax offence.

The mechanism for requesting assistance is through the exchange of letters rogatory, which are written requests sent by judicial authorities in the requesting State to the relevant authorities in the foreign State.³⁰ While requests are normally sent between the relevant Ministries of Justice, in urgent cases they can be sent and

24 *Ibid*, Art 17.

25 *Ibid*, Art 19.

26 ETS 30.

27 See Chapter 8.

28 Bilateral conventions on the implementation of the 1959 Convention have also been concluded between European Union (EU) States. Other conventions which impact on mutual legal assistance within the EU include the 1962 Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, the 1990 Schengen Implementing Convention and the 2000 EU Convention on Mutual Assistance in Criminal Matters.

29 1959 European Convention on Mutual Assistance in Criminal Matters, Art 2.

30 *Ibid*, Arts 3 and 6. For a discussion of the problems of obtaining evidence by this means, see *op cit*, Nadelmann (1993), note 1, pp 318–24.

received by judicial authorities. In addition to the summoning of witnesses,³¹ provision is made in the Convention for the transfer of documentary and real evidence on the understanding it will be returned as soon as possible.³² A request can also be made for assistance in serving writs and records of judicial verdicts.³³ Included in the list of reservations is a provision enabling the requested State to reserve the right to refuse to undertake searches for and seizure of evidence unless specific conditions are satisfied.³⁴ This provision, which introduces an element of double criminality into the Convention, provides that requests for search and seizure of property can be refused unless the offence in question is punishable under the law of both States and is extraditable. Requests for assistance are generally executed in accordance with the national law and practice in the requested State.³⁵ This is known as the *locus regit actum* principle. Although obtaining evidence in this manner can cause admissibility problems in criminal proceedings in the requesting State, the Convention does not address the issue of admissibility of evidence. Arguably, this problem may serve to frustrate some of the aims of the Convention.³⁶ In order to encourage certainty and reduce fishing expeditions, the requesting State is required to indicate, in some detail, the nature of the investigation and the assistance sought.³⁷ Requesting States are required to guarantee witnesses immunity from prosecution for offences committed before they returned to give evidence.³⁸ Similarly, witnesses must not be detained in respect of any outstanding convictions.

9.4 EU INITIATIVES

9.4.1 Introduction

Member States have consistently demonstrated a reluctance to relinquish sovereignty in matters relating to crime and public order. Thus, unlike the common agricultural policy and regional policies, matters related to justice and home affairs (JHA) have traditionally remained outside the Community legal order and have been dealt with under the Third Pillar.³⁹ Thus JHA matters have been dealt with at an intergovernmental level involving Justice Ministers and their departments. Although under the Treaty of Amsterdam, which came into force in May 1999, issues relating to common foreign and security policy such as asylum and immigration became Community matters, police and judicial co-operation in criminal matters remain within the Third Pillar. However, the Third Pillar was reorganised and provisions

31 *Ibid*, Art 8 states that the summons is not binding and Art 9 provides for the witness to claim expenses.

32 *Ibid*, Art 6.

33 *Ibid*, Art 7.

34 *Ibid*, Art 5.

35 *Ibid*, Art 3.

36 See below.

37 1959 European Convention on Mutual Assistance in Criminal Matters, Art 14.

38 *Ibid*, Art 12.

39 For a general discussion on the Third Pillar, see D O'Keeffe, 'Recasting the Third Pillar', *CML Rev* (1995), 893, and for consideration of its impact, see M Furse and S Nash, 'Free Movement, Criminal Law and Fundamental Rights in the European Community', 3 *Juridical Review* (1997), 148.

relating to police and judicial co-operation in criminal matters are now contained in Title VI of the Treaty on European Union (TEU). The provisions included within Title VI aim to create:

...an area of freedom, security and justice by developing common action among Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia.⁴⁰

This objective is to be achieved through closer co-operation between police forces, customs authorities and judicial authorities in Member States. Common action in the field of police co-operation will include the collection and exchange of relevant information, joint initiatives in training and the use of equipment and the common evaluation of investigative techniques.⁴¹ Judicial co-operation will involve facilitating the enforcement of decisions and the process of extradition, and preventing conflicts of jurisdiction.⁴² Under Art 34, which was previously known as Art K4, the Council of the EU⁴³ is required to undertake a range of initiatives including adopting framework decisions for the purpose of approximation of the laws and regulations of the Member States. Although framework decisions are binding on Member States with respect to the result to be achieved, the choice of method is left to national authorities. At a special meeting of the European Council⁴⁴ which focused on JHA, it was agreed that the mutual recognition of judicial decisions should form the cornerstone of the future development of judicial co-operation. The 1999 Tampere proposals also included the setting up of joint investigative teams to combat trafficking in drugs and people and terrorism. Additionally, in order to reinforce the fight against serious organised crime, a Eurojust unit was proposed which would be comprised of national Prosecutors and magistrates from all Member States. This body would be given the task of facilitating co-ordination of national prosecuting authorities and to work with the European Judicial Network in order to simplify the execution of requests for assistance.

9.4.2 1990 Schengen Implementing Convention⁴⁵

The primary purpose of the 1990 Schengen Implementing Convention is to facilitate the free movement of persons between Member States of the EU by removing internal border controls. This initiative provides for the introduction of a common policy on free movement and contains provisions relating to the issuing of visas and residence permits,⁴⁶ the movement of aliens⁴⁷ and the processing of applications for asylum.⁴⁸ Subsequently, several measures have been introduced under the Schengen initiative,

40 TEU, Art 29.

41 *Ibid*, Art 30.

42 *Ibid*, Art 31.

43 This body is comprised of ministers from each Member State. The Minister for Justice or the Minister of the Interior usually deals with JHA matters.

44 This body is comprised of the Heads of State of the Member States and the President of the European Commission. The Council meets every six months.

45 30 ILM (1991), 84.

46 *Ibid*, Arts 9–18.

47 *Ibid*, Arts 19–24.

48 *Ibid*, Arts 28–38.

which focus on police and judicial co-operation including measures which allow police officers to engage in the 'hot pursuit' of a suspect.⁴⁹ These measures were introduced, in part, to address concerns relating to crime and public security arising from the relaxation of border controls. In 1997, the Treaty of Amsterdam formally integrated the Schengen *acquis* into the EU framework. Although not a party to the 1990 Convention, in May 1999 the UK formally applied to participate in parts of the Schengen *acquis* that deal with police and judicial co-operation, including customs co-operation, and the Schengen Information System (SIS).⁵⁰ The SIS is a database that stores criminal information from participating Member States and is considered to be the most prominent instrument of police co-operation devised under Schengen. The data protection provisions of this system have been subjected to some severe criticism.⁵¹

9.4.3 2000 EU Convention on Mutual Assistance in Criminal Matters⁵²

In order to facilitate the operation of the 1959 Convention within Member States of the EU, and to address some of the problems caused by the complexity of existing procedures,⁵³ a draft convention was proposed in accordance with Art 34 of the TEU.⁵⁴ The primary purpose of the Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union is to improve co-operation between judicial, police and customs authorities by modernising existing mutual legal assistance provisions. Following more than four years of negotiations the text of the simplified Convention was finally agreed in May 2000 and embraces both conventional forms of assistance and some controversial cross-border investigation methods. Although some relief was expressed that the EU Convention was finally approved, it has been the subject of much criticism.⁵⁵ While the new Convention was originally concerned with judicial co-operation, provisions on police co-operation were added later. Although the preamble and the first Article of the Convention indicate that the new arrangements supplement rather than extend the scope of existing conventions, including arrangements under the Benelux Treaty and the 1990 Schengen Implementing Convention,⁵⁶ some provisions represent a fundamental shift in traditional arrangements. This instrument, breaking with the

49 *Ibid.*, Art 41.

50 Under Art 4 of the Schengen Protocol to the TEU, which incorporates the Schengen *acquis*, the UK is not bound by the Schengen *acquis* but can request to take part in some of the provisions. Before the JHA Council agrees to the UK's participation in Schengen, the other Schengen States are required to formally evaluate the UK's implementation procedures.

51 See JUSTICE, *Report on the Schengen Information System*, Autumn 2000.

52 2000 OJ C197/01.

53 Evidence presented to a House of Lords Select Committee suggested that the system for the exchange of requests established under the 1959 Convention was at the point of collapse: *Select Committee on the European Communities on the Draft Convention for Europol: Memorandum from Fair Trials International*, Session 1994/95, 10th Report.

54 31 ILM (1992), 247.

55 See G Vermeulen, *Mutual Legal Assistance in Criminal Matters Within the European Union: Towards a Full Mutual Assistance Area Specific to the Member States?*, 1999, unpublished PhD thesis, University of Ghent.

56 The Convention on Mutual Assistance in Criminal Matters repeals Arts 49(a), 52, 53 and 73 of the 1990 Schengen Implementing Convention.

Council of Europe's tradition of allowing contracting parties to enter reservations against any provision, stipulates which provisions contain opt-out clauses. Critical comment has been made regarding the failure to include a provision allowing States to refuse to execute a request on the ground that it would present a threat to sovereignty, security and public order. There has also been criticism regarding resistance to include data protection provisions similar to those found in other Third Pillar conventions.⁵⁷ Whilst the new powers were introduced primarily as a response to governmental concerns about the growth in cross-border serious and organised crime, this Convention has been drafted to cover any crime. Although the preamble points out that States will act in a manner which is compatible with the European Convention on Human Rights, the body of the Convention does not allow assistance to be refused on the ground that fundamental rights will be compromised. Speed and efficiency may be achieved by reducing to an unacceptable level the procedural guarantees that provide the accused in transnational cases with protection from over-zealous States. This instrument has subsequently been supplemented by a Protocol which extends mutual assistance provision to matters related to money laundering and financial crime.⁵⁸

The Convention imposes an obligation on contracting parties to execute requests for assistance from another EU State as soon as possible. The requested State has a duty to inform the requesting State if it cannot meet the deadline set for execution in order that they can agree on any further action. To aid the process of mutual assistance, contracting parties must identify the competent administrative authorities, the central authority, the police and customs authorities and the authority with the power to order the interception of communications. In order to expedite the process of mutual assistance, procedural documents can be posted directly to the person or body who can provide the necessary information or sent via the competent authority.⁵⁹ Included with the documents should be a translated summary and a report indicating where the addressee can seek information about his rights and obligations concerning the document. Normally, requests for assistance are processed through judicial authorities but in some cases a request may, and in some circumstances must, be sent via a central authority.⁶⁰ For example, requests for the temporary transfer or transit of prisoners and the sending of information from judicial records must be sent through the central authority. Urgent requests for assistance can be sent directly to Interpol or Europol. The police or customs authority in the requested State can be contacted directly by either the central or the judicial authority in the requesting State. Contracting parties can opt out of this clause.⁶¹ Mutual assistance can be sought in relation to 'proceedings brought by administrative authorities' and for criminal proceedings relating to a 'legal person'. Thus requests can relate to administrative offences and criminal acts committed by corporate bodies. In respect to these

57 See UK Select Committee on the European Union in the House of Lords, July 1998.

58 The Protocol to the Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union, 2001 OJ C326/01.

59 Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union, Art 5.

60 *Ibid*, Art 6.

61 *Ibid*, Art 6(7).

proceedings, a request for assistance can be made directly to the administrative body in the requested State.⁶² In appropriate circumstances States can exchange information about criminal or administrative offences without the need to resort to the formalities set out in the Convention.⁶³ To address the problem of incompatibility of evidence gathering rules in member States, evidence is gathered according to the law of the requesting State, the *forum regit actum* principle, rather than in accordance with the *locus regit actum* principle established in the 1957 Convention.⁶⁴ This is subject to the proviso that evidence gathering activities do not involve a breach of fundamental principles of law in the requested State. There is a duty to inform the requesting State if the request cannot, or cannot fully, be executed in accordance with the procedural requirements set by the requesting State. However, the automatic reception of evidence gathered lawfully in another State was considered, and rejected, during negotiations.⁶⁵ The departure from the traditional principle is intended to prevent an admissibility problem arising when evidence obtained abroad is adduced at trial in the requesting State.

The Convention makes provision for requests for specific forms of mutual assistance. Thus, requests can be received for stolen property to be placed at the disposal of a requesting State with a view to it being returned to the owner.⁶⁶ Further in appropriate circumstances, prisoners can be temporarily transferred to the territory of a requesting State,⁶⁷ witnesses and experts can give evidence by telephone and video conference,⁶⁸ and controlled deliveries are permitted provided the criminal investigation involves an extraditable offence.⁶⁹ By mutual agreement, the competent authorities can set up a joint investigation team for a specific purpose and for a limited period of time.⁷⁰ Although the composition of the team may include personnel from more than one State, the team's activities must be co-ordinated by a person from the State in which the investigation is being conducted. States can also provide each other with assistance in conducting covert investigations provided the investigation is conducted according to the national law and practice of the State where the investigation is taking place.⁷¹ Matters relating to the interception of communications held up the Convention's progress for several years.⁷² Some States expressed concern in respect of the adequacy of the data protection provisions. However, it was eventually agreed that in appropriate circumstances communications can be intercepted and may be transmitted directly to a Member State, or recorded for

62 *Ibid*, Art 3.

63 *Ibid*, Art 7.

64 *Ibid*, Art 4.

65 In January 1997, Steering Group III asked the Working Party on Mutual Assistance to consider this question and considered the free movement of evidence an unworkable concept. See *op cit*, Vermeulen, note 55.

66 Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union, Art 7.

67 *Ibid*, Art 9.

68 *Ibid*, Arts 10 and 11.

69 *Ibid*, Art 12.

70 *Ibid*, Art 13.

71 *Ibid*, Art 14.

72 *Ibid*, Arts 15–18. See, eg, the *Memorandum by JUSTICE*, House of Lords Select Committee on the European Communities, October 1997.

subsequent transmission. A request for this form of assistance must be made through the competent authority, which is either a judicial authority or an administrative authority designated for this purpose. Due to the nature of modern telecommunications systems, interception frequently does not require technical assistance from other States. However, Member States are urged to inform each other in respect of activities relating to the interception of communications. The Convention contains provisions which restrict the use of data communicated under the Convention to specific purposes. Thus data may only be used for judicial and administrative proceedings and to prevent an immediate and serious threat to public security. However, data obtained under the Convention can also be used 'for any other purpose' if consent is obtained from either the State communicating the data or the individual concerned.⁷³ Parties to this Convention may only enter reservations in respect of specific articles which make express provision. As a result of concerns raised by some Member States the Council of the EU adopted a Protocol to the Convention with a view to improving mutual assistance provision in the area of money laundering and financial crime. Thus, under the Protocol States are required to provide information relating to both individual and company bank accounts and are prohibited from using bank secrecy rules as a reason for refusing a request for assistance.⁷⁴ Further, a request may not be refused in respect of fiscal offences and a refusal to provide assistance on the ground of the political offence exception is significantly restricted.⁷⁵

9.5 MUTUAL LEGAL ASSISTANCE INITIATIVES IN THE UK

9.5.1 Introduction

In 1986, the Home Secretary set up an interdepartmental working group to review the law and practice in the UK in relation to mutual legal assistance in criminal matters. This group recommended legislative reform in order to facilitate closer international co-operation in the rapid expansion in extra-territorial crime and to provide the UK with easier access to foreign evidence. Four areas where changes were necessary were identified: service of process, the taking of evidence, the transfer of prisoners and the search and seizure of evidence for use in other jurisdictions. It was noted that the bulk of material generated under MLATs is in documentary form. Reliance on oral testimony at trial can preclude the admission of witness statements taken abroad and is a disincentive to co-operation. Thus, in addition to reform of UK mutual legal assistance law, reform of the domestic rules on the reception of hearsay evidence was also required. The Criminal Justice (International Co-operation) Act (CJICA) 1990 was enacted to enable the UK to co-operate with other States in criminal investigations and is the means by which the UK engages in mutual legal assistance.⁷⁶ An application to obtain evidence from outside the UK may be

73 *Ibid*, Art 23.

74 The Protocol to the Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union, Arts 1 and 7.

75 *Ibid*, Arts 8 and 9.

made by either a prosecuting authority or, if proceedings have commenced, by the person charged in those proceedings.⁷⁷ A judge or a magistrate or, in Scotland, a sheriff or a judge issues a formal letter requesting assistance in obtaining specified items of evidence.⁷⁸ The letter of request may only be issued if there are reasonable grounds for suspecting that an offence has been committed⁷⁹ and proceedings have been instigated or the matter is under investigation.⁸⁰ Provision is also made for a letter of request to be issued by a designated prosecuting authority.⁸¹ The Secretary of State has the task of directing letters requesting assistance to the appropriate central authority designated to receive requests for mutual legal assistance.⁸² However, in cases of urgency a request for assistance may be sent direct to a court or tribunal specified in the letter.⁸³ Most mutual assistance provisions have a double criminality requirement in respect of requests for search and seizure of material and insist on precise information of the place to be searched, the material to be seized and the nature of the offence under investigation. Whilst searches and seizures are usually conducted in accordance with local rules, domestic courts are required to be vigilant to prevent police officers exceeding their investigative powers.⁸⁴ On occasion, a member of the investigation team can travel abroad to assist in the execution of the request providing this does not infringe foreign law.⁸⁵ Likewise, in some circumstances, arrangements can be made for the defence to be represented during the questioning of witnesses.⁸⁶ To ensure fairness, the Act provides some restrictions and safeguards. Thus, evidence must only be used for the purposes specified in the letter of request and, unless the overseas authority states to the contrary, any material no longer required for the specified purpose must be returned to the central authority.⁸⁷ Factors relevant to the use at trial of written statements shall include: in England, whether it was possible to challenge the accuracy of the statement by questioning the person who made it, and whether the local law permitted the parties

76 The procedure to be followed is contained in the Home Office guidelines for judicial and prosecuting authorities seeking assistance in criminal matters from the UK.

77 CJICA 1990, s 3(2).

78 *Ibid.*, s 3(1).

79 *Ibid.*, s 3(1)(a).

80 *Ibid.*, s 3(1)(b).

81 *Ibid.*, s 3(3).

82 *Ibid.*, s 3(4). Requests for judicial assistance are usually channelled through a central point in each jurisdiction which in the UK is located within the Home Office. The Mutual Legal Assistance Section in the Judicial Co-operation Unit has the function of checking the documentation of both incoming and outgoing requests and then sending incoming requests on for execution and transmitting outgoing requests to the relevant central authority abroad.

83 *Ibid.*, s 3(5). See also 1959 Convention, Art 15(2) and Draft Convention, Art 6(4).

84 See *op cit*, Murray and Harris, note 1, Chapters 8 and 9.

85 In civil jurisdictions elements of the preliminary inquiry are conducted in private and do not permit the presence of third parties.

86 Defence attendance is relevant to the exercise of discretion to admit a written statement under the Criminal Justice Act (CJA) 1988, s 25; see S Nash, 'The Admissibility of Witness Statements Obtained Abroad: *R v Radak*', 3 *E & P* (1999), 195.

87 CJA 1988, s 3(7).

to be legally represented when the evidence was taken,⁸⁸ and in Scotland, whether its reception will cause unfairness to either party.⁸⁹

9.5.2 Crime (International Co-operation) Bill

This Bill has been introduced to implement the mutual assistance provisions of the 1990 Schengen Implementing Convention, the 2000 Convention on Mutual Assistance in Criminal Matters and its Protocol, and several Framework Decisions in the field of justice and home affairs. Part 1 of the Bill addresses mutual legal assistance. The clauses in this Bill amend the provisions in Pt 1 of the CJICA 1990 which in effect will widen the scope of cases in which the UK can make requests and offer mutual assistance in criminal matters, and provides for the direct transmission of requests. The Bill also contains clauses which amend the Criminal Justice and Police Act 2001 by providing that the additional powers of seizure of evidence in this statute will also apply to overseas offences or investigations.⁹⁰ Provision is made to enable UK courts, for the first time, to take video evidence of witnesses for transmission abroad.⁹¹ UK courts will also be able to respond to requests for telephone hearings but will have no power to compel a witness to attend the hearing.⁹² In Pt 2, which implements the EU Framework Decision on combating terrorism, the UK is required to take extra-territorial jurisdiction over a range of terrorist offences. Part 3 of the Bill introduces the mutual recognition of driving disqualifications and Pt 4 implements measures set out in the 1990 Schengen Implementing Convention which address the area of police co-operation, extradition and data protection.

9.6 THE USE OF EVIDENCE OBTAINED ABROAD

9.6.1 Introduction

Under the terms of the Crime (International Co-operation) Bill, evidence obtained from a foreign authority may only be used for the purposes for which it was requested, unless the consent of the requested State has been obtained, and is subject to the same admissibility rules as evidence obtained from within the jurisdiction.⁹³ However, evidence obtained abroad for use in domestic criminal proceedings can raise difficult admissibility issues for national courts. While the new European Convention on Mutual Assistance in Criminal Matters will assist with some of these problems, on occasion national courts are required to consider the admissibility of evidence obtained without reference to formal assistance procedures. Whether

88 *Ibid*, s 3(8).

89 *Ibid*, s 3(9).

90 Crime (International Co-operation) Bill, cl 26.

91 *Ibid*, cl 30.

92 *Ibid*, cl 31.

93 *Ibid*, cl 9.

evidence is obtained through formal or more informal methods of international co-operation, the admissibility dilemma remains a problem. Undoubtedly, traditional common law admissibility rules exacerbate the problem and create a potential disincentive to international co-operation in the investigation of serious crime. National courts have approached the admissibility problem in a variety of ways.

9.6.2 Evidence obtained outside the UK⁹⁴

The admissibility of evidence obtained outside the UK is determined by reference to national law and practice. Whether evidence has been obtained in breach of local, foreign or international law may be relevant to, but is not determinative of, the court's discretion to exclude evidence. Traditionally, the approach in both jurisdictions has been to discount misconduct occurring outside the UK on the ground that it involved no manipulation of the court's process.⁹⁵ Although, in *Bennett*⁹⁶ and *Mullen*,⁹⁷ the English court was prepared to inquire into the activities of foreign prosecuting authorities and refused to hear criminal proceedings brought against defendants whose presence within the jurisdiction was secured by means which were not merely irregular, but offended against fundamental principles of justice, the principles of abuse of process have not been applied to the exclusion of irregularly obtained evidence. In *Bennett, Petitioner*,⁹⁸ the Lord Justice General suggested that the Scottish courts might, in an appropriate case, be prepared to reconsider the decision of the High Court in *Sinclair v HM Advocate*,⁹⁹ in which the court held it could not enter into the questions of whether the proceedings abroad had been regular, formal and in accordance with the foreign law. Notwithstanding these developments, courts in both jurisdictions demonstrate a reluctance to use discretionary powers to secure the exclusion of relevant, reliable evidence obtained irregularly outside the UK.

9.6.3 Evidence obtained in breach of foreign law

In *Governor of Pentonville Prison ex p Chinoy*,¹⁰⁰ the Divisional Court was asked to consider the admissibility of evidence obtained in France in breach of French law and sovereignty and the European Convention on Human Rights. The court was of the opinion that the admissibility of foreign evidence was primarily a matter of relevance and reliability.¹⁰¹ The applicant in this case was the manager of the BCCI

94 For further discussion, see M Mackarel and C Gane, 'Admitting Irregularly or Illegally Obtained Evidence From Abroad into Criminal Proceedings: A Common Law Approach', *Crim LR* [1997], 720; and C Murray, 'The Protection of Fundamental Rights in Mutual Assistance Cases', *Oxford Conference on International Co-operation in Criminal Matters*, 1998, Oxford: Christ Church.

95 For further discussion on the development of the abuse of process doctrine, see A Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, 1993, Oxford: OUP.

96 [1994] 1 AC 42.

97 [1999] 2 Cr App R 143.

98 [1994] SCCR 902.

99 (1890) 17 R(J) 38.

100 [1992] All ER 317.

bank in Paris. Following his arrest in the UK, he had been committed to prison to await extradition to the USA on the basis of evidence obtained by US agents operating in France. The magistrate allowed the US Government to adduce as evidence transcripts of telephone conversations recorded in France without the knowledge of the French authorities, in breach of French sovereignty, in breach of Art 8 of the European Convention on Human Rights and without recourse to the available mutual legal assistance provisions. Counsel for Chinoy argued that the transcripts should have been excluded on the ground that US authorities had engineered the applicant's presence in the UK in order to avoid French proceedings, which amounted to an abuse of process of the English court, and, in the alternative, the trial judge should have exercised his exclusionary discretion under s 78(1) of the Police and Criminal Evidence Act 1984 (PACE).

In dismissing this application, Nolan J noted that 'crucial evidence against the applicant has been obtained by means which are criminal in France and, at any rate according to French law, are in breach of the European Convention on Human Rights'.¹⁰² He proceeded to ask: 'If (subject to s 78 of PACE) evidence unlawfully obtained in England is admissible, as Sang declares, then why should a different rule apply with regard to evidence obtained unlawfully in another country?'¹⁰³ Holding that evidence obtained abroad in breach of foreign law or international law 'formed part of the circumstances in which the evidence was obtained',¹⁰⁴ Nolan J considered it relevant that 'all the misconduct of which complaint is made took place before the matter came within the jurisdiction of the magistrates' court, and involved no abuse of process before that court'.¹⁰⁵ The fact that the court may find the manner in which the evidence was obtained objectionable is relevant to, but not determinative of, the judge's discretion to admit or exclude such evidence.¹⁰⁶ Accordingly, the magistrate was entitled to take the view that these breaches carried 'no more weight than breaches of English law and therefore did not constitute sufficient reason for excluding the evidence'.¹⁰⁷ The court chose to adopt a policy of non-inquiry into the manner in which evidence was obtained outside the UK by foreign law enforcement agencies and has been criticised for engaging in the laundering of evidence.¹⁰⁸ In presenting evidence obtained in breach of foreign law for use in the criminal process in another jurisdiction, the manner in which the evidence was obtained can be more easily overlooked than if it was obtained within the jurisdiction. Gane and Mackarel argue that, in *Chinoy*, evidence obtained unlawfully by US agents was effectively 'laundered' through local admissibility rules.

101 PACE, s 78, applies to extradition proceedings. Whilst the Criminal Procedure and Investigations Act (CPIA) 1996, para 26, Sched 1, removed committal proceedings from the scope of PACE, s 78 by inserting s 78(3), it is arguable that in extradition proceedings the magistrate is not sitting in the same capacity as an examining magistrate in criminal proceedings.

102 [1992] 1 All ER 317, p 330.

103 *Ibid.*

104 *Ibid.*, p 332.

105 *Ibid.*, p 330.

106 Interestingly, in *Chinoy v UK*, Application No 15199/89, the European Commission for Human Rights dismissed the application that the committal to prison was in breach of Art 5 on the ground that the domestic court's decision to allow the prosecution to rely on unlawfully obtained evidence complied with national rules and could not, therefore, be considered arbitrary.

107 [1992] 1 All ER 317.

108 See *op cit*, Gane and Mackarel, note 12, p 116; *op cit*, Mackarel and Gane, note 94, p 725.

In *Chinoy*,¹⁰⁹ the impugned conduct was attributable to US agents; there was no suggestion that English prosecuting authorities were party to the illegal acts of the foreign law enforcement officers. However, in *USA v Verdugo-Urquidez*,¹¹⁰ the US Supreme Court was prepared to admit evidence obtained from outside the jurisdiction by US agents acting in deliberate breach of the law of a foreign State. Following the arrest of a Mexican citizen for drug offences, US Drug Enforcement Agency (DEA) agents, working with Mexican police officers, conducted a search of the respondent's premises in Mexico. A Federal District Court held that the evidence seized during the search should be excluded on the ground that the search was unlawful under the Fourth Amendment to the Constitution. The DEA failed to obtain a warrant and did not have sufficient grounds for conducting a search without a warrant. On appeal, the Supreme Court held that the Fourth Amendment, which provided citizens with protection against unlawful search and seizure, did not apply to searches of property that was owned by non-resident foreigners located in a foreign State and, thus, the evidence was admissible.

In a powerful dissenting opinion, Brennan J warned that 'the behaviour of our law enforcement agents abroad sends a powerful message about the rule of law to individuals everywhere—when US agents conduct unreasonable searches, whether at home or abroad, they disregard our nation's values'.¹¹¹ In holding that the respondent was entitled to the protections of the Fourth Amendment, he reminded the court that a judicial warrant was intended to protect suspects from the 'unbridled discretion of investigating officers' which was 'no less important abroad than at home'.¹¹² He considered that, in sanctioning the unlawful actions of the DEA, there was a danger that the court was lending support to the argument that in the administration of criminal law the end justifies the means. It is arguable that, by failing to exclude this evidence, the Supreme Court missed an opportunity to discourage future illegal investigations by US agents. The Canadian courts have also demonstrated a willingness to accept evidence obtained by irregular methods. In *USA v Langlois*,¹¹³ the Ontario Court of Appeal, during extradition proceedings, was asked to consider whether to admit evidence obtained by a search considered unlawful in the State of Maryland in the United States. Complying with the rule of non-enquiry in relation to the issue of double jeopardy, the court held that it was inappropriate and unwise to inquire into foreign procedural and evidentiary rules, unless principles of 'fundamental justice' had been violated. In *R v Filonov*,¹¹⁴ the court held that, subject to certain exceptions, all relevant evidence was admissible. Furthermore, the 1982 Canadian Charter of Rights and Freedoms does not have extra-territorial effect. In *R v Terry*,¹¹⁵ the court also held that the Charter of Rights has no effect on law enforcement officials abroad, and as such does not render illegally obtained evidence inadmissible. Under Art 24(2) of the Charter, evidence not taken

109 [1992] 1 All ER 317.

110 108 L Ed 2d 222 (1990).

111 *Ibid*, p 246.

112 *Ibid*, p 252.

113 *USA v Langlois* (1989) 50 CCC 3d 445, Ontario Court of Appeal.

114 *R v Filonov* (1993) 82 CCC 3d 516, Ontario Court, General Division.

115 *R v Terry* (1994) 91 CCC 3d 209, British Columbia Ct of Appeal.

under the protection of the Charter should be excluded only 'if it would bring the administration of justice of this country into disrepute'.

Whilst the majority of the court in *Verdugo-Urquidez*¹¹⁶ sought to justify not only misconduct by law enforcement agencies engaged in investigating criminal offences abroad but also the illegal activity of US personnel involved in 'other foreign policy operations which might result in "searches or seizures"',¹¹⁷ the same criticism cannot be made against the Divisional Court in *Chinoy*. Domestic prosecuting authorities were beyond reproach and it is doubtful whether an English court can exert any influence over the activities of foreign agents. However, the failure to reject evidence, which was obtained not merely in breach of foreign law, but also in violation of international human rights standards, on the ground that the misconduct took place outside the jurisdiction of the English court, is lamentable and demonstrates a lack of sensitivity and understanding of the rules operating in other legal systems. Whilst the court may decide to disregard a breach of local rules when considering the admissibility of evidence obtained within the jurisdiction, to take the same approach to a blatant disregard for the rules applicable in another State is an entirely different matter. In effectively disregarding the infringement of the sovereign rights of French law and the violation of rights guaranteed by the European Convention on Human Rights, the court failed to take account of generally recognised principles and rules of international law and international comity.¹¹⁸ However, this case illustrates the reluctance to exclude relevant, reliable evidence and exposes the English court's commitment to a reliability principle. Following the enforcement of the Human Rights Act (HRA) 1998, the English judiciary has maintained its resistance to rejecting evidence.¹¹⁹

9.6.4 Evidence obtained in compliance with foreign law but which is irregular under local law

Although acknowledging that its exclusionary discretion extends to foreign evidence, English courts have been reluctant to lay down guidelines as to when it would be appropriate to refuse to admit such evidence. In *Quinn*,¹²⁰ the Court of Appeal held that identification evidence obtained abroad as a result of arrangements made by a foreign police force was admissible. Several weeks after the shooting of a police officer in London, Quinn stood trial in Dublin for offences committed in the Republic of Ireland. A witness to the shooting went to Dublin and identified the appellant. The fact that this identification was carried out in a manner which did not correspond with PACE and the codes of practice, should not be 'disregarded in so far as it affects the intrinsic fairness of the identification procedure adopted'.¹²¹ Noting that 'English

116 108 L Ed 2d 222 (1990).

117 *Ibid.*, p 238.

118 In 1975, over 30 Member States of the Council of Europe signed the Helsinki Declaration and agreed to abide by their obligations under international law including those 'arising from the generally recognised principles and rules of international law... In exercising their sovereign rights, including the right to determine their laws and regulations'.

119 For further discussion, see A Choo and S Nash, 'Evidence Law in England and Wales: The Impact of the Human Rights Act 1998', 7 *E & P* (2003), 31.

120 *Crim LR* [1990], 581.

121 *Ibid.*

courts cannot expect English procedural requirements to be complied with by police forces operating abroad, even if, as in the present case, they have similar procedural requirements',¹²² Lord Lane considered that for the purposes of s 78(1) the critical factor was the fairness of the subsequent English proceedings. In dismissing this appeal, he was satisfied that when exercising his discretion the trial judge had taken into account relevant factors such as the lack of an opportunity to cross-examine the witness and the fact that the disputed evidence was not the sole evidence in the case. Interestingly, the court noted that 'the present case was not one where the procedural departures... were the responsibility of the British authorities'.¹²³

The possibility of at least some control over evidence obtained as a result of serious extra-territorial irregularity is raised by the Scottish case of *HM Advocate v McKay*.¹²⁴ The court was required to consider the admissibility of evidence that had been obtained in Eire under an Irish search warrant. In accordance with the practice in Eire, documents were seized which were not in the name of the accused. At the subsequent trial in Scotland, objection was taken to the admissibility of the documents. It was submitted that it would be improper to admit the evidence because the search offended against the principles governing the search of premises in Scotland. Lord Wheatley took the view that:

The procedure followed was regular according to the law of the land where it took place [and that] does not in itself necessarily constitute a sufficient justification for the admission of the evidence. I can visualise circumstances where the practice followed by the law and procedure of the local country was so offensive to our own fundamental principles of justice and fair play that the admissibility of such evidence would not be tolerated. It seems to me, therefore, to be a question of facts and circumstances in each case.¹²⁵

The court held that, as far as Scottish procedure was concerned, the search was irregular. However, the irregularity was not necessarily fatal to the admissibility of the evidence. In this case the court was satisfied that in the circumstances the irregularity could be excused and the evidence admitted. The submission regarding the admissibility of evidence was not based on the premise that foreign police officers behaved improperly or that the evidence was gathered in breach of foreign procedures.

Unlike the court in *McKay*, the English court has so far failed to contemplate what would happen if foreign evidence gathering rules did offend English sensibilities. Citing *Quinn* with approval, the English court, in *Konscol*,¹²⁶ was prepared to admit evidence obtained outside the UK in accordance with local law, notwithstanding that it was obtained in a manner which did not correspond with English practice. *Konscol* was arrested in Belgium and subsequently convicted of conspiracy to import drugs into the UK. At his trial, he objected to the prosecution adducing in evidence a note of an interview obtained in Belgium by a customs officer, acting under the instruction of a Belgian magistrate. In accordance with local procedures, the Belgian authorities did not offer the suspect the services of a lawyer and did not administer a caution. In refusing to exclude this evidence, the trial judge considered it relevant that there was

122 *Ibid*, p 582.

123 *Ibid*.

124 1961 SLT 176.

125 *Ibid*, p 179.

126 *Crim LR* [1993], 950.

no dishonesty or bullying behaviour by the Belgian authorities and at no time did the appellant deny that he said what was recorded. On appeal, the appellant submitted that as the interview was not conducted in accordance with the provisions of PACE and would have been excluded had it been taken in England, the judge was wrong to permit the prosecution to adduce it. In dismissing the appeal, the Court of Appeal assumed that the interview was conducted lawfully in accordance with Belgian procedures. It is of note that in both *Quinn* and *Konscol* the issue before the court was the application of its discretionary exclusionary power under s 78 of PACE. It is questionable whether the court's reasoning would be sustainable if the evidence had been a confession obtained by oppression and the submission was based on the exercise of the mandatory exclusionary power under s 76 of PACE.

In *MacNeil and Others v HM Advocate*,¹²⁷ the Scottish court again used the principle of urgency to justify the admission of evidence obtained outside the jurisdiction. However, on this occasion the court moved to consider the admissibility issue without ruling on the legality of the search. The appellants were convicted of offences relating to the importation of cannabis. Following the discovery of drugs on a yacht moored on the Clyde, customs officers obtained a warrant under the Customs and Excise Management Act 1979. Material was seized from an address in Liverpool that was not covered by the warrant. Objection was taken to the admissibility of this material on the ground that it had been obtained irregularly and there were no circumstances which might excuse the irregularity. Proceeding on the basis that the items were irregularly obtained, the court held that the sheer urgency of the situation excused any potential irregularity and that, in the circumstances, the trial judge was correct in holding that the items should be admitted as evidence. It is unfortunate that the court did not deliver its opinion on the legality of the search before proceeding to consider the issue of admissibility. In cases involving evidence obtained outside the jurisdiction, it is important to distinguish between rules regulating the gathering of evidence and rules relating to the admissibility of evidence. In this case, if evidence was obtained unlawfully in Liverpool it could not be rendered lawful by the application of the principle of urgency, since this is not a principle recognised in English law. However, since the principle of urgency relates to the admissibility of evidence, the court in Scotland could consider whether it was appropriate in the circumstances to excuse the irregularity, which took place in England, and admit the evidence at trial.

In *Torres v HM Advocate*,¹²⁸ the court reaffirmed that it would exclude evidence obtained by means which offended fundamental principles of justice and fair play, irrespective of what was legal according to foreign law. However, nothing in this case suggested that the appellant had been denied a right of any kind. The prosecution alleged that cocaine had been transported to Scotland, by ship, from South America via Halifax, Nova Scotia, and sought to rely on a note discovered by Canadian Customs officials during a search of the vessel. A Canadian court granted an order for the transfer of the note to Scotland. The objection to its use at trial was based on the circumstances in which it had been obtained and transmitted to Scotland. The appellant submitted that the Canadian search warrant did not authorise the removal

127 [1986] SCCR 288.

128 [1997] SCCR 491.

of the note. Seizure of evidence in these circumstances would represent a breach of the fundamental principle of justice and fair play which was recognised in Scotland. Where a foreign official sought to justify a departure from the terms of the warrant, this was required to be supported by evidence of practice in his country. Furthermore, there were no circumstances which indicated that the principle of urgency could be used to excuse the irregularity. The Scottish court should apply the same principles to the admissibility of evidence obtained abroad as it does to evidence obtained as a result of an unlawful search in Scotland. In dismissing this appeal, the Lord Justice Clerk considered there was no basis to suggest the evidence was obtained in a manner which offended Scottish principles of justice and fair play. Any irregularity was 'one of the most technical kind'¹²⁹ and related to the execution of a search warrant on a vessel, which at the time was under the control of the Canadian authorities. Thus, it was inappropriate for the court to exercise its discretion to exclude evidence. In this case, the court was not prepared to look behind the decision of the Canadian court to the transfer of items of evidence to see whether the procedure was in accordance with foreign law. Interestingly, in *Schreiber v Canada*,¹³⁰ the Canadian Supreme Court was asked to consider whether the Canadian standard for the issuance of a search warrant was required before the federal Department of Justice submitted a letter of request to the Swiss authorities. The court held that a search carried out by foreign authorities, in a foreign country, in accordance with foreign law did not infringe a defendant's reasonable expectation of privacy, as a foreigner cannot expect greater privacy than is provided by national law.

On occasion prosecuting authorities have been able to use evidence obtained outside the UK in accordance with foreign law, notwithstanding a prohibition on the use of evidence obtained in the same manner within the jurisdiction. The Court of Appeal has ruled that the provisions of the Interception of Communications Act (ICA) 1985 which render telephone intercepts effected within the UK inadmissible at trial do not apply to foreign telephone intercepts. Relying on evidence consisting of telephone calls intercepted in the US, the US Government, in *Governor of Belmarsh Prison ex p Martin*,¹³¹ sought the applicant's extradition to stand trial for conspiracy to cause explosions. Having considered the intercepts, the magistrate found that there was a *prima facie* case against him and committed him to await the directions of the Secretary of State. The applicant applied for a writ of habeas corpus on the grounds that telephone intercepts were, by virtue of the ICA 1985, inadmissible in proceedings in the UK. In this case, the Divisional Court did not concern itself with the question whether the intercept was obtained in accordance with foreign law. It was satisfied that a foreign telephone intercept obtained in the US, by US Government agents, could be adduced in evidence in England because the ICA 1985 had no extra-territorial jurisdiction.¹³² Relevant to the court's decision was the fact that no offence had been committed by any person concerned in the operation of the public communications system in the UK.

129 *Ibid*, p 499.

130 [1998] 1 SCR 841.

131 [1995] 1 WLR 412.

132 For further discussion of the ICA 1985, see SNash, *Interception of Communications in the European Union*, 5 *Juridical Review* (1996), 321.

Similarly, in *Aujla*,¹³³ the Court of Appeal held that evidence of an intercept obtained outside the UK in accordance with local law was admissible in an English trial notwithstanding the provisions of the ICA 1985. The applicants were charged with conspiracy to facilitate the illegal entry of persons into the UK. During the course of a preparatory hearing,¹³⁴ the trial judge ruled that an intercept obtained in The Netherlands in accordance with Dutch law and procedure was admissible as evidence. Having obtained the appropriate judicial authority to intercept telephone calls, Dutch police officers recorded conversations made between Dutch residents and the appellants. These transcripts were eventually used as evidence in criminal proceedings in The Netherlands. Following the conviction of the Dutch residents, the transcripts were made available to the English police for use in the prosecution of the appellants in England. There was no challenge to the authenticity of the transcripts or the accuracy of the translations. The appellants argued that the trial judge's ruling breached the spirit of the ICA 1985 and ignored Art 8 of the European Convention on Human Rights.

In dismissing this interlocutory appeal, the Court of Appeal held that the operation of the ICA 1985 did not bar the use of material obtained by foreign phone tapping as evidence in proceedings in England. Furthermore, the court was satisfied that this evidence was obtained without violating the appellants' right to privacy, which is guaranteed by Art 8 of the Convention. Relevant to the court's decision was the fact that the evidence had been obtained in accordance with Dutch law and Dutch procedure which was presumed to meet the requirements of the Convention; the transcripts were part of a record of proceedings before a Dutch court and, thus, open to public scrutiny and no issue was taken as to the relevance or the reliability of the transcripts which had been obtained in a manner which did not conflict with English law. Whilst the primary issue, in *Aujla*, was whether the ICA 1985 had extra-territorial effect, it is authority for the proposition that evidence obtained in accordance with the law of a foreign country is *prima facie* admissible in an English trial.

This issue has also been addressed by the Belgian *Cour de Cassation* in relation to telephone intercepts obtained outside the jurisdiction, but made available for use in criminal proceedings in Belgium. The court was asked to consider whether a transcript of a telephone intercept obtained in The Netherlands at the request of the Belgian authorities was correctly admitted at trial, notwithstanding the prohibition on the interception of telephones in Belgium.¹³⁵ In upholding the conviction, the court ruled that an intercept obtained in The Netherlands in accordance with Dutch law and procedure was compatible with the European Convention on Human Rights.¹³⁶ Similarly, no objection was taken to the admissibility of transcripts obtained by French police in connection with a French criminal investigation which were made available to Belgian authorities for use in Belgium.¹³⁷ Whilst the court was not

133 [1998] 2 Cr App R 16.

134 CPIA 1996, s 31(3), provides that a trial judge may make a ruling as to the admissibility of evidence and under s 35(1) of that Act, the accused can apply for leave to appeal to the Court of Appeal against this ruling. If leave is granted, the Court of Appeal has the power to confirm, reverse or vary the judge's ruling.

135 Loi du 13 Octobre 1930, Art 17.

136 Cour de Cassation (2ème ch, sect Néel) 26 January 1993 (en cause de Co D) Revue de droit penal, 1993.

prepared to determine the legality of foreign procedures, providing the transcript was obtained lawfully according to French law and did not conflict with rights guaranteed by the Convention, the evidence could be received by a Belgian court.

The enforcement of the HRA 1998 has required courts in the UK to consider carefully arguments based on compatibility with Convention rights. In a series of interlocutory appeals brought under s 35(1) of the CPIA 1996, the Court of Appeal considered questions concerning the admissibility of evidence of foreign telephone intercepts involving an international element and the effect upon such admissibility of Arts 6 and 8 of the European Convention on Human Rights. In *R v X; R v Y; and R v Z*,¹³⁸ the appellants argued that as a matter of public policy, transcripts of telephone conversations obtained by intercepting telephones outside the jurisdiction which by reason of the operation of the ICA 1985 would be inadmissible if obtained in the UK should not be adduced at trial, whether or not the interception was in accordance with foreign law, and whether or not such evidence would be received in foreign criminal proceedings. The Court of Appeal was satisfied with the trial judge's finding that the foreign law enforcement agencies had acted lawfully throughout the proceedings. The telephone calls, which were recorded by means of an intercept being placed on a telephone in another country, were in accordance with the law of that country, as was the subsequent handing over to the British authorities for the purposes of prosecution and, any interference with the appellant's right to privacy was justifiable under Art 8 of the Convention.

Giving the judgment of the court, Potter LJ¹³⁹ held that whilst the consideration of an application to exclude evidence under s 78(1) obliged the court to attach considerable importance to a violation of a right guaranteed by the Convention, it remained necessary for the judge to engage in a consideration of all the circumstances surrounding the gathering of the evidence.¹⁴⁰ The question whether the interference with the appellant's right to privacy was in violation of Art 8 did not depend simply upon the legality of the gathering of the evidence, which was a matter of the foreign country's law, but also upon the subsequent use of the material. The court was satisfied that the judge was correct in treating the circumstances of this case as being not materially different from those of *Aujla* and found no fault with the exercise of discretion. Any risk that, as a consequence of this decision, English police officers would be tempted to ask foreign law enforcement agencies to arrange an intercept at the foreign end of a telephone line to circumvent the provisions of the ICA 1985 was not considered relevant to this case since there was no evidence that such a request had been made or such a purpose contemplated. Whether the court would move to exclude evidence obtained by collusion between prosecuting authorities remains to be seen. Current jurisprudence indicates that any intentional

137 Cour de Cassation (2ème ch, sect Néel) 12 October 1993 (en cause de Co D) *Revue de droit penal*, 1994.

138 (2000) *The Times*, 23 May.

139 The judge heard the application to exclude as though the HRA 1998 was already in force, since any appeal would be heard after its enforcement date. See *Ex p Kebeline* [1999] 4 All ER 801.

140 In *Khan v UK* (2001) 31 EHRR 45, the court held that the use of evidence, which had been obtained in breach of a right guaranteed by the Convention, was not necessarily in violation of the right to a fair trial.

circumventing of rules would be considered as relevant to, but not determinative of, the exercise of the discretionary power to exclude evidence.

The courts in the US have consistently reaffirmed the principle that the actions of foreign law enforcement officials and evidence obtained outside the US by those actions are not subject to the usual constitutional protections afforded by the Bill of Rights. In *Brulay v USA*,¹⁴¹ for example, the defendant was arrested in Mexico for the possession of drugs and subsequently convicted in the US for conspiracy to smuggle narcotics into the United States. On appeal, he claimed that statements taken from him by Mexican police and searches and seizures made by them did not conform to standards set out by the constitution, that such evidence was therefore irregularly obtained and should be excluded. The court disagreed, maintaining that applying exclusionary rules to the actions of Mexican police would not alter their search policies and that the exclusionary rules relating to evidence improperly obtained were intended to require US police officers to obey US law. Notwithstanding a breach of Mexican law, the Fourth and 14th Amendments to the US Constitution did not apply to evidence obtained by Mexican police officers, or indeed to foreign law enforcement officials in general.

Providing the actions of foreign officials did not 'shock the conscience' of the court¹⁴² or involve the participation of US officials so as to represent a joint venture, this principle has been acknowledged by the US courts on many occasions.¹⁴³ Arguably, the court has taken a rather disingenuous view of the concept of 'joint venture'. In *USA v Marzano*,¹⁴⁴ a suspect wanted for substantial bank thefts in the United States fled to the Cayman Islands. A police officer in Grand Cayman allowed two FBI agents to accompany him during the investigation, in the course of which the suspect was arrested and searches of a legally dubious nature carried out. He was then put on a plane destined for Miami. Thus, without any recourse to the formal procedures required under extradition or mutual assistance arrangements, prosecuting authorities in the US were in possession of the fugitive and the incriminating evidence. The FBI agents claimed that their role in the operation had been completely passive and this was supported by the Cayman police officer involved. The Court of Appeals, Seventh Circuit, accepted that the role of the US agents was entirely passive and found no evidence to support the view that the investigation involved a joint venture with the foreign agents. Accordingly, the evidence was properly admitted at trial.

Taking a similar standpoint, the Canadian courts have held that the rights set out in the Canadian Charter of Rights and Freedoms have no extra-territorial effect. In *R v Terry*,¹⁴⁵ for example, at the request of the Canadian authorities the defendant was arrested and questioned in the US by US police officers and a statement taken.

141 383 F 2d 345 (1967), 9th Cir, Ct of Appeals.

142 No express guidance has been set down as to what constitutes malpractice severe enough to shock the conscience of the court; however, in *USA v Toscanino*, 500 F 2d 267 (1974), the court was 'shocked' by the torture of the respondent by US officials, but was not shocked by his forcible abduction.

143 See *Stonehill v USA*, 405 F 2d 738 (1968), 9th Cir Ct of Appeals; *USA v Marzano*, 537 F 2d 257 (1975), 7th Cir Ct of Appeals; *USA v Cotroni*, 527 F 2d (1975), 2nd Cir Court of Appeals; *USA v Busic*, 587 F 2d 577 (1978), 3rd Cir Ct of Appeals.

144 537 F 2d 257 (1975), 7th Cir Ct of Appeals.

145 (1994) 91 CCC 3d 209, British Columbia Ct of Appeal.

Following his extradition to Canada, the statement was tendered as evidence at trial. The defence objected to its admissibility on the ground that the defendant had had no opportunity to receive legal advice, as required under the Charter. Rejecting this argument, the court held that the purpose of the Charter was to ensure that evidence obtained by Canadian officials was obtained fairly, which included evidence taken abroad on behalf of the Canadian authorities. The court held that while it should consider the manner in which evidence was obtained abroad, foreign evidence would be admitted in Canadian proceedings unless it would bring 'the administration of justice in Canada into disrepute'.¹⁴⁶ Whilst the procedure did not strictly conform to the requirements of the Canadian Charter, there had been no violation of local law and there was nothing in this case to bring the administration of justice into disrepute.

The Canadian Supreme Court considered this matter further in *R v Harrer*.¹⁴⁷ In this case, the defendant was interviewed by US police officers and, whilst she had been advised of her constitutional rights before interview, she had not been offered access to counsel.¹⁴⁸ The defendant argued that these statements should be excluded from proceedings in Canada because standards established under the Canadian Charter of Rights and Freedoms had been violated. The court held that it should not restrict the territorial limits of the Charter because to do so might limit the protection of Canadian people against an interference with their rights. He observed that had the questioning been undertaken by Canadian officers in the US, or by the US police at the request of the Canadian authorities, the Charter would have applied. However, since the US police officers were not acting on behalf of the Canadian authorities, the Charter has no direct application in the US. Accordingly, the statements were admissible. La Forest J considered that it should not be assumed that the evidence would be unfair because it fell below the standards of the Charter, because concepts of 'fairness and principles of fundamental justice involve a delicate balancing to achieve a just accommodation between the interests of the individual and those of the State in providing a fair and workable system of justice'.¹⁴⁹ He considered that the fact that the evidence was obtained in the foreign State in accordance with its law is an important consideration in relation to the admissibility of the evidence. However, to exclude that evidence only where it 'shocks the conscience' of the court is probably too low a standard. Fairness was a more objective criterion and evidence obtained abroad should be admissible unless it would lead to an unfair trial. Such an interpretation appears to be a similar standard to that set out under s 78(1) of PACE in English law, which allows the court to exclude evidence which 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'.

146 *Ibid.*

147 (1995) 101 CCC 3d 193, Supreme Ct of Canada.

148 Following the decision of the US Supreme Court in *Miranda v Arizona*, 86 S Ct 1602 (1966), a suspect must be advised of their constitutional rights on being taken into custody.

149 *R v Harrer* (1995) 101 CCC 3d 193, Supreme Ct of Canada.

9.7 EVIDENCE OBTAINED IN BREACH OF INTERNATIONAL HUMAN RIGHTS STANDARDS

In addition to the minimum standards of procedural fairness which are set out in Art 14 of the International Covenant on Civil and Political Rights (ICCPR)¹⁵⁰ and Art 6 of the European Convention on Human Rights,¹⁵¹ the privilege against self-incrimination,¹⁵² the right to remain silent¹⁵³ and the principle of equality of arms¹⁵⁴ are internationally recognised standards which are implicit in the right to a fair trial. Similarly, Statutes of both the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) contain fair trial guarantees.¹⁵⁵ However, international human rights instruments do not set out formal rules of evidence and international tribunals have resisted any moves to be bound by strict exclusionary rules.¹⁵⁶ The case law of the European Court of Human Rights unequivocally establishes that the admissibility of evidence is a matter for regulation by national law and the assessment of evidence is a matter for national courts and any attempt to introduce exclusionary rules into Convention jurisprudence has been actively resisted.¹⁵⁷ Similarly, the Human Rights Committee¹⁵⁸ when considering alleged violations of the ICCPR considers itself free to assess all the evidence presented before it in order to establish the facts. Whilst the Statute of the ICTY does have specific rules of procedure and evidence, r 89 provides that the Trial Chamber shall apply rules of evidence 'which will best favour a fair determination of the matter before it', but can exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.¹⁵⁹

Notwithstanding the lack of formal exclusionary rules, implicit in the right to a fair trial is the rejection of evidence obtained in breach of fundamental human rights

150 999 UNTS 171.

151 Rome, 4 November; TS71 (1953); Cmnd 8969.

152 *Funke v France* (1993) 16 EHRR 297.

153 The right to remain silent when questioned by law enforcement agencies and the freedom from self-incrimination is closely linked to the presumption of innocence. Although *Funke v France* (1993) 16 EHRR 297 and *Saunders v UK* (1994) 18 EHRR CD 23 establish that compelling the accused to provide incriminating evidence which is later adduced in evidence against him will infringe the freedom from self-incrimination, in *Murray v UK*, (1996) 22 EHRR 29, the court held that drawing inferences from the accused's silence will not automatically result in breach of the Convention.

154 In *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213, the court considered that the concept of equality of arms requires that 'each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.

155 SC Res 955 (8 November 1994). For further discussion, see Chapter 5.

156 Although having no formal status, Art 33 of the European rules proposed by the *Corpus Juris* project, a discussion paper prepared by a group of experts asked by the European Commission to consider the problem of budgetary fraud sets out conditions for the exclusion of illegally obtained evidence.

157 *Schenk v Switzerland* (1988) 13 EHRR 242.

158 Under the ICCPR, Optional Protocol 1, contracting States may declare that they recognise the competence of the Human Rights Committee to receive complaints from individuals claiming to be victims of violations of the rights set out in the covenant. See generally D McGoldrick, *The Human Rights Committee*, 1994, Oxford: Clarendon.

159 Rules of Procedure and Evidence for the International Tribunal for the Former Yugoslavia, s 3, r 89(B), UN Doc IT/32 (14 March 1994).

standards. Thus, although human rights jurisprudence has only limited impact on admissibility, the prohibition on torture which is generally recognised as an internationally accepted standard and enshrines one of the fundamental values of democratic societies,¹⁶⁰ guarantees that evidence obtained in this manner will be excluded from a criminal trial regardless of its reliability.¹⁶¹ In *Burgos v Uruguay*,¹⁶² the Human Rights Committee found that the use at trial of evidence obtained under torture infringed the right to a fair trial.¹⁶³ Refusing to accept that fair trial rights can be sacrificed for the sake of expediency, the European Court of Human Rights has rejected the use of evidence on the ground that it was obtained in breach of procedural safeguards inherent in Art 6.¹⁶⁴ This approach led to an expectation that the Court would not support convictions based on evidence obtained in breach of fundamental principles of fairness, despite its relevance and reliability. However, recent authority suggests that when assessing evidence obtained in breach of Convention rights, other than fair trial rights, the Court is prepared to focus on the nature of the evidence rather than the fact that human rights standards have been breached.

In *Khan v UK*,¹⁶⁵ the Court accepted that the admission of evidence obtained in breach of privacy rights did not conflict with the applicant's right to a fair trial. The applicant complained that the use at trial of evidence obtained in violation of a right guaranteed by Art 8 of the Convention was incompatible with the requirements of fairness guaranteed by Art 6(1). The court was satisfied that the evidence, which consisted of a tape-recorded conversation acquired by the use of a listening device attached to a private house without the knowledge of the owner or occupier, was obtained in violation of the applicant's right to respect for private and family life. The applicant argued that a conviction based solely on evidence obtained in consequence of the unlawful acts of prosecuting authorities was incompatible with the right to a fair trial. The court reiterated that its primary function was to determine whether the applicant's trial as a whole was fair and not to rule whether evidence of this type must, as a matter of principle, be excluded. Whilst Art 6 guarantees fair trial rights, it does not lay down any rules relating to the exclusion of evidence, which is primarily a matter for regulation under national law. Acknowledging that the secret recording was, in effect, the only evidence tendered for the prosecution, the court considered it relevant that there was no suggestion that this evidence was unreliable and that the applicant had had ample opportunity to challenge the authenticity of the recording. Where there was no risk of unreliability, the need for the court to look for supporting evidence was less important. The admissions on the tape-recording were made voluntarily and did not result from any entrapment or inducement on the part of the authorities. Noting that, under English law there was nothing unlawful about a breach of privacy, the court was satisfied that the recording of the applicant's conversation was not contrary to domestic criminal law. In rejecting

160 See, eg, European Convention on Human Rights, Art 3; ICCPR, Art 7; and American Convention on Human Rights, Art 5.

161 See discussion in *Soering v UK* (1989) 11 EHRR 439, para 88.

162 (1981) 1 Selected Decisions Human Rights Committee 88, p 90.

163 See also *Johnson v Jamaica* (1997) 4IHRR 21 and *Zelaya Blanco v Nicaragua* (1995) 2 IHRR 123.

164 See, eg, *Saunders v UK* (1997) 23 EHRR 313, the right to silence; *Murray v UK* (1996) 22 EHRR 29, access to a lawyer; *Teixeira v Portugal* (1998) 28 EHRR 101, entrapment.

165 (2001) 31 EHRR 45.

the applicant's claim, the court noted that at each level of jurisdiction the national court had a discretionary power to exclude the evidence if its admission would adversely affect the fairness of the proceedings. Interestingly, Loucaides J, in a dissenting opinion, considered that endorsing the use of evidence obtained in a manner which violated the applicant's rights served to frustrate the aims of the Convention. Moreover, the court was offering encouragement to police officers to continue gathering evidence in disregard of the accused's rights. Loucaides J, thus, urged that the exclusion of evidence obtained contrary to a Convention right should be seen as 'an essential corollary of the right'.

The English approach to the admissibility of evidence obtained in breach of human rights standards has been to regard the circumstances which amounted to the breach as relevant to, but not determinative of, the judge's discretion to admit or exclude evidence under s 78 of PACE. In admitting evidence of a telephone intercept obtained in breach of Art 8 of the Convention, the Divisional Court in *Chinoy*¹⁶⁶ considered it pertinent that any violations of French law and European human rights legislation occurred at the hands of US agents operating outside the jurisdiction of the English court.¹⁶⁷ Relevant to the court's decision to admit evidence of telephone intercepts in *Aujla*¹⁶⁸ was the fact that the transcripts were part of a record of proceedings before a Dutch court, obtained in accordance with Dutch law and Dutch procedure, which was presumed to meet the requirements of the human rights standards set out in the Convention. Similarly, in *R v X; R v Y; and R v Z*,¹⁶⁹ the trial judge held, in a *post-Khan v UK* decision, that an English court could use the fruit of foreign telephone intercepts notwithstanding any breach or potential breach of privacy rights without affecting fair trial guarantees inherent in Art 6. Relevant to the admissibility decision was the fact that both the making of the telephone intercepts and the subsequent handing over to the British authorities for the purpose of prosecution were in accordance with the law of a foreign State.

9.8 FAILURE TO USE MUTUAL LEGAL ASSISTANCE PROVISIONS¹⁷⁰

In the absence of a specific treaty provision,¹⁷¹ there is no mechanism whereby parties can be obliged to use formal mutual legal assistance provisions to obtain evidence abroad. In *Re Sealed Case*,¹⁷² the US Court of Appeals rejected the argument that US law enforcement agencies were limited to obtaining evidence in accordance with the provisions set out in a mutual legal assistance treaty signed by the Swiss and US

166 [1992] 1 All ER 317.

167 *Ibid*, p 332.

168 [1998] 2 Cr App R 16.

169 (2000) *The Times*, 23 May.

170 For further discussion of this topic, see *op cit*, Gane and Mackarel, note 12.

171 See, eg, the USA-UK Treaty concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters, Art 17, 26 ILM (1987), 536, which forbids US courts to use compulsory measures to obtain documents located outside the jurisdiction. Worthy of note is UN Model Treaty on Mutual Assistance in Criminal Matters, Art 8, which provides limitations on the use and transfer of evidence. Unless consent is obtained from the requested State, the evidence may only be used in connection with investigations set out in the request.

172 832 F 2d 1268 (1987), US Ct of Appeals for the District of Columbia.

Governments.¹⁷³ The appellant refused to comply with a subpoena to appear before a US court to produce documents relating to Swiss companies. Rejecting the argument that compliance with the request would be contrary to Swiss secrecy laws and in breach of international comity, the court held that it could 'order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's view to the contrary'.¹⁷⁴ Support for the court's decision can be found in Art 38(1), which states that the treaty would not prevent or restrict the use of procedures available under municipal law.

A similar approach towards international comity was adopted by the Court of Appeals in *Re Grand Jury Proceedings; Marsoner v USA*,¹⁷⁵ where, in the absence of any formal legal assistance arrangements with Austria, the District Court ordered the appellant to sign a disclosure directive to act as consent under Austrian law for obtaining documents from bank accounts. The appellant refused to sign and was fined and imprisoned for contempt. On appeal, the appellant argued that the disclosure order violated his rights under the fourth and fifth Amendments of the US Constitution, and Austrian law. After dismissing these claims, the Court of Appeals held that, despite the order of the District Court compelling the appellant to sign the disclosure directive breaching Austrian law and Arts 3, 6 and 8 of the European Convention on Human Rights, international comity did not preclude its enforcement. The court balanced the interests of the US in collecting its taxes against the purported illegality of the order under Austrian law and considerations of bank secrecy and upheld the interests of the US in compelling the appellant's signature, leaving Austrian courts to decide what effect to give the disclosure directive with respect to Austrian bank records. The decision of the Court of Appeals shows little concern for international comity. Some disquiet has been expressed with respect to the extra-territoriality approach taken by the US courts. Following attempts by the US Court of Appeals to use coercive measures against a bank to obtain confidential documents in the Cayman Islands, the UK insisted on the inclusion of a specific provision forbidding the use of extra-territorial coercive measures by US courts. In this case, a fine was imposed on the bank for failure to comply with an order from the US court, despite the fact that compliance with the request would have been in breach of local law.¹⁷⁶ The UK reacted by insisting that an agreement to combat narcotics in 1984,¹⁷⁷ and subsequently the MLAT, signed two years later,¹⁷⁸ contained a variety of restrictions on assistance, including provisions designed to prevent 'fishing expeditions' for information.¹⁷⁹

173 1973 USA-Switzerland Treaty on Mutual Assistance in Criminal Matters.

174 See n 173, p 1283.

175 40 F 3d 959 (1994), 9th Cir, US Ct of Appeals.

176 *USA v Bank of Nova Scotia*, 740 F 2d 817.

177 *Exchange of Letters of 26 July 1984 Between the USA and UK Concerning the Cayman Islands and Matters Connected with, Arising From, Related to, or Resulting From any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961, Art 6, Cmnd 9344, 1984.*

178 1986 US-UK Treaty Relating to the Cayman Islands, Art 17(3).

179 For a good summary to the background to and content of the Cayman Islands agreements see *op cit*, Gilmore, note 1, pp xx-xxiii.

The reluctance of national courts to insist that the exchange of evidence takes place under formal arrangements has encouraged prosecuting authorities to engage in more informal methods of evidence gathering.¹⁸⁰ However, in *Radak*,¹⁸¹ the Court of Appeal refused to sanction the prosecution's failure to make use of available mutual legal assistance procedures intended to safeguard defence rights. In this case, the prosecution could have issued a letter requesting assistance in obtaining the witness's written testimony for use in criminal proceedings in the UK. On receipt of a formal letter of request, the US authorities provide assistance in accordance with the provisions of the treaty between the Government of the UK of Great Britain and Northern Ireland and the Government of the US on mutual legal assistance in criminal matters. Article 8(4) provides that a requested party shall allow persons specified in the letter of request to ask questions of the person whose testimony is being taken. The examination of the witness is conducted through a legal representative qualified to appear before the courts of the requested State. Under this procedure the parties are provided with the opportunity to test the evidence of a witness living overseas by cross-examination. The court held that the failure to obtain evidence in accordance with s 3 of the CJICA 1990 was relevant to the exercise of the judge's discretion to grant leave to admit a written statement under s 26 of the CJA 1988.¹⁸² Although the prosecution had known from the outset that a crucial witness was reluctant to leave the US, they 'let slip the opportunity of obtaining cross-examined evidence on commission in time for the date fixed for the trial'.¹⁸³ The issue for the court was whether the lack of opportunity to cross-examine this witness was sufficiently unfair to the defence that it was not in the interests of justice to admit the evidence. In seeking leave to admit the statement, the prosecution were 'seeking leave to cover their culpability'¹⁸⁴ for failing to use treaty provisions designed to provide the prosecution and defence with an equal opportunity to summon and examine witnesses which would safeguard defence rights and minimise any

180 See, eg, *USA v Verdugo-Urquidez*, 110 S Ct 1056 (1990), in which no mention was made of the existence of a mutual legal assistance treaty between Mexico and the US which contained a provision for searches and seizure. In *USA v Alvarez-Machain*, 112 S Ct 2188 (1992) the Supreme Court held that unless a procedure was expressly prohibited by the treaty, the court would not prevent prosecuting authorities from acting in a manner which was arguably in breach of international law. In this case, the court refused to return a fugitive who had been abducted by US authorities. In the absence of an express provision in the extradition treaty prohibiting abduction, the court refused to pronounce the activities unlawful.

181 [1999] 1 Cr App R 187. See S Nash, 'The Admissibility of Witness Statements Obtained Abroad; *R v Radak*', 3 E & P (1999), 195.

182 In England and Wales, the admissibility of written statements made outside the UK is subject to the provisions of the CJA 1988, Pt II. The CJA 1988, s 23(1), provides that first hand documentary evidence shall be admissible in criminal proceedings provided the maker of the statement is unavailable to give evidence for one of the reasons set out in s 23(2) or (3). However, satisfying the conditions of admissibility still does not guarantee that a written statement will be adduced in evidence. It is true that there is a presumption against admitting statements which satisfy s 23, if they were prepared during the course of a criminal investigation: CJA 1988, s 26. In considering whether to exercise its discretion, the court is required to balance the importance of the document to the party seeking to rely on it against the degree of unfairness to the other party if the statement were admitted in evidence. The lack of opportunity to test the evidence by cross-examination is a powerful factor weighing against admission of a written statement.

183 [1999] 1 Cr App R 187, p 203.

184 *Ibid.*

unfairness. The court was satisfied that had this evidence been obtained on commission by a court in the US, it would have satisfied the requirements of Art 6(3)(d) of the European Convention on Human Rights.¹⁸⁵ In allowing this appeal, the court considered that, on balance, the degree of unfairness resulting from the failure to use available mutual legal assistance provisions was sufficient to exclude the statement. Whether this case will encourage prosecuting authorities to make better use of mutual legal assistance provisions remains to be seen. What is encouraging is the willingness of the court to exclude evidence in order to ensure equality between the defence and the prosecution as regards the examination of witnesses.

In addition to avoiding formal procedures, prosecuting authorities engage in informal mutual co-operation practices by simply allowing police officers in another jurisdiction access to evidence.¹⁸⁶ In *Aujla*,¹⁸⁷ evidence gathered by Dutch police officers in the course of a criminal investigation in The Netherlands was 'made available' to police officers in the West Midlands for use at trial in England. Although the Court of Appeal noted that this evidence was used in criminal proceedings in The Netherlands and, thus, was in the public domain, no reference was made to the manner in which it arrived within the jurisdiction.¹⁸⁸ The admissibility of foreign evidence was subject to the trial judge's discretion to exclude under s 78 of PACE,¹⁸⁹ and there was no authority to support the proposition that the doctrine of abuse of process could be applied to exclude evidence obtained irregularly from outside the jurisdiction. Relevant to the exercise of this discretion was the fact that the evidence in question had been obtained lawfully in accordance with Dutch criminal law and procedure. Similarly, in *X, Y and Z*,¹⁹⁰ the Court of Appeal supported a ruling by the trial judge that foreign telephone intercepts obtained from police authorities in another EU State were admissible at trial in England. The Court of Appeal considered the trial judge's finding that the handover of the transcript was 'in accordance with the law of that other country' could not be impugned. However, no mention was

185 European Convention on Human Rights, Art 6(3) provides that the accused shall have the right to 'examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.

186 The discussion will not consider more formal methods of police co-operation for the purposes of intelligence gathering, which takes place through Interpol and Europol.

187 [1998] 2 Cr App R 16.

188 *USA v Busic*, 592 F 2d 13 (1978) provides a more colourful example of the reluctance of States to enquire into the manner in which evidence arrived within the jurisdiction. Having hijacked an aircraft in the US, a group of Eastern European hijackers surrendered to the French authorities whereupon both the fugitives and the evidence were put back onto the aircraft and returned to the US. The Court of Appeals refused to exclude the evidence on the ground that the Fourth Amendment, which prohibits the use of evidence obtained as a result of an unlawful seizure, did not apply to foreign authorities.

189 Section 78 provides: '(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.' In *R v Governor of Pentonville Prison ex p Chinoy* [1992] 1 All ER 317, eg, the Divisional Court held, p 332, that evidence obtained abroad in breach of foreign law or international law forms 'part of the circumstances in which the evidence was obtained' and was a relevant factor to be taken into account in the exercise of the trial judge's discretion.

190 (2000) *The Times*, 23 May.

made in this case of the means by which this evidence came before the court. In *R v P and Others*,¹⁹¹ the House of Lords confirmed that where telephone conversations between a national of State A and the appellants had been lawfully monitored in State A by the prosecuting authorities of that country, tape-recordings of the conversations were admissible in evidence at the appellants' trial in England. Although English courts have refused to try persons brought within the jurisdiction by the deliberate avoidance of formal procedures,¹⁹² and obtaining evidence from abroad frequently creates similar problems, there is little authority to suggest that admissible evidence will be rejected on the basis that it arrived in the jurisdiction by unconventional means.

9.9 MLATS AND INDIVIDUAL RIGHTS

While some States seek to provide the accused with a mechanism to obtain evidence located abroad, the US favours MLATs which expressly exclude the defence from obtaining access to evidence under the agreement. It has been suggested that any requirements for strict controls on the use of evidence can be met in the case of defence requests by providing for transmission through domestic courts; and where it was suspected that the means of carrying out requests would breach the requesting State's own obligations under human rights instruments, it should be incumbent on the requesting State to particularise its requirements in the request.¹⁹³ Although the UK has attempted to ensure that evidence gathered under mutual legal assistance arrangements is used according to domestic rules of evidence,¹⁹⁴ the US continues to exclude individuals from taking any action to exclude evidence obtained under an MLAT.¹⁹⁵ Thus, treaty arrangements with the US, generally, contain a specific provision excluding the rights of any person to exclude evidence or to seek judicial relief in connection with requests under an MLAT.¹⁹⁶ In *USA v Garcia*,¹⁹⁷ the Court of Appeals confirmed that a defendant had no standing to challenge the erroneous use of Swiss banking records obtained under the Treaty. In *USA v George D Davis*,¹⁹⁸ the

191 (2000) *The Times*, 19 December.

192 In *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All ER 138, the Divisional Court held that it would be wrong and improper to try a person before an English court if his presence within the jurisdiction was brought about by the use of means which threatened either basic human rights or the rule of law. See also *Mullen* [1999] 3 WLR 777.

193 The Working Group on Mutual Legal Assistance in Criminal Matters, 1998 Oxford Conference on International Co-operation in Criminal Matters, 'Balancing the Protection of Human Rights With the Needs of Law Enforcement', 24–28 August 1998, Oxford: Christ Church.

194 CJICA 1990, s 3(8) and (9).

195 See, eg, The Netherlands-USA Treaty, Art 18(2); Canada-USA Treaty, Art 2(4); USA-UK Treaty on the Cayman Islands, Art 1(3); Mexico-USA Treaty, Art 1(5).

196 See, eg, the USA-Switzerland MLAT, Art 37(1), which purports 'to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this treaty'. Under this provision, anyone the subject of information obtained by the US under an MLAT is unable to move that any of that evidence should not be admitted, leaving the court to act *ex officio* in excluding evidence containing some irregularity.

197 37 F 3d 1359 (1994), 9th Cir, US Ct of Appeals.

198 767 F 2d 1025 (1985); 18 Fed R Evid Serv (Callaghan) 53.

defendant claimed that his rights of confrontation under the sixth Amendment of the US Constitution had been violated on the grounds that he had not been informed of proceedings taking place in Switzerland which he or his counsel were entitled under the terms of the Treaty to attend.¹⁹⁹ Whilst acknowledging the defendant's predicament, the Court of Appeals observed that, notwithstanding his right to attend the hearing in Switzerland, he lacked any standing under the Treaty. Thus, his attendance was an academic point without practical merit. Under this type of treaty, the interests of the individual rest with the respective central authorities. However, whilst the authorities can make a claim to exclude evidence or require explanation for failure to comply with the treaty provisions,²⁰⁰ it is not usually in their interest to pursue such a claim. Frequently, the admissibility of the evidence will enhance the chances of a successful prosecution, thus, exclusion of the evidence will be counterproductive to the authorities' interests. Following their conviction for tax offences, the appellants in *USA v Sturman and Others*²⁰¹ claimed that the US Government had requested information and bank records from the Swiss authorities to investigate tax offences, which was expressly excluded under the Treaty.²⁰² The appellants claimed that the Government had misrepresented the facts, informing the Swiss authorities that the investigation was in relation to organised crime.²⁰³ Disallowing the appeal, the Court of Appeals observed that Art 37 of the Treaty with Switzerland excluded the right of individuals to suppress evidence.²⁰⁴ The court was satisfied that the requests for assistance 'contain no serious misrepresentations' and for a violation to warrant a reversal of a conviction it must constitute 'serious governmental misconduct'.²⁰⁵

9.10 INFORMAL METHODS OF MUTUAL ASSISTANCE

Despite the increased willingness of States to engage in formal methods of mutual legal assistance, there are many other less formal methods of evidence gathering which permit law enforcement agencies to exchange information and material relevant to transnational investigations. The *Explanatory Report on the European Convention on Mutual Legal Assistance in Criminal Matters*²⁰⁶ indicates that the Convention was designed to supplement rather than replace existing co-operative arrangements. Informal methods of co-operation include: Memoranda of Understanding, which are non-legally binding written agreements setting out an undertaking to provide the assistance requested, indicating the procedures to be

199 See USA-Switzerland MLAT, Art 18(5).

200 *Ibid*, Art 37(3).

201 *USA v D Sturman; R Levine; R Sturman; and M Kaminsky*, 951 F 2d 1466 (1991), 6th Cir, US Ct of Appeals.

202 USA-Switzerland MLAT, Art 2(1)(a) and (5).

203 *US v D Sturman; R Levine; R Sturman; and M Kaminsky*, 951 F 2d 1466 (1991), 6th Cir, US Ct of Appeals, p 1482.

204 *Ibid*, p 1483.

205 *Ibid*, p 1484.

206 1969 report, Council of Europe.

followed and the grounds for refusing a request for assistance; and mutual administrative assistance which allows for the delivery of information between investigating agencies on a voluntary basis. This procedure requires the consent of the person holding the information.²⁰⁷ The methods by which requests for information are transmitted through the international police networks of Interpol and Europol are discussed in some detail in the next chapter. Undoubtedly, police officers engage in less formal methods of information and evidence exchange.²⁰⁸

In addition to launching new conventions on extradition and mutual legal assistance, the EU has taken several other important initiatives. Activities under the Third Pillar of the TEU address the field of judicial co-operation in criminal matters. It is relevant whether mutual legal assistance measures come under the Third Pillar of the TEU or the Treaty establishing the European Communities. Third Pillar bodies are subject to less stringent control than community bodies. It is of note that Europol and Eurodac are not subject to the same protection regime as First Pillar bodies. Several new initiatives arose as a result of the European Council meeting in Tampere. Thus the JHA Council has given its approval for the setting up of a European public prosecutions unit which will be located in The Hague, operating alongside Europol. The formation of a Eurojust unit will operate with a management team of prosecutors, magistrates and police officers drafted in from Member States; each participant can seek information from their relevant national authorities and have access to the SIS.²⁰⁹ When acting in their own State, members will be bound by national rules of procedure. However, when operating in another State:

Each Member State shall define the nature and extent of the powers it grants its national members in its own territory. The other Member States shall undertake to accept and recognise the prerogatives thus conferred.²¹⁰

These initiatives raise concerns about public accountability. Eurojust reports from the unit to the JHA Council and the European Parliament are less likely to be as extensive as reports from national prosecuting authorities to national bodies.²¹¹ The European Council endorsed the principle of mutual recognition of judicial decisions at Tampere, which is in line with other EC policies designed to promote free movement,²¹² and considered that it should apply to judgments and other decisions of judicial authorities. To promote the free movement of prosecutions, it is proposed to replace the current system of sending requests for assistance through a central authority with a directly enforceable European Enforcement Order. Other developments have included the issuing of European arrest warrants in extradition cases and mutual recognition of final judgments by criminal courts. While the creation of simplified procedures for judicial co-operation assist prosecuting authorities in

207 For further discussion, see *op cit*, Murray and Harris, note 1, Chapter 14.

208 See, eg, *R v Aujla* [1998] 2 Cr App R 16.

209 Draft decision contained in the Joint Initiative Setting up Eurojust, Art 9(2).

210 *Ibid*, Art 8(2).

211 For further criticism, see (2000) *Statewatch*, No 3/4, June-August 2000, Vol 10.

212 For a general discussion on free movement, see P Mathijsen, *A Guide to European Union Law*, 2000, London: Sweet & Maxwell.

transnational cases, the removal of traditional procedural safeguards for the defendant raises issues regarding fair trial rights. The need for national parliamentary scrutiny of Third Pillar proposals is essential since under Title VI of the TEU there is no effective role for the European Parliament. Concerns have been voiced regarding this lack of scrutiny and accountability.²¹³

213 See JUSTICE, *Submission to the House of Lords European Communities Committee: Report on the Rules and Regulations Governing EUROPOL*, May 1997. See also *The Scrutiny of European Business*, Select Committee on European Legislation, 27th Report, July 1996.

INTERNATIONAL POLICE CO-OPERATION

10.1 INTRODUCTION

The increase in transnational organised crime and the mobility of suspects and witnesses generally has resulted in the increased willingness of States to develop co-operative procedures to facilitate the gathering and transmission of evidence for use in criminal prosecutions in other jurisdictions. International crime is an increasing phenomenon, in terms of its frequency, scale and diversity. While the relaxation of border controls, ease of access to air travel and the dramatic advancement in the development of communications systems have combined to assist transnational criminal activity and has arguably facilitated the recent growth in terrorist-related crime, police investigative powers do not generally transcend national borders. Prosecuting authorities requiring access to suspects or material located outside the jurisdiction are required to seek assistance from their foreign counterparts through operational police co-operation and other mutual legal assistance procedures. Accordingly, the growth in cross-border crime and terrorism has resulted in the need for law enforcement agencies to modernise and increase their capability to investigate criminal activity which transcends national borders. However, some of the recent initiatives introduced to improve police and judicial co-operation in criminal matters have arguably reduced the traditional procedural protections for suspects to an unacceptable level. Thus, improving co-operation between policing agencies is a task beset with seemingly insurmountable hurdles. Even within Member States of the European Union (EU), which have close geographical and cultural ties, divergent legal systems, different law enforcement strategies and the increasing diversity of transnational criminal activity combine to hamper effective police co-operation.

10.2 INTERPOL

The International Criminal Police Commission (ICPC), known as Interpol, is an intergovernmental organisation which facilitates co-operation between national law enforcement agencies. The ICPC was formed in 1923 and has a membership of 181 States including Afghanistan and East Timor. Its primary purpose is to assist national authorities in the fight against transnational organised crime including drug-trafficking and Internet based child pornography. One of its most important functions is to assist police forces disseminate crime related information to each other through the use of the Interpol communication system. The origins of this international police network can be traced back to 1914. At the First International Police Congress held in Monaco, representatives from 14 countries considered establishing an international criminal records office and discussed methods for improving extradition procedures. Although further progress was prevented by the outbreak of the First World War, in 1923 the Second International Police Congress met in Vienna and set up the ICPC, which was to be based in Vienna. The Commission, which focused on providing

assistance to prosecuting authorities throughout Europe, suffered a severe setback with the outbreak of the Second World War and the Nazi occupation of Austria. It has been suggested that the information and records kept by Interpol assisted the Nazi regime in their persecution of minorities.¹ After the war, the ICPC moved to Paris and the process of rebuilding its reputation and membership commenced. It was during this period that the organisation took its telegraphic address, 'Interpol', which has since become the name by which the organisation is known. In 1956, the General Assembly, the governing body of the ICPC, agreed to draft new statutes which changed the name of the organisation to the International Criminal Police Organisation. Its membership has grown rapidly since the Second World War.

Interpol's modern constitution dates from 1956. Article 2 of this provides that its role is:

- (I) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in different countries and in the spirit of the Universal Declaration of Human Rights.
- (II) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.

Interpol's main function is to process inquiries and disseminate information by way of its international communications system. Consequently, it is not an operational agency in the same manner as a conventional domestic police force. Article 3 of its constitution, which strictly forbids the organisation to undertake any intervention or activities of a political, military, religious or racial character, has the effect of limiting its role. The interpretation of Art 3 rekindled some pre-war perceptions of the organisation and, for a time, it refused to assist investigations connected to the prosecution of Nazi war criminals. However, this changed with the issuing of a request for the arrest of Joseph Mengele in 1985. Article 3 caused further problems when some States refused to co-operate in undertaking investigations into terrorist activities on the basis that this category of offences was politically motivated. These problems threatened to jeopardise the general work of Interpol and it became clear that some regenerative action was required. In 1984, the General Assembly of Interpol met to draft revised guidelines with the intention of bringing about a change in focus to the problematic interpretation of Art 3. As a consequence of these discussions, the General Assembly agreed that the motive put forward by the terrorist would not in itself be sufficient to make the offence 'political' in nature. Each case must be considered separately on its merits and all the elements involved are to be considered.² Whilst Art 3 was not amended, the revised guidelines provided Interpol with a more pragmatic basis for distinguishing between ordinary criminal offences and 'politically motivated offences'.

10.2.1 Organisation of Interpol

Interpol is a non-political, independent policing organisation which has been recognised by the United Nations (UN) Economic and Social Council Resolution as

1 M Andersen, *Policing the World: Interpol and the Politics of International Police Co-operation*, 1989, Oxford: OUP, pp 41–42.

2 A Bossard, 'Interpol and Law Enforcement: Response to Transnational Crime', 11 *Police Studies* (1988), 177, p 179.

an intergovernmental organisation,³ and is independent from other international bodies such as the UN or the Council of Europe. The General Assembly and the Executive Committee are the two senior decision making bodies and the General Secretariat, which is comprised of a number of departments, is responsible for implementing the decisions of the assembly and executive. The Secretariat and the Interpol National Central Bureau (NCB) are responsible for co-ordinating with law enforcement agencies in each Member State to facilitate the everyday work of police co-operation. The General Assembly is composed of delegates from all 181 Member States. Meeting annually, the General Assembly makes major decisions which affect general policy, operational priorities, resources and finances and elects the organisation's officers. The Executive Committee is comprised of members elected from the General Assembly and aims to implement the decisions of the General Assembly, and works closely with the Secretary General. The General Secretariat, the permanent administrative body through which Interpol operates, co-ordinates investigations and information via both national and international authorities and implements policy set down by the General Assembly and the Executive Committee. Based in Lyon, France, the General Secretariat is headed by the General Secretary, who is elected every five years and is answerable to the General Assembly and the Executive Committee. The Secretariat currently operates with a staff of approximately 300 personnel, consisting of about 100 police officers seconded from national authorities. The remainder are civilian support staff.

The NCBs have been described as the Vital cogs upon which the organisation turns'.⁴ Each Member State has an NCB, normally based with a central domestic policing agency. In the case of the UK, the NCB is attached to the National Criminal Intelligence Service (NCIS) which is based in London. The NCBs are charged with the responsibility of sending requests for assistance and receiving enquiries. National police officers or government officials staff the NCBs and are required to operate in accordance with national law. The function of NCBs is to carry out the following tasks:

- (a) collecting criminal intelligence related to offences and offenders which have international elements. This intelligence is disseminated to other NCBs and the General Secretariat;
- (b) ensuring that police operations requested by other States' NCBs are carried out;
- (c) receiving requests from other NCBs for information and replying to those requests;
- (d) transmitting requests for international co-operation from domestic police and courts to foreign NCBs;
- (e) forming part of the national delegations which attend the annual meeting of the General Assembly

Whilst NCBs communicate with each other, it is their responsibility to inform the General Secretariat of their work in order to ensure information and operations can be centralised and co-ordinated efficiently.

3 E/RES/1579 (L).

4 J Benyon *et al*, *Police Co-operation in Europe: An Investigation*, 1993, Leicester: University of Leicester Centre for the Study of Public Order, p 125.

Interpol's historical origins lie within Europe and its early work was concerned primarily with improving police co-operation between the European States that made up the membership of the organisation. Priority was given to the policing concerns of the European and US members, who were the heaviest users of Interpol. As a consequence of the organisation's expansion, Interpol's activities became concerned with criminal activity throughout the world. Towards the end of the 1980s, it was acknowledged that 'police collaboration in EU countries is constrained by the fact that it is the international police organisation of the world'.⁵ Undoubtedly, the globalisation of criminal activity has tested the organisation's capacity to respond, and the increasingly transnational nature of crime has had repercussions on policy.⁶ A fraudulent offence against a European bank will affect the bank's interests globally and any criminal investigation may involve activity in several geographically and culturally diverse regions. Similarly, possession and supply of proscribed drugs in Europe and the US cannot be viewed in isolation from the producer countries in South America and the Far East. Whilst Interpol continues to take measures to provide for the needs of its European members, there is a general shift towards regionalisation. In 1999, a Regional Co-ordination and Development Directorate was set up within the General Secretariat to increase the range of regional initiatives. In 1986, the European dimension of Interpol's work was given a sharper focus with the establishment of a European Secretariat and a European Liaison Bureau within the General Secretariat. This body has the task of overseeing criminal matters with a European dimension. The organisation's budget for 1999 was \$US 27.2 million. In October 2002, the member countries agreed to a 23.4% increase in contributions to ensure that Interpol can continue to respond effectively to current challenges. While all Member States of Interpol make financial contributions to the running of the organisation, individual contributions vary depending upon the size of the country and use made of the resources. States are required to indicate to the Executive Committee their intended contribution and the Secretary General is charged with implementing the budget. The accounts are externally audited under the direction of the General Assembly and Executive Committee.

10.2.2 Interpol operational activities

Although its primary role is to act as a conduit for information exchange between the Member States, in reality the breadth of tasks undertaken by Interpol is more extensive. Interpol's policy initiatives grew significantly during the 1990s as a consequence of rapid developments in communications, information and data storage and analysis. Undoubtedly, the success of the organisation depends to a large extent upon the efficient use of its extensive criminal databases. However, the efficient exchange of sensitive information relies not only on Interpol's sophisticated computer system but also on the national police communications network in the 181 Member States. Thus the telecommunications network operates on three tiers and involves the NCBs, the regional stations and the central station in Lyon.

5 *Ibid*, p 130.

6 'Memoranda of evidence, minutes of evidence and appendices', in Home Affairs Committee, *Seventh Report: Practical Police Co-operation in the European Community*, House of Commons, Session 1989-90, Vol II, p 37.

Throughout the 1990s, the network system was upgraded to ensure that message exchange became efficient and has been designed for flexibility, providing for the interaction between the central system and a variety of equipment designed by different manufacturers. This technology allows for the exchange of other information such as data and images. Further improvement was attained when the capacity for messages to be encrypted was achieved, thereby rendering messages indecipherable to anyone except the intended recipient. Interpol has also developed the automated search facility (ASF), which allows Interpol NCBs and other official agencies to consult databases at the General Secretariat. Searches can now be carried out for information relating to international fugitives; the database holds information on fugitives, missing persons, stolen works of art and stolen vehicles. Improvements in technology and the introduction of the Interpol Criminal Intelligence System have extended the amount of material that can be stored by the organisation, and have substantially reduced the time needed to answer enquiries received from NCBs.

Arguably, one of the most publicised aspect of Interpol's work is its circulation of international notices which provide information relating to photographs and fingerprints. There are several different categories of notice which are colour coded. A 'wanted notice' is a request for the arrest of a person with a view to extradition and is known as a red notice. An enquiry notice is published to collect information about individuals and is known as a 'blue' notice. A warning notice is given to provide information about known offenders operating internationally and is known as a 'green' notice. A request for information relating to the tracing of an individual, a missing person notice, is known as a 'yellow' notice and an unidentified body notice which provides a description of a corpse is known as a 'black' notice. The legal basis for issuing a red notice is a valid arrest warrant issued by judicial authorities in the requested State, and a commitment to seek the fugitive's extradition following arrest. Thus the issuing of a red notice is dependent upon the existence of an extradition treaty between the relevant States. While a red notice contains identifying information such as fingerprints and photographs, in urgent cases Member States can issue 'Diffusions' which are emails containing limited identifying information. In March 2003 there were approximately 30,000 red notices and Diffusions in circulation of which nearly 9,000 were issued in 2002. In 2002, over 1,200 arrests were made on the basis of an Interpol notice.⁷ In addition to other updates about developments in crime and particular offenders, Interpol also circulates notices about stolen property and provides notices relating to specific *modus operandi* used in the commission of certain offences. Improvements in telecommunications have assisted in the effectiveness of the notice system. The improved computer systems at the General Secretariat have given rise to the development of the Analytical Criminal Intelligence Unit (ACIU), which reviews information and intelligence received by Interpol and searches for patterns and links in criminal activity. These analyses are shared with relevant NCBs who may be working on separate elements of the same problem.

During the period between 1970 and 1990, Interpol was criticised for its inefficiency and lack of rigour in matters of internal security and doubt was cast upon its ability to counteract the rapidly developing problem of organised crime. During this period,

7 Information taken from a speech given by the General Secretary of Interpol in March 2003 at Tuft's University, Boston, US.

there was evidence that information relating to serious crimes had been inappropriately disclosed. There were suggestions that representatives of States allegedly sympathetic to terrorist activity were passing information to terrorist organisations.⁸ Several States allegedly harbouring international terrorists were members of Interpol. Following events after 11 September 2001, the Secretary General of Interpol reiterated that its constitution prohibits involvement in political, ethnic or religious disputes. As an institution it is committed to neutrality, its mission being to assist all States to share police information under any lawful circumstances. Undoubtedly, improvements in telecommunication security and encryption techniques have combined to reduce the problem. Further criticism has been levelled at the inefficient system for the exchange of information, which is bureaucratic and laborious. Again, recent improvements in technology accompanied by efficient leadership have produced results. Following Interpol's relocation to headquarters in Lyon in 1989, the response to inquiries has improved. Thus, in 1986, Interpol was reported to take on average 14 days to respond to an inquiry, whereas in 1989 the delay was reduced to two hours.⁹ In 1990, the Home Affairs Committee in its *Seventh Report on Practical Police Co-operation in the European Community* urged that '[m]istrust of Interpol should not be perpetuated on the basis of past failings'.¹⁰ In a recent internal appraisal of the work of the British NCB, Interpol was described as having a 'pivotal and essential role in dealing with international criminal enquiries': for example, in 1998, the British NCB handled 157,345 messages.¹¹ In addressing criticisms made in the 1980s, Interpol has succeeded in developing its global role while operating in conjunction with collaborative policing initiatives taking place within Europe.¹²

10.3 EU INITIATIVES

The Amsterdam Treaty, which came into force in May 1999, provides the legal basis for cross-border police co-operation within the EU. However, although matters relating to common foreign and security policy became Community matters, police and judicial co-operation in criminal matters remain within the Third Pillar which has been subjected to some reorganisation.¹³ Provisions relating to police and judicial co-operation in criminal matters are now contained in Title VI of the Treaty of European Union (TEU). Initiatives in the field of police co-operation will include

8 *Op cit*, Benyon *et al*, note 4, p 129.

9 G Mason, 'Kendall's Kingdom', 14 *Police Studies* (1991), 19.

10 *Report Together with the Proceedings of the Committee*, House of Commons, Session 1989–90, Vol I.

11 NCIS, *Annual Report*, 1998–99, p 31.

12 For further information about Interpol, see www.interpol.int.

13 The EU is founded on three pillars: the European Communities, Common Foreign and Security Policy, and co-operation in the fields of justice and home affairs. Activities under the Third Pillar address the area of police and judicial co-operation in criminal matters. It is relevant whether mutual legal assistance measures come under the Third Pillar of the TEU or the First Pillar of the Treaty Establishing the European Communities (TEC), Third Pillar bodies being subject to less stringent control than Community bodies. Concerns have been raised regarding the adequacy of the democratic and judicial controls in the area of justice and home affairs. It is of note that Europol and Eurodac, bodies holding sensitive data, come under the Third Pillar and are not subject to the same protection regime as First Pillar bodies.

the collection and exchange of relevant information, joint initiatives in training and the use of equipment and the common evaluation of investigative techniques.¹⁴ In October 1999, the European Council held a special meeting to discuss making full use of the possibilities offered by the Amsterdam Treaty to create an area of freedom, security and justice in the EU. To counter the threat to freedom posed by serious crime, the Council considered that a common effort was needed to prevent and fight crime and criminal organisations throughout the EU. In order to achieve this objective it was considered necessary to facilitate the joint mobilisation of police and judicial resources. In its conclusions the Tampere European Council called for an increase in all forms of co-operation between law enforcement agencies in Member States. Measures should be taken to set up joint investigative teams to combat trafficking in drugs and people and terrorism. Additionally, in order to reinforce the fight against serious organised crime, a Eurojust unit was proposed which would be comprised of national prosecutors and magistrates from all Member States. This body would be given the task of facilitating co-ordination of national prosecuting authorities and working with the European judicial network in order to simplify the execution of requests for assistance. The mechanism by which many of these EU initiatives are implemented has been the subject of some criticism. The UK parliamentary European Scrutiny Committee,¹⁵ for example, noted in its report on amendments to the framework proposal to replace extradition between Member States with a European arrest warrant that:

The presentation of radically changed texts in the last days of a Presidency, with calls for their immediate adoption, does not appear to us to be an appropriate way of determining changes at EU level to the criminal law. This is compounded by rules which prevent public and open discussion of what takes place in the Council, so that it may become possible for responsible Ministers to explain why particular changes were made. The legislative process should be open and transparent and not one of secret bargaining. We intend to return to this subject as part of our inquiry into democracy and accountability in the EU and the role of national parliaments.¹⁶

The rapid expansion in the field of police and judicial co-operation in criminal matters raises questions related to the protection of the fundamental rights traditionally enjoyed in modern democracies. In drafting mutual assistance initiatives care must be taken to maintain sufficient procedural safeguards to protect individual rights. Increasingly, police co-operation initiatives involve the creation of extensive computer networks and databases to facilitate the exchange of information and provide the basis for analysis and intelligence. Proliferation of these databases brings with it problems relating to data protection and efficiency. Member States have access to information provided by Interpol, Europol, the Schengen Information System (SIS), the Customs Information System and Eurodac, a DNA database. Thus, large amounts of data and intelligence are being circulated between countries, which raises concern about control and accuracy. The development of police co-operation is not solely concerned with information exchange. Measures to increase operational co-

14 TEU, Art 30.

15 UK Ministers cannot normally agree to EU legislative or other proposals until the parliamentary scrutiny process is completed.

16 UK parliamentary European Scrutiny Committee, Seventeenth Report of Session 2001–02, HC 152–xvii.

operation can be found in the redefined role of Europol in investigations and in the practical measures established under the 1990 Convention Implementing the Schengen Agreement (Schengen Implementing Convention). Arguably, these initiatives blur the distinction between operational police co-operation and the traditional form of judicial assistance envisaged under mutual assistance arrangements. Both the 1990 Schengen Implementing Convention and the 1959 European Convention on Mutual Assistance in Criminal Matters, for example, provide for cross-border covert surveillance and controlled delivery arrangements.¹⁷ Traditionally, Member States have demonstrated a reluctance to transfer competence to the Community in relation to justice and home affairs matters. Incorporating the Schengen *Acquis* into the EU will increase accountability in respect of the SIS; however, Third Pillar bodies remain subject to less rigorous scrutiny than Community bodies.¹⁸ Lack of involvement by EU institutions, such as the ECJ and the European Parliament, in Third Pillar activities raises questions in respect to the level of democratic accountability. JUSTICE, the British section of the International Commission of Jurists, consider that it is increasingly anachronistic and unjustified to have different data protection standards at EU level, particularly when the lower Pillar standards of the Third Pillar cover areas that involve highly sensitive data.¹⁹ The relaxation of internal border controls has been responsible, in part, for the increase in cross-border criminal activity and has given rise to many formal and informal police co-operation initiatives. The question remains whether the recent moves towards increased operational co-operation between law enforcement agencies are subject to adequate democratic and judicial control. It is unfortunate that an area which has ramifications for several aspects of Community policy and raises human rights issues has been removed from the community architecture and, in particular, from judicial clarification by the ECJ.

10.3.1 The European Court of Justice

The extent of the involvement of the European Community (EC) with criminal justice matters is at present very limited.²⁰ Any move towards increasing Community competence in the area of police and judicial co-operation has caused some Member States to express concern over possible loss of national sovereignty. However, in some procedural areas a level of harmonisation has been achieved through the operation of the European Convention on Human Rights, which has been embraced by the ECJ, the judicial body responsible for ensuring Member States comply with Community law. While the ECJ traditionally has exercised no jurisdiction over Third Pillar activities such as justice and home affairs, the Amsterdam Treaty extended the power of the ECJ to a limited extent. In February 2003, the ECJ gave its first ruling on

17 The problems of accountability with these operations can be illustrated by the inquiry of the Dutch Van Traa Committee in 1996 which considered the background to the apparent loss of control by the Dutch police over its controlled delivery system.

18 Activities taking place under the First Pillar are subject to scrutiny by EU institutions such as the European Parliament and the European Court of Justice (ECJ). For further discussion, see P Mathijsen, *A Guide to European Union Law*, 2000, London: Sweet & Maxwell.

19 M Colvin, *The Schengen Information System: A Human Rights Audit*, 2000, London: JUSTICE.

20 For further discussion, see M Furse and S Nash, 'Free Movement, Criminal Law and Fundamental Rights in the European Community', *3 Juridical Review* (1997), 148.

the interpretation of Art 54 of the 1990 Schengen Implementing Convention. This provision states that:

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

In *Huseyin Gozutok*²¹ and *Klaus Brugge*,²² the ECJ held that once a prosecutor makes a decision to discontinue criminal proceedings on the basis of an agreed settlement with the accused, without involving the court, a subsequent prosecution in another Member State based on the same set of facts would be contrary to this provision which enshrines the rule against double jeopardy. There remains considerable reluctance among many Member States to relinquish control to a supranational body in matters affecting public order and crime. Despite significant recent achievements in this area, full integration of justice and home affairs will be a slow process.

10.3.2 Europol

The European Police Agency (Europol) was set up under the Third Pillar by the 1995 Europol Convention and became operational in 1999. Its primary purpose is to facilitate operational police co-operation in respect to combating serious and organised criminal activity within Member States of the EU. Its primary role is the exchange and analysis of information. Thus, Europol maintains an extensive computerised database to store personal data for use in the prevention and investigation of serious crime, which can be accessed by national units and liaison officers. Each Member State is required to establish a national body which liaises between Europol and the competent national authorities. An independent joint supervisory body is responsible for monitoring Europol's activities. The budget is financed by contributions from Member States. It is anticipated that Europol's operational role will increase and that it will be equipped with increased coercive powers. In October 2000, for example, the Council of the EU expressed concern that the definition of computer crime in the Annex to the Europol Convention²³ was insufficiently precise. Accordingly, it was proposed to add a specific definition of 'computer crime' to this instrument, which would include all forms of attack on automated data processing systems, and to extend Europol's mandate to cover these offences. In November 2002, a Protocol amending the Europol Convention was introduced which will enable Europol to participate in joint investigation teams.²⁴ Further, in March 2003 the European Commissioner for Justice and Home Affairs and the Director of Europol signed a co-operation agreement that will allow the exchange of strategic information such as threat assessments but will not include the exchange of personal data. Extending Europol's mandate to cover not only a wider range of criminal activity but also to permit greater participation in criminal

21 Case No C-187/01.

22 Case No C-385/01.

23 See the Convention based on Art K3 of the TEU establishing a European Police Office (Europol Convention) (CM 3050, 1995).

24 2002 OJ C312 16/12.

investigations increases concerns relating to accountability.²⁵ The need for national parliamentary scrutiny of Third Pillar proposals is seen as essential since under Title VI of the TEU there is no effective role for the European Parliament.

The proposal to set up a European police office was first considered in 1970 and resulted from ministerial discussions considering measures to counter the growth in terrorism. These meetings, which took place outside the formal EC structure, produced some interesting initiatives in the area of European police co-operation.²⁶ In an effort to rationalise these efforts, and prompted by the view that Interpol was not serving the interests of European countries as well as it should, Germany proposed the creation of a specific policing agency for Member States of the EC. At the time of the signing of the TEU in 1992, it was agreed that the Third Pillar of the Treaty would include a commitment to the creation of a Central European Criminal Investigation Office.²⁷ Prior to the Europol Convention being ratified, an interim agency, the Europol Drugs Unit (EDU) was established by ministerial agreement and began operating from temporary premises in The Hague.²⁸ The role of the EDU was to begin work on the task of police co-operation by way of information exchange on a limited basis. At this stage, it was agreed that enquires would be restricted to investigations into drug-trafficking. While there has been a rapid growth in the workload of Europol, its activities have developed entirely under the auspices of the Council of Ministers and, thus, have not been subject to any significant scrutiny by the European Parliament. Although the Council of Ministers must provide an annual report on the activities of Europol,²⁹ and consult the European Parliament with respect to any amendment to the Europol Convention, the Ministers are under no obligation to act upon comments or recommendations.

Article 2(1) of the 1995 Europol Convention provides that:

The objective of Europol shall be...to improve...the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug-trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved and two or more Member States are affected...

Under Art 2(2) of this Convention, Europol was empowered to deal initially with drug-trafficking, the movement of illegal nuclear materials, illegal immigrant smuggling, trade in human beings and motor vehicle crime. The Convention allows further expansion of the agency's role by listing other forms of crime in an annex to the treaty. Thus, the Council of Ministers, acting unanimously, may decide to invest Europol with the power to investigate any offence in the list, which covers an extensive and diverse range of criminal activity. The annex itself may be expanded

25 See JUSTICE, *Report on the Rules and Regulations Governing Europol* Submission to the House of Lords European Communities Committee, May 1997. See also Select Committee on European Legislation, *The Scrutiny of European Business*, 27th Report, July 1996.

26 T Bunyan, 'Trevi, Europol and the New European State', in T Bunyan (ed), *Statewatching the New Europe: A Handbook on the European State*, 1993, Nottingham: Russell.

27 1992 TEU, Title VI, Provisions on Co-operation in the Fields of Justice and Home Affairs, Art K1.

28 Joint Action on Europol Drugs Unit (10 March 1995).

29 1995 Europol Convention, Art 34(1).

by the Council of Ministers.³⁰ The tasks for Europol in relation to the objective in Art 2 of the Convention are set out in Art 3 of the Convention. They include:

- (a) facilitating the exchange of information between States;
- (b) obtaining, collating and analysing information and intelligence;
- (c) notifying Member States about information concerning them and any connections identified between criminal offences;
- (d) aiding investigations in Member States by forwarding all relevant information to the national units;
- (e) maintaining a computerised system of collected information containing data.

From the outset, it was evident that Europol was not simply concerned with collecting 'hard' information, but would also be proactive and undertake the analysis of any material it held in order to facilitate criminal investigations undertaken by national police forces. Initially, Europol aimed to engage in the analysis and exchange of information relating to a specific range of criminal activity which was listed in Art 3 of the Convention. These are defined as 'offences committed in order to procure the means for perpetrating acts [or] to facilitate or carry out acts [or] to ensure the impunity of acts', which covers a wide range of offences, from conspiracy to extortion. These two terms are not defined with any precision in the Convention. Further, allowing Europol to hold information on 'related criminal offences' has resulted in a blurring of aims.³¹ Problems have arisen, for example, in relation to the expression 'related criminal offences'. There is no consistency in the definition of criminal offences in Member States. The offence of conspiracy, for example, is defined very narrowly in Dutch law, whereas it is given a more expansive definition in English law. Thus, whilst authorities in the UK would be required to provide information on conduct which was defined as conspiracy in English law, and would, therefore, be classed as a 'related criminal offence', the same activity may not constitute a conspiracy in The Netherlands and the Dutch authorities would not incur liability.

Article 8 of the 1995 Europol Convention allows the information system 'to store, modify and utilise only the data necessary for the performance of Europol's tasks'. This includes not only a wide range of factual information, but also some categories of 'soft' intelligence including vague terms, such as 'belief', 'suspicion' and 'hearsay'. The use of soft information raises a number of civil liberty concerns. Soft information can include 'persons suspected of having committed...a criminal offence', details of 'alleged' crimes, 'suspected membership of a criminal organisation' and 'other characteristics likely to assist in identification'. These are subjective and imprecise categories of information. The 'other characteristics' category has given rise to a well founded fear that data on race, sexuality and politics may be held on the information system. These fears were exacerbated by the approval of the Council of Ministers which confirmed such information as being suitable for being held on file.³² Under Art 10 of the Convention, information may be held on witnesses, victims, 'contacts and associates' and informers. Thus, the Convention provides Europol

30 *Ibid*, Art 43(3).

31 *Ibid*, Art 2(3).

32 *Statewatch Bulletin*, No 6, November-December 1995, Vol 5, p 5.

with the power to obtain and hold a wide range of information. Whilst such information may be useful for national prosecuting authorities during a criminal investigation, concern has been raised regarding lack of scrutiny and accountability. The 1995 Europol Convention was ratified by all Member States on 1 October 1998 and was operational on 1 July 1999. Since the Convention was signed, Europol's remit has been extended to include offences ranging from forgery of money and credit cards, terrorism and money laundering.

During negotiations surrounding the drafting of the Europol Convention, Member States disagreed about the extent to which the European Parliament and the ECJ would be permitted to scrutinise the agency's activities. The role of the European Parliament in decision making in respect of Europol was removed during the drafts of the Convention, and decisions about the operation of the agency became the responsibility of the Ministers of Justice and Home Affairs. The role allocated to the ECJ was also limited. Whilst the majority of States suggested that the ECJ should be a forum for resolving disputes concerning the interpretation of the Convention and should settle any disagreements between Member States and Europol staff, the UK opposed any involvement. Whilst the ECJ, generally, has no jurisdiction over Third Pillar activities, it is not unreasonable to assume that Europol, which has responsibility for policing within the EU, should be subject to scrutiny by the ECJ. Support for this view was expressed, even within the UK.³³ The role of the ECJ has been revisited with a Protocol to the Europol Convention, which allowed Member States to 'accept the jurisdiction of the Court of Justice of the European Communities to give preliminary rulings on the interpretation of the Europol Convention'.³⁴ The UK remains the only Member State opposed to providing the ECJ with jurisdiction to consider the activities of Europol.

While it was agreed that the main function of Europol is to collect, exchange and analyse information, Member States disagreed over rights of access by the public to personal information and the necessary standards of data protection. Thus, access to information is subject to national guidelines and currently Member States are also responsible for data protection under national guidelines.³⁵ This is an example of so called 'Variable geometry' within the EU. Problems have arisen when international agreements are applied in accordance with national law. Alleged corruption in the data collection office is a sensitive issue and, in June 2001, an investigation was begun by Dutch criminal authorities into allegations of fraud and money laundering by police officers working in the computer and data section in The Hague.

Under Art 30 of the Amsterdam Treaty, the Council of Ministers was given a mandate to widen the operational scope of Europol, thereby extending the remit of Europol. The Council has recently adopted a recommendation that Member States give 'due consideration' to requests from Europol to initiate, conduct or co-ordinate

33 *Select Committee on the European Communities on the Draft Convention for Europol: Recommendations of the Committee on 'Jurisdiction over Disputes'*, 10th Report, House of Lords Papers, 1994–95, pp 30–31.

34 Protocol drawn up on the basis of the TEU, Art K3, on the interpretation, by way of preliminary rulings, by the ECJ on the Convention on the Establishment of a European Police Office (Europol Convention), 24 July 1996.

35 1995 Europol Convention, Art 14.

investigations in specific cases.³⁶ It has also given Europol authority to enter into agreements for the exchange of data with countries outside the EU. The States listed for early co-operation agreements include Canada, Iceland, Norway, the Russian Federation, Switzerland, Turkey and the US. Agreements facilitating the exchange of information with several South American States are contemplated. It is likely that these initiatives would also involve Interpol. Concern is increasing over Europol's lack of accountability. It is unclear, for example, whether restrictions exist on the transmission of evidence or information obtained in violation of international human rights standards or in breach of national law, and whether a distinction will be made between hard facts and 'soft intelligence'.³⁷ Europol has undertaken a major strategic analysis on specific crimes such as drug-trafficking, carried out operational analysis looking at information transmitted during inquiries to the agency and maintained a directory of 'Centres of Excellence' giving details to Member States of specialised agencies and experts in particular fields such as DNA analysis.³⁸

The Europol initiative is an acknowledgment that Member States share common problems in respect of criminality. Offences such as drug-trafficking and illegal immigration are cross-border by nature and, following the relaxation of internal border controls, cause similar problems for all law enforcement agencies of the Member States. While initiatives to fight the 'euro-criminal' are popular with the public, critics argue that the political policy behind Europol is the product of a 'mutual internal security ideology'.³⁹ This 'fortress Europe' mentality is criticised for placing security and policing arrangements to the fore, and in giving public accountability and civil liberties insufficient attention. Two of the major criticisms levelled at Europol relate to its 'legal deficit' arising from the exemption prohibiting the ECJ from reviewing cases involving matters of law and order, and its lack of accountability before the European Parliament, which has been described as the 'democratic deficit'. Problems arising from this lack of accountability have given rise to concern amongst national police forces that shared data may be misused.

10.3.3 The Schengen *Acquis*⁴⁰

On the 14 June 1985 France, Germany, Belgium, The Netherlands and Luxembourg reached an agreement with respect to the gradual abolition of checks at their common borders. This agreement, which was signed in the Luxembourg village of Schengen,⁴¹ was designed to encourage free movement of goods and services within Member States of the European Economic Community. From its inception, the EC has been

36 Justice and Home Affairs Press Release, 28 September 2000, 11705/00 (Presse 341-G).

37 Council Decision authorising the Director of Europol to enter into negotiating agreements with third States and non-EU related bodies, 27 March 2000. See also *Statewatch*, No 2, 2000, Vol 10, pp 23–24.

38 Available at: www.europol.eu.int.

39 M Den Boer and N Walker, 'European Policing After 1992', 31 *Journal of Common Market Studies* (1995), 3.

40 This term encompasses all the initiatives arising from the 1985 Agreement and the 1990 Schengen Implementing Convention.

41 Schengen Agreement on the Gradual Abolition of Checks at Common Borders and the Convention Applying the Agreement, 30 ILM (1991), 68.

committed to facilitating the free movement, within its common borders, of goods,⁴² services,⁴³ capital⁴⁴ and workers⁴⁵ (the four freedoms). In its Resolution adopting the Declaration of Fundamental Rights and Freedoms, the European Parliament⁴⁶ considers it 'fundamental' that 'Community citizens shall have the right to move freely and the right to choose their residence within Community territory'.⁴⁷ In an attempt to address some of the less desirable consequences flowing from the removal of restrictions on free movement across borders, the initial Schengen Agreement made some provision for the establishment of policing and security measures. In June 1990, the Schengen Implementing Convention was introduced which provided for the abolition of internal border controls between signatory States. This Convention introduced a system of compensatory measures centred on policing and immigration which were designed to tackle the increase in cross-border crime. These measures included the intensification of external border checks,⁴⁸ harmonisation of policies on the issuing of visas and residence permits,⁴⁹ a common policy on asylum applications⁵⁰ and harmonisation of rules relating to illicit drugs and arms.⁵¹ The initiatives taken under the Schengen *Acquis* have encouraged EU collaboration in the areas of crime and security which eventually will create an area of freedom, security and justice.

The membership of the Schengen *Acquis* grew steadily after the Convention came into operation with Austria, Denmark, Finland, Greece, Italy, Portugal, Spain, and Sweden all becoming members, and Iceland and Norway becoming 'associate members'. Notwithstanding the continued reluctance on the part of the UK and Ireland to sign this Convention, by the time it was integrated into the EU under the Amsterdam Treaty, all other Member States of the EU had signed. However, it was anticipated that the UK would seek to be included in some of its initiatives and, indeed, the UK's recent application to participate in part of the Schengen *Acquis* relating to policing has been accepted and, in June 2000, Ireland applied to participate on a similar basis. It has been suggested that the UK will soon be seeking to participate in the immigration and asylum aspects of Schengen.⁵² Whilst the Schengen Implementing Convention forms part of international law, it is not incorporated into EC law. However, it is only open to signature by Member States of the EU. The Convention has been described as a 'landmark in the history of the regulation of international police co-operation in Western Europe',⁵³ and 'the most elaborate regime

42 EC Treaty, Arts 30–37.

43 *Ibid.*, Arts 59–66.

44 *Ibid.*, Arts 67–73h.

45 *Ibid.*, Arts 48–51.

46 1989 OJ C120/51.

47 Declaration, Art 8(1); see K Lenaerts, 'Fundamental Rights to be Included in a Community Catalogue' [1991] ECR 366.

48 1990 Schengen Implementing Convention, Arts 3–8.

49 *Ibid.*, Arts 9–27.

50 *Ibid.*, Arts 28–38.

51 *Ibid.*, Arts 77–91.

52 *Op cit*, Colvin, note 19.

53 C Fijnaut, 'The Schengen Treaties and European Police Co-operation', 1 *Eur J Crime Cr L Cr J* (1993), 37.

for internal security co-operation between (some of the) EU Member States so far'.⁵⁴ This development is directed at transferring frontier controls to the external borders of the Schengen States, thereby creating an area without internal frontiers.⁵⁵

Signatories to the 1990 Schengen Implementing Convention undertake that national police authorities will assist each other 'for the purpose of preventing and detecting crime' within the limits of their national law.⁵⁶ Whilst the Convention lays down regulations for cross-border observation and allows police officers from the Member States to maintain their observation of persons suspected of having committed cross-border criminal offences, permission from other States should generally be sought before beginning the cross-border observation. However, the Convention lists several serious offences for which observation may be maintained without prior permission. Police carrying out cross-border observation are obliged to comply with the law of the host State and to submit a report to the relevant authorities. The Convention also provides for 'hot pursuit', that is, the pursuit by 'foreign' police officers of fugitives who escape across borders, providing the fugitive was observed committing an offence or had escaped from lawful custody. This provision allows Member States to set down rules governing the duration of the pursuit and the limitation on the powers of the pursuing officers. Under the Convention, police officers involved in cross-border operations acquire the same powers as indigenous police officers. Liability for damages rests with the originating State in respect of the activities of pursuing officers. The Convention also contains provisions designed to improve technical aspects of police co-operation, including agreements to exchange communication equipment, broaden radio frequency bands in border areas and the harmonisation of communication links. Thus, police forces may send unsolicited information which might be of assistance in investigations to other police forces and there is provision for the exchange of liaison officers between the parties. Although not contained within the general framework for police co-operation, the Convention also provides for the use of controlled deliveries in order to counter drug-trafficking. Although in recent years, the use of controlled deliveries by law enforcement agencies has become more widespread, this provision was considered to be innovative at the time.

10.3.4 The Schengen Information System

The 1990 Schengen Implementing Convention provides for the establishment of an information system, which is a database used by policing agencies and immigration authorities in the Schengen Convention States.⁵⁷ The SIS came into operation in 1995 and collapsed within 90 minutes due to overuse. It is a series of national databases connected to a central system which holds information on suspected criminals, missing persons, unwanted aliens and stolen vehicles and documents. Police officers, immigration officials and staff responsible for issuing visas can access this system. The SIS is supplemented by Supplementary Information Requests at the National Entry (SIRENE), a database which allows for research for further information held

54 *Op cit*, Den Boer and Walker, note 39, p 564.

55 For further discussion, see *op cit*, Furse and Nash, note 20.

56 1990 Schengen Implementing Convention, Art 39.

57 *Ibid*, Arts 92–119.

on the SIS and facilitates the 'spontaneous' exchanges of information between police forces.⁵⁸ Statistics reveal that the majority of entries on the SIS relate to immigration concerns rather than other criminal concerns. It has been suggested that the SIS is not primarily a tool for tackling serious crime, but is a basis for preventing illegal immigration and for tracing lost or stolen property. The successful 'hit' rate of the system is generally low and it is questionable whether the information held on the SIS is accurate.⁵⁹ The data protection provisions of this system, which holds approximately 9.7 million files, have been subjected to some severe criticism.⁶⁰ Although the UK is not a party to the 1990 Schengen Implementing Convention, it has recently made a successful application to participate in parts of the Schengen *Acquis*, which deal with policing and criminal and customs matters and which will include use of the SIS.⁶¹ The decision is made by the other Schengen States and requires unanimity. The SIS is considered to be the most prominent instrument of police co-operation devised under Schengen.

10.3.5 Eurojust

A European Judicial Co-operation Unit (Eurojust), which was established under the Third Pillar, is given the task of facilitating co-operation between the judicial authorities of the Member States, supporting criminal investigations and assisting with the co-ordination of prosecutions for serious cross-border crime and organised criminal activity, particularly when two or more Member States are involved. The authority for establishing Eurojust can be found in the Conclusions of the Tampere European Council and in the Nice Treaty.⁶² Eurojust will be available to provide immediate legal advice and assistance on cross-border cases to the criminal investigation team. It will, for example, be able to provide assistance with the formalities of mutual assistance procedures, such as letters rogatory. The Unit can receive information from Europol and is able to co-operate closely with the European Judicial Network. Although Eurojust has no authority to commence or conduct criminal investigations itself, it has the power to make formal requests to national authorities for an investigation or prosecution to be initiated. National authorities are required to provide reasons for refusing to comply with a request. A provisional Eurojust Unit, Pro-Eurojust, was set up in December 2000 and started work in March 2001 but was unable to fulfil the requirements of a permanent Unit. Eurojust became an operational Unit in May 2002 and began its preparatory work. The Eurojust Unit operates with a management team of prosecutors, magistrates and police officers drafted in from Member States and each participant can seek information from their

58 *Ibid.*, Arts 39 and 46.

59 See generally *op cit*, Colvin, note 19, p 8.

60 *Ibid.*

61 Under the 1992 TEU, Schengen Protocol, Art 4, which incorporates the Schengen *Acquis*, the UK is not bound by the Schengen *Acquis* but can request to take part in some of the provisions. The decision is made By the other 13 Schengen States and requires unanimity.

62 1992 TEU, Arts 29 and 31, as amended (OJ C80).

relevant national authorities and have access to the SIS.⁶³ Team members are expected to understand the legal systems of their respective States and to establish good contact with their national authorities. When acting in their own State, members will be bound by national rules of procedure. However, when operating in another State:

Each Member State shall define the nature and extent of the powers it grants its national members in its own territory. The other Member States shall undertake to accept and recognise the prerogatives thus conferred.⁶⁴

This initiative has raised concerns about public accountability. Eurojust is a prosecuting authority created by law enforcement officials and permanent members of EU staff. Reports from the unit to the Justice and Home Affairs Council and the European Parliament may not be as extensive as reports from national prosecuting authorities to national bodies.⁶⁵

10.3.6 The European Public Prosecutor

Although an outline proposal to establish a European Public Prosecutor (EPP) was presented at the Nice intergovernmental conference in 2000, the European Council did not act on it until its meeting in Laeken in 2001. The Commission's proposal stemmed from concerns relating to fraud against the Community's finances and to remedy the fragmentation of law enforcement. The EPP would be a Community body with prosecuting powers specifically relating to the financial interests of the Community. The European Commission gave a presentation of its proposals to the Justice and Home Affairs Council and, although the Council identified several practical and constitutional difficulties, in December 2001 the Commission published a Green Paper on criminal law protection of the financial interests of the Community and the establishment of an EPP. The Green Paper explored the legal status and internal organisation of the EPP and substantive and procedural issues including the law of evidence and penalties. It also addressed the conduct of investigations, the choice of Member State and the right to review by national courts and the ECJ. The EPP will be an independent judicial authority with the power to conduct investigations and prosecutions into offences against the Community's financial interests, such as fraud and corruption, anywhere within the EU. The tasks allocated to the EPP would include the gathering of evidence for and against the accused. Although the trial would be held in national courts, the EPP would direct and co-ordinate prosecutions. However, the actions of the EPP would be subject to review by national courts. The Commission considered it essential that trials are held in national courts and did not foresee the creation of a Community court. It was proposed that in appropriate cases the EPP would co-operate with Eurojust and would exchange information in accordance with the rules on data protection and would be able to execute the European Arrest Warrant. The Commission considered that the activities of Eurojust and the EPP would be complementary to each other. Thus, the EPP would centralise the direction of prosecutions in relation to a limited number of offences whereas Eurojust would work

63 Draft Decision, Art 9(2), contained in the joint initiative setting up Eurojust.

64 *Ibid*, Art 8(2).

65 For further criticism, see *Statewatch*, Nos 3/4, June-August 2000, Vol 10.

within the bounds of traditional mutual legal assistance mechanisms in relation to a wider range of serious crime. In its response to the Green Paper the UK Select Committee on European Scrutiny considered that:

...this proposal is impractical and that it raises serious issues of principle. We see no reason for creating an institution at EU level, which will have the effect, on the one hand, of diluting the responsibility of Member States to deal with fraud and, on the other, of putting the function of criminal prosecutions beyond the reach of democratic accountability.⁶⁶

In March 2003 the Commission adopted a follow-up report on the public consultation conducted during 2002 on the establishment of an EPP.

10.3.7 The European arrest warrant

Initiatives to reform the surrender mechanisms within Member States have been expedited by the events that took place in the US in September 2001. At an Extraordinary European Council meeting held on 21 September 2001, the Heads of State of the EU, the President of the European Parliament and the President of the European Commission called for the creation of a European warrant for arrest and extradition in accordance with the conclusions reached at the Tampere meeting. Consequently, the European Commission presented a proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States.⁶⁷ In its report on this proposal, the UK Parliamentary European Scrutiny Committee expressed some concern at the speed with which this initiative was processed through the EU legislative machinery. The Committee noted that 'judicial authority' was not defined in the proposal and sought assurances that only arrest warrants issued by a court would be enforced in the UK. Further, the Committee considered that there should be a right to refuse to surrender suspects to Member States which failed to meet the standards required by Art 6 of the European Convention on Human Rights in respect to fair trials. Concern was also voiced at the lack of a double criminality requirement and the absence of a guarantee for retrial for persons convicted *in absentia*. This initiative requires implementing legislation before it will become operative in the UK.⁶⁸ It is intended that the European arrest warrant will replace formal extradition within the EU with a system of surrender on the basis of mutual recognition of the warrant. This system, which sets out to facilitate law enforcement in the EU, will only apply to Member States. The European Commission has given its assurance that persons detained under an EU warrant will not be surrendered to a third State.⁶⁹ The European arrest warrant operates on the mutual recognition of court judgments and is the enforced transfer of a person from one Member State to another. A warrant will be issued in respect to the prosecution of all offences carrying a sentence of imprisonment of at least 12 months, or for persons already sentenced to a custodial or detention order exceeding four months. Having received a request from a judicial authority for the surrender of a convicted person or

66 Select Committee on European Scrutiny, 34th Report, June 2002, para 14.12.

67 COM (2001) 0522.

68 See the UK Extradition Bill discussed in Chapter 8.

69 E-3359/01EN. Answer given by Mr Vitorino on behalf of the Commission.

a person wanted for prosecution, Member States must arrange transfer. Grounds for refusal to execute a warrant will be very limited. It is anticipated that the whole process will be judicial with no executive or administrative discretion to refuse surrender and there will be no exception for nationals. Persons arrested under a warrant cannot rely on either the double criminality rule or the specialty rule. However, provision will be made for States to create a list of offences for which they will refuse to execute an arrest warrant. The mechanism of the European arrest warrant, which assumes a high level of trust between both judicial and law enforcement authorities of Member States, is intended to replace many of the instruments authorising extradition within the EU, including provisions of the 1990 Schengen Implementing Convention.

10.3.8 The European Judicial Network

The European Judicial Network is a Third Pillar initiative established by a Joint Action adopted by the Council in June 1998. Its primary aim is to improve standards of co-operation between judicial authorities in criminal matters. The Action Plan formalised the practice of exchanging legal personnel with expertise in judicial co-operation procedures.⁷⁰ The primary task of the Network, which was inaugurated in September 1998, is to facilitate contacts and co-operation between authorities with direct local jurisdiction. In order to achieve this aim, the Network meets regularly and assists in disseminating information on the law and practice relevant to transnational investigations. Thus it is available to provide practitioners working in the field of judicial co-operation with practical information on mutual legal assistance. Responsibility for the administration of the Network lies with the General Secretariat of the Council. The European Judicial Network comprises the central authorities responsible for international judicial co-operation and other competent authorities with specific responsibilities related to international co-operation. Member States have a responsibility to ensure that personnel used as the contact point have an adequate knowledge of at least two European languages.⁷¹ The personnel staffing the contact point must have: access to the contact points in each Member State; a simplified list of the judicial authorities and a directory of the local authorities in each Member State; concise legal and practical information concerning the judicial and procedural systems in all Member States; and the texts of the relevant legal instruments and conventions, including up to date information regarding declarations and reservations.⁷² The Council assesses the operation of the Network every three years.

10.3.9 The European Police College

The European Police College (CEPOL) was established to train senior police officers of the Member States. The aim of this Council initiative is to develop a European approach to the problems facing Member States in the fight against crime, particularly the cross-border dimension of the problem. CEPOL's objectives are as follows:

70 Joint Action of 29 June 1998, 98/428/JHA.

71 *Ibid*, Art 2.

72 *Ibid*, Art 8.

- (a) to increase knowledge of the national police systems and structures of other Member States, of Europol and of cross-border police co-operation within the European Union;
- (b) to strengthen knowledge of international instruments, in particular those which already exist at European Union level in the field of co-operation on combating crime;
- (c) to provide appropriate training with regard to respect for democratic safeguards with particular reference to the rights of the defence.⁷³

The Council Decision establishing CEPOL is to be reviewed after a three year period in order to decide whether to extend CEPOL's tasks.

10.3.10 1959 European Convention on Mutual Assistance in Criminal Matters⁷⁴

The drafting of this Convention and its Protocol took place under the Third Pillar of the EU, the area relating to justice and home affairs. While the Convention was originally concerned with judicial co-operation, provisions on police co-operation were added later. The Convention provides for: controlled deliveries; the examination of witnesses and experts by telephone and video conference; the direct transmission of requests for assistance; the spontaneous exchange of information between competent authorities; the setting up of joint investigative teams; the provision of assistance during covert investigations; and sets out arrangements for the interception of communications. Critical comment has been made regarding resistance to include data protection provisions similar to those found in other Third Pillar conventions.⁷⁵

10.3.11 *Corpus juris*

In addition to the Third Pillar initiatives, the European Commission has financed a group of experts to consider the problem of prosecuting fraud on the Community's finances. The *Corpus Juris* project proposed the creation of a 'European Judicial Space' within which financial crime against the EC would be prosecuted according to a set of common rules of procedure and evidence. The study proposed a standard set of rules on admissibility and a common set of powers for evidence gathering. Thus, under Art 33 of the European Rules:

- (1) Evidence must be excluded if it was obtained by community or national agents either in violation of the fundamental rights enshrined in the European Convention on Human Rights, or in violation of the European rules set out in this code or in violation of applicable national law without being justified by the European rules previously set out.

The national law applicable to determine whether the evidence has been obtained legally or illegally must be the law of the country where the evidence was obtained. When evidence has been obtained legally in this sense, it should not be possible to oppose the use of this evidence because it was obtained in a way that would have been illegal in the country of use. But it should always be possible to object to the use

73 Council Decision 2000/820/JHA, 22 December 2000, Art 6.

74 For further discussion, see Chapter 9.

75 See UK Select Committee on the European Union in the House of Lords, July 1998.

of such evidence, even where it was obtained in accordance with the law of the country where it was obtained, if it was obtained in a manner which violated the rights enshrined in the European Convention on Human Rights.

10.3.12 Common procedural safeguards

While the creation of mechanisms to improve judicial and police co-operation provide assistance for prosecuting authorities investigating transnational cases, fears have been expressed that little attention has been paid to procedural safeguards for the defendant. However, the European Commission has recently adopted a Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the EU. This initiative, which is in line with the principle of 'mutual recognition' endorsed by the Tampere European Council in 1999, is part of a European Union plan to create a 'European area of justice'. The Commission considers that to achieve this objective Member States need to have confidence in each other's judicial systems. It suggests that having faith in the procedural safeguards operating in other Member States will increase confidence. The Green Paper is seen as the first step towards establishing acceptable common minimum standards that should not reduce the level of national procedural protection currently offered. However, the Commission is looking to establish European 'best practice' guidelines and is not intending to create new rights for suspects. The starting point for the Green Paper is the minimum standards established by the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. Thus the topics that concern the Commission at this stage are access to legal representation, access to interpreters and translation, informing suspects of their rights and protection for vulnerable suspects and defendants. The Commission intends to present a draft Framework Decision on this issue before the end of 2003. The Commission is also currently engaged in work on other aspects of fair trial including the gathering and use of evidence, the right to silence and *in absentia* judgments. It is anticipated that another Green Paper will be launched in 2004.

EVIDENCE BEFORE THE AD HOC TRIBUNALS

11.1 INTRODUCTION

By virtue of Art 15 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute and Art 14 of the International Criminal Tribunal for Rwanda (ICTR) Statute the Rules of Procedure and Evidence were adopted on 11 February 1994 and 29 June 1995 respectively. The principal drafters of the Rules of Procedure and Evidence of the ICTY were the Trial Chamber judges and Appeals Chamber judges, in co-operation with States and organisations. Proposals were submitted by Argentina, Australia, Canada, France, Norway, Sweden, the UK and the US as well as the American Bar Association, Helsinki Watch, the Lawyers Committee for Human Rights and the International Women's Human Rights Law Clinic, as well as the judges themselves.¹ The purpose of this inclusionary approach was to ensure that different domestic legal systems would be considered and incorporated.² Particularly common law and civil law systems, the leading systems in the world and therefore the most influential systems in the development of international criminal law and procedure, differ significantly and have far-remote historical roots.

In civil law systems, which are predominantly inquisitorial, judges play an active role. Most civil law systems have incorporated the concept of an investigative judge, who has the task to ensure that the investigation is fair and efficient. In discharging this task the investigative judge will review the actions of the investigators. In addition, the investigative judge may hear witnesses and predetermine their reliability. Although most civil law systems apply the principle of orality, meaning that witnesses should be heard at trial in the presence of the accused, it is not always perceived to be necessary to hear witnesses again if they have been heard by an investigative judge. Trial judges lead and control the trial and rely heavily on the 'Dossier' drafted by a police officer or other investigator, containing detailed information about the pre-trial stage. Hence, the core stage of a criminal proceeding in a civil law system is the pre-trial stage, rather than the trial stage. Since the finding of guilt is a task of the judges, with or without the assistance of lay members who are trained and experienced in assessing the weight of evidence, evidence is more likely than not admitted at trial.

Common law systems, are party based systems. The judges have a more passive role to play. They react to the submissions of the parties, but will rarely take their own initiatives. Generally, the onus to object to the admission of evidence is on counsel. Contrary to civil law jurisdictions, the judge does not intervene in support of the accused unless counsel for defence raises an issue to which the judge has to respond. In principle, all evidence has to be presented at trial. The determination of guilt is a task of jury members, who merely rely on the evidence that is produced by the parties at trial. Judges, being responsible for the legal aspects of the trial, need to ensure that the evidence presented to the jury is relevant and not unnecessarily prejudicial to the accused. If evidence does not meet these criteria, judges will exclude

1 V Morris and MP Scharf, *The International Criminal Tribunal for Rwanda*, 1998, Irvington-on-Hudson, NY: Transnational, p 414.

2 *Ibid*, pp 413–14.

it. From these brief and simplified descriptions of common law and civil law systems, which will be further developed in this chapter, it appears that they are fundamentally different, which explains the difficulties in finding consensus on the core issues of procedure and evidence.

Representatives of common law systems, particularly the US, played a more influential role in the drafting process of the ICTY Rules. Consequently, the Rules of Procedure and Evidence are predominantly common law rooted. This is particularly the case with regard to the procedure, which is based on the adversarial approach of common law. Thus, the leading role is played by the parties, and the role of the judges is, with exceptions, reactionary. A body similar to an investigative judge has not been incorporated into the Rules of Procedure and Evidence. The Rules on Evidence, which are subject to analysis throughout this chapter, are nonetheless more civil law influenced. As Antonio Cassese J, President of the ICTY at the time, pointed out:

...there are two important adaptations to that general adversarial system. The first is that, as at Nuremberg and Tokyo, we have not laid down technical rules for the admissibility of evidence... [T]his Tribunal does not need to shackle itself to restrictive rules which have developed out of the ancient trial by jury system. All relevant evidence may be admitted to this Tribunal unless its probative value is substantially outweighed by the need to ensure a fair and expeditious trial. An example of this would be where the evidence was obtained by a serious violation of human rights. Secondly, the Tribunal may order the production of additional or new evidence *proprio motu*. This will enable us to ensure that we are fully satisfied with the evidence on which we base our final decisions and to ensure that the charge has been proved beyond reasonable doubt. It will also minimise the possibility of a charge being dismissed on technical grounds for lack of evidence. We feel that, in the international sphere, the interests of justice are best served by such a provision and that the diminution, if any, of the accused's rights is minimal by comparison.³

These arguments, particularly that trials are conducted by professional judges, rather than juries, have often been repeated by the ad hoc tribunals.⁴

The ICTY Rules of Procedure and Evidence served as a model for the ICTR Rules of Procedure and Evidence.⁵ This was the intention of the Security Council as similar rules of procedure in the two tribunals would ensure consistency in the development of international criminal procedural matters. This also ensured a quick adoption of the Rules of Procedure and Evidence at the ICTR without having to elaborate on issues that were already discussed in detail in relation to the ICTY Rules. As a result, the Rules were almost identical. The Rules on Evidence of the ICTY and ICTR, which

3 Statement by the President of the International Tribunal, UN Doc IT/29 (1994), reprinted in Morris and Scharf, *ibid*, vol 2, pp 649, 651.

4 See, *inter alia*, *Prosecutor v Tadic*, Decision on Defence Motion on Hearsay (*Tadic* decision on hearsay) (5 August 1996), Case No IT-94-1-T, paras 14 and 17. In this case, the Trial Chamber held that one of the reasons the drafters of the Rules have opted for a civil law approach towards the admission of evidence is that 'the trials are conducted by judges who are able, by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight. Thereafter, they may make a determination as to the relevancy and the probative value of the evidence'. See also *Prosecutor v Brdanin and Talk*, Order on the Standards governing the admission of evidence (*Brdanin and Talk* Admission of Evidence Order) (15 February 2002), Case No IT-99-36-T, para 14; and *Prosecutor v Delalic and Others*, Decision on the Motion of the Prosecution for the Admissibility of Evidence (19 January 1998), Case No IT-96-21-T, para 20.

5 This is in compliance with ICTR Statute, Art 14, which provides that '[t]he judges shall adopt ... the Rules of Procedure and Evidence... of the International Criminal Tribunal for the Former Yugoslavia with such changes as they deem necessary'.

will be thoroughly discussed in this chapter, were identical, save for three differences.⁶ Over the years the Rules have, however, evolved, resulting in a great number of amendments.⁷ These amendments have widened the gaps between the Rules of Evidence of the two ad hoc tribunals. The fundamentals of the ICTR and ICTY Rules of Evidence nevertheless remained similar, though not identical.

In this chapter the system of evidence as adhered to by the ad hoc tribunals will be discussed. Procedural matters are left out of the discussion. Since the Statutes of the ad hoc tribunals are silent about the qualitative and quantitative standards of evidence, the focus will be on the Rules on Evidence, as embodied in s 3 of the Rules of Procedure and Evidence of both tribunals. Where necessary, attention will be paid to the differences between the Rules of the two tribunals and the amendments made. In addition, this chapter will examine to what degree common law and civil law systems have influenced the Rules of Evidence and their application; which specific elements derive from common law and which from civil law will be highlighted.

11.2 THE LEGAL FRAMEWORK OF EVIDENCE

Before discussing the Rules on Evidence, it is useful to define the term 'evidence'. Judge May of the ICTY held that in the context of a common law criminal trial, evidence means 'the information which is put before the court in order to prove the facts in issue, that is, those facts which the prosecution must establish in order to prove their case and the defendant must establish in order to raise a defence'.⁸

The burden of proof beyond reasonable doubt lies with the prosecutor. Although the legal instruments of the ad hoc tribunals are silent regarding the allocation of burden, the principle that the prosecutor carries the onus of proving beyond

6 Rule 89 was and still is different in the sense that the ICTY Rules include sub-r 89(D), providing that '[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'. The ICTR never incorporated a similar Rule. Another difference was that r 95 of the ICTY Rules originally stated that evidence obtained directly or indirectly by means that constitute a violation of internationally protected human rights shall be inadmissible. The title of this Rule was 'evidence obtained by means contrary to internationally protected human rights'. Rule 95 of the ICTR Rules, entitled 'exclusion of evidence on the grounds of the means by which it was obtained', on the other hand, provided (and still provides) that 'no evidence shall be admitted if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings'. By subsequent amendments in 1995 and 1997, ICTY, r 95 is now identical to its ICTR counterpart. The amendments are said to have been introduced in order to give a wider interpretation to the rights of the defendant. A final difference was that r 96(i) of the ICTR Rules begins with '[notwithstanding r 90(C)...'. A similar phrase has always been unknown to r 96(i) of the ICTY Rules.

7 The main purpose of these amendments was to better guarantee fairness and efficiency. It should be noted that amendments are introduced by the judges after consulting the Prosecutor's and the Registrar's proposals for amendments (ICTY and ICTR Rules, r 6). Defence counsel are excluded from this process, but can submit their proposals to the Registrar, who will consider whether or not they are relevant for discussion in the Plenary Session. The reason to opt for a system where the Rules can be easily amended by the judges, who themselves apply and interpret the Rules, is to ensure a flexible system which is adaptable to emerging international criminal law exigencies. Although there may have been good reasons to choose a system where the legislative and legal tasks are carried out by the same body, this is incompatible with the principle of separation of powers. See ST Johnson, 'On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia', 10 *International Legal Perspective* (1998), 111, pp 116–17, and 166–71.

8 R May, *Criminal Evidence*, 4th edn, 1999, London: Sweet & Maxwell, p 3.

reasonable doubt without exception is a direct consequence of the presumption of innocence, as set out in Art 21(3) of the ICTY Statute and Art 20(3) of the ICTR Statute.⁹ If the prosecutor is not successful in discharging this burden the judges have to acquit the accused by virtue of r 87 of the Rules of both ad hoc tribunals.¹⁰ The accused is thereby entitled to the benefit of the doubt.¹¹ Consequently, 'the evidence of the witnesses upon which the prosecution relied should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the evidence given by the Accused and the witnesses upon which the Defence relied'.¹²

The question then arises as to what are the qualitative and quantitative standards of evidence that the prosecutor is to produce in order to discharge this burden of proof beyond reasonable doubt. These standards will be analysed in the remainder of this chapter. First, it will be considered whether the legislation of the ad hoc tribunals, that is, s 3 of the Rules of Procedure and Evidence, provides some guidelines on the matter of evidence. Secondly, the case law of the ad hoc tribunals will be examined to review the interpretation that judges have given to the Rules on Evidence.

11.2.1 The Rules of Evidence of the ad hoc tribunals

Rule 89, is the leading article in relation to the application of the law of evidence. Rule 89 of the Rules cover distinct but overlapping principles. Rule 89 of the ICTY provides:

- (A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

9 The principle that the prosecution has the burden of proving the case beyond reasonable doubt has been confirmed by case law. See *Prosecutor v Delalic and Others*, Judgment (*Delalic* judgment) (16 November 1998), Case No IT-96-21-T, paras 599, 601, where the Trial Chamber held that the onus of proof on the prosecutor was a general principle of law. See also *Prosecutor v Kayishema and Ruzindana*, Judgment (*Kayishema and Ruzindana* judgment) (21 May 1999), Case No ICTR-95-1-T, para 84. An exception applies where the defence 'makes an allegation, or when the allegation made by the Prosecutor is not an essential element of the charges of the indictment'. See *Delalic* judgment, para 602. In such situations, the defence is required to prove its allegations on the balance of probabilities, *ibid*, para 603. See also *Prosecutor v Krnojelac*, Judgment (15 March 2002), Case No IT-97-25-T, para 3; *Prosecutor v Kunarac, Kovac and Vukovic*, Judgment (22 February 2001), Case Nos IT-96-23-T and IT-96-23/1-T, para 559.

10 Rule 87(A) of the ICTY Rules provides: 'When both parties have completed their presentations of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.' Rule 87(A) of the ICTR Rules is similar but for the first phrase. Rule 87(A) begins with: 'After presentation of closing arguments, ...' This is a difference in language, not a difference in substance. The principle that Trial Chambers can convict only when satisfied that the guilt of the accused has been proved beyond reasonable doubt has been confirmed, eg, in *Prosecutor v Tadic*, Appeals Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin (*Tadic* judgment on allegations of contempt) (31 January 2000), Case No IT-94-1-A-R77, para 131.

11 *Delalic* judgment (16 November 1998), paras 601, 603. In Latin this principle is called '*in dubio pro reo*' and is applied in the vast majority of domestic jurisdictions.

12 *Krnojelac* judgment (15 March 2002), para 5. A similar reasoning was adopted in the *Kunarac* judgment (22 February 2001), para 560.

- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
- (E) A Chamber may request verification of the authenticity of evidence obtained out of court.
- (F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

Rule 89 of the ICTR Rules provides:

- (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) A Chamber may request verification of the authenticity of evidence obtained out of court.

If one compares the two Rules, one observes that, contrary to the ICTY (r 89(D)), the ICTR does not provide an exclusionary rule to safeguard the fairness of the trial. This does not mean, however, that the ICTR does not take account of the necessity to ensure a fair trial. *Inter alia* in the case of *Akayesu*, the Trial Chamber made clear that it 'can freely assess the probative value of all relevant evidence. The Chamber had thus determined that in accordance with r 89, any relevant evidence having probative value may be admitted into evidence, provided that it is in accordance with the requirements of a fair trial'.¹³ Rule 89(F) of the ICTY Rules is also unknown to the ICTR Rules. Rule 90(A) of the ICTR Rules nevertheless incorporates a similar, though more stringent principle in favour of oral testimony.¹⁴

Rule 90 of the Rules of Procedure and Evidence of both tribunals deals with the testimony of witnesses. *Inter alia*, this Rule sets out a witness's duty to make a solemn declaration before testifying.¹⁵ It also grants the possibility of a child giving testimony without having to make the solemn declaration 'if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth'.¹⁶ Such testimony on its own does not suffice to secure a conviction.¹⁷ A witness who has not given testimony

13 *Prosecutor v Akayesu*, Judgment (2 September 1998), Case No ICTR-96-4-T, para 136.

14 ICTR Rules, r 90(A), provides: 'Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in r 71.' Thus, unless r 71 applies, witnesses should appear at trial to give their testimony. Note that the same Rule applied at the ICTY until it was first amended on 25 July 1997 to include the possibility of receiving a testimony via video-conference link in exceptional circumstances and in the interests of justice. By amendments of 1 and 13 December 2000, ICTY r 90(A) became what is now r 89(F). The amendments aimed to facilitate the admission of written evidence.

15 ICTY Rules, r 90(A); ICTR Rules, r 90(B).

16 ICTY Rules, r 90(B); ICTR Rules, r 90(C).

yet is not entitled to listen to other witnesses, although this does not disqualify him as a witness.¹⁸ A witness has a right to refuse to make statements which may tend to incriminate him, unless compelled by the judges to answer a question.¹⁹ Rule 90(F) of the ICTY Rules, introduced initially as r 90(G) on 9/10 July 1998, and r 90(F) of the ICTR Rules, introduced on 8 June 1998, gives the Trial Chamber the authority to control the cross-examination,²⁰ and finally r 90(H) of the ICTY Rules and r 90(G) of the ICTR Rules, both introduced by the same amendment as 90(G) and 90(F) respectively, limit the cross-examination to the subject matter of the evidence-in-chief and matters affecting the credibility of the witness.²¹ Rule 90 *bis* of the ICTY Rules, which is identical to r 90 *bis* of the ICTR Rules, arranges the transfer of detained witnesses. Rule 91 covers false testimony under solemn declaration. Rule 92 is interesting in the sense that it shifts the burden of proof. Rule 92 of both tribunals provides: 'A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of r 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.' Thus, contrary to the common law approach, if an accused person confessed allegedly against his will, it is up to him to demonstrate that the confession was involuntary. From the Rules it is unclear whether the standard of proof is the standard beyond reasonable doubt, or that based on the balance of probabilities.²²

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- 17 As will be pointed out later in this chapter, this is the only situation where corroboration is required.
- 18 ICTY Rules, r 90(C); ICTR Rules, r 90(D). An exception applies to experts. In addition, ICTY Rules, r 90(D) introduced as r 90(E) on 9/10 July 1998, states that investigators may, upon order of the Chamber, testify even when they have been present in court during the proceedings. ICTR Rules, r 90 does not include a similar provision.
- 19 ICTY and ICTR Rules, r 90(E). If judges indeed compel the witness to answer a question, such testimony cannot subsequently be used against the witness, save in proceedings relating to false testimony.
- 20 ICTY Rules, r 90(G) is more extensive than ICTR Rules, r 90(F). ICTY Rules, r 90(G) holds that the Trial Chamber 'shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time'. ICTR Rules, r 90(F) did not adopt the same qualification.
- 21 Note that ICTR Rules, r 90(G) speaks of 'points raised in the examination-of-chief. Though different terminology, in practice there is no difference. ICTY Rules, r 90(H) is more extensive than ICTR Rules, r 90(G). ICTY Rules, r 90(H) provides: '(i) Cross-examination shall be limited to the subject matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of that case, (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examination party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness, (iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.' Rule 90(G) ICTR Rules simply states, in addition to the aforementioned principle of limitation of cross-examination, that the Trial Chamber 'may, if it deems it advisable, permit enquiry into additional matters, as if on direct examination'. By an amendment of 12 April 2001, a new r 90(G) was introduced to the ICTY Rules, whereby the Trial Chamber 'may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73 *bis* (C) and 73 *ter* (C)'.
- 22 See DD Ntanda Nsereko, 'Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia', in RS Clark and M Sann, *The Prosecution of International Crimes: A Critical Study of the International Criminal Tribunal for the Former Yugoslavia*, 1996, New Brunswick: Transaction, p 329, who in highlighting the difficulties to prove involuntariness, rightly suggests that the burden should be on a balance of probabilities or preponderance of evidence and not beyond a reasonable doubt.

By virtue of r 92 *bis*, adopted on 13 December 2002 by the ICTY and on 6 July 2002 by the ICTR, the Trial Chamber may admit 'in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to the proof of a matter other than the acts and conduct of the accused as charged in the indictment'. The Rule then enumerates the factors in favour and against admission of evidence under this Rule.²³ In order for such evidence to be admissible, it has to be supplemented by a declaration of the person producing the written statement, stating that the contents are true and correct to the best of his or her knowledge and belief. This declaration must be witnessed by a person authorised to do so on the basis of domestic law and procedure ((B)(i)(a)), or 'a Presiding Officer appointed by the Registrar of the Tribunal for that purpose' ((B)(i)(b)). The witness attaches a dated note, mentioning the place of the declaration ((B)(ii)(d)), identifying the person making the declaration as the person in the written statement ((B)(ii)(a)), verifying that the person in question indeed stated that the contents are true and correct to the best of his knowledge and belief ((B)(ii)(b)), and stating that the person knew that he may be prosecuted for false testimony if the content of the written statement is not true ((B)(ii)(c)).

Furthermore, written statements may be presented in lieu of dead persons, persons who can no longer with reasonable diligence be traced, or persons who are unable to give evidence in court due to their physical or mental condition, if the Trial Chamber is satisfied on a balance of probabilities that the person in question is indeed dead, untraceable or too ill to attend; and the Trial Chamber is satisfied that there are satisfactory indicia of its reliability. Finally, r 92 *bis* (D) authorises the Chamber to admit 'a transcript of evidence given by a witness in proceedings before the Tribunal which goes to the proof of a matter other than the acts and conduct of the accused.'

Rule 93 allows the admission of '[e]vidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute' in the interests of justice. Facts of common knowledge, such as documented by evidence in other proceedings, do not need to be proved. Instead, the Trial Chamber shall take judicial notice thereof (r 94).²⁴ Rule 94 *bis* was introduced by amendment of 9/10 July 1998 in the ICTY Rules and on 8 June 1998 in the ICTR Rules to deal with

23 Factors in favour of admitting such evidence include: its cumulative nature ((A)(i)(a)); its relationship with relevant historical, political or military background ((A)(i)(b)); whether the evidence consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates ((A)(i)(c)); whether it concerns the impact of crimes upon victims ((A)(i)(d)); its relationship with issues of the character of the accused ((A)(i)(e)); or its relationship with factors to be taken into account in determining sentence ((A)(i)(f)). Factors against admitting such evidence include: an overriding public interest in the evidence in question being heard orally ((A)(ii)(a)); a demonstration of an objecting party that its nature and source renders the evidence unreliable, or that its prejudicial effect outweighs its probative value ((A)(ii)(b)); any other factors which make it preferable that the witness gives evidence in court ((A)(ii)(c)).

24 By amendment of 9/10 July 1998 to the ICTY Rules and amendment of 3 November 2000 to the ICTR Rules, r 94 was extended to include a sub-r (B), providing that '[a]t the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings'.

expert testimony. The party not calling the expert may indicate whether it accepts the expert witness statement disclosed to him as it is, or whether it wishes to cross-examine the expert witness.²⁵ On 3–4 December 1998, r 94 *ter* was added to the ICTY Rules on Evidence. This Rule allows a party to submit affidavits in support of an oral witness testimony to prove a fact in dispute if the opposing party does not object within five working days after the witness's testimony. This Rule had a short existence, as it was deleted by amendment of 1 and 13 December 2000. Rule 95 is important, as it states that '[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings'.²⁶

In relation to cases of sexual assault the Rules make it explicit that no corroboration of the victim's testimony shall be required,²⁷ and that consent is no defence if the victim has been subjected to or threatened with, or has had reason to fear violence, duress, detention or psychological oppression (r 96(ii)(a)), or reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear (r 96(ii)(b)). Evidence of the victim's consent will only be admitted if the accused satisfies the Trial Chamber *in camera* that the evidence is relevant and credible (r 96(iii)). By virtue of r 96(iv) 'prior sexual conduct of the victim shall not be admitted in evidence'.²⁸

Rule 97 provides for privilege of all communications between lawyer and client, they thus not being subject to disclosure except with the client's consent (r 97(i)) or where the client has voluntarily disclosed the contents of the communication to a third party, and that third party subsequently gives evidence of that disclosure (r 97(ii)). On the basis of r 98 a Trial Chamber may *proprio motu* summon witnesses and order their attendance or order either party to produce additional evidence. Finally, notice should be made of r 71, which initially allowed for the production of deposition evidence on request of one of the parties only if justified by 'exceptional circumstances' and 'the interests of justice'. By amendment of 7 December 1999, the ICTY deleted the requirement of 'exceptional circumstances'; thus, the party seeking to produce deposition evidence only needs to demonstrate that such is required in the interests of justice. This example was not followed by the ICTR.

- 25 ICTY Rules, r 94 *bis* has been amended twice more. The second amendment added a requirement of the opposing party to indicate, not only whether it wishes to cross-examine the expert witness, but also whether it 'challenges the qualifications of the witness as an expert or the relevance of all or parts of the report, and if so, which parts' ((B)(iii)). This last specification is not required under ICTR Rules, r 94 *bis*.
- 26 As mentioned, the ICTY Rules originally stated that evidence obtained directly or indirectly, by means that constitute a violation of internationally protected human rights, shall be inadmissible, but the Rule was amended on 30 January 1995.
- 27 ICTR Rules, r 96 makes specific reference to the exception under r 90(C), namely, if the victim is a child who testifies without making the solemn declaration. A declaration from a child always needs to be corroborated by other evidence. The fact that the ICTY does not specifically mention this exception does not necessarily indicate that this exception does not apply.
- 28 On the basis of the sub-Rule, the Trial Chamber in the *Delalic* case struck off the record information that was revealed on the victim's prior sexual conduct as irrelevant and inadmissible evidence. *Delalic* judgment (16 November 1998), para 70. See Chapter 13, 13.4.

11.2.2 Analysis of the Rules on Evidence of the ad hoc tribunals

Two main principles, common to both tribunals, can be derived from r 89. The first is that national rules of evidence have no binding effect (r 89(A)).²⁹ The ICTY and ICTR Rules of Procedure and Evidence are nevertheless influenced by domestic legal systems, and so are their interpretations.³⁰ The civil law influence can be traced back to r 89(C) by virtue of which all relevant evidence with probative value may be admitted. This reflects the free system of proof, which is inherent to most civil law jurisdictions,³¹ and constitutes the second principle that can be derived from r 89.³² As rightly pointed out in the *Tadic* case: 'In the civil law system, the judge is responsible for determining the evidence that may be presented during trial, guided primarily by its relevance and its revelation of truth.'³³ Common law systems, on the other hand, are familiar with exclusionary rules, such as rules that exclude irrelevant evidence in general,³⁴ and more specifically hearsay evidence, similar fact or character evidence, opinion evidence, evidence protected by public immunity interest, evidence protected by legal privilege, and improperly obtained evidence, in particular confessions that are made under pressure. Thus, the assessment of the reliability of evidence takes place at a different point in time. In common law systems the assessment occurs prior to trial, at the stage of the admission of evidence, while the assessment in civil law systems occurs after trial when judges deliberate on the basis of the totality of evidence presented at trial. The main reason for this difference in approach is, as briefly pointed out in the introduction, that common law systems rely on juries to render their judgments. Dubious evidence should be kept away from them, as such may influence

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- 29 This has been confirmed by the case law of both ad hoc tribunals. See, eg, *Tadic* decision on hearsay (5 August 1996), para 7; *Akayesu* judgment (2 September 1998), para 131, where the Chamber noted that 'it is not restricted under the Statute of the Tribunal to apply any particular legal system and is not bound by any national rules of evidence. In accordance with r 89 of its Rules of Procedure and Evidence, the Chamber has applied the rules of evidence which in its view best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law'. Further confirmed, in *Prosecutor v Rutaganda*, Judgment (6 December 1999), Case No ICTR-96-3-T, paras 16–17, and *Prosecutor v Musema*, Judgment (27 January 2000), Case No ICTR-96-13-T, para 33; *Brdanin and Talk*, Admission of Evidence Order (15 February 2002), para 5.
- 30 The Chambers examine both civil and common law systems when determining an issue. See *Tadic* decision on hearsay (5 August 1996), para 7.
- 31 In the French system this principle is referred to as '*le principe de la liberté des preuves*', meaning that, apart from the cases where the law provides otherwise, offences may be proven by any means of evidence, and it is for the judge to decide according to his 'intime conviction' (ie, inner conviction) (Art 427, Code de Procedure Pénale). G Stefani, G Levasseur and B Bouloc, *Procédure Pénale*, 1867, 18th edn, 2001, France: Dalloz, p 108, paras 131, 132 and pp 117–18, para 150. In Belgium the same principle of 'intime conviction' is applied (Code d'Instruction Criminelle, Art 342). In Germany, the system of proof is one of '*Freibeweis*' (ie, free proof), which means that judges are free in assessing the weight of evidence. They are nonetheless bound by means of proof incorporated in statutory law. See M Delmas-Marty, *Procédure Pénale d'Europe*, 1995, France: Dalloz, p 65, 103, 105–06. The Dutch system of proof is similar to the German system. The judges are free to assess the evidence on the basis of their '*rechterlijke overtuiging*' (judicial conviction), but have to base their judgment on those means of proof that are enumerated in the statutory law, in *Wetboek van Strafrecht*svoording (Code of Criminal Procedure), Art 339(1).
- 32 Indeed, as confirmed in *Prosecutor v Aleksovski*, Appeal Judgment (24 March 2000), Case No IT-95-14/1-A, para 60, '[u]nless the Rules or general international law provides otherwise, Trial Chambers are free to admit various types of evidence to determine whether or not a particular fact has been established beyond reasonable doubt'.
- 33 *Tadic* decision on hearsay (5 August 1996), para 13.
- 34 See, eg, r 402 of the US Federal Rules of Evidence applied, which provides: 'All relevant evidence is admissible, except as otherwise provided...evidence which is not relevant is not admissible.'

the minds of the jury members. Civil law countries often have judges on the bench who determine the case with or without lay members. Judges are trained to give appropriate weight to the evidence that is presented before them. Another reason is that common law jurisdictions are reluctant to rely on indirect evidence. It is at the heart of adversarial proceedings to have witnesses testify of their own knowledge rather than to rely too heavily on documents or out-of-court statements. Although contemporary civil law systems tend to rely more on court proceedings than in previous years, restrictions on the admission of evidence are still rare.

The approach of the ad hoc tribunals is more in line with the civil law approach in this respect. The civil law influence becomes apparent when carefully examining the Rules. Rule 89 is the most striking example, although the terminology directly stems from common law, thus, presumably also its interpretation. Also a number of other Rules, and through the adoption of new Rules and amendment of old Rules increasingly so, are rooted in civil law. Indeed, rr 71 and 92 *bis*, allowing for indirect evidence, find their basis in the civil law tradition. These Rules are both very broad. Rule 71 requires that the admission is in the interest of justice and in the ICTR that there are exceptional circumstances. Rule 92 *bis*, on the other hand, has no such requirements and covers practically any form of evidence. Although the Rule only applies to evidence relating to matters 'other than the acts and conduct of the accused as charged in the indictment', evidence submitted in accordance with r 92 *bis* 'needs to bear some evidentiary value related to the issues at stake'.³⁵ Moreover, r 93, which allows for the admission of evidence of a 'consistent pattern of conduct relevant to serious violations of international humanitarian law', is more civil law influenced. Whilst civil law systems generally allow the admission of evidence of previous misconduct of the alleged perpetrator, such is prohibited in common law jurisdictions.

The only exclusionary rule that has been incorporated in the Rules of the ICTY and ICTR constitutes r 95, allowing for the exclusion of evidence that has been obtained irregularly where this has had an impact on its reliability or the integrity of

35 *Prosecutor v André Ntagerura and Others*, Decision on the Defence Motion for Leave to Present Evidence in the Form of a Written Statement under r 92 *bis* (13 March 2003), Case No ICTR99-46-T, para 14. It should be noted that written statements which fall within the ambit of r 92 *bis* cannot be submitted under r 89(C), thereby avoiding the need to meet the criteria of r 92 *bis*, as 'the general requirement under r 89 that admissible evidence be relevant and probative applies in addition to, and not in lieu of, the more specific provisions of r 92 *bis*'. See *Prosecutor v Ndayambaje, Kanyabashi and Others*, Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit into Evidence the Witness Statements of Four of Said Witnesses (22 January 2003), Case No ICTR-98-42-T, para 20, thereby following the approach adopted in *Prosecutor v Galic*, Appeal Judgment (7 June 2002), Case No IT-98-29-AR73 2, para 31.

36 *Delalic and Others*, Decision on Motion by the Defendants on the Production of Evidence by the Prosecution (8 September 1997), para 9; in *Blaskic*, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability (21 January 1998), Case No IT-95-14-T, para 14, it was stated that r 89(D) allows the Defence 'to demonstrate that a hearsay testimony which was declared admissible must, in the end, be excluded because its probative value is insufficient'. This ground of exclusion exists also in most civil law systems under influence of regional human rights bodies. See, eg, for the case of France, *op cit*, West *et al*, note 31, pp 222-24. The German system incorporated a number of 'Beweisverbote' (prohibitions of evidence non-admissibility of evidence) in paras 52-55 and 136(a) of the 1987/2001 Strafprozess Ordnung (Code of Criminal Procedure). See *op cit*, Delmas-Marty, note 31, p 105. The Dutch system created a discretion for judges to exclude evidence if principles of fair administration of justice have been violated, depending on the gravity of the violation and the consequences thereof, in accordance with Art 359(a) of the Wet van Strafvoeding (Code of Criminal Procedure).

the proceedings.³⁶ In addition, a privilege of communications between lawyer and client is provided for in r 97, which has been recognised in most domestic systems, whether civil law or common law. Another civil law influence can be found in r 98, which allows judges to order *proprio motu* the production of new or additional evidence without the need to rely on the evidence produced by the parties.³⁷

Thus, on the level of admission of evidence the civil law system is the more influential legal system in the sense that there are few formal grounds of exclusion of evidence. On the basis of the Rules, it seems that the admissibility criteria are, like in civil law systems, very lenient. The assessment of reliability and probative value occurs on the level of the deliberation by the judges after having heard all evidence. Reliability and probative value are thus a question of weight, rather than admissibility. In addition, the ad hoc tribunals increasingly depart from the principle that witnesses should give evidence in court in presence of the accused, as set out in Art 21(4)(e) of the ICTY Statute and Art 20(4)(e) of the ICTR Statute, as well as r 89(F) of the ICTY Rules and r 90(A) of the ICTR Rules. However, unlike most civil law jurisdictions where some minimum standards of weight of evidence are generally provided for in the criminal codes, the Rules on Evidence of the ad hoc tribunals have not incorporated specific criteria as to how to determine weight. The only exception is r 96, dealing with sexual assault cases. Rule 96(i) specifies that no corroboration of testimony is required in sexual assault cases. The fact that the Rules are silent about cases other than sexual assault does not indicate that corroboration is required in cases other than sexual assault. Both tribunals made that very clear.³⁸

Hence, the system of proof applied at the ad hoc tribunals is a mix of domestic legal systems, although more civil law than common law influenced. It should be noted that the tribunals perceive themselves as *sui generis* institutions, rather than mere hybrid systems of common law and civil law traditions.³⁹ The question is whether such a *sui generis* system functions well, as incorporating bits from one system and bits from another brings along the danger that the protection mechanism that is inherent to a singular system falls apart when mixed together. Another problem is that the Rules leave many gaps. Questions, such as when a witness is competent, when controversial evidence will be excluded and how the weight is being assessed, remain unanswered.⁴⁰ It should, however, be noted that:

37 Judges do not often use their discretion under r 98, but on a number of occasions they have invoked r 98 to order the production of new or additional evidence. See, eg, *Prosecutor v Blaskic*, Decision of Trial Chamber I in Respect of the Appearance of General Enver Hadzihasanovic (25 March 1999), Case No IT-95-14.

38 *Prosecutor v Tadic*, Judgment (7 May 1997), Case No IT-94-1-T, para 535; *Rutaganda* judgment (6 December 1999), para 18, wherein the Chamber's approach was 'that it will rely on the evidence of a single witness, provided such evidence is relevant, admissible and credible'; *Delalic* judgment (16 November 1998), para 594; *Akayesu* judgment (2 September 1998), para 134; *Musema* judgment (27 January 2000), para 45.

39 See *Blaskic* hearsay decision (21 January 1998). This is consistent with the argument of the ICTR Trial Chamber that the Rules 'are broader than either the common or civil law systems and they reflect an international amalgamated system without necessarily adopting a single national system of evidence'. See *Prosecutor v Bagosora*, Decision on the Defence Motion for Pre-Determination of Rules of Evidence [*Bagosora* pre-determination decision], (8 July 1998), Case No ICTR-96-7-T, p 4.

40 Because of lack of clarity of the Rules of Evidence, the defence teams for Bagosora at the ICTR filed a motion for pre-determination of the Rules. This request was rejected on the ground that '[t]he basic rule is to allow flexibility and efficacy in order to permit the development of the law'. See *Bagosora* pre-determination decision, *ibid*, p 4.

...[i]n the context of rules of procedure and evidence, the approach of the Statute of this Tribunal is to lay down a framework or a structure, conceived in the broadest terms, with due regard to the accused's rights to a fair and public hearing. The Trial Chamber, therefore, has the responsibility to ensure that the trial is fair and expeditious and that the proceedings are conducted in accordance with the Rules, with full respect for the procedural and substantive rights of the accused and also for the protection of victims and witnesses.⁴¹

Thus, the importance of a fair trial is recognised and the Rules should be read in that light. In order to determine whether this mixed system accurately matches the reality of international criminal justice, it is important to review how these Rules are being applied. The discussion is limited to issues of admissibility and weight of evidence and the relationship between the two. It is beyond the scope of this chapter to provide a full and comprehensive discussion on the interpretation of each Rule separately. Thus, only the most important elements are highlighted. Cases where the defendant pleaded guilty are left out of the discussion as, in such cases, the guilty plea is the main basis for the conviction. The prosecution does not need to prove the case beyond reasonable doubt independently of the guilty plea.⁴²

The ICTY and ICTR approach will be discussed jointly as they do not significantly differ. To the contrary, they have influenced one another, although most of the doctrine has been developed at the ICTY rather than the ICTR. Where there is a difference, it will be so stated. If not, it may be assumed that the principles discussed apply to both tribunals even where reference is made to the case law of only one.

11.3 ADMISSIBILITY

In relation to admissibility of evidence, r 89 is particularly relevant. As already mentioned, this Rule has a wide scope for evidence to be admitted.⁴³ Indeed, as an ICTY Chamber held: '[t]his Trial Chamber believes that it should not be hindered by technical rules in its search for the truth, apart from those listed in Section 3 of the Rules.'⁴⁴ The Trial Chamber determined that not all categories of the proposed evidence should be held admissible, highlighting that '[t]he purpose of the Rules is to promote a fair and expeditious trial, and Trial Chambers must have the flexibility to achieve this goal'.⁴⁵

41 *Brdanin and Talk*, Admission of Evidence Order (15 February 2002), para 9. This follows from ICTY Statute, Art 21 and ICTR Statute, Art 20, as well as r 89(B) of the Rules of Procedure and Evidence.

42 The judges only need to be satisfied that the guilty plea is based on 'sufficient facts for the crime and the accused's participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case' (ICTY Rules, r 62 *bis* (iv); ICTR Rules, r 62(B)(iv)).

43 See, eg, *Rutaganda* judgment (6 December 1999), para 18.

44 *Brdanin and Talic*, Admission of Evidence Order (15 February 2002), para 10.

45 *Prosecutor v Aleksovski*, Appeals Decision on Prosecutor's Appeal on Admissibility of Evidence (*Aleksovski* appeals decision on admissibility) (16 February 1999), Case No IT-95-14/1-AR73, para 19. As quoted in *Prosecutor v Kordic and Cerkez*, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence (*Kordic and Cerkez* decision on the Tulica Report) (29 July 1999), Case No IT-95-14/2-T, para 11.

In the *Brdanin and Talic* case,⁴⁶ the ICTY Trial Chamber set out some general principles relating to the admission and weight of evidence. In sum, these principles are as follows:

- 1 A distinction should be made between legal admissibility of documentary evidence and the weight given to it.⁴⁷
- 2 Judges are entitled to reverse a decision to exclude evidence if at a later stage 'further evidence emerges that is relevant, has persuasive value and hence justifies the admission of the evidence in question'.⁴⁸
- 3 The 'mere' admission of a document into evidence does not indicate that the contents will be considered to be 'an accurate portrayal of the facts'. *Inter alia*, authenticity and proof of authorship are important factors, not so much in relation to the admission of documents, but rather in relation to the assessment of the weight of a particular piece of evidence.⁴⁹ As already mentioned, 'the threshold standard for the admission of evidence...should not be set excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence in general'.⁵⁰ At the stage of admission of evidence, 'the implicit requirement of reliability means no more than that there must be sufficient indicia of reliability to make out a *prima facie* case for the admission of that document'.⁵¹
- 4 Authenticity is a matter of weight, rather than admissibility.⁵²
- 5 There is 'no blanket prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify'. Also, absence of a signature or a stamp does not necessarily mean it lacks authenticity.⁵³
- 6 Hearsay evidence is admissible if relevant and has probative value.⁵⁴
- 7 The Tribunal applies the 'best evidence rule', a common law concept.⁵⁵ In determining what is the best evidence, whilst exercising its discretion, the Tribunal will take account of the 'particular circumstances attached to each document and to the complexity of [the case in question] and the investigations that preceded it'.⁵⁶

46 *Brdanin and Talic*, Admission of Evidence Order (15 February 2002).

47 *Ibid*, para 16.

48 *Ibid*, para 17.

49 *Ibid*, para 18.

50 *Ibid*. See also *Tadic* judgment on allegations of contempt (31 January 2000), para 94, where the Appeals Chamber held that a document may be admitted, not so much to prove the guilt of the accused, but to 'demonstrate a particular course of conduct or to explain the events in issue which took place within that period'.

51 *Brdanin and Talic*, Admission of Evidence Order (15 February 2002), para 18.

52 *Ibid*, para 19.

53 *Ibid*, para 20.

54 *Ibid*, para 21.

55 For an analysis of the common law concept of the 'best evidence rule' as applied in the UK, see C Allen, *Practical Guide to Evidence*, 2nd edn, 2001, London: Cavendish Publishing, p 22.

56 *Brdanin and Talic*, Admission of Evidence Order (15 February 2002), para 22.

- 8 Statements that were made involuntary as a result of oppression will be excluded on the basis of r 95. The Trial Chamber held that it is up to the Prosecutor to 'prove beyond reasonable doubt that the statement was voluntary and not made under oppression'.⁵⁷
- 9 '[Reliability is an inherent and implicit component of each element of admissibility... However, in respect to other documentary evidence, the Trial Chamber does not agree that the determination of the issue of reliability, when it arises, should be seen as a separate, first step in assessing a piece of evidence offered for admission'.⁵⁸
- 10 The Trial Chamber imposes on itself 'an inherent right and duty' to secure the admission of each piece of evidence that so qualifies. At the same time, the Trial Chamber will go out of its way, *ex officio* where needed, to ensure that pieces of evidence that do not so qualify on the basis of the Rules are not admitted.⁵⁹

From these principles it follows that, indeed, the preferable approach is to admit evidence and to assess the appropriate weight 'when all the evidence is being considered by the Trial Chamber in reaching its judgment'.⁶⁰ These criteria will be more thoroughly discussed below. In order to facilitate discussion, the definition of the relevant terms, set out in r 89(C) and applied by the Chambers in relation to admissibility of evidence, namely relevance and probative value, including the component of reliability, will be discussed.

11.3.1 Relevant definitions

11.3.1.1 Relevance

The ICTY defined relevance as requiring that in relation to two facts there needs to be 'a connection or nexus between the two which makes it possible to infer the existence of one from the other',⁶¹ thereby referring to the *Cloutier* case, determined by the Canadian Supreme Court.⁶²

11.3.1.2 Probative value

Dissenting Stephen J in the *Tadic* case defined probative value as a 'quality of necessarily very variable content and much will depend on the character of the

57 *Ibid*, para 23.

58 *Ibid*, para 24.

59 *Ibid*, para 25.

60 *Ibid*, para 13.

61 *Delalic and Others*, Decision on the Prosecutor's Oral Request for the Admission of Exhibit 155 into Evidence and for an order to Compel the Accused, Zdravko Mucic, To Provide a Handwriting Sample [*Delalic* Decision on Admission of Evidence] (19 January 1998), Case No IT-96-21-T, para 29.

62 *R v Cloutier* [1979] 2 SCR 709; 99 DLR (3d) 577, *per* Pratte J.

evidence in question'.⁶³ Probative value is interwoven with the credibility and reliability of the evidence and its relevance to the charges.⁶⁴

11.3.1.3 Reliability

Reliability is not a separate condition for admission,⁶⁵ but an inherent and implicit component of relevance and probative value under r 89.⁶⁶ Reliability is the invisible golden thread that runs through all components of admissibility.⁶⁷ Lack of reliability should therefore result in exclusion of the evidence.⁶⁸

11.3.1.4 Documentary evidence

Documentary evidence has been construed as follows: 'Documentary evidence consists of documents, produced as evidence for evaluation by the Tribunal. For the purposes of this case, the term "document" is interpreted broadly, being understood to mean anything in which information of any description is recorded. This interpretation is wide enough to cover not only documents in writing, but also maps, sketches, plans, calendars, graphs, drawings, computerised records, mechanical records, photographs, slides and negatives.'⁶⁹

The party which seeks the admission of a document needs to prove that it meets the criteria necessary for admission, namely relevance and probative value linked with reliability.⁷⁰ The standard of proof is on the balance of probabilities. This means that the party who wishes to rely on the document in question has to show some relevance, some probative value, and some reliability. Whether the relevance, probative value and reliability are sufficient for judges to rely on the document is a question of weight, not of admissibility.⁷¹ Credibility is not yet an issue at the admission stage.⁷² When the rights of the accused are at stake, it may be more appropriate to apply the burden of proof beyond reasonable doubt.⁷³

63 *Tadic* decision on hearsay (5 August 1996), Separate Opinion of Judge Stephen, p 3. See also *Aleksovski* appeals decision on admissibility (16 February 1999), para 15, where reference is made to the content and character of the evidence in question in connection to relevance.

64 *Musema* judgment (27 January 2000), paras 39–40.

65 *Ibid*, para 38.

66 *Tadic* decision on hearsay (5 August 1996), para 15; confirmed in the *Musema* judgment (27 January 2000), paras 35–36.

67 *Delalic* decision on admission of evidence (19 January 1998), para 32; *Musema* judgment (27 January 2000), para 37.

68 *Tadic* decision on hearsay (5 August 1996), para 15.

69 *Musema* judgment (27 January 2000), para 53.

70 *Ibid*, para 55. On appeal, *Musema* claimed that it was not fair to place a burden of proof on the defence to show that the documents the defendant wished to tender were reliable. *Musema* alleged that the only burden that was placed upon the defence was the burden to cast reasonable doubt on the prosecution case. His arguments were rejected. See *Prosecutor v Musema*, Appeal Judgment (16 November 2001), Case No ICTR-96-13-A, para 39.

71 *Musema* judgment (27 January 2000), para 56; see also Principle 3 enunciated in *Brdanin and Talic*, Admission of Evidence Order (15 February 2002), para 18.

72 *Musema* judgment, *ibid*, para 57; *Delalic and Others*, Decision on the Motion of the Prosecution for the Admissibility of Evidence (*Delalic* decision on admissibility) (21 June 1998).

73 *Musema* judgment, *ibid*, para 58, thereby relying on the arguments in *Delalic and Others*, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (*Delalic* decision on exclusion of evidence) (2 September 1997).

It should be noted that Chambers are inclined to admit a document without any further debate where the opposite party does not dispute the relevance, probative value and reliability of the document. Documents in general are mostly admitted as evidence, even if their source is dubious, the justification being that documents usually do not directly address the issue of guilt, but are of a more general nature.⁷⁴ As mentioned, authenticity of the document in question goes to its weight, not its admission.⁷⁵ Unlike common law jurisdictions, these documents do not necessarily need to be presented by a witness.⁷⁶

11.4 HEARSAY EVIDENCE

Hearsay has been described as 'the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what that person says'.⁷⁷ On the basis of this definition, hearsay evidence may cover 'any written document, including expert reports and official documents, which is not adduced by its author while testifying, as well as any behaviour carried out and words uttered by a person other than the witness who reports them in court to establish the truth of the matter'.⁷⁸ In relation to hearsay evidence the common law and civil law positions are most remote. While the civil law traditions have no specific ground on which to exclude hearsay evidence,⁷⁹ at common law hearsay evidence is inadmissible save a number of limited exceptions.⁸⁰

The ad hoc tribunals do not give the same consideration to hearsay evidence as common law courts. On the basis of arguments already presented, namely, that the trials are conducted by professional judges and judges do not wish to be bogged

⁷⁴ *Delalic and Others*, Decision on Admissibility (21 June 1998).

⁷⁵ *Prosecutor v Blaskic*, Judgment (3 March 2000), Case No IT-94-14-T, para 36; see Principle 4 enunciated in *Brdanin and Talk*, Admission of Evidence Order (15 February 2002), para 19. At common law, authenticity, which needs to be proven through direct or circumstantial evidence, is a requirement for the admission of a document.

⁷⁶ *Blaskic* judgment, *ibid*, para 35.

⁷⁷ *Aleksovski* appeals decision on admissibility (16 February 1999), para 14.

⁷⁸ A Rodrigues and C Tounaye, 'Hearsay Evidence', in R May *et al*, *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, 2001, The Hague: Kluwer, p 291.

⁷⁹ The European Convention on Human Rights, of which a large number of European civil law jurisdictions are members, may constitute a possible ground to exclude hearsay evidence. Although the European Court of Human Rights does not prohibit the use of hearsay evidence *per se*, it has imposed restrictions on States in its application. Assessing evidence is primarily a matter for domestic courts. See, eg, *Delta v France*, ECHR Judgment (19 December 1990), para 35, and *Van Mechelen and Others v The Netherlands*, ECHR Judgment (23 April 1997), p 691, para 50. However, where the right to a fair trial is affected, it will nevertheless intervene, such as in *Lüdi v Switzerland*, ECHR Judgment (15 June 1992), p 21, para 49. Hearsay evidence should not be the most substantial evidence (*Unterperthinger v Austria*, Judgment (24 November 1986), para 33), otherwise, its admission violates the right to question the witness (Art 6(3)(d)). Reading out statements rather than hearing the witness is itself not inconsistent with Art 6, 'but the use made of the statements as evidence must nevertheless comply with the rights of the defence' (*Unterperthinger v Austria*, para 31).

⁸⁰ The necessity for the exclusionary rule of hearsay evidence is explained in the case of *Teper v R* [1952] AC 480: The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanor would throw on his testimony is lost.'

down by technicalities, hearsay evidence is more likely than not admitted. In principle, witnesses have to give oral testimony in the presence of the accused (r 89(F) of the ICTY Rules and r 90(A) of the ICTR Rules in combination with Art 21(4)(e) of the ICTY Statute and Art 20(4)(e) of the ICTR Statute).⁸¹ However, the tribunals underscored that the principle set out in r 90(A) of the ICTR Rules, which is currently set out in different terms in r 89(F) of the ICTY Rules, does not necessarily indicate that priority is given to direct and oral evidence. Instead, it deals with technicalities in relation to the reception of testimony. So, irrespective of the availability of the actual witness, both parties can, produce hearsay evidence instead.⁸²

Furthermore, the Chambers have made it clear that the right to cross-examination, incorporated as part of the fair trial provisions of Art 21 (4) (e) of the ICTY Statute and Art 20(4)(e) of the ICTR Statute applies to 'the witness testifying before the Trial Chamber and not to the initial declarant whose statement has been transmitted to this Trial Chamber by the witness'.⁸³ Cross-examination is the only tool available to the defence to test the reliability and credibility of the actual witness. This is gravely undermined by admitting hearsay evidence.

The issue of hearsay arose for the first time in the *Tadic* case.⁸⁴ In that case the Trial Chamber held that there was no 'blanket prohibition on the admission of hearsay evidence',⁸⁵ but that its admission depends on its relevance and probative value, focusing on its reliability.⁸⁶ Many subsequent cases followed this example.⁸⁷ In the *Kordic and Cerkez* case, approximately 40 transcripts from other trials were admitted. Only those which repeated already heard testimonies were excluded, due to lack of relevance. The Chamber also determined that the witnesses should be called when the transcripts concerned the determination of the guilt of the accused directly.⁸⁸ In the *Aleksovski* case⁸⁹ the Trial Chamber did not accept that the admission of a transcript from another case violated the fundamental right of the accused to confrontation and cross-examination guaranteed by the ICTY Statute.⁹⁰ However, the Trial Chamber added that 'this ruling will not preclude the application by the Defence to cross-examine the witnesses on the ground that there are significant relevant matters not

81 European Convention on Human Rights, Art 6(3)(d); International Covenant on Civil and Political Rights, Art 14(4)(e), upon which ICTY and ICTR Statutes, Arts 21 and 20 are based. As the European Court of Human Rights pointed out, *inter alia*, in *Kostovski v The Netherlands*, Judgment (20 November 1989), para 41, '[i]n principle all the evidence has to be produced in the presence of the accused at a public hearing with a view to cross-examination, although statements obtained at a pre-trial stage could be used as evidence, provided the rights of the defence were respected'. Although human rights treaties generally apply to Member States only, and not to international institutions, the ICTY and ICTR have confirmed that the decisions of the ECHR are 'authoritative and applicable'. See *Prosecutor v Delalic and Others*, Decision on the Motion by the Prosecutor for Protective Measures for the Prosecution Witnesses Pseudonymed 'B' through 'M', Preliminary Judgment (28 April 1997), para 27.

82 *Aleksovski* appeals decision on admissibility (16 February 1999).

83 *Elastic* hearsay decision (21 January 1998), para 29.

84 *Tadic* decision on hearsay (5 August 1996).

85 *Ibid*, para 7.

86 *Ibid*, para 19.

87 See *Aleksovski* appeals decision on admissibility (16 February 1999).

88 *Kordic and Cerkez* decision on the Tulica Report (29 July 1999).

89 *Aleksovski* appeals decision on admissibility (16 February 1999).

90 *Ibid*, para 25.

covered by cross-examination in *Blaskic* which ought to be raised in this case'.⁹¹ The ICTR adopted a similar approach.⁹²

The same approach is applied to the admission of hearsay evidence as to other forms of evidence. The core issues are again relevance and probative value in connection with reliability. To evaluate the relevance, probative value and reliability of the hearsay evidence:

the Trial Chamber will hear both the circumstances under which the evidence arose as well as the content of the statement. The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognised by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. In bench trials before the International Tribunal, this is the most efficient and fair method to determine the admissibility of out-of-court statements.⁹³

In sum, from the case law it appears that hearsay evidence is admitted as a rule, even where a statement constitutes multiple hearsay. This fact on its own gravely undermines the right to cross-examination, which is inherent in a fair trial. This disadvantage to the defence can be partly compensated if judges take it sufficiently into account when weighing the evidence.

11.5 DEPOSITION EVIDENCE

Deposition evidence is out-of-court evidence given by a witness. Thus, the deposition replaces the witness's appearance in court, and is generally conditional upon the unavailability of the witness.⁹⁴ The deposition will normally be taken by a court official in presence of the defence who has the right to cross-examine the witness. The trial judges or jury members will not hear the witness directly but will rely on the record made of the deposition. Notwithstanding the maintenance of the defendant's right to cross-examine the witness, this is a form of hearsay by common law standards. Its use at the *ad hoc* Tribunals is explicitly allowed on the basis of r 71 of the ICTY and ICTR Rules. The use of deposition evidence is an exception to the general rule that witnesses should testify orally in court, which follows from r 90(A) of the ICTR Rules and r 89(F) of the ICTY Rules.

In its original form, r 71 could only be invoked in exceptional circumstances and in the interests of justice. The onus is on the party seeking to admit deposition evidence to demonstrate exceptional circumstances and interests of justice. Over time, the use of deposition evidence became standard, and exceptional circumstances were easily accepted.⁹⁵ In the *Kupreskic* case⁹⁶ the Appeals Chamber gave a restrictive

91 *Ibid*, para 28.

92 *Musema* judgment (27 January 2000), para 51, where the Trial Chamber noted that 'hearsay evidence is not inadmissible *per se*, even when it cannot be examined at its source or when it is not corroborated by direct evidence. Rather, the Chamber has considered such hearsay evidence, with caution, in accordance with Rule 89'; see also *Prosecutor v Ntahobali and Others*, Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness 'TN' (1 July 2002), Case No ICTR-98-42-T, para 21, where the Trial Chamber held that 'hearsay evidence is permissible at the Chamber's discretion'.

93 *Tadic* decision on hearsay (5 August 1996), para 19.

94 See JW Strong (ed), *McCormick on Evidence*, 1999, St Paul, Minnesota: West, pp 391-92.

interpretation of r 71 and held that it should be invoked only as intended, namely as an exception to the general rule that witnesses should be heard directly by the Trial Chamber. An exception applies where both parties agree.⁹⁷ The witness's age, poor mental or physical condition may amount to exceptional circumstances.⁹⁸ Also, the refusal of the government of the country where the witness is residing to allow the transfer of the witness to the Tribunal may constitute an exceptional circumstance.⁹⁹

As for the requirement of the interests of justice, Chambers are more reluctant to accept the presence of this ground. The ICTY established the following criteria on the basis of which to evaluate whether a deposition is in the interests of justice: (1) the testimony must have sufficient importance in the sense that it would be unfair to run the trial without its admission; (2) the witness is unwilling or unavailable to testify orally; (3) the deposition will not prejudice the right of the accused to confront the witness.¹⁰⁰ These criteria are equally accepted by the ICTR, but the ICTR added one additional criterion: 'the practical considerations (including logistical difficulty, expense, and security risks) of holding a deposition in the proposed location [should] not outweigh the potential benefits to be gained by doing so.'¹⁰¹ In the *Naletilic* case, the ICTY Trial Chamber stated that deposition evidence would be admitted where 'the witness proposed for deposition will not present eyewitness evidence directly implicating the accused in the crimes charged, or alternatively, their evidence will be of a repetitive nature in the sense that many witnesses will give evidence of similar facts'.¹⁰² It should be noted that the tribunals do not make a distinction between requests for deposition of evidence from the defence and those from the prosecution; notwithstanding the fact that the main problem of taking deposition is that it may undermine the position of the defence.

As explained, the ICTY amended r 71. The term 'exceptional circumstances' has been deleted to make its use more flexible. It still needs to be in the interests of justice, which relates to the importance and the disputable nature of the evidence. The ICTR

95 Even the unavailability of one of the Trial Chamber judges amounted to exceptional circumstances. See *Kordic and Cerkez*, Decision on the Prosecutor's Request to Proceed by Deposition (13 April 1999); *Prosecutor v Kupreskic and Others*, Decision on Prosecutor's Request to Proceed by Deposition (25 February 1999), Case No IT-95-16-T.

96 *Kupreskic and Others*, Appeals Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition (15 July 1999), Case No IT-95-16-AR73, p 3.

97 *Prosecutor v Kvočka and Others*, Decision to Proceed by Way of Deposition Pursuant to Rule 71 (15 November 1999), Case No IT-98-30-PT.

98 *Prosecutor v Bagosora and others*, Decision on Prosecutor's Motion for Deposition of Witness OW (5 December 2001), Case No ICTR-98-41-I, para 12. The fact that a witness is protected, indigent or fearful does not amount to an exceptional circumstance justifying deposition. These are issues that can be dealt with by the Tribunal's Witness and Victim Support Section, and hence, deposition is not necessary. See *Prosecutor v Semanza*, Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure (20 October 2000), Case No ICTR-97-20-I, para 27.

99 This is only so if the Prosecutor has made all efforts to secure the attendance of the witness. See *Prosecutor v Niyitegeka*, Decision on the Prosecutor's Amended Extremely Urgent Motion for the Deposition of a Detained Witness Pursuant to Rule 71 (4 October 2002), Case No ICTR-96-14-T, para 5.

100 *Delalic and Others*, Decision on the Motion to Allow Witnesses K, L, and M to Give Their Testimony by Means of Video-Link Conference (28 May 1997).

101 *Bagosora*, Decision on Deposition of Witness OW (5 December 2001), paras 13-14.

102 *Prosecutor v Naletilic and Martinovic*, Decision on Prosecutor's Motion to Take Depositions for Use at Trial (Rule 71) (10 November 2000), Case No IT-98-34-PT, p 4; *Niyitegeka* decision on deposition (4 October 2002), para 3.

Rules still require the presence of both exceptional circumstances and the interests of justice. The ICTY amendment will not make a significant difference, as most requests strand on the requirement of the interests of justice, rather than exceptional circumstances.

11.6 CHARACTER EVIDENCE

A rule of common law provides that evidence, which tends to prove the bad character of the accused or his previous misconduct, is excluded as such, being only prejudicial and does not indicate anything about the accused's guilt in the matter at issue.¹⁰³ An exception applies where the probative value of evidence outweighs its prejudicial effect.¹⁰⁴ This will only be the case where the facts shown by the evidence are strikingly similar to the facts alleged by the prosecutor. Another exception applies where the accused produces evidence of his 'good' character, which may be rebutted by the prosecutor by bringing evidence of his 'bad' character. A final exception applies where the evidence does not tend to demonstrate the accused's guilt, but rather his motive, intent, plan or similar issues.¹⁰⁵ Civil law jurisdictions have not incorporated such a rule. Since the assessment of evidence is in the hands of judges, the prosecutor is free to adduce evidence showing the alleged perpetrator's tendency to commit a crime.

The Tribunals have not incorporated an exclusionary rule in relation to character evidence. To the contrary, r 93 specifically allows for the admission of evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law. The term 'consistent pattern of conduct' seems to be broader than the common law term 'striking similarities'. Thus, the use of r 93 potentially endangers the position of the defence. The Tribunals, qualified such evidence as circumstantial evidence, but they apply this Rule with caution.¹⁰⁶ Bad character or

103 See, eg, *Makin v AG for New South Wales* [1894] AC 57, determined by the Privy Council (UK): It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the person is likely from his criminal conduct or character to have committed the offence for which he is being tried' (*per* Lord Herschell, p 65); see also US Federal and Revised Uniform Rules of Evidence, r 404(a) which provides that, subject to a number of exceptions, '[e]vidence of a person's character or, a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion'.

104 See *DPP v P* [1991] 2 AC 447, decided by the British Court of Appeal: It was not appropriate to single out striking similarity as an essential feature of every case involving the admission of evidence of one victim on a charge relating to another victim. The principle was whether the probative force of the evidence was sufficiently great to make it just to admit the evidence, notwithstanding its prejudicial effect in showing the defendant's guilt of another crime.' (*Per* Lord Mackay.)

105 See Federal and Revised Uniform Rules of Evidence, r 404(b) which provides: 'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.' Rule 405(a), furthermore, allows opinion testimony as well as reputation testimony to prove character whenever any form of character evidence is appropriate. In addition, when character is 'in issue', it may also be proved by testimony about specific acts.

similar fact evidence can nevertheless be used to undermine the credibility of the accused as a witness.¹⁰⁷ It may even be taken into account in relation to one's guilt or innocence if 'it bears on the questions as to whether the conduct alleged... was deliberate or accidental, and whether it is likely that a person of good character would have acted in the way alleged'.¹⁰⁸ In comparison with common law, these are borderline decisions. Common law has created an exclusionary rule against bad character evidence for good reasons, such that evidence may be irrelevant whilst being very prejudicial. Thus, the Tribunals should be careful when applying r 93.¹⁰⁹

11.7 INVESTIGATOR'S REPORT

In civil law systems it is common for police investigators to file a Dossier containing the results of their investigations. This may include witness statements, scientific reports, psychoanalysis reports and others. It is often considered unnecessary to call for testimony the witnesses whose statements are duly reported in the Dossier. Judges rely on the accuracy of the police investigator's report.¹¹⁰ This approach gravely undermines the right to cross-examine and is, in specific circumstances, severely criticised by the European Court of Human Rights.¹¹¹ The Prosecutor attempted to pursue this controversial practice common in some civil law countries, such as Belgium, France and The Netherlands.

In the *Kordic and Cerkez* case,¹¹² the prosecutor proposed to submit into evidence¹¹³ a Dossier of evidence relating to the attack on Tulica in June 1993. The Dossier itself contains seven categories of documents:

106 *Krnjelac* judgment (15 March 2002), para 4: 'Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute was admitted pursuant to r 93(A) in the interests of justice. Such evidence is similar to circumstantial evidence. A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the existence of a particular fact upon which the guilt of the accused person depends because they would usually exist in combination only because a particular fact did exist. Such a conclusion must be established beyond a reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion cannot be drawn.'

107 *Tadic*, Appeals Judgment on Allegations of Contempt (31 January 2000), para 128.

108 *Ibid*, para 130.

109 *Op cit*, Nsereko, note 22, p 336.

110 In France, great importance is attached to a '*process-verbal*' the contents of which, in relation to 'contraventions' (ie, misdemeanours), are held to be true unless the contrary is proved (Code de Procédure Pénale, Art 537). Thus, it results in shifting the burden of proof. In relation to crimes, the judges are able to assess the weight of the information contained in such '*procès-verbal*' in accordance with their inner conviction (Code de Procédure Pénale, Art 430); *op cit*, West *et al*, note 31, pp 221–22. In the Dutch system, an accused can be convicted on the contents of a '*process-verbal*' only (Wetboek van Strafvordering, Art 344(2)), which is an exception to the rule that evidence needs to be corroborated (Wetboek van Strafvordering, Arts 341(4) and 342(3)).

111 In particular, the European Court of Human Rights has condemned this approach where witnesses are not called to testify without taking proper action to safeguard the right 'to examine or have examined witnesses against him' (Art 6(3)(d)). See, eg, *Van Mechelen*, ECHR Judgment (23 April 1997), p 691; *Visser v The Netherlands*, ECHR Judgment (14 February 2002), Application No 00026668/95.

112 *Kordic and Cerkez* decision on the Tulica Report (29 July 1999).

113 *Ibid*, para 7.

- (i) five maps relevant to the presentation;
- (ii) one video containing footage relevant to the presentation;
- (iii) eight witness statements;
- (iv) four court transcripts;
- (v) exhumation documents, including on-site reports, photographs and death certificates;
- (vi) photographs, a schematic diagram and a map relating to destruction of property;
- (vii) 13 photographic 'stills' taken from the video footage.

The prosecutor suggested calling the investigator for cross-examination by the defence on the materials in his report, including the statements of persons who were not to be called as witnesses.¹¹⁴ The defence objected on the basis that the inclusion of the Tulica report would amount to a violation of the fundamental right of the accused to 'examine, or have examined, the witnesses against him' (Art 21(4)(e) of the ICTY Statute). The defence underlined the fact that the report contained second or third hand hearsay evidence.¹¹⁵ While confirming that relevant hearsay evidence may be admitted under r 89(C),¹¹⁶ the Tribunal determined that not all categories of the proposed evidence should be held admissible. The report itself was not admitted into evidence, as the investigator could not be qualified as a factual witness, nor as an expert witness. He gathered materials long after the events took place and was thus not in a position to say anything more than which materials were in the Dossier.¹¹⁷ Instead, the Tribunal looked at the materials independently, rather than the report as a whole. As for the witness statements (iii), the Tribunal held that 'this is not an appropriate case for the exercise of the discretion under that provision [r 89(C)], as it would amount to the wholesale admission of hearsay untested by cross-examination, namely the attack on Tulica, and would be of no probative value'.¹¹⁸

As for the transcripts (iv), the Trial Chamber held that there was no justification for admitting the transcript of a witness testimony given earlier in the same trial. The inclusion of this testimony would therefore be 'unnecessarily repetitious'.¹¹⁹ The transcripts of three other witnesses were found admissible, as the witnesses had been cross-examined in the *Blaskic* case, the defence of which the Trial Chamber considered to have a common interest with the defence in the case in question. The right to cross-examine the witnesses on matters which were not raised in the *Blaskic* case was nonetheless reserved for the defence.¹²⁰ The Trial Chamber admitted into evidence the exhumation documents (v), consisting of an 'on-site report' carried out by an Investigating Judge for the Sarajevo Cantonal Court, photograph documentation concerning exhumation autopsy and identification, and death

114 *Ibid*, para 8.

115 *Ibid*, para 9.

116 *Ibid*, para 19.

117 *Ibid*, para 20.

118 *Ibid*, para 23.

119 *Ibid*, para 26.

120 *Ibid*, para 28.

certificates. With regard to the on-site report, the Trial Chamber however held that '[a]ny assumptions or conclusions which are expressed in this material will be disregarded by the Trial Chamber and will not form part of the record of evidence which it will consider in determining the innocence or guilt of the accused'.¹²¹

Thus, the Chamber refused to admit a 'Dossier' as a whole without examining the materials independently. This is an encouraging approach. In cases where the person filing the report is perceived as an expert witness, the approach is totally different, although expert reports rely as much on hearsay evidence as investigators' reports. The approach in relation to expert reports is analysed below.

11.8 EXPERT EVIDENCE

At common law a witness cannot make a value judgment or express an opinion. The reason for this prohibition of value judgments or opinions is that the fact finder is to draw his own conclusions on the facts brought before him; the witness should not replace this function of the fact finder.¹²² An exception applies with regard to experts who can give their opinion within the limits of their expertise. If a person qualifies as an expert on the basis of his professional qualifications or expertise, which requires special skills and knowledge, and the expert's opinion is likely to be outside the experience and knowledge of a judge or jury, the opinion may be admitted into evidence.¹²³ If judges or jury members can form their own conclusions on the facts without the assistance of an expert opinion, such opinion is irrelevant and therefore not admitted into evidence.

An important rule is the 'ultimate issue rule': the expert cannot testify as to the guilt of the alleged perpetrator.¹²⁴ Another important rule is that an expert cannot express the opinion of another expert or assistant-expert (primary facts). It is however permitted to rely on the opinions of other experts to make up one's own opinion (expert's facts). It is very difficult not to rely to some extent on hearsay evidence, as the expertise is normally based on someone else's expertise.¹²⁵

121 *Ibid*, para 32. The Trial Chamber repeated this reasoning in relation to the remaining categories of evidence (i, ii, vi, vii) (paras 34, 36).

122 *R v Robb* (1991) 93 Cr App R 161; C Allen, *Practical Guide to Evidence*, 2nd edn, 2001, London: Cavendish Publishing, pp 307–16.

123 In *R v Silver Lock* [1894] 2 QB 766, handwriting was considered to be an expertise on the basis that it required special skills and knowledge. See also *R v Turner* [1975] QB 834, *per* Lawton LJ, and *R v Robb, ibid*.

124 See however the English case *R v Stockwell* (1993) 97 Cr App R 260, where it was found acceptable for an expert witness to give his opinion on an ultimate issue, such as identification, provided the judge directed the jury that they were not bound to accept the opinion. See also US Federal Rules of Evidence, r 704(a), which states: 'Except as provided in subdivision (b), testimony in the form of opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.' Rule 704(b) provides that when an accused's mental state or condition is in issue (such as premeditation in homicide, lack of predisposition in entrapment, or the true affirmative defence of insanity), an expert witness may not testify that the defendant did or did not have the mental state or condition constituting an element of the crime charged or of the defence.

125 Under US Federal Rules on Evidence, rr 703 and 705, an expert may give a direct opinion upon facts and data, including technically inadmissible reports, provided the reports or other data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject'. JW Strong (ed), *McCormick on Evidence*, 1999, St Paul, Minnesota: West, pp 28–29.

In civil law systems generally, there is little that binds the court in relation to expert opinion evidence. It is entirely within the discretion of the court to determine who can be qualified as an expert and on what basis. In practice, civil law courts tend to accept expert evidence without any further scrutiny.¹²⁶ There is no equivalent to the common law ultimate issue rule, although implicitly, there is, as the expert witness can only testify according to his expertise. The ultimate matter of guilt of the alleged perpetrator would not fall within the ambit of his expertise.

In principle, the Tribunals follow the common law approach. Testimony qualifies as expert testimony where 'intended to enlighten the judges on specific issues of a technical nature, requiring special knowledge in a specific field'.¹²⁷ The evidence given by the expert needs to be relevant and of assistance to the Chamber in its deliberations.¹²⁸ If the evidence relates merely to legal issues, rather than issues of a technical nature, it will not be admitted, as the judges are well capable of drawing their own conclusions on legal matters.¹²⁹ In the *Military I* case, the ICTR Trial Chamber held that:

...[i]t is widely accepted and the parties in this case do not dispute that the role of an expert is to provide opinions or inferences to assist the finders of fact in understanding factual issues. In addition, there is no dispute that before being permitted to submit opinion testimony, the Chamber must find that the expert is competent in her proposed field or fields of expertise. The expert must possess some specialised knowledge acquired through education, experience, or training in a field that may assist the fact finders to understand the evidence or to assess a fact at issue.¹³⁰

The ICTY held that expert reports can only be used to prove general events, not for the determination of the guilt of a specific alleged perpetrator.¹³¹ Thus, it respects the ultimate issue rule of common law. The ICTR, however, adopted a different approach. As will be illustrated below, in the *Military I* case, the expert report of Madame DesForges was accepted despite the fact that she discussed the culpability of the four persons accused in great detail.¹³²

Moreover, as regards relying on hearsay evidence, which to a certain degree is impossible to avoid, it seems that the ICTY is more cautious than the ICTR. Two examples, one from the ICTY and the other from the ICTR, illustrate this difference in approach in relation to both hearsay evidence and the ultimate issue rule. In the *Kovacevic* case,¹³³ the defence made an objection against inclusion of prosecution

126 Some argue that one needs to be careful in qualifying a witness as an 'expert' as judges are inclined to attach great importance to an expert opinion, sometimes too much. See *op cit*, West *et al*, note 31, p 221.

127 *Akayesu*, Decision on a Defence Motion for the appearance of an Accused as an Expert Witness (9 March 1998); reiterated in *Prosecutor v Nahimana, Barayagwiza, Ngeze*, Decision on the Expert Witnesses for the Defence (24 January 2003), Case No ICTR-99-52-T, para 2.

128 *Ibid*, *Nahimana*, paras 6 and 11.

129 *Ibid*, paras 16 and 22; *Nahimana and Others*, Decision to Reconsider the Trial Chamber's Decision of 24 January 2003 on the Defence Expert Witnesses (25 February 2003), para 4.

130 *Prosecutor v Bagosora and Others*, Oral Decisions on Defence Objections and Motions to Exclude the Testimony and Report of the Prosecution's proposed Expert Witness, Dr Alison DesForges, or to Postpone her Testimony at Trial (4 September 2002), Case No ICTR-41-98-T, para 5; *Nahimana* oral decision (20 May 2002), pp 122-26.

131 See, eg, *Prosecutor v Kovacevic*, Official Transcript (6 July 1998), Case No IT-97-24-T, p 71; *Kordic and Cerkez*, Official Transcript (28 January 2000), pp 13268-306.

132 *Bagosora and Others*, Oral Decisions on Objections to Exclude Testimony (4 September 2002), para 8.

133 *Kovacevic*, Official Transcript (6 July 1998).

Exhibit 10 on the ground that it contained multiple hearsay and otherwise inadmissible evidence.¹³⁴ The document constituted a report of an expert, namely a judge, who summarised, analysed and collated information from 400 witnesses. Thus, the defence argued that it was denied the fundamental right to cross-examination, and the right to confront witnesses, as the judge, the only witness available for cross-examination, was not a direct witness herself. With reference to an expert witness, the defence rightly held: '[t]hey cannot merely summarise evidence and introduce it under the guise of being an expert.'¹³⁵

The prosecution responded that:

...it is very clear on its face, she does not purport to give exact details from specific witnesses. What she purports to do in that report is to analyse a great body of evidence. And, based on that analysis, reach certain conclusions. It's in a summary form, such as a contemporary historian may provide when reviewing evidence that occurred very recently.¹³⁶

The defence argued:

We're not talking about simply hearsay that an expert may use to fortify their expert opinion. We're talking about being denied the right to cross-examine a paper witness.¹³⁷

May J responded:

It is our view that the witness should be treated as an expert in this sense, an expert who has made a study of material and is therefore qualified to give evidence about it. The position being analogous to that of the historian. We take entirely the point made by the defence, that they cannot cross-examine the 400 witnesses on whose statements this evidence will be based. We understand that. But in this Tribunal we admit all types of evidence. The hearsay rule does not apply, but the issue of how much weight is given to this evidence is very much a matter for the Tribunal. And, in that connection, we shall, of course, bear in mind that it is hearsay. And, as I said earlier, sometimes hearsay upon hearsay. With those considerations in mind, we shall admit the report. But, I should make it quite plain, there is no question of this defendant being convicted on any count on the basis of this evidence. And we shall require other evidence before we consider taking any such course.¹³⁸

In the above case, it is highly questionable why that person qualified as an expert, and an expert in what. Is gathering materials an expertise? The dangers of qualifying a witness as an expert are well known. Often, their opinions are blindly followed. Experts in the Tribunals tend to rely on materials of others. They may have collected the materials but base their findings entirely on what others have said. The dangers of relying mainly on hearsay evidence are nevertheless recognised, and Judge May rightly stated that someone should not be convicted on the basis of such report only.

In the *Kordic and Cerkez* case, the defence raised an objection with regard to the expertise of Professor Cigar, the author of a book on ethnic cleansing in 1995.¹³⁹ The

134 *Ibid*, pp 69–71.

135 *Ibid*, p 71.

136 *Ibid*, p 73.

137 *Ibid*, p 74.

138 *Ibid*, p 75.

139 *Kordic and Cerkez*, Official Transcript (28 January 2000).

prosecution argued that the controversy surrounding his expertise should not be a ground for exclusion, but should rather be addressed during cross-examination.¹⁴⁰ May J raised concerns as regards the ultimate issue rule, as well as the relevance of the allegations.¹⁴¹ The prosecutor responded that the document included conclusions:

...which are the principal matters that are outside the experience of the Chamber and upon which expertise is vital and helpful. And in his survey of and marshalling of the material and then, applying his analysis to reach the conclusions that precede the final conclusions, he is doing the work of an expert and not expressing final conclusions.¹⁴²

The prosecutor moreover argued that:

He gathers together the material with expertise that is not available to us. This is a recognised and respected area of expertise to which he's devoted some part of his life, entirely neutrally gathering materials that aren't available to us in their broad range and knowing where to look, and that marks him out and it gives him a particular insight and a particular value.¹⁴³

]Mr Stein for the defence objected, arguing that Professor Cigar was neither neutral nor an expert, and had no expertise to offer something which the court did not already have.¹⁴⁴ He stated about Prof Cigar:

He has instead looked at a variety of newspaper documents, things supplied to him by the Tribunal from witnesses, some of whom have appeared and some of whom have not, and he has made his conclusion... [H]e has made his conclusion having decided the credibility and reliability of witness statements, reports in news journals, accepted some and rejected others... Cigar's report contains not only news articles but a number of, quote, 'open sources which have been analysed with due regard to their reliability'... Judge Cigar has decided who is reliable and who isn't, taking that entirely from your hands, and presents to you his analysis of the shadow case which I suggest.¹⁴⁵

After the Trial Chamber deliberated on the matter, May J held:

Much of the complaint made by the defence about this witness is a matter which is susceptible to cross-examination and is a question of weight. However, they raise a fundamental point, which is that what this witness effectively is doing is to provide evidence or provide opinion, more accurately, upon the very matters upon which this Trial Chamber is going to have to rule, and that, as they correctly point out, invades the right, power, and duty of the Trial Chamber to rule upon this issue... It is littered, if I may say, with examples of conclusions, drawing inferences, drawing conclusions, which it is the duty of this Trial Chamber to consider and to draw if appropriate or to reject. It's correctly pointed out that the witness hasn't heard the evidence. We have, and we have to decide the case. It's not a matter for him to decide... We also don't think, and this is a matter where Rule 89(C) comes into play, that his evidence is going to assist us very much. 89(C) says we may admit any relevant material which it deems to have probative value. Because it's dealing with the matters which we have to deal with ultimately, drawing the conclusions and inferences which we have to draw, we think that it does not assist and is, therefore, not of probative value... Accordingly, we shall exclude the evidence.¹⁴⁶

140 *Ibid*, pp 13267–68.

141 *Ibid*, pp 13269–71.

142 *Ibid*, pp 13271–72.

143 *Ibid*, p 13275.

144 *Ibid*, p 13289.

145 *Ibid*, pp 13292–93.

146 *Ibid*, pp 13305–07.

In the ICTR, any historian can be called an expert. In many cases the expertise of Dr Alison DesForges, a historian on African affairs, was received as expert on the Rwandan genocide. While not in Rwanda when the genocide took place, she based her conclusions on what others have narrated. Moreover, her book *Leave None to Tell the Story*, submitted by Human Rights Watch, is full of conclusions and opinions on the ultimate issue. In the *Military I* case, this was particularly clear. Her expert report contained four chapters specifically on the guilt of each person accused in the case in which she was testifying. This clearly is the task of the judges. Moreover, she based her assessments on anonymous testimonies. Finally, one of her areas of expertise concerned human rights, a legal area in relation to which judges, being lawyers themselves, do not arguably need expert advice. Amongst others, these three issues, that is, (1) the violation of the ultimate issue rule, (2) the deprivation of the right to learn the identity of persons or sources that form the basis of the expert opinion, and (3) the rule that the expert opinion is only relevant where the area of expertise goes beyond the knowledge of the judges, were raised by the four defence teams.

With regard to the first issue, the Trial Chamber held:

With respect to the sceptre raised by the defence that Dr DesForges should not be permitted to opine upon the ultimate issue, lest the parties forget, this matter is being tried by a panel of seasoned Judges who will not permit the opinion of an expert to usurp their exclusive domain as fact finders. Rules disallowing an expert to provide opinions and inferences on the ultimate issue are ordinarily directed at protecting against lay jurors from substituting the opinion of the expert for their independent assessment of the facts. There is no such danger here.¹⁴⁷

In relation to the second issue, the Trial Chamber stated that there was no danger of a deprivation of the right to know the expert's sources, as the defence teams had ample opportunity to ask questions relating to the sources during cross-examination.¹⁴⁸ As for the third issue, the Trial Chamber argued:

...[c]ontrary to the submissions of the defence, there is no requirement that the opinion of the expert be essential or strictly necessary or that areas of her knowledge lie beyond the understanding of the triers of fact as a predicate for its admissibility. All that is required is that the expert opinion be helpful to assist the Chamber in understanding the evidence or to assess facts at issue in this case.¹⁴⁹

Thus, one may conclude that, in comparison with the rules of common law on expert evidence, expert reports, particularly at the ICTR, are being accepted far too lightly.

11.9 EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE

A rule excluding improperly obtained evidence exists in practically all systems, civil and common law systems alike. Civil law systems tend to focus on procedural matters, which means that evidence will be excluded if obtained in violation of procedural fairness irrespective of the relevance of the evidence. Common law systems focus more on issues of reliability: if the prejudicial effect exceeds probative

¹⁴⁷ *Bagosora and Others*, Oral Decisions on Objections to Exclude Testimony (4 September 2002), para 9.

¹⁴⁸ *Ibid*, para 11.

¹⁴⁹ *Ibid*, para 5.

value the evidence will not be admitted. To a more limited degree, evidence the admission of which would affect fairness may also be excluded at common law.¹⁵⁰

The scope of r 95 is wide. In the *Delalic* case, the ICTY held that for 'evidence to be reliable, it must be...obtained under circumstances which cast no doubt on its nature and character'. Thus, r 95 creates an additional element to reliability, namely the source.¹⁵¹ Another element of r 95 is the integrity, which refers to a fair trial. Particular care needs to be taken when it concerns admissions of the accused. As explained, to admit evidence of the accused's statement under r 95, the prosecution needs to prove 'convincingly and beyond reasonable doubt' that the statement was made voluntarily.¹⁵² On the basis of r 95, certain pieces of evidence, such as those obtained in an armed search,¹⁵³ in irregular investigation procedures,¹⁵⁴ or by a mere breach of the Rules of Procedure and Evidence, will be found inadmissible.¹⁵⁵ Thus, irregularities in the procedure suffice to exclude the evidence obtained therein. It is not necessary that the quality of evidence is thereby affected. It appears that r 95 is wide enough to properly sanction misconduct of investigators, regardless of whether or not the Tribunal is responsible for its actions.

Thus, the core issues in relation to admission of evidence seem to be relevance and reliability, which is not far removed from the common law approach. The difference, however, is that practically all evidence is considered to be sufficiently

150 See *Sang* [1980] AC 402, where Lord Diplock, p 437, held that judges have no discretion 'to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The Court is not concerned with how it was obtained'. Even though s 78 of the Police and Criminal Evidence Act 1984 (PACE) incorporates the judicial discretion to exclude evidence if improperly obtained, *Chalkley* [1998] 2 Cr App R 79, per Lord Auld, pp 105–06, confirms the common law position set out in *Sang*. This approach may, however, have become invalidated in light of the incorporation of the European Convention on Human Rights through the adoption of the Human Rights Act 1998. In Canada, the position is similar. See *R v Wray* [1971] SCR 272; *R v Harrer* [1995] 3 SCR 562. However, the Canadian Charter provides for a remedy itself: if the manner with which the evidence was obtained is in violation of the Canadian Charter, the evidence may be excluded under Art 24(2) of the Charter if its admission would bring the administration of justice into disrepute. The US has shown considerable concern with the fairness in which evidence was obtained, even where the reliability of the evidence is not directly affected. This appears, *inter alia*, from *State v Brown*, 543 A 2d 750, 763 (1988); and *USA v Leon*, 468 US 897 (1984). See also Federal and Revised Uniform Evidence Rules, r 403, which codifies the common law power of the judge to exclude relevant evidence, 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence'.

151 *Delalic*, Decision on Exclusion of Evidence (2 September 1997), para 41.

152 *Ibid*, para 42.

153 *Kordic and Kerkez*, Decision Stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence (25 June 1999), pp 3–5.

154 *Delalic and Others*, Decision on the Motion for the Exclusion of Evidence and Restitution of Evidence by the Accused Zejinil Delalic (25 September 1997), para 45; *Delalic* judgment (16 November 1998), para 65.

155 *Delalic and Others*, Decision on the Tendering of Prosecution Exhibits 104–08 (9 February 1998), para 20. The 'mere' breach was the breach of the right to counsel. Although this restriction of the right to be represented while being questioned by Austrian police and prosecution investigators during a criminal investigation was in accordance with Austrian law and was allowed under the European Convention on Human Rights, Art 6(3) of which Austria is a member, the Trial Chamber nevertheless considered it to be 'inconsistent with the unfettered right to counsel in Art 18(3) [of the Statute] and sub-Rule 42(A)(i) [of the Rules]'. On that ground, it excluded the statements made by the accused to the Austrian police as evidence under r 95. The Trial Chamber nonetheless admitted statements made in Munich notwithstanding the defence's allegation that irregularities occurred in recording the interview. *Delalic* judgment (16 November 1998), para 64; *Akayesu* judgment (2 September 1998), para 95.

relevant and reliable to be admitted. The degree of relevance needed for the admission of evidence is to be distinguished from the relevance needed to attach sufficient weight to the evidence in determining the guilt of the accused. Some relevance and some probative value suffice.¹⁵⁶ Thus, subject to questions of relevance and prejudice, any evidence, including hearsay, will be admitted. Even issues of authenticity and proof of ownership are more relevant for weighing the evidence than they are for its admissibility. As aforementioned, such an approach does not necessarily undermine the burden of proof beyond reasonable doubt. That depends on the extent to which the judges take account of aspects undermining the quality of evidence adduced against the defendant. This will be discussed next.

11.10 DETERMINATION OF WEIGHT OF EVIDENCE

11.10.1 General principles

First of all it should be noted that a tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. The converse also holds true.¹⁵⁷ This approach entails dangers. One consequence may be that a person will be convicted on the basis of evidence that, independently, lacks relevance, probative value and reliability, but because of other factors pointing in the same direction of guilt, the evidence suddenly becomes sufficiently reliable to secure a conviction. This reasoning, however, does not suggest that the Chambers do not consider the weight of evidence individually. In the *Akayesu* case, the Chamber held that the evidence, whether testimony or documentary evidence, has to be assessed individually on its probative value 'according to its credibility and relevance to the allegations at issue'.¹⁵⁸ The Chamber thereby relies on the evidence produced by the parties. In addition, it may consider and rely on 'indisputable facts and on other elements relevant to the case, such as constitutive documents pertaining to the establishment and jurisdiction of the Tribunal, even if these were not specifically tendered in evidence by the parties during trial'.¹⁵⁹

On occasions defendants have complained that the Chambers have not established sufficiently clear criteria in order to assess the weight of evidence.¹⁶⁰ In response, the Appeals Chamber pointed out that 'it is neither possible nor proper to draw up an

156 As was set out in Principle 3 in *Brdanin and Talk* Admission of Evidence Order (15 February 2002), one needs to establish 'sufficient indicia of reliability to make a *prima facie* case for admission'.

157 *Tadic*, Judgment on Allegations of Contempt (31 January 2000), para 92.

158 *Akayesu* judgment (2 September 1998), para 131.

159 *Ibid.*

160 See, *inter alia*, *Prosecutor v Kayishema and Ruzindana*, Appeal Judgment (1 June 2001), Case No ICTR-95-1-A, paras 307-11.

exhaustive list of criteria for the assessment of evidence, given the specific circumstances of each case and the duty of the judge to rule on each case in an impartial and independent manner'.¹⁶¹

11.10.2 Corroboration

The ICTR has reiterated that corroboration is not a requirement. Here, the Tribunals differ from civil law jurisdictions. As regards the application of the civil law principle *unus testis, nullus testis* (one witness is no witness), implying that corroboration of evidence is required before any weight can be attached to it, the Trial Chamber has held that such does not apply: 'the Chamber can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible'.¹⁶² In another case it was held that the evidence needs to be 'reasonable' and 'reliable'.¹⁶³

Since almost all evidence is admissible the main criteria to assess the weight of evidence appears to be its relevance and credibility, irrespective of corroboration.

However, although corroboration may not be required in order to accept evidence as sufficiently credible, the Chambers are 'nevertheless aware of the importance of corroboration'.¹⁶⁴ Thus, if the evidence does not corroborate, the Chambers scrutinise the evidence against the accused 'with great care before accepting it as sufficient to make a finding of guilt against the accused'.¹⁶⁵ Alternatively, 'the corroboration of testimonies, even by many witnesses, does not establish the credibility of those testimonies'.¹⁶⁶

11.10.3 Documentary evidence

As highlighted in the *Brdanin and Talk* case, the standard of proof for admission of documents is lower than the standard which is applied when assessing the weight of the evidence.¹⁶⁷ In order to accord appropriate weight to a document, one needs to consider its authenticity and its source or authorship. In relation to the authenticity of a document,¹⁶⁸ it was held that absence of a signature or a stamp does not necessarily

161 *Ibid.*, para 319.

162 *Akayesu* judgment (2 September 1998), para 135; *Rutaganda* judgment (6 December 1999), para 18; *Musema* judgment (27 January 2000), para 43.

163 *Kayishema and Ruzindana*, Appeals Judgment (1 June 2001), paras 320 and 322.

164 *Kayishema and Ruzindana* judgment (21 May 1999), para 80; *Musema* judgment (27 January 2000), paras 42 and 75: '[a]ny evidence which is supported by other evidence logically possesses a greater probative value than evidence which stands alone, unless both pieces of evidence are not credible.'

165 *Krnjelac* judgment (15 March 2002), para 8.

166 *Musema* judgment (27 January 2000), para 46.

167 *Brdanin and Talk*, Admission of Evidence Order (15 February 2002), para 18.

mean it lacks authenticity.¹⁶⁹ In order to determine the authenticity of a document, the form, contents and purported use of the document, as well as the position of the parties on the matter, are important factors for consideration.¹⁷⁰

As regards the form of documentary evidence, the ICTY considers elements such as: whether it is an original copy; whether it is registered or enrolled with an institutional authority; whether it contains a signature; whether it is sealed, certified or stamped; whether it is officially authorised by an authority or organisation; and whether it is duly executed.¹⁷¹ As regards the content of a document, the Chamber will consider all circumstances of the case, 'including its relation to oral testimony given before the Chamber pertaining to the content of the document'.¹⁷² These factors are not conclusive. In addition, it should be noted that '[a]s a general rule, it is insufficient to rely on any one factor alone as proof or disproof of the authenticity of the document. Authenticity must be established through reference to all relevant factors'.¹⁷³

In relation to the source of a document, it has been made clear that this may have an impact on the reliability or credibility of the document in question.¹⁷⁴ Although the fact that the source is the party which itself adduces the document does not necessarily render the document unreliable,¹⁷⁵ since evidence which aims to support a defence of alibi is normally held to be more reliable when the source is not the accused himself.¹⁷⁶

11.10.4 Weight of hearsay evidence

As already explained, the ICTY and ICTR rejected the common law approach in relation to the admission of hearsay evidence. As the ICTR stated in the *Akayesu* case, 'evidence which appears to be "second-hand" is not, in and of itself, inadmissible; rather it is assessed, like all other evidence, on the basis of its credibility and relevance'.¹⁷⁷ The Chambers nevertheless acknowledge that 'the weight to be afforded to that material will usually be less than that given to the testimony of a witness who has given it under oath and who has been cross-examined, although

168 It should be noted that by virtue of ICTY Rules, r 89(E) and ICTR Rules, r 89(D), a Chamber may request verification of the authenticity of evidence obtained out of court. An accused can, however, not be forced to produce any sample as that would violate the privilege against self-incrimination. *Musema* judgment (27 January 2000), paras 64 and 68; *Delalic*, Decision on Admission of Evidence (21 January 1998).

169 *Brdanin and Talic*, Admission of Evidence Order (15 February 2002), para 20.

170 *Musema* judgment (27 January 2000), para 66.

171 *Ibid*, para 67.

172 *Ibid*, para 70.

173 *Ibid*, para 72.

174 *Ibid*, para 63.

175 *Ibid*, para 61.

176 *Ibid*, para 63. On appeal *Musema* complained about this reasoning. It was held on his behalf that 'since all persons are entitled to equal treatment before the Tribunal, documents produced by him cannot be accorded a lesser status than documents produced by others' (*Musema*, Appeals Judgment (16 November 2001), para 40). The Trial Chamber disagreed, but stated that 'it is correct to state that the sole fact that evidence is proffered by the accused is no reason to find it, *ipso facto*, less reliable', para 50.

177 *Akayesu* judgment (2 September 1998), para 103.

even this will depend upon the infinitely variable circumstances which surround hearsay material'.¹⁷⁸ Double or triple hearsay will, on this basis, presumably be denied significant weight.¹⁷⁹

A danger exists that hearsay evidence is considered to have sufficient weight on the mere basis that it passed the test of admission. In general though, judges tend to be more cautious in relation to hearsay evidence than direct evidence.

11.10.5 Lapse of time

Régis Pouget, expert for the defence in the *Kayishema and Ruzindana* case, pointed out the dangers of relying on eyewitnesses, who were, in his opinion, often not a reliable source of information.¹⁸⁰ He contended that witnesses have often not paid attention to what they have seen, but will nevertheless give a firm answer to a question they do not know the answer to. He also emphasised the accuracy of recollection, which is undermined by the lapse of time, and mixed up with 'other external factors such as media reports or numerous conversations about the events'.¹⁸¹

The Trial Chamber agreed on certain matters and pointed out that these general observations are not in dispute. It agreed that the 'corroboration of events, even by many witnesses, does not necessarily make the event and/or its details correct'.¹⁸² In the opinion of the Trial Chamber this does not, however, mean that the reflections of eyewitnesses have no value *per se*:

[I]t is for the Trial Chamber to decide upon the reliability of the witness' testimony in light of its presentation in court and after its subjection to cross-examination. Thus, whilst corroboration of such testimony is not a guarantee of its accuracy, it is a factor that the Trial Chamber has taken into account when considering the testimonies.¹⁸³

The fact that a witness is not specific about the dates of the event does not on its own render the witness unreliable.¹⁸⁴ As the ICTY Chamber held in the *Delalic* case, 'inconsistencies or inaccuracies between the prior statements and oral testimony of a witness, or between different witnesses, are relevant factors in judging weight but need not be, of themselves, a basis to find the whole of a witness' testimony unreliable'.¹⁸⁵

178 *Tadic*, Judgment on Allegations of Contempt (31 January 2000), para 93; *Krnjelac* judgment (15 March 2002), para 7: 'the Trial Chamber has been careful to scrutinise that evidence with care before determining to rely upon it, taking into account that such material is not capable of being tested by cross-examination, its source is not the subject of a solemn declaration, and its reliability may be affected by a potential compounding of errors of perception and memory'; *Prosecutor v Kamuhanda*, Decision on Kamuhanda's Motion to Admit Evidence Pursuant to Rule 89 of the Rules of Procedure and Evidence (10 February 2003), Case No ICTR-99-54A-T, para 10.

179 This conclusion may, *inter alia*, be drawn from *Tadic*, Judgment on Allegations of Contempt (31 January 2000), paras 114 and 115.

180 *Kayishema and Ruzindana* judgment (21 May 1999), para 68.

181 *Ibid*, para 69.

182 *Ibid*, para 70.

183 *Ibid*, para 70.

184 *Kayishema and Ruzindana*, Appeal Judgment (1 June 2001), para 325; *Krnjelac* judgment (15 March 2002), para 6.

185 *Delalic* judgment (16 November 1998), para 596.

11.10.6 Traumas

Dr Pouget, expert for the defence in the *Kayishema and Ruzindana* case, also addressed the fact that ‘strong emotions experienced at the time of the events have a negative effect upon the quality of recollection’. In his opinion, traumatised witnesses tend to have buried their memories ‘so deep that they are not easily, if at all, accessible’.¹⁸⁶ Not all experts agree on this issue. To the contrary, as the prosecutor rightly pointed out, there are plenty of ‘experts’ who support the opposite.¹⁸⁷ It is also important to recognise the limits of an expert. The Trial Chamber correctly argued that ‘different witnesses, like different academics, think differently’.¹⁸⁸ It stated:

The Chamber is aware of the impact of trauma on the testimony of witnesses. However, the testimonies cannot be simply disregarded because they describe traumatic and horrific realities. Some inconsistencies and imprecision in the testimonies are expected and were carefully considered in light of the circumstances faced by the witnesses.¹⁸⁹

This reasoning is consistent with other cases at the ICTY and ICTR. In the *Akayesu* case, for example, the Chamber worked on the basis of the assumption that all the witnesses suffered from post-traumatic or extreme stress disorders and ‘[i]nconsistencies or imprecisions in the testimonies, accordingly, have been assessed in the light of this assumption, personal background and the atrocities they have experienced or have been subjected to’.¹⁹⁰ Moreover, ‘there is no recognised rule of evidence that traumatic circumstances necessarily render a witness’s evidence unreliable. It must be demonstrated *in concrete* why “the traumatic context” renders a given witness unreliable’.¹⁹¹

Thus, it seems that implicitly the Trial Chamber agrees with the findings of Dr Pouget, that traumatic experiences affect the witness’s ability to accurately reflect on the matter, but rather than being more cautious as a consequence, the Trial Chamber believes such witness and explains any inconsistency in this light.¹⁹² Traumatism should not be perceived as a mitigating factor as regards inconsistencies. We adhere to the view expressed by the defence in the *Musema* case, that ‘the testimony of a Prosecution witness is either credible or not credible and that if the

186 *Kayishema and Ruzindana* judgment (21 May 1999), para 73.

187 *Ibid.*, para 74.

188 *Ibid.*

189 *Ibid.*, para 75, where the Trial Chamber also stated that ‘[t]he possible traumatism of these witnesses caused by their painful experience of violence during the conflict in Rwanda is a matter of particular concern to the Chamber. The recounting of traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context. The Chamber has considered the testimony of those witnesses in this light’; see *Akayesu* judgment (2 September 1998), para 142; *Rutaganda* judgment (6 December 1999), para 22.

190 *Akayesu* judgment, *ibid.*, para 143.

191 *Prosecutor v Kunarac*, Appeal Judgment (12 June 2002), Case No IT-96-23-A, para 12; *Prosecutor v Furundzija*, Appeal Judgment (21 July 2000), Case No IT-95-17/1-A, para 109, where the Trial Chamber held that ‘[t]here is no reason why a person with [post-traumatic stress disorder] cannot be a perfectly reliable witness’.

192 *Akayesu* judgment (2 September 1998), paras 142–56; *Kunarac, Vukovic and Kovac* judgment (22 February 2001), para 564.

credibility of such testimony is vitiated, the testimony must be regarded as not credible, notwithstanding the origin of the factors affecting its credibility'.¹⁹³

11.10.7 Prior statements

A distinction should be made between: (1) witness statements and other non-judicial testimonies; (2) testimonies before this Tribunal; and (3) statements before other judicial bodies.¹⁹⁴

As regards discrepancies between witnesses' written statements and their oral statements in court, the Trial Chamber held that the written statements of witnesses are not evidence *per se*, but may be so admitted, in part or in whole, to undermine a witness's credentials.¹⁹⁵ The Chamber will compare the written statements with the oral testimony and consider the discrepancies between the two. In doing so, the Chamber will take account of the significant lapses of time between the events, the written and oral statements,¹⁹⁶ language and translation problems, and whether or not the witness had read the written statement.¹⁹⁷ Thus, a lot depends on the 'conditions under which the prior statement was provided, as well as on other factors relevant to, or indicia of, the prior statement's reliability or credibility, or both'.¹⁹⁸ Given the fact that the written statements were not made under solemn declaration and not taken by judicial officers, 'the probative value attached to the statements is, in the Chamber's view, considerably less than direct sworn testimony before the Chamber, the truth of which has been subjected to the test of cross-examination'.¹⁹⁹ The Chamber will nonetheless consider the prior statement in so far as the inconsistencies between the prior statement and the oral testimony 'raise doubt in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material to the witnesses' evidence as a whole'.²⁰⁰ The Trial Chamber will listen to the explanation of the witnesses²⁰¹ for the inconsistencies that may occur and will, in light of all circumstances of the case, determine whether this explanation removes the doubt. In order to remove the doubt, the explanation needs to be of

193 *Musema*, Appeal Judgment (16 November 2001), para 58. The Appeals Chamber disagreed. It held that the fact that 'the Trial Chamber should take into account the impact of trauma on a witness's memory implies the Trial Chamber's awareness of such factors (as in the case of the passage of time) and of their possible effect on the ability of the witness to recount events impartially and accurately'.

194 *Musema* judgment (27 January 2000), para 83.

195 *Kayishema and Ruzindana* judgment (21 May 1999), para 77.

196 *Ibid.*, para 77; *Akayesu* judgment (2 September 1998), para 140, where the Chamber held that memory over time naturally degenerates.

197 *Akayesu* judgment, *ibid.*, para 137; *Rutaganda* judgment (6 December 1999), para 19; *Musema* judgment (27 January 2000), para 85.

198 *Musema* judgment, *ibid.*, para 83.

199 *Akayesu* judgment (2 September 1998), para 137; *Musema* Judgment, *ibid.*, para 86.

200 *Kayishema and Ruzindana* judgment (21 May 1999), para 77.

201 *Musema* judgment (27 January 2000), para 88.

substance; an explanation of mere procedure does not suffice.²⁰² The Trial Chamber also argued that a doubt can be removed with the corroboration of other evidence, even though corroboration is not necessary.²⁰³

As far as point (2) is concerned, inconsistency between two testimonies of the same witness, both given under solemn declaration, affects the credibility and reliability of the later testimony.²⁰⁴ The Chamber only assesses the credibility and reliability in the later test, as the earlier one has been assessed by a Chamber.²⁰⁵

In assessing the probative value of statements made before other judicial bodies, the Chamber relies on the general principles, 'taking into account the circumstances and conditions in which the documents were produced'.²⁰⁶ However, 'judicial testimonies (and other testimonies made under oath or solemn declaration) tend, as a general rule, to demonstrate greater reliability than non-judicial testimonies'.²⁰⁷

11.10.8 Language problems

Language problems do not only occur in relation to prior written statements, but also in court. In the ICTR, most witnesses testify in Kinyarwanda, which then has to be translated into English and French. In the ICTY, most witnesses testify in Serb-Croat, thus similar problems occur. In the ICTR, judges have relied on a language expert, Dr Ruzindana, to explain how to interpret Kinyarwandan terminology. Dr Ruzindana stated that 'in ascertaining the specific meaning of certain words and expressions in Kinyarwanda, it is necessary to place them contextually, both in time and in space'.²⁰⁸ Language difficulties 'have been taken into consideration by the Chamber in its assessment of all evidence presented to it, including evidence for which the source was not available for examination by the Chamber'.²⁰⁹

11.10.9 Cultural aspects

Cultural aspects may be the cause for inconsistencies. Cultural aspects may include language problems, such as the intonation of the language.²¹⁰ Dr Ruzindana moreover pointed out that it is inherent to Rwandan culture to spread the word of someone else as if it were your own. This is an important aspect in relation to eyewitnesses

202 An explanation commonly given is that the interviewer did not correctly transcribe what the witness said. In absence of evidence supporting that allegation, such explanation does normally not remove the doubt raised. *Kayishema and Ruzindana* judgment (21 May 1999), para 78. An explanation relating to the contents of the interview may, however, suffice to remove the doubt, *ibid*, para 79; *Prosecutor v Ignace Bagilishema*, Judgment (7 June 2001), Case No ICTR-95-1A-T, para 24, where it was held that issues, such as traumas, lapse of time, language problems and related issues may provide an adequate explanation for inconsistencies. However, where the inconsistencies cannot be so explained to the satisfaction of the Chamber, the reliability of witness testimony may be questioned.

203 *Kayishema and Ruzindana* judgment, *ibid*, para 80.

204 *Musema* judgment (27 January 2000), para 89.

205 *Ibid*, para 90.

206 *Ibid*, para 92.

207 *Ibid*, para 94.

208 *Akayesu* judgment (2 September 1998), para 146.

209 *Musema* judgment (27 January 2000), para 102.

210 *Rutaganda* judgment (6 December 1999), para 23.

who come to testify at the ICTR. Witnesses have sometimes testified to an event, which they themselves did not experience, but someone else in the community did. Thus, eyewitness accounts may have been reported as first-hand accounts, although they were in fact second-hand accounts. The Tribunal has taken this cultural phenomenon into consideration in its assessment of a witness's credibility without failing to recognise that Rwandan witnesses could, like anyone else, distinguish between what they had heard and what they had seen.²¹¹

Cultural aspects may also include lack of familiarity with the manner in which the trials are conducted at the ad hoc tribunals, or equipment used, such as 'spatiotemporal identification mechanisms and techniques (dates, times, distances, locations, use of maps, films, photographs and other graphic representations)'.²¹² Also, cultural restraints may explain why the witness is reluctant to give a direct answer to questions which he perceived as delicate.²¹³ These are a few examples in which the witness's appearance of credibility may be affected. The Tribunals have determined that one should be sensitive as regards the cultural identity of the witness. Equipment a witness is not familiar with should not be used.²¹⁴ Moreover, the Chambers held that no adverse inference should be drawn from inconsistencies caused by cultural restraints.²¹⁵

11.10.10 Expert evidence

It is difficult to determine how much weight the Chambers accord to expert witnesses. Generally, expert witnesses are only referred to in relation to general matters, not to matters which directly concern the guilt of the accused. It is, however, close to impossible to state with certainty that the Chambers have not relied on expert witnesses in their finding of guilt. No clear guidance has been given as to how to determine the weight of an expert opinion, or why one is considered to be more valuable than another. The Tribunals did nevertheless state that they do not necessarily accord more weight to an expert who is more experienced than another.²¹⁶

11.10.11 Standard on appeal

The task of assessing the evidence and giving it its appropriate weight, which includes the determination of the credibility of witness statements, lies with the Trial Chamber. Therefore, 'the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber'.²¹⁷ Only where no reasonable tribunal of fact could have reached the conclusion of guilty beyond reasonable doubt will the Appeals Chamber intervene.²¹⁸ This is understandable in light of the fact that an appeal 'is

211 *Prosecutor v Akayesu*, Appeal Judgment (1 June 2001), Case No ICTR-96-4-A, para 155.

212 *Ibid.*, para 156.

213 *Ibid.*

214 *Ibid.*

215 *Ibid.*

216 *Prosecutor v Kunarac*, Appeal Judgment (12 June 2002), Case No IT-96-23-A, para 21.

217 *Musema*, Appeal Judgment (16 November 2001), para 18; *Akayesu*, Appeal Judgment (1 June 2001), para 232; *Prosecutor v Tadic*, Appeal Judgment (15 July 1999), Case No IT-94-1-A, para 64; *Furundzija*, Appeal Judgment (21 July 2000), paras 37, 63.

not an opportunity for a party to have a *de novo* review of their case'.²¹⁹ Thus, the Trial Chamber, having seen and heard the witnesses is in a much better position to determine their credibility.²²⁰

The Trial Chambers have nonetheless a duty to provide a 'reasoned opinion in writing' (Art 22(2) of the ICTY Statute; Art 21(2) of the ICTR Statute and r 88(C) of the Rules) explaining how they reached their conclusions.²²¹ They are thereby not required to give reasoning for each step they took in the process of weighing and assessing the evidence.²²² There is no guiding principle on the extent to which Trial Chambers have to be specific about their reasons to reject or accept a witness testimony as reliable and credible. The reliability and credibility of witness testimony has to be determined on a case by case basis.²²³

In addition, the Appeals Chamber of the ICTY has stated that although the evidence produced may not have been referred to by a Trial Chamber, based on the particular circumstances of a given case, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account.²²⁴ This is particularly so in the evaluation of witness testimony, including inconsistencies and the overall credibility of a witness. A Trial Chamber is not required to set out in detail why it accepted or rejected a particular testimony.²²⁵ Thus, in the *Celebici* case, the Appeals Chamber of ICTY stated that:

[t]he Trial Chamber is not obliged in its Judgment to recount and justify its findings in relation to every submission made during trial. It was within its discretion to evaluate the inconsistencies highlighted and to consider whether the witness, when the testimony is taken as a whole, was reliable and whether the evidence was credible. Small inconsistencies cannot suffice to render the whole testimony unreliable.²²⁶

In conclusion, factors, such as traumas, time lapse, language problems, cultural barriers, and similar factors, which are normally perceived as undermining a witness statement, in the tribunals, are used to explain inconsistencies and tend to be perceived as increasing, rather than decreasing, the reliability and credibility of the testimony.

218 *Musema*, Appeal Judgment (16 November 2001), para 17.

219 *Ibid.*

220 *Aleksovski*, Appeal Judgment (24 March 2000), para 63; *Kayishema and Ruzindana*, Appeal Judgment (1 June 2001), para 319.

221 ICTY Rules, r 98 *ter* (C). In *Furundzija*, Appeals Judgment (21 July 2000), para 69, the ICTY relied on ECHR jurisprudence, stating that the right to a reasoned opinion is an aspect of the fair trial requirement embodied in Arts 20 and 21 of the Statute.

222 *Prosecutor v Delalic*, Appeal Judgment, Appeals Chamber (20 February 2001), Case No IT-96-21-A, para 481.

223 *Ruiz Torija v Spain*, ECHR Judgment (9 December 1994), para 29, cited in *Furundzija*, Appeal Judgment (21 July 2000), para 69.

224 *Musema*, Appeal Judgment (16 November 2001), para 19; *Akayesu*, Appeal Judgment (1 June 2001), para 306.

225 *Musema*, Appeal Judgment, *ibid*, para 20; *Akayesu*, Appeal Judgment, *ibid*, para 306.

226 *Prosecutor v Delalic and Others*, Appeal Judgment, Appeals Chamber (20 February 2001), Case No IT-96-21-A, para 498.

NUREMBERG, TOKYO AND THE BIRTH OF MODERN INTERNATIONAL CRIMINAL LAW

12.1 INTRODUCTION

Following their victory in the Second World War, the allied powers established International Military Tribunals (IMT) in Nuremberg and Tokyo to try war criminals from the German and Japanese forces respectively. These trials were not limited to military personnel, but encompassed a variety of civilian officials. The creation of these tribunals was without precedent and the law and procedure of the tribunals represented the first proper expression of international criminal law and procedure. This chapter will examine and appraise the law of the tribunals, as well as the development of international criminal law in the post-Second World War era.

12.2 EFFORTS TO TRY INTERNATIONAL CRIMES PRIOR TO THE SECOND WORLD WAR

Previous to the Nuremberg and Tokyo tribunals, there had been sporadic instances in history where efforts had been made to bring individuals to account for what would be regarded today as international crimes. In Naples in 1268, Conradin von Hohenstafen, Duke of Suabia, was tried, convicted and executed for initiating an unjust war. In 1474, Peter von Hagenbach was convicted of crimes against 'the laws of God and man', including murder and rape, by an international tribunal comprising of judges from Alsace, Austria, Germany and Switzerland in respect of offences committed during his occupation of Breisach on behalf of Charles, the Duke of Burgundy.¹ Although there were calls for the King of England to be called to account for 'war against the natural rights of all mankind' following the US revolutionary war,² another 400 years elapsed before a proposal was tabled for the creation of an international criminal court to hear cases relating to atrocities committed during the Franco-Prussian war in 1870. Lack of interest by European governments saw the proposal eventually losing interest from interested parties.³

Following the end of the First World War, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War, that was established by the Paris Peace Conference in 1919, proposed that an ad hoc tribunal be set up to try those responsible for war crimes and violations of the laws of humanity. As in the past, the proposal did not come to fruition but was set aside in favour of trying the Kaiser before an international tribunal under the terms of the 1919 Peace Treaty of Versailles (Versailles Treaty). Other cases were to be tried by Allied military courts. In the event, the Kaiser fled to

1 G Schwarzenberger, *International Law As Applied by Courts and Tribunals*, 1968, London: Stevens, pp 462–66.

2 JJ Paust, 'Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights', 18 *Case W Res J Int'l L* (1986), 283, pp 283–84.

3 P Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross*, 1985, Geneva: Henri Durant Institute, pp 283–84.

The Netherlands. His extradition was requested by the Allied powers; however, The Netherlands refused the request on the grounds that Dutch law only provided for extradition to a sovereign State, not a coalition of States as was the case with the Allies. Moreover, he was deemed by the Dutch Government at the time to be a political fugitive. No further serious attempts were made to secure his presence for trial and the Kaiser remained in The Netherlands until his death. Also, under the terms of the Versailles Treaty, Germany had agreed to surrender suspected war criminals to the Allies for trial by specially established tribunals. But, since German capitulation was not unconditional, the German Government in essence possessed an effective veto vis-à-vis the demands of the Allies. As a result, when the Allies demanded, during the Paris Peace Conference in 1920, the extradition of 896 Germans that were accused of violating the laws of war, Germany refused to comply. As a compromise, the Allies agreed that some individuals would be tried before the Criminal senate of the Imperial Court of Justice in Leipzig. Only 12 accused were actually brought to trial and the Leipzig trials were hugely unpopular with the German press and public. The trials that took place dealt mainly with the treatment of survivors of torpedoed ships and prisoners of war, and not with the actual conduct of hostilities.⁴ The hearings fizzled out after a small number of cases had been considered. Some of these cases do, however, remain of value for the law set down.⁵

12.3 THE BACKGROUND TO THE ESTABLISHMENT OF THE IMT

Even early during the Second World War, news reached Western Europe of the atrocities committed by German forces and their allies against the Jews, other minority civilian groups and against prisoners of war. As early in the war as 1941, Churchill and Roosevelt made statements expressing their intention to seek 'retribution' for these offences. Subsequent discussions amongst the allied powers and governments-in-exile developed the policy that war criminals would face prosecution after the war. In a note sent by the British Government to the other allied Governments on 6 August 1942, it was suggested that agreement should be reached as to how trials should proceed so as to ensure rapid justice, prevent individuals and groups exacting their own revenge and so that Europe could return to a peaceful atmosphere. Significantly, the note also proposed that:

In dealing with war criminals, whatever the court, it should apply the existing laws of war and no specific *ad hoc* law should be enacted.

This was not the end of the matter and views had changed by the time that Roosevelt, Stalin and Churchill came to sign the Moscow declaration on 30 October 1943. The declaration stated that German war criminals would be returned to the countries in which their offences had taken place, and 'that they [would] be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged'. Shortly after this, Churchill proposed that the major war criminals should be declared as 'world outlaws' and be shot without trial.

4 See IF Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, 1982, Westport, Conn: Greenwood.

5 *Dover Castle* case, 16 *AJIL* (1922), 704; *Llandoverly Castle* case, 16 *AJIL* (1922), 708; *Trial of Emil Mueller*, 16 *AJIL* (1922), 684.

The IMT was formally established by the London Agreement of 8 August 1945 between the Governments of Great Britain, the US, France and the Union of Soviet Socialist Republics.⁶ The Charter of the IMT was annexed to the London Agreement. The Charter provided for the trials of ‘major war criminals of the European Axis’.⁷ Other war criminals were to be tried by individual allied powers responsible for the administration of occupied Germany, in accordance with Allied Control Council Law No 10, while other countries were permitted to prosecute individuals on the basis of the territorial principle of jurisdiction, that is, with regard to offences perpetrated on their respective territories. Moreover, in 1946 an International Military Tribunal for the Far East (IMTFE) sitting in Tokyo was established by order of the Allied Supreme Commander of the Pacific Theatre of Operations, General Douglas MacArthur, whose purpose was to try the major Japanese war criminals.

12.3.1 The law and jurisdiction of the IMT at Nuremberg

The London Charter for the Nuremberg IMT (Nuremberg Charter)⁸ is brief but is of enormous significance for the development of international criminal law. The Charter defines offences and sets out the parameters for individual criminal responsibility with regard to these offences. Both the Charter and the judgment of the IMT have been extremely influential on the evolution of the law and procedure of more contemporary institutions, namely, the International Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR, respectively), as well as the newly established International Criminal Court (ICC).

The jurisdiction of the IMT was set out under Art 6 of the Tribunal’s Charter, which provided:

The tribunal established by the agreement referred to in Art 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the tribunal for which there shall be individual responsibility:

- (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
- (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

6 See generally T Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoire*, 1993, London: Bloomsbury; A Tusa and J Tusa, *The Nuremberg Trial*, 1983, London: Macmillan.

7 Charter of the International Military Tribunal at Nuremberg (IMT Charter), Art 1.

8 UKTS 4 (1945), Cmnd 6671; 5 UNTS 251; 39 *AJIL Supp* (1945), 257.

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators, and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Mindful that these offences had not been set out in this manner before, in its judgment, the IMT set out the legal basis behind the offences. The Tribunal approached its explanation in a bullish way, stating that:

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the tribunal has heard full argument from the prosecution and the defence, and will express its view on the matter.⁹

The IMT rejected the argument presented by the defence that the Charter breached the principle that there can be no punishment without law, *nullum crimen sine lege*, *nulla poena sine lege*, by arguing that this maxim was a principle of justice and not a limitation of sovereignty. Its rationale was that if a war of aggression is illegal in international law, then it necessarily follows that those who plan and wage such a war are committing a crime.¹⁰

The IMT found that:

Occupying the positions they did in the Government of Germany, the defendants or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes, they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.¹¹

The inherent problem with formulating the offence of crimes against peace lies with the fact that even if aggression could be deemed to have been illegal by 1939, this would at best be considered an act entailing State responsibility rather than personal criminal responsibility. The League of Nations Covenant had by no means prohibited recourse to armed force for the settlement of international disputes, although it had established a complex conciliatory mechanism that was aimed at delaying recourse to violence rather than prohibiting it altogether.¹² New attempts to define aggression as an international crime took place with the 1923 Draft Treaty on Mutual Assistance and the 1924 Protocol for the Pacific Settlement of International Disputes. Article I of the 1923 Draft Treaty declared that aggressive war was an international crime, as did also the 1924 Protocol. Although the Protocol did not enter into force, 48 States recommended its ratification in the League Assembly, thereby indicating a

9 IMT judgment, reprinted in 41 *AJIL* (1947), 172, p 217.

10 *Ibid.*, p 218.

11 *Ibid.*, p 217.

12 See I Brownlie, *International Law and the Use of Force by States*, 1963, Oxford: OUP, p 62.

willingness to outlaw such behaviour.¹³ Where prior attempts to prohibit war had formally failed, the 1928 General Treaty for the Renunciation of War as an Instrument of National Policy, also known as the Kellogg-Briand Treaty or Pact of Paris,¹⁴ outlawed recourse to war entirely. However, not even the Pact of Paris specifically penalised aggression and, hence, it can hardly be asserted that as a matter of positive international law the perpetration of aggression entailed with certainty the personal liability of the culprit. The IMT in its judgment made reference to the aforementioned instruments, to which Germany was a party, the result of which was to denunciate the waging of aggressive war as well as certain methods of warfare, and nonetheless found that the crime of aggression had been established under customary law. Interestingly, the Tribunal attempted an analogy with the 1907 Hague Conventions and its annexed Regulations, stating that neither the Hague Regulations expressly penalised the breaches contained therein—that is, much like the Pact of Paris—but went on to say that breaches of this nature have long been prosecuted by national courts.¹⁵ This analogy hardly supports the Tribunal’s argument, since it is an example of a legal instrument having attained the status of customary law through consistent and continuous State practice, whereas the same cannot be said of the crime of aggression. A number of scholars, such as Finch, rejected the argument that the crime of aggression could have been established by reference to unratified treaties and resolutions of international conferences that were not sanctioned by subsequent national or international action. He argued, moreover, that if aggressive war in violation of international treaties was a crime entailing individual responsibility, then such responsibility should also encompass those in the UK and France that compelled Czechoslovakia to consent to German aggression, as well as those Soviet officials that were responsible for the invasion of Poland in violation of their non-aggression pact with Germany of 23 August 1939—although Germany had herself invaded Poland 16 days earlier.¹⁶ Other jurists, nonetheless, were of the view that the waging of an aggressive war was an international crime.¹⁷

Since a war of aggression could only be committed by persons in the highest echelons of authority and after formulating a plan to that effect, the Tribunal set out the parameters of criminal participation in crimes against peace. First, it held that the conspiracy charge could only apply to the crime of aggressive war, although the indictment had applied it to all the offences in the Charter. It rejected the prosecution’s argument that any significant participation in the workings of the Nazi Party since its inception in 1919 was evidence of involvement in a conspiracy to commit the offences that were within the Tribunal’s jurisdiction, holding that the conspiracy must not have been too far removed from the time of decision and of action.¹⁸ The

13 On 24 September 1927, the Assembly of the League of Nations unanimously adopted a resolution regarding wars of aggression, whose preamble expressly stated that such wars constituted international crimes. See IMT judgment, reprinted in 41 *AJIL* (1947), 172, p 220.

14 94 LNTS 57.

15 *Op cit*, IMT judgment, note 9, p 218.

16 G Finch, ‘The Nuremberg Trial and International Law’, 41 *AJIL* (1947), 20, pp 26–28.

17 S Glueck, ‘The Nuremberg Trial and Aggressive War’, 59 *Harv L Rev* (1946), 396; Lord Wright, ‘War Crimes Under International Law’, 62 *LQR* (1946), 40.

18 *Op cit*, IMT judgment, note 9, p 222.

IMT found that plans to wage aggressive war had been revealed as early as 5 November 1937, if not earlier, but this involved many separate plans rather than a single conspiracy embracing them all. The Tribunal was of the opinion that a crime against peace required not mere participation in the Nazi conspiracy, but also an intention to commit aggressive war. Thus, Schacht was acquitted of this charge, because he terminated his financial and armament building activity in 1937, after discovering Hitler's intention to invade other nations.¹⁹ The IMT held that, even though the plan or conspiracy may have been conceived by only one person, its status as a conspiracy remains unaltered where other persons participate in its execution. Indeed, as the Tribunal pointed out since Hitler could not have waged aggressive war on his own, it was evident that those executing the plan did not avoid responsibility 'by showing that they acted under the directions of the man who conceived it'.²⁰ The unsatisfactory, from a legal point of view, formulation of the crime against peace in Art 6(a) of the IMT Charter did not readily evolve as a principle of either treaty or customary law in the post-Nuremberg era. It was not until the 1998 ICC Statute that it was included, albeit without any force until an appropriate definition is agreed upon by participating States.

However, the IMT was more vague when it came to justifying the existence of crimes against humanity. It had been common knowledge that atrocities against German Jews and minority groups had been carried out by the Nazi regime, as well as similar offences against other civilians of other countries occupied by Germany. Whilst the brutality against civilians of other countries during the course of fighting or occupation might have been covered by 'established' international law on war crimes and aggression, atrocities against a State's own citizens were not. Article 6(c) of the Charter, concerning crimes against humanity, was drafted so as to encompass these acts, which had occurred on such a massive scale that they could not be ignored. Article 6(c) of the Charter covered acts against 'any' civilian population.²¹ However, the IMT sidestepped any discussion of precedents for crimes against humanity in international law. Instead, it took the approach of delineating its own jurisdiction over such offences:

The tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime.²²

Although it had found that the Jewish minority in Germany, as well as other minority groups, had been subjected to acute discrimination and extermination policies long before the outbreak of the Second World War, in order to describe these pre-war acts as crimes against humanity it had to establish that they were committed in 'execution of, or in connection with, any crime within the jurisdiction of the tribunal'. Evidently, the Tribunal was not prepared to go that far, possibly because of the evidentiary difficulties this exercise would entail, taking account of the limited resources and time it was allocated in carrying out its task. Alternatively, it could be said that because there was more than ample evidence of large scale atrocities perpetrated against

19 Q Wright, 'The Law of the Nuremberg Trial', 41 *AJIL* (1947), 38, p 67.

20 *Op cit*, IMT judgment, note 9, p 223.

21 Art 6(b) dealt with acts committed against the 'civilian population of or in occupied territory'.

22 *Op cit*, IMT judgment, note 9, p 249.

civilians and other minority groups in the course of the war there was no need to indulge, at least for the purposes of that particular prosecution, in other events that were harder to establish in legal terms. The Tribunal did not, however, exclude the possibility that crimes against humanity might be committed also before a war.

Although Art 6(c) required a link between crimes against humanity and crimes against peace or war crimes, it was not entirely clear whether international law required an additional nexus between crimes against humanity and the existence of an armed conflict. Control Council Law No 10 later provided for the prosecution of crimes against humanity, without requiring a nexus to other crimes in the IMT Charter, or other crimes in general. In fact, prosecutions under this law by US military courts resulted in the conviction of hundreds of Nazi soldiers and officers and, significantly, these courts were not limited to the examination of post-1939 events, but looked into crimes perpetrated before the outbreak of the war. Article 6(c) of the Charter distinguished two categories of punishable acts: first, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war; and second, persecution on political, racial or religious grounds.²³

The legality of the concept of 'war crimes' was unquestionable, although the defence argued that the Tribunal did not enjoy jurisdiction for violation of the laws or customs of war. This argument was correctly rejected on the basis that war crimes prosecutions against aliens had a long history in the law of nations.²⁴ Since any nation could initiate criminal proceedings, it was therefore possible for a group of nations, in this case the Allies, to do so in concert. As far as the law of nations was concerned, the concept of war crimes was precisely delineated under treaty and customary law. Efforts to codify and enforce this law had begun as early as 1864 with the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.²⁵ The most significant codification of the *jus in bello* principles was that undertaken in the context of the 1899 and 1907 Hague Peace Conferences, where a number of conventions regulating conduct in warfare were adopted. Most important among these was, undoubtedly, the 1907 Hague Convention IV on Respecting the Laws and Customs of War on Land and the regulations annexed thereto. The IMT found that the evidence furnished by the prosecution demonstrated beyond doubt the perpetration of pre-planned war crimes that were to be committed whenever the Fuhrer and his close associates thought them to be advantageous. This was done, for example, in relation to the plunder and ill-treatment of Soviet civilians and their property, the exploitation of slave labour of other occupied territories, as well as the murder of captured enemy commandos and Soviet Commissars.²⁶ The existence of these policies was revealed by reference to orders that were issued and circulated by some of the accused, such as the 1941 'Night and Fog Decree' that was issued by Hitler and signed by Keitel, under which persons who committed offences against the Reich or the German forces in occupied

23 See E Schwelb, 'Crimes against Humanity', 23 *BYIL* (1946), 178.

24 *Ex p Quirin*, 317 US 27 (1942) and *Re Yamashita*, 327 US 1 (1946).

25 18 Martens Nouveau Recueil General de Traités, p 607. The 1868 Additional Articles Relating to the Condition of the Wounded in War extended the humanitarian principles enunciated in the 1864 Convention to Warfare at Sea.

26 *Op cit*, IMT judgment, note 9, p 224.

territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to criminal organisations for trial or punishment.²⁷ As is evident, the IMT dealt with war crimes as far as this concept encompassed a policy. Subsequent military tribunals had ample opportunity to prosecute individuals who had willingly implemented and executed such policies during the war.

Significantly, the Charter provided for the determination by the Tribunal of the criminal character of indicted German organisations, whose purpose was to serve as a precedent in cases before other military tribunals. The Tribunal declared that the SS (Hitler's bodyguards) and its subsidiary the SD, the Gestapo and the Leadership Corps of the Nazi Party were criminal. The SA (stormtroopers), the Reich Cabinet and the High Command were acquitted without prejudice to the individual liability of their members. In exercising its power to declare organisations criminal, the Tribunal pointed out that membership of such organisations did not necessarily entail the liability of each member. Rather:

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Art 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.²⁸

The Charter went on to develop the extent of individual criminal responsibility for the offences set out in Art 6 by specifically excluding their official position or the fact that the accused were acting under orders as a defence.²⁹ The IMT did not deal in any great detail with the defence of superior orders for two reasons. First, as it was dealing with the most senior Axis officials it had already found that the majority of them were co-conspirators in the waging of aggressive wars, and each according to his position had planned the commission of offences against the occupied civilian populations. Secondly, the orders circulated to the respective High Commands and Hitlerite groups were either issued by Hitler, but in the acquiescence and prompting of the accused, or were alternatively authored by them. The Tribunal held that the defence of superior orders could be urged in mitigation of punishment in cases where 'moral choice was in fact possible'. Hence, even in the extreme event that any one of the accused was under a direct order from Hitler, his position in the Reich structure would, in fact, be so high that a moral choice should have been possible. The same is not always true of the soldier on the battlefield, where the order and its consequences are not directly or immediately clear and the threat of punishment for disobedience is certain.³⁰

The judgment of the IMT at Nuremberg was delivered on 30 September 1946 and sentences were pronounced on 1 October 1946. Of the 22 indicted—the accused

27 *Op cit*, IMT judgment, note 9, p 229. Similarly, Keitel was found to have issued the 'Commissar Order' in 1941, and the 'Commando Order' in 1942.

28 *Op cit*, IMT judgment, note 9, p 251.

29 IMT Charter, Arts 7–8.

30 See ICC Statute, Art 33; see also MJ Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War', 86 *Cal L Rev* (1998), 939.

Bormann was not found, while Goering had succeeded in committing suicide before the judgment was rendered—three were acquitted. The remainder were convicted of one or more of the crimes set down in Art 6 of the IMT Charter. Twelve of the accused were sentenced to death, while seven were sentenced to imprisonment for terms ranging from 10 years to life (three were actually sentenced to life imprisonment). As already observed, of the six accused organisations only three were found to be criminal. The Soviet judge dissented from all the aforementioned acquittals. The details of punishment, which in the case of the death penalty was hanging, as well as any appeals against the sentences passed upon the accused were handled by the Allied Control Council.

12.3.2 The legal basis and criticism of the IMT

The IMT is commonly regarded as the first ‘international’ criminal tribunal of its type. However, it can be argued that the Tribunal was not so much an international tribunal but rather an Allied Forces tribunal. In outlining the legal basis under which the Allied powers had established the Tribunal, the judgment of the IMT held that:

The making of the Charter was the exercise of the sovereign legislative power by countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world.³¹

This suggests that the nature of the IMT was more akin to that of a municipal court established by the allied Governments exercising sovereign power in Germany after the war. This conclusion is also borne out from the fact that the Allies had effectively occupied Germany, without however intending its annexation. As for the recognition of the IMT by the international community, although no State objected to its establishment, the allied powers received only 22 statements of support.

Although the IMT Charter should be regarded as a landmark in international criminal law, the rules relating to evidence and procedure during trial seem simplistic in the light of modern day developments. Conduct of the trials at Nuremberg operated under the rules set out in Arts 17–25 of the IMT Charter. The rules of evidence and procedure seem hopelessly inadequate when one considers the complexity of the rules and procedure that apply in respect of the ad hoc ICTY and ICTR. Whilst Art 16(d) of the Nuremberg Charter gave the accused the right to legal representation, the accused did not actually meet their counsel until immediately before, or even on the first day of the trials. All this suggests that the IMT is an easy target for criticism. Allegations that the law of the IMT was *ex post facto*, that there were insufficient procedural safeguards for the accused, that the trials were Victor’s justice’ have all been levelled at the Tribunal. A number of commentators criticised the way in which the IMT supported the law of the Charter, especially with regard to the crimes contained in Art 6.³² Further criticisms were made regarding the delineation of crimes against humanity, which it has been suggested, because of the IMT’s decision to

31 *Op cit*, IMT judgment, note 9, p 216.

32 *Op cit*, Finch, note 16, p 334.

restrict its jurisdiction to events occurring only during the war, effectively rendered the offence almost synonymous to war crimes.³³ On the other hand, had the principal Axis officials not been held accountable for their atrocious deeds, justice would have been sacrificed and their impunity would have adversely affected future generations. Prosecution under the terms of German law was inappropriate because the Reich Government had decriminalised all the crimes committed in Germany and abroad. It was exactly for this reason that Art 6(c) upheld liability for crimes against humanity, even if the said offence did not violate the domestic law of the country where it was perpetrated. Perhaps, therefore, the creation of the IMT with the jurisdictional competence granted to it under Art 6 represented the most appropriate solution as the meting of justice was concerned, regardless of the legal sensitivities this exercise necessarily entailed.

If one considers the consequences for the development of international law, and more particularly the concept of individual criminal responsibility, had Churchill's option of summary execution been followed, the proceedings of the IMT may have taken on a rosier hue. Whilst they may have been imperfect, they no doubt formed the starting point for the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions, and the development of domestic legislation amongst States prescribing the offences against international law as set at Nuremberg.³⁴

12.4 THE IMTFE

Imperial Japan had waged wars of aggression in the vicinity of South East Asia since 1928, in an effort to subjugate and control that part of the world. However, Japanese aggression entered the greater theatre of the Second World War from the moment its forces attacked the US naval forces at Pearl Harbor, Hawaii, on 8 December 1941, although the Japanese army had previously attacked and occupied territories in China, Thailand and others, some of which formed part of the British Commonwealth. Therefore, the Pacific theatre of operations during the Second World War encompasses merely one phase of the war and the parties involved. Since the invasion of China in 1933, Chinese nationalist forces were engaged in a brutal war with the Japanese army, which culminated in large scale atrocities against Chinese civilians, the most notorious being the so called 'Rape of Nanking'.

On 1 December 1943 the Cairo Declaration on World War II was made by the Presidents of the US and Nationalist China and the Prime Minister of Great Britain. It read, in relevant part, that:

The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion.

Prior to the signing of the Instrument of Japanese Surrender on 2 September 1945, the allied forces adopted the Declaration of Potsdam on 26 July 1945. They reiterated what was said in the Cairo Declaration, but added that:

33 F Biddle, 'The Nuremberg Trial', 33 *Va L Rev* (1947), 679.

34 CM Bassiouni, 'Nuremberg Forty Years After: An Introduction', 18 *Case W Res J Intl L* (1986), 261.

We do not intend that the Japanese people shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners.

Unlike the Nuremberg Tribunal, the IMTFE³⁵ was established not by treaty but on the basis of a Special Proclamation adopted on 19 January 1946 by the Supreme Commander for the Allied Forces in the Pacific Theatre, General Douglas MacArthur.³⁶ His authority to establish the IMTFE and promulgate its Charter was exacted from his mandate, through which he possessed the competence to create military commissions and tribunals. Many such commissions were subsequently established by all the allied forces involved in the war. In fact, the conviction of General Yamashita, Governor and Supreme Military Commander of the Japanese Army in the Philippines prior to the emancipation of the islands by the Allies, emanated from such a commission. The indictment included 55 counts, charging 28 accused with crimes against peace, war crimes and crimes against humanity during the period from 1 January 1928 to 2 September 1945. Of the 28 accused, three were acquitted. Although the IMTFE was established with the aim of prosecuting the most senior Japanese officials, holding both political as well as military positions, Emperor Hirohito was not arraigned.

From a legal point of view, both the substantive and procedural law of the IMTFE were essentially similar to that of the Nuremberg Tribunal. Once again, the same criticisms levelled against the IMT and concerning the retroactive character of the crimes against peace and against humanity were directed at the IMTFE. Its response to these and other arguments was the same as that given by the Nuremberg Tribunal. This was not, however, a unanimous decision, as the Indian judge, Justice Pal, strongly dissented from the majority's opinion on the illegality of aggressive war and the establishment of personal liability for acts of State.³⁷ Unlike the IMT, however, the IMTFE addressed the issue of superior responsibility in count 55 of the indictment, holding, especially as this relates to the maintenance of prisoner of war camps, that all those involved with captured enemy personnel, from the incumbent Minister to the last camp commander, have a duty to initiate a system of protection and thereafter to ensure its effective functioning. This served as an important precedent in subsequent cases both in Europe and Asia. It has been suggested that because MacArthur exerted substantial influence on the trials so as not to allow the proceedings to threaten the success of the occupation, the IMTFE never enjoyed the attention and precedential authority of the IMT.³⁸

12.5 THE ILC'S ROLE IN THE POST-NUREMBERG ERA

Perhaps the crucial point which has given the judgment of the IMT its place as the starting point for contemporary international criminal law was the fact that one of the first acts of the newly created United Nations was the General Assembly's affirmation of 'the principles of international law recognised by the Charter of the

35 4 Bevens 20 (as amended on 26 April 1946).

36 See generally RH Minear, *Victor's Justice: The Tokyo War Crimes Trial*, 1971, Princeton: Princeton UP.

37 ES Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 *NYUJ Intl L & Pol* (1991), 373.

38 M Ratner and J Abrams, *Accountability for Human Rights Atrocities in International Law*, 1997, Oxford: OUP, p 164.

Nuremberg Tribunal and the judgment of the Tribunal'.³⁹ In the following year, the Assembly requested the International Law Commission (ILC) to formulate the Nuremberg judgment and Charter provisions into a set of principles.⁴⁰ The ILC considered this request during its first session in 1949 and concluded that, since these principles had already been affirmed by the General Assembly, its task should not be to express its appreciation on their content, but rather to formulate them as substantive principles of international law.⁴¹ The report of special rapporteur, Spiropoulos, was adopted by the Commission, which subsequently forwarded its formulation of the seven principles,⁴² together with their commentaries to the General Assembly.⁴³ The Assembly asked Member States for their comments and requested the ILC to prepare a Draft Code of Offences Against the Peace and Security of Mankind.⁴⁴

The Commission's work in preparing the Draft Code of Offences was undertaken in two distinct phases, from 1947 to 1954, and the second from 1982 to 1996. Although it was successful in formulating and convincing States to adopt the ICC Statute in 1998, completion of the Draft Code is still eluding it. The ILC had made such progress by 1951 that it submitted the Draft Code to the General Assembly, but in light of the comments received, it resubmitted its final version in 1954.⁴⁵ The Assembly felt, however, that the definition of aggression raised unsurpassed problems, and decided to postpone consideration of the Code until further work was done on the question of aggression.⁴⁶ A definition on aggression was adopted with consensus some 20 years later in 1974,⁴⁷ and the Commission once again suggested that it might resume examination of the Code. This was done in 1981, when the Assembly invited the Commission to examine the Code as a matter of priority, taking into account 'the results achieved by the process of the progressive development of international law'.⁴⁸ The Commission resumed its work in 1982 and by 1996 it had adopted a final set of

39 GA Res 95(1), GAOR Resolutions, First Session, Pt II, p 188. Significantly, in 1963, the Lord Chancellor told the UK Parliament that the Nuremberg Principles were 'generally accepted among States and [had] the status of customary international law'. Hansard, HL, Vol 253, col 831, 2 December 1963; BPIL 1963, p 212.

40 GA Res 95(I) (11 December 1946).

41 YBILC (First Session, 1949), p 282.

42 Principle I, Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment; Principle II, The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law; Principle III, The fact that a person who committed an act which constitutes a crime under international law acted as a Head of State or responsible government official does not relieve him from responsibility under international law; Principle IV, The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him; Principle V, Any person charged with a crime under international law has the right to a fair trial on the facts and law; Principle VI, Crimes against Peace, War Crimes and Crimes against Humanity are punishable as crimes under international law; Principle VII, Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

43 YBILC (Second Session, 1950), Vol II, p 374.

44 GA Res 488(V) (12 December 1950).

45 YBILC (Sixth Session, 1954), Vol II, p 149.

46 GA Res 897(IX) (4 December 1954).

47 GA Res 3314(XXIX) (14 December 1974).

48 GA Res 36/106 (10 December 1981).

20 draft Articles constituting the Code of Crimes Against the Peace and Security of Mankind,⁴⁹ a number which constituted a substantial reduction from the initial proposals and drafts that had been presented since 1982. The Commission, however, made it clear that the inclusion of certain crimes in the Code did not affect the status of other crimes under international law, nor did the adoption of the Code preclude the further development of this area of law. As to the implementation of the statute, the Assembly was presented with two options: adoption of an international convention, or incorporation into the statute of an international criminal court. Since the Preparatory Committee for the establishment of the ICC had already commenced its work, the Assembly drew the attention of the participating States to the relevance of the Draft Code.⁵⁰

On 17 July 1998, the Statute of the ICC was adopted, without the Code having ever entered into force. It is more than evident, however, that one of the significant catalysts for the adoption of the ICC Statute as well as the establishment of the ad hoc tribunals for Yugoslavia and Rwanda was the work of the ILC on the Draft Code. From a legal point of view, the possible adoption of the Code in light of the ICC would be relevant only for those countries that had not ratified the ICC Statute, while it would also reaffirm the substantive law of that statute and other international conventions. Its application might even instigate the extension of the ICC's jurisdiction to encompass other international crimes, or bind those States that are not parties to particular multilateral criminal conventions. Overall, the Draft Code represents an example of the variety of processes that exist within the science of international law. The ILC worked diligently on a 'difficult' set of rules on the basis of State consent, waiting patiently for the time they matured into solid concepts, but did not insist on their adoption in the form contemplated in its reports, but in any form the international community could reach agreement on. This turned out to be the ICC, but it could very well have been the Code itself.

49 See ILC Draft Code Commentary, UN Doc A/51/10 (1996); 18 HRLJ (1997), 96.

50 GA Res 51/160 (16 December 1996).

THE INTERNATIONAL CRIMINAL TRIBUNALS FOR YUGOSLAVIA AND RWANDA

13.1 INTRODUCTION

Reports since 1991 of widespread and gross human rights violations as a result of the armed conflicts raging between rival ethnic groups in the territory of the former Yugoslavia prompted the Security Council to express its deep concern and describe the situation as a threat to international peace and security.¹ This determination was premised in large part on a series of detailed interim reports that were submitted to the Council by a United Nations (UN) Commission of Experts established under Security Council Resolution 780 in 1992. Security Council Resolution 808 instructed the Secretary General to examine whether the establishment of a criminal tribunal would have a basis in law, and if so, formulate an appropriate statute. The Secretary General promptly replied in the affirmative and duly formulated a statute on the basis that it would apply only to those portions of international law which were beyond any doubt part of customary international law.² Based on the Secretary General's report, to which a statute was annexed, the Security Council adopted Resolution 827 on 25 May 1993 and established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY).³

Both the establishment of the Commission of Experts and, more so, the ICTY itself, constitute a historic breakthrough for the UN and the role of the Security Council. The Commission was created as an international fact-finding body as envisaged under Art 90 of the 1977 Protocol I Additional to the 1949 Geneva Conventions (Protocol I).⁴ Although such commissions require the explicit consent of the States involved, the Council departed from this rule in Resolution 780.⁵ The establishment of the ICTY on the basis of a Security Council Resolution under Chapter VII of the UN Charter merits closer consideration. It was preferred to a treaty because it was speedier and did not require the consent of the, by then, crumbling Yugoslavia. Obviously, the reinvigoration of the Council after the end of the Cold War meant that it could far more easily than in the past reach consensus and take concerted action with regard to situations jeopardising international peace and security. The establishment of the ICTY under Chapter VII was a measure not involving the use of force and, thus, fell squarely within the ambit of Art 41 of the 1945 UN Charter, despite the fact that the indicative list of measures envisaged in that article make no

1 SC Res 808 (22 February 1993).

2 *Report of the Secretary General pursuant to Security Council Resolution 808 (1993)*, UN Doc S/25704 (1993), para 2, reprinted in 32ILM (1993), 1159.

3 See JC O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', 87 *AJIL* (1993), 639.

4 1125 UNTS 3.

5 See CM Bassiouni, 'The United Nations Commission of Experts Pursuant to Security Council Resolution 780 (1992)', 88 *AJIL* (1994), 784.

reference to judicial bodies. Its relation to the Security Council is that of a subsidiary organ under Art 29 of the UN Charter.⁶ As the product of a Security Council resolution the Statute of the ICTY is binding upon every member of the UN in accordance with Art 25 of the UN Charter. There is no doubt that such a result would never have been achieved through the negotiation of a treaty, as few States would have seen any benefit in partaking of an enterprise of this magnitude, especially since the protagonist countries would, themselves, have refused to participate. From its very nature, therefore, the ICTY could not take the form of a permanent judicial institution but an ad hoc one, whose jurisdiction is limited in time, place and subject matter, and whose mandate may theoretically be terminated by its creator at any time.

In 1994, atrocities of a scale many times over those perpetrated in the former Yugoslavia were reported taking place in Rwanda in the form of genocide against the Tutsi minority by extremist Hutu elements. The estimated number of dead as a result of this genocide is estimated to be anywhere between 500,000 and one million. The Security Council instructed a Commission of Experts to investigate the situation in Rwanda in the same manner it had acted in the case of Yugoslavia and, on the basis of the Commission's reports, it determined that there was a threat to international peace and security. It subsequently ordered the establishment of an International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (ICTR).⁷ By Resolution 977 the Security Council decided that the seat of the Tribunal would be located in Arusha, United Republic of Tanzania.⁸ Initial suggestions for expanding ICTY jurisdiction to incorporate Rwandan crimes failed because a number of States feared this would lead to a permanent international criminal court. Instead, the Council expedited matters further by establishing the ICTR, without demanding a prior report from the Secretary General as in the case of the ICTY.⁹ Both institutions are, nonetheless, interrelated not only because they are subsidiary organs of the Security Council, but also because they share a common Appeals Chamber¹⁰ and prosecutor.¹¹ The intention behind these common institutions was the development of a balanced and coherent jurisprudence, which has evidently been achieved. It should be noted that although the ruling Rwandan Government that overthrew the Hutu extremists responsible for the genocide in that country had, itself, proposed the creation of the ICTR, it finally voted against Resolution 955 because, *inter alia*, it had envisaged both control over the Tribunal as well as wide temporal jurisdiction, well before the January 1994 boundary fixed by the Security Council.¹²

6 See DSaroshi, 'The Legal Framework Governing United Nations Subsidiary Organs', 67 *BYIL* (1996), 413, pp 428–31.

7 SC Res 955 (8 November 1994).

8 SC Res 977 (22 February 1995).

9 P Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', 90 *AJIL* (1996), 501, p 502.

10 ICTR Statute, Art 12(2).

11 *Ibid*, Art 15(3).

12 *Op cit*, Akhavan, note 9, pp 504–05.

In 1995 the Appeals Chamber of the ICTY was seized by an appeal against a Trial Chamber decision regarding, amongst other issues, the legality of its establishment by the Security Council and its authority, as a subsidiary organ thereto, vis-à-vis the Council to determine the legality of its mandate. The Appeals Chamber, presided by Antonio Cassese, in a cornerstone decision for the development of international law ruled that in the case of the ICTY the Security Council intended to establish a special kind of subsidiary organ, a tribunal.¹³ It further affirmed that international law dictates that every tribunal is a self-contained system, whose jurisdictional powers may be limited by their constitutive instruments, though they cannot be allowed to jeopardise their judicial character.¹⁴ More importantly, the Appeals Chamber expressly confirmed the inherent or incidental jurisdiction of any judicial body to determine its own competence, whether this is provided for in its constitutive instrument or not (that is, the so called doctrine of 'Kompetenz-Kompetenz').¹⁵

Before we proceed to examine the substantive provisions and rich jurisprudence that has emanated from both Tribunals, it is useful to investigate the possible interpretative means of their Statutes. Although these are not *stricto sensu* international agreements, it is reasonable to subject them to the rules of interpretation available for treaties,¹⁶ since they constitute legal instruments with the attributes of international agreements as defined by Art 2(a) of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention).¹⁷ The applicability of the interpretative rules of the Vienna Convention is further supported by the status of the ICTY and ICTR as subsidiary organs of the Security Council and, thus, directly linked to the constituent instrument of the UN, its Charter. Therefore, since Art 5 of the 1969 Vienna Convention applies to treaties which are the constituent instruments of an international organisation and treaties adopted within an international organisation, it would seem appropriate that, by extension of the powers vested in the Security Council by the UN Charter, the rules of treaty interpretation apply also to the ICTY and ICTR Statutes.

Thus, the ICTY Chambers' primary reliance on a 'literal' construction of their Statute, followed by 'teleological', 'logical' and 'systematic' methods of interpretation as secondary means,¹⁸ is consonant with Art 31(1) of the 1969 Vienna Convention, according to which, treaties are to be interpreted in accordance with their ordinary meaning and in the light of their object and purpose, as well as Art 32 which allows for supplementary means when literal interpretation does not clarify the meaning of a provision. It should be stated that, although humanitarian and human rights

13 *Prosecutor v Tadic*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (*Tadic* appeals jurisdiction decision) (2 October 1995), 105 ILR 453, para 15.

14 *Ibid*, para 11.

15 *Ibid*, para 18. Reference was made to Cordova J's dissenting opinion in the International Court of Justice (ICJ)'s *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO* (1956) ICJ Reports 77, p 163 (dissenting opinion of Judge Cordova).

16 *Prosecutor v Tadic*, Decision on Protective Measures for Victims and Witnesses (10 August 1995) (1997) 105 ILR 599, para 18.

17 1155 UNTS 331, Art 2(a) provides that the term 'treaty' means 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'; the Chinese representative to the Security Council made a statement to this effect during the deliberations of Resolution 808 (1993). See UN Doc S/PV3217 (1993), p 33.

18 *Tadic* appeals jurisdiction decision (2 October 1995), paras 71–72, 79.

instruments warrant an interpretation which ensures their widest possible effectiveness in accordance with their object and purpose,¹⁹ the so called 'evolutionary' method of interpretation,²⁰ according to which contemporary developments in international law are to be incorporated into the relevant provisions of humanitarian treaties, should not generally apply to the ICTY or ICTR because of their ad hoc character, their specific mandate to apply customary law, and the violation of the principle of certainty belying criminal proceedings. The only possible exception could perhaps lie in those rules of procedure that are more favourable to the accused. Finally, although the issue of intra-ICTY precedent has been a problematic one, especially as regards the classification of armed conflicts by the various Chambers, it now seems settled that decisions of the Appeals Chambers should be followed, except where cogent reasons in the interests of justice require a departure. Such a departure is justified where the previous decision was decided on the basis of a wrong legal principle or wrongly decided on account of the judges' misconstruction of the relevant law.²¹

13.2 FORMATIVE YEARS OF THE AD HOC TRIBUNALS

Unlike the ICTR, where a large number of accused were already apprehended by the new government, the ICTY did not enjoy the co-operation of States on whose territory the alleged offenders had taken refuge. This was due to a large degree to the fact that the various conflicts in the Republic of Bosnia and Herzegovina officially terminated as late as 14 December 1995, with the conclusion of the General Framework Agreement for Peace (GFAP, otherwise known as Dayton Peace Agreement).²² Although the signatory former Yugoslav Republics undertook an obligation after 1995 in accordance with the Dayton Agreement to co-operate with the Tribunal, such co-operation has not been forthcoming, especially from Croatia²³ but more so from the Federal Republic of Yugoslavia (now Serbia and Montenegro).²⁴ Another complicating factor was the division of the Republic of Bosnia and Herzegovina into two autonomous entities, an ethnic Serbian (Republika Srpska) and a Moslem one (Federation of Bosnia and Herzegovina), governed however by a common presidency.²⁵ Republika Srpska has refused to render much assistance to

19 *Advisory Opinion Concerning Reservations to the Genocide Convention* (1951) ICJ Reports 23; *Ireland v UK* (1978) EuCtHR, Ser A, No 25, para 239.

20 *Advisory Opinion Concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia* (1971) ICJ Reports 3, para 53; *Tyrer case*, Judgment (1978) EurCtHR, Ser A, No 26, para 31.

21 *Prosecutor v Aleksovski*, Appeals Chamber Judgment (24 March 2000), Case No IT-95-14/1-A *Aleksovski* Judgment (24 March 2000), paras 101–15; *Prosecutor v Kordic and Cerkez*, Case No IT-95-14/2-T, Trial Chamber Judgment (26 February 2001) (*Kordic and Cerkez* judgment), para 148.

22 35 ILM (1996), 75. Although the GFAP was signed in Paris, the Agreement itself was concluded in a US Air Force base in Dayton, Ohio, on 21 November 1995.

23 Request by the Prosecutor under r 7bis (B) that the President Notify the Security Council of the Failure of the Republic of Croatia to Comply with its Obligations under Art 29 (28 July 1999).

24 'President Cassese reports to the Security Council on the continuing violation of the FRY of its obligation to co-operate with ICTY', ICTY Doc CC/PIO/075-E (23 May 1996).

25 GFAP, Art 3.

the Tribunal, on account of its leaders' alliance to a number of those indicted by the ICTY.

With an empty docket, the ICTY faced an imminent danger of redundancy and oblivion by the very international community that created it, since it was no secret that by early 1995 a substantial number of States were growing weary of funding a judicial institution which had no accused to try.²⁶ During this time the Prosecutor was busy establishing liaisons and investigative teams in order to collect evidence and identify potential witnesses not only in the former Yugoslavia, but across the globe, since a large number of witnesses and victims had subsequently sought refuge abroad. Endowed with the authority to formulate their own Rules of Procedure,²⁷ the ICTY judges adopted the first ever comprehensive code of international criminal procedure, adapted to the special needs of the Tribunal and based on a combination of both common law and civil law elements. For example, as regards examination of individuals, the adversarial system was preferred, while the almost unlimited admission of evidence, including hearsay, as long as it was deemed to have probative value,²⁸ reflects, rather, civil law criminal practice.

Rule 61 is of particular relevance to the present discussion. This rule permits the Prosecutor to submit his or her evidence against an accused to a Trial Chamber in order for the latter to review the indictment in cases where a warrant of arrest has not been executed and personal service of the indictment has not been effected despite sincere efforts by the Prosecutor. If, thereafter, the Trial Chamber ascertains there are reasonable grounds for believing that the accused committed any or all of the crimes charged, it is empowered to make a formal declaration to that effect²⁹ and issue an international arrest warrant, which is then transmitted to all UN Member States.³⁰ If any State fails to execute the contents of the warrant, the ICTY President may notify the Security Council.³¹ Five cases were brought before a Trial Chamber by the Prosecutor under r 61 proceedings, the most prominent of which was that against the political leader of the Bosnian Serbs, Radovan Karadzic, and the Chief of Staff of the Bosnian Serb Army, Radko Mladic,³² where an abundance of testimony and other documentation evinced the existence of a policy of 'ethnic cleansing' against non-Serbs and whose planning, at least, was attributed to the two accused. In each of these cases, the judgment stressed that r 61 proceedings were intended to serve as public reviews of indictments, and did not constitute trials *in absentia*, a guarantee prescribed under Art 21 (d) of the ICTY Statute. They did not culminate in a verdict, nor deprive the accused of their right to contest the charges in person. Furthermore, it was pointed out that such proceedings provided an opportunity to victims to be heard in a public

26 The judges of the ICTY express their concern regarding the substance of their programme of judicial work for 1995', ICTY Doc CC/PIO/OO3-E (1 February 1995).

27 ICTY Statute, Art 15. The first version of the rules is reprinted in 33 ILM (1994), 484.

28 ICTY Rules, r 89(C).

29 *Ibid*, r 61(C).

30 *Ibid* r 61(D).

31 *Ibid* r 61(E).

32 *Prosecutor v Karadzic and Mladic (Karadzic and Mladic decision)* r 61 Decision (11 July 1996), Case Nos IT-95-5-R61 and IT-95-18-R61, 108 ILR 86.

33 See *Prosecutor v Nikolic (Nikolic decision)* r 61 Decision (20 October 1995), Case No IT-94-2-R6, 108 ILR 21.

hearing and become part of history.³³ Indeed, the publicity that followed these proceedings, and especially the detailing of the horrific crimes that were found to have been perpetrated sustained the impetus for international justice, instigated efforts for effective enforcement, and made sure that history would not be erased or forgotten.

Despite the clear obligation under Art 29(2) of the ICTY Statute to arrest, detain or surrender accused persons to the Tribunal, Trial Chamber orders or requests to this effect were largely disobeyed by the independent former Yugoslav Republics and all the Prosecutor and judges could do was inform the Security Council on an *ad hoc* basis, as well as through the ICTY President's Annual Report to the Council. This stalemate was ultimately resolved on account of two factors: international pressure on recalcitrant States and amelioration of the Tribunal's image which led to the voluntary surrender of a significant number of accused; and increased willingness of the North Atlantic Treaty Organisation (NATO)-led Stabilisation Force (SFOR)—legal successor to IFOR under Security Council mandate—to co-operate in the arrest of accused persons residing on the territory of Bosnia. Likewise, some central European States had begun exercising universal criminal jurisdiction over persons accused of having violated the laws or customs of war in the course of the Yugoslav armed conflicts.³⁴ One such criminal proceeding initiated in the Federal Republic of Germany, against Dusan Tadic, was deferred to the jurisdiction of the ICTY after an official request, despite the accused's pleas to the contrary.³⁵ Tadic, although only a guard at the Bosnian Serb Omarska prisoner and detention facility, was utilised as a vehicle for initiating prosecutions and developing a coherent jurisprudence, upon which both the ICTY and ICTR relied and further elaborated in future cases.

The obligation to co-operate with the Tribunal under Art 29 of its Statute is addressed only to States, not to international organisations nor peace-keeping or peace enforcement entities. Accordingly, the ICTY having no enforcement mechanisms of its own was forced to rely on the co-operation of individual States and the goodwill of peace-keeping forces. In a meeting on 19 January 1996 between the ICTY President and the Secretary General of NATO, it was agreed that, within the limits of its resources and mandate, SFOR would not only assist in ICTY investigations, but would also detain any indicted persons whom it came across in the ordinary conduct of its duties.³⁶ Although it was initially doubted that NATO forces entertained the political or military will to make any arrests, such clouds soon disappeared as SFOR has since proceeded to detain a substantial number of accused in Bosnia.³⁷ This task has been considerably facilitated by the fact that since 1997 the prosecutor has pursued only high-ranking officials and has applied a sealed indictment policy, thereby allowing for the element of surprise and relative safety of NATO operations in their pursuit of indicted persons.

34 *Prosecutor v Saric* (1995) unreported (Denmark); *Public Prosecutor v Djajic*, reported in 92 AJIL (1998), 528, FRG; *Public Prosecutor v Grabec (Re G)* (Swiss), reported in 92 AJIL (1998), 78.

35 Decision of the Trial Chamber on the Application of the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of DUSKO TADIC (8 November 1994), Case No IT-94-1-D, reprinted in 101 ILR 1; see C Warbrick, 'International Criminal Law', 44 ICLQ (1995), 465, p 471.

36 See 'The Parties, IFOR and ICTY' (1996) *ICTY Bulletin*, No 2, 22 January.

37 See ICTY Doc JL/PIS/475-e (6 March 2000) and JL/PIS/513-e (26 June 2000), regarding the arrest by SFOR of accused Prcać and Sikirica, respectively. From July 1997 until July 2000, SFOR has detained and transferred to the ICTY 15 suspected war criminals.

There has also been much speculation over the existence of a secret bargain between the leaders of the warring factions and the third party instigators of the Dayton Agreement to the effect that the former would be excluded from the ambit of the ICTY. It is alleged that this was the price for achieving peace and ending the war.³⁸ Even if this allegation contains some truth vis-à-vis the drafters and sponsors of the Dayton Agreement, it certainly carries no weight as far as the Office of the Prosecutor is concerned. In fact, not only has the prosecutor carried out a meticulous investigation against former Bosnian Serb leaders Karadzic and Mladic, which culminated in a detailed indictment, an r 61 review and an international arrest warrant; the Office of the Prosecutor has gone as far as charging an acting Head of State, President Slobodan Milosevic of the Federal Republic of Yugoslavia (FRY) for a number of offences allegedly ordered or tolerated by him during the civil unrest in Kosovo in 1999.³⁹ At the same time that the indictment against Milosevic was confirmed by a Trial Chamber, the prosecutor requested the freezing of all assets of the accused, whereby a subsequent order to all UN Members was duly issued by the Tribunal.⁴⁰ The accused was later transferred to the jurisdiction of the ICTY and the indictment was amended to encompass crimes committed during the civil war in Bosnia and Croatia. As for the Prosecutorial discretionary practice of 'plea bargaining', which is common to many legal systems, it generally should not be applied to the ad hoc tribunals where immunity is specifically prohibited. However, neither of the two Statutes nor the Rules of Procedure deny the authority to engage in plea bargaining, which as an implied power may be 'necessary for completing the investigation and the preparation and conduct of the prosecution'.⁴¹ In order to balance, on the one hand the interests of justice by avoiding impunity, and the enhancement of its resources on the other, the Office of the Prosecutor has restricted its plea negotiations to lower level officials.⁴²

The Rwanda Tribunal, as already explained, was not seriously plagued by problems relating to the absence of accused or lack of State co-operation, since most of the accused were already in Rwanda and, in any event, with the exception of the Republics of Congo and Burundi, no other States have any national or other substantial interest in shielding persons in their territory or withholding evidentiary material. Nonetheless, lack of support by the Rwandan Government as well as the Organisation for African Unity (OAU),⁴³ serious delays in prosecution and poor trial management, coupled with financial and administrative mismanagement, resulted in the resignation of the first ICTR deputy Prosecutor Honore Rakotomanana and plunged the already beleaguered Tribunal into chaos and uncertainty. The ICTR,

38 A D'Amato, 'Peace vs Accountability in Bosnia', 88 *AJIL* (1994), 500.

39 See 'President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo', ICTY Doc JL/PIU/403-E (27 May 1999).

40 *Prosecutor v Milosevic and Others*, Decision on Review of Indictment and Application for Consequential Orders (24 May 1999), para 29.

41 ICTY Rules, r 39(ii).

42 JE Alvarez, 'Crimes of States, Crimes of Hate: Lessons from Rwanda', 24 *Yale J Int'l L* (1999), 365, pp 377-78.

43 The OAU initially criticised the establishment of the ICTR under a Chapter VII resolution instead of through a treaty, but by 1997 its prior hesitation had given way to full co-operation. See D Wembou, 'The International Criminal Tribunal for Rwanda: Its Role in the African Context', 321 *IRRC* (1997), 685.

however, was faced with overcoming a further obstacle, directly related to its previously elaborated misfortunes. Although its judicial focus was on the highest ranking Hutu officials who had allegedly planned, instigated, incited and executed genocide, more than 75,000 accused were detained since the change of rule in July 1994 under extremely poor conditions in Rwandan prisons, the vast majority of which without having been formally indicted. The devastated infrastructure of the country and the absence of a criminal justice system as a result of the genocide and the subsequent departure abroad of many educated Hutus, including lawyers, meant that not only was there insufficient local trial chambers to guarantee speedy trials for the multitudes of accused, but there did not exist a single Rwandan lawyer who would be willing to defend them.⁴⁴ Moreover, the retention of the death penalty under Rwandan law, in contrast to its rejection in the ICTR, led to an absurd result whereby the planners and instigators of genocide would, at most, receive life imprisonment sentences by the ICTR, whereas minor executioners were to suffer capital punishment under Rwandan criminal law.⁴⁵ The Rwanda Tribunal could do nothing regarding the discrepancy in sentencing, but it has played a seminal role in raising awareness over the need to enhance the Rwandan criminal justice system through international financing and training, so that at least accused persons would not suffer lengthy detention periods. The ICTR seems to have overcome its initial problems and has since concluded a significant number of cases, including one against the former Prime Minister of the Interim Rwandan Government, Jean Kambanda.⁴⁶ It has, moreover, made a substantial contribution to the development of international humanitarian law and restoration of peace in Rwanda.

13.3 JURISDICTION OF THE ICTY AND ICTR

Although both the ICTY and ICTR enjoy concurrent jurisdiction with other national courts, they are endowed with primacy over all national courts in relation to offences falling within the ambit of their respective Statutes.⁴⁷ However, since the ad hoc tribunals were established with the aim of prosecuting the most serious offences, it is natural that a large number of prosecutions be undertaken by national authorities, especially from the countries in the former Yugoslavia. In order better to monitor these prosecutions and assess their relevance to ICTY proceedings, a clause was inserted in an agreement signed in Rome on 18 February 1996 between the presidents of FRY, Croatia and the Republic of Bosnia and Herzegovina. Paragraph 5 of the Rome Agreement requires review by the ICTY of specific cases before the national authorities of the aforementioned States can arrest individuals suspected of having

44 *Op cit*, Akhavan, note 9, p 49. This problem has been resolved to a large degree by the Ministry of Justice's authorisation to foreign lawyers working for Lawyers Without Borders to plead on behalf of accused persons. O Dubois, 'Rwanda's National Criminal Courts and the International Tribunal', 321 *IRRC* (1997), 717.

45 From July 1996 until April 2000 more than 2,500 persons have been sentenced by Rwandan courts, 300 of them to death. The first executions took place on 24 April 1998, when 22 people were put to death publicly. There have been no executions since, although the Government has not ruled them out; 'Rwanda Court Sentences Eight to Death' (2000) *Associated Press*, 2 April.

46 *Prosecutor v Kambanda*, Judgment (4 September 1998), Case No ICTR-97-23-S, 37 ILM (1998), 1411.

47 ICTY Statute, Art 9; ICTR Statute, Art 8.

committed any offences related to the Yugoslav wars. To this end, a set of Procedures and Guidelines for Parties for the Submission of Cases to the ICTY Under the Agreed Measures of 18 February 1996 was developed.⁴⁸ This procedure simply facilitates the ICTY's work and promotes justice, and is in no way a substitute of the international Tribunal's primacy over any national proceedings.

The subject matter jurisdiction of the Yugoslav Tribunal consists of four core offences: grave breaches of the 1949 Geneva Conventions,⁴⁹ violations of the laws or customs of war,⁵⁰ genocide⁵¹ and crimes against humanity.⁵² Although the majority of crimes charged took place in Bosnia, the Tribunal enjoys, under Art 1 of its Statute, jurisdiction over offences falling within Arts 2–5, as long as these were perpetrated anywhere on the territory of the former Yugoslavia since 1991. This wide jurisdiction both in time and place has enabled the prosecutor to investigate and indict persons for offences committed in Kosovo by FRY forces in 1999, as well as Croat military and police personnel for crimes committed during and in the aftermath of operations 'Flash and Storm' in the retaking of Serb held Krajina.

In the case of the ICTR, the Security Council was conscious, on the one hand, that there were no international elements to the armed conflict between the Hutu Government and the Rwandan Patriotic Front (RPF) and, on the other, it wished it to be recognised that a well planned campaign of genocide had taken place. This intention is clearly reflected in the Rwanda Tribunal's Statute, whose jurisdiction consists of the crimes of genocide,⁵³ crimes against humanity⁵⁴ and violations of Art 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II to these Conventions.⁵⁵ Although one may presume that the temporal jurisdiction of the ICTR, spanning from 1 January until 31 December 1994, is wider than the actual duration of hostilities, since the mass killings commenced on 14 June 1994 and lasted approximately three months, evidence shows that plans to commit genocide existed at least as far back as 1992.

Both statutes penalise participation in the preparatory and execution stages of prescribed offences, that is, planning, instigation, ordering, or aiding and abetting in the planning, preparation or execution.⁵⁶ However, an accused can only be found guilty if the offence charged was actually completed. This rule does not apply with regard to genocide which, taken verbatim from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), does not require the commission of acts of genocide in order to hold the accused liable.

48 These procedures have become known as the 'Rules of the Road'.

49 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (No I), 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Ship-wrecked Members of Armed Forces at Sea (No II), 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (No III), 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (No IV), 75 UNTS 287, Art 2.

50 *Ibid*, Art 3.

51 *Ibid*, Art 4.

52 *Ibid*, Art 5.

53 *Ibid*, Art 2.

54 *Ibid*, Art 3.

55 *Ibid*, Art 4. Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609.

56 ICTY Statute, Art 7(1); ICTR Statute, Art 6(1).

Furthermore, following established principles of customary law, persons incur criminal liability where they fail to either prevent or punish crimes committed by their subordinates in cases they know or had reason to know that subordinates were about to commit such acts or had already done so.⁵⁷ This latter form of criminal participation, initially borne for the exigencies of military authorities, is known as the doctrine of command or superior responsibility. We shall now proceed to examine in detail the nature and elements of the various offences under the two statutes.

13.3.1 Grave breaches of the 1949 Geneva Conventions

The *jus in bello* has conventionally been categorised as ‘Geneva’ law, that is, international humanitarian, and ‘Hague’ law, which is concerned with the regulation of the means and methods of warfare. International humanitarian law is itself concerned with the protection of victims of armed conflict, which includes those rendered *hors de combat* by injury, sickness or capture, as well as civilians. This division is purely artificial and there is a wide measure of overlap between the two.⁵⁸ For the purposes of ICTY jurisdiction, international humanitarian law is contained principally in the four 1949 Geneva Conventions. The Geneva Conventions recognise two types of violations, in accordance with the gravity of the condemned act, namely, ‘grave breaches’⁵⁹ and other prohibited acts not falling within the definition of grave breaches. Although both grave breaches and all other infractions of the Conventions are outlawed under international humanitarian law, the distinguishing feature of grave breaches is that they can only be committed in international armed conflicts against protected persons or property as designated by the Conventions and are moreover subject to universal jurisdiction.⁶⁰

According to the *Tadic* appeals jurisdiction decision an armed conflict exists where there is ‘resort to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State’.⁶¹ The Appeals Chamber further affirmed that the temporal and geographical scope of an armed conflict extends beyond the exact time and place of hostilities.⁶² This means that, although actual fighting may not be taking place in certain parts of a territory plagued by war, any breaches committed in these locations against protected persons or property may warrant the application of humanitarian law if the breaches are connected in some way to the armed conflict.

An armed conflict may be classified as being international in nature when armed force is resorted to between two or more States, when a State directly intervenes militarily in a non-international armed conflict on the side of either party, or when a State exercises ‘overall control’ over a rebel entity as to justify attributing its actions to

57 ICTY Statute, Art 7(3); ICTR Statute, Art 6(3).

58 H McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts*, 1990, Aldershot: Dartmouth, pp 1–2.

59 Convention I, Art 50; Convention II, Art 51; Convention III, Art 130; Convention IV, Art 147.

60 1977 Protocol I added new ‘grave breaches’ to the list of the 1949 Geneva Conventions and further introduced a new set of such breaches, namely those violations against the laws of warfare; C Van den Wyngaert, ‘The Suppression of War Crimes under Additional Protocol I’, in AJM Delissen and GJ Tanja (eds), *Humanitarian Law of Armed Conflict*, 1991, Dordrecht: Martinus Nijhoff, p 197.

61 *Tadic* appeals jurisdiction decision (2 October 1995), para 70.

62 *Ibid.*, para 67.

the controlling State. The Appeals Chamber in its judgment in the *Tadic* case rebuffed the 'effective control' test propounded by the International Court of Justice in the *Nicaragua* case, which held that organised private individuals whose action is coordinated or supervised by a foreign State and to whom specific instructions are issued are considered *de facto* organs of the controlling State. Although this test had found application by the International Court of Justice (ICJ) to 'Unilaterally Controlled Latino Assets' who were non-US nationals, but acting while in the pay of the US, on direct instructions and under US military or intelligence supervision to carry out specific tasks, it was not applied to the contras because they had not received any instructions.⁶³ The ICTY Appeals Chamber held that the ICJ's 'effective control' test was at variance with both judicial and State practice, and could only apply with regard to individuals or unorganised groups of individuals acting on behalf of third States, but was generally inapplicable to military or paramilitary groups.⁶⁴ The ICTY's departure from the stringent 'effective control' test was duly replaced with an 'overall control test' which simply requires co-ordinating or helping in a group's general military planning, besides equipping or possibly financing the group, in order to establish a relationship of agency between the group and the aiding State.⁶⁵ Thus, in overturning the much criticised Trial Chamber's judgment which had found the Bosnian Serb Army (VRS) not to be an agent of FRY,⁶⁶ the Appeals Chamber held the VRS to constitute a military organisation under the overall control of the FRY, finding the latter not only to have equipped and financed the VRS, but to have also participated in the planning and supervision of its military operations.⁶⁷ Until the *Tadic* appeals judgment in 1999, the various ICTY Chambers had, as a direct result of interpreting the test propounded in the *Nicaragua* judgment differently in each case, reached inconsistent determinations of the nature of the Bosnian armed conflicts. The 'overall control' test, correct on its merits, seems to have set a precedent and is now accepted as good law by ICTY Chambers in their evaluation of both FRY and Croat intervention on behalf of rebel entities.⁶⁸

As already observed, the 'grave breaches' provisions are applicable where the victims are defined as 'protected persons' under the relevant Geneva Convention. For the purposes of the present discussion civilian populations during the Yugoslav conflicts were made the target of attacks with a view to either being exterminated or expelled. Article 4 of Geneva Convention IV provides that protected persons are those belonging to another party to the conflict. When this provision was drafted in 1949, it did not envisage the transformation and unprecedented eruption of internal or mixed armed conflicts in their contemporary form, and its purpose was to protect civilian persons held by the adversary, these being in their majority enemy nationals. The concept of nationality, belying a formal legal bond between an individual and a State, would not serve the protective function of Geneva Convention IV as both victims and attackers possessed the same nationality, even though the ensuing conflict

63 *Prosecutor v Tadic*, Appeals Judgment (15 July 1999) (*Tadic* appeals judgment), paras 109, 114.

64 *Ibid.*, para 124.

65 *Ibid.*, para 131.

66 T Meron, 'Classification of Armed Conflicts in the Former Yugoslavia: Nicaragua's Fallout', 92 *AJIL* (1998), 236.

67 *Tadic* appeals judgment (15 July 1999), para 131.

68 *Prosecutor v Aleksovski*, Appeals Judgment (24 March 2000), Case No IT-95-14/1-A, para 145; *Prosecutor v Blaskic*, Judgment (*Blaskic* judgment) (3 March 2000), Case No IT-95-14-T, para 100.

was in most part international in character. The *Tadic* appeals judgment correctly observed that since 1949 the legal bond of nationality has not been regarded as crucial in determining protected person status, further adding that, in the particular case of the former Yugoslavia, it was 'allegiance' to a party or 'control' over persons by a party that was perceived as crucial.⁶⁹ In a nation that had crumbled, ethnicity became more important than nationality in determining loyalties.⁷⁰ Therefore, civilian persons in Bosnia who fell into the hands of belligerents possessing the same nationality as they did, but who associated themselves with a different ethnic group, were entitled to protected status under Art 4 of Geneva Convention IV. The *Tadic* appeals judgment further identified as recipients of the same protection persons in occupied territory who, while possessing the nationality of their captor, are refugees and thus no longer benefit from the protection of Geneva Convention IV.⁷¹ A possible scenario would be that of German Jews fleeing to France before 1940 to avoid persecution, and who subsequently fall into German hands when Germany occupies France. It should be noted that whatever the defining element of loyalty may be in each particular case, under Art 4(2) of Geneva Convention IV 'nationals' of co-belligerent States are not entitled to benefit from protected status. In the case of the fragile and, on many occasions, interrupted alliance between the Bosnian Croats and the Bosnian Moslems, the *Blaskic* judgment found the two parties not to be co-belligerents.⁷² Although the Trial Chamber in the latter case rebuffed the existence of an alliance *in toto*, at least as this was relevant to determining protected status, this alliance undoubtedly existed on various occasions despite its instability, and on this basis co-belligerency must be formally recognised as a fact.

The specific unlawful acts which entail individual responsibility under Art 2 of the ICTY Statute and which must further be sufficiently linked to the armed conflict are:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Although the International Committee of the Red Cross (ICRC) commentary to the 1949 Geneva Conventions states that the list of grave breaches therein is not exhaustive and that criminality itself may extend beyond grave breaches,⁷³ such construction cannot have any application to Art 2 of the ICTY Statute whose list of offences is exhaustive, and which must provide guarantees of fairness and certainty.

69 *Tadic* appeals judgment (15 July 1999), paras 165–66.

70 *Blaskic* judgment (3 March 2000), paras 125–33.

71 *Tadic* appeals judgment (15 July 1999), para 164.

72 *Blaskic* judgment (3 March 2000), paras 137–43.

73 JS Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of Armed Conflict*, 1958, p 305.

13.3.2 Violations of the laws or customs of war in internal conflicts

Although the title of Art 3 of the ICTY Statute, 'Violations of the laws or customs of war' suggests that the intention of its drafters was to limit this provision to the 1907 Hague Convention IV and the Regulations annexed to it, the Appeals Chamber in the *Tadic* jurisdiction decision held that Art 3 in fact covers all violations of international humanitarian law other than grave breaches. This therefore includes, besides the 1907 Hague Convention, those portions of the 1949 Geneva Conventions other than their grave breaches provisions, violations of common Art 3 of the four Geneva Conventions, as well as other customary law applicable to internal conflicts, and violations contained in agreements entered into by the parties to the conflict.⁷⁴ The implication of this construction of Art 3 of the ICTY Statute, which is nonetheless consistent with relevant Security Council deliberations, has been the recognition for the first time by an international judicial institution of individual criminal responsibility for offences committed in the context of non-international armed conflicts.

The Appeals Chamber did not hesitate to assert that violations of common Art 3 of the 1949 Geneva Conventions entail individual criminal responsibility under customary international law.⁷⁵ It is true, as categorically noted by the ICJ, that the norms prescribed in common Art 3 constitute minimum considerations of humanity.⁷⁶ Similarly, the ICTY Appeals Chamber found that customary international law prohibited all attacks against civilian objects and persons no longer taking part in hostilities, as well as certain means and methods of warfare applicable to internal armed conflicts.⁷⁷ Although the international community's concern over such issues seemingly violates the rule against interference in the domestic affairs of States, it is evident that a State sovereignty oriented approach has been gradually supplanted by a human being oriented approach.⁷⁸ Notwithstanding this universal character of international humanitarian norms governing internal conflicts, it seems unlikely that there ever existed a customary rule entailing the penalisation of these norms under international law, especially since both common Art 3 and the 1977 Protocol II were drafted purposively, that is, as minimum humanitarian considerations, whose criminal aspects and prosecution would be determined exclusively at a domestic level.⁷⁹ In fact, the drafting history of the 1949 Geneva Conventions demonstrates that ICRC proposals to apply the Conventions to non-international armed conflicts were almost unanimously rejected by participating delegates. The ICRC then

74 *Tadic* appeals jurisdiction decision (2 October 1995), para 87, 89.

75 *Ibid*, para 134.

76 *Nicaragua v USA*, Military and Paramilitary Activities in and Against Nicaragua (Merits) (1986) ICJ Reports 14, para 218.

77 *Tadic* appeals jurisdiction decision (2 October 1995), para 127.

78 *Ibid*, para 97.

79 The view common among jurists is that by 1994 there was no such consensus at the interstate level. See D Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts', 20 *IRRC* (1990), 414; T Meron, 'The Case for War Crimes Trials in Yugoslavia' (1993 Summer) *Foreign Affairs*, 124, p 128; 'Letter dated 24 May 1994 from the Secretary General to the President of the Security Council', UN Doc S/1994/674 (1994), para 52, which reads: 'It must be observed that the violations of the law or customs of war...are offences when committed in international, but not in internal armed conflicts', in JV Mayfield, 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act', 9 *Emory Int'l L Rev* (1995), 573.

proposed that the Civilians Convention IV be applied to internal conflicts in order to better protect civilians, but delegates noted the political and technical difficulties this would entail. The conference rejected a considerable number of alternative drafts and after much effort adopted common Art 3.⁸⁰ The aforementioned discussion seeks merely to highlight the fact that contrary to the Appeals Chamber conclusion, customary international law had not until 1995 penalised violations of the laws or customs of war occurring in internal conflicts. This notwithstanding, it is undeniable that the pronouncement of such liability is laudable and is in fact now supported by a much larger number of States than prior to the establishment of the ICTY. Whatever the merits of the Appeals Chamber ruling on the criminal nature of common Art 3 in October 1995, that decision has subsequently been relied upon as authoritative by both ICTY and ICTR Chambers,⁸¹ it has influenced the national prosecution of common Art 3 offences committed abroad, and has culminated in the incorporation of an analogous provision in the Statute of the International Criminal Court (ICC).⁸²

Under international law, there exist two types of non-international armed conflicts: internal armed disputes of any kind attaining the threshold of armed conflicts (common Art 3 conflicts) and armed disputes under Art 1(1) of the 1977 Protocol II which require that rebels occupy a substantial part of territory, attain a sufficient degree of organisation, and hostilities reach a certain degree of intensity.⁸³ Although the 1977 Protocol II was purposely excluded from the ambit of the ICTY, it was expressly included in Art 4 of the ICTR Statute. The application of common Art 3 and Protocol II as criminal provisions are triggered by the cumulative existence of a non-international armed conflict, a link between the accused and the armed forces, the civilian nature of the victims and a nexus between the crime and the armed conflict. The accused need not necessarily be a member of the armed forces, since 'individuals legitimately mandated and expected as public officials or agents or persons otherwise holding public authority or *de facto* representing the government in support of the war effort' are deemed to be sufficiently linked to the armed forces.⁸⁴ As for the victims, although the definition of 'civilian population' is usually given negatively as consisting of persons who are not members of the armed forces,⁸⁵ the concept of 'civilians' includes those accompanying armed forces, those who are either attached to them, or those who are among combatants engaged in hostilities.⁸⁶ In accordance with Art 13(3) of Protocol II, 'civilians' enjoy protection unless and for such time as they take a direct part in hostilities. 'Civilian populations' by their very nature are presumed not to take part in hostilities and are, therefore, entitled to general

80 See DE Elder, 'The Historical Background of Common Article 3 of the Geneva Conventions of 1949', 11 *Case W Res J Int'l L* (1979), 37.

81 *Prosecutor v Akayesu*, Judgment (*Akayesu* judgment) (2 September 1998), Case No ICTR-96-4-T, para 617, reproduced in 37 *ILM* (1998), 1399.

82 ICC Statute, Art 8(2)(c) and (e).

83 See D Turns, 'War Crimes Without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts', 7 *RADIO* (1995), 804; HP Gasser, *International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 31 *Am U L Rev* (1982), 911.

84 *Akayesu* judgment (2 September 1998), para 631; *Prosecutor v Kayishema and Ruzindana*, Judgment (*Kayishema* judgment) (21 May 1999), Case No ICTR-95-1-T, para 175.

85 1977 Protocol I, Art 50.

86 *Kayishema* judgment (21 May 1999), para 180.

protection. In the *Kayishema* case, the ICTR ascertained the existence of a Protocol II type conflict between governmental Rwandan forces (FAR) and dissident armed forces (RPF). It found the RPF to be under the responsible command of General Kagame, to have exercised control over part of Rwanda, and to have been able to carry out sustained and concerted military action, as well as implement international humanitarian law.⁸⁷ It found, however, the Tutsi victims of the specific assault not to have been attacked by either the FAR or the RPF at the localities they sought refuge in in Kibuye prefecture. It held the massacres to have been undertaken by civilian authorities as a result of an extermination campaign against the Tutsis, with no proof that either the victims or the offences against them were directly related to the conflict, and thus concluded that Protocol II was inapplicable in that case.⁸⁸

Both Arts 3 and 4 of the ICTY and ICTR Statutes, respectively, contain indicative lists of offences, so these may validly be supplemented by customary law in the case of the ICTY, as well as Protocol II offences in the case of the ICTR.⁸⁹ On the basis of Art 4(2)(e) of Protocol II, Art 4(e) of the ICTR Statute penalises rape, enforced prostitution and any form of indecent assault. Although Art 3 of the ICTY Statute makes no express reference to rape or other forms of sexual assault, offences of this nature may be prosecuted through the application of common Art 3 which prohibits, *inter alia*, 'outrages upon personal dignity'.

13.3.3 Crimes against humanity

The concept of crimes against humanity was first articulated as an international offence in Art 6(c) of the Charter of the Nuremberg Tribunal in 1945.⁹⁰ Prior to the Nuremberg Charter, reference to the laws of humanity and the dictates of public conscience' was expressly made in the preamble to the 1907 Hague Convention IV—otherwise known as the Martens clause—the aim of which was to extend additional protection to both combatants and civilian populations where the law was silent or in development, until such time as more comprehensive rules were adopted. Following the massacre of at least 1.5 million Armenian civilians under orders of what was then the Ottoman Empire, the Governments of Great Britain, France and Russia issued a declaration denouncing the atrocities as 'crimes against humanity and civilisation', further noting the criminal culpability of all members of the Turkish Government and its agents.⁹¹ The 1920 Peace Treaty of Sevres which made provision for the trial of those Turkish officials responsible for violating the laws and customs of war and of engaging in the Armenian massacres during the war, but excluding

87 *Ibid*, para 172.

88 *Ibid*, paras 602–03.

89 *Akayesu* judgment (2 September 1998), para 617, held that the provisions of Protocol II entail individual responsibility.

90 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279. See E Schwelb, 'Crimes Against Humanity', 23 BYIL (1946), 178; B Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', 37 *Columbia J Trans L* (1999), 787.

91 R Clark, 'Crimes Against Humanity at Nuremberg', in G Ginsburg, VN Kudriavtsev (eds) *The Nuremberg Trial in International Law*, (1990), p 177.

reference to the 'laws of humanity',⁹² was superseded by the 1923 Treaty of Lausanne which contained a declaration of amnesty for all offences committed between 1914 and 1922.⁹³ However, as Cherif Bassiouni points out, the political motivations behind this compromise could not disguise the fact that amnesties are only granted for crimes, which even if not prosecuted does not negate their legal existence.⁹⁴

Immediately upon conclusion of the First World War, the Allied and Associated Powers established in 1919 a Commission on the Responsibility of the Authors of the War and Enforcement of Penalties.⁹⁵ The majority of the Commission supported the establishment of a tribunal with criminal jurisdiction over all persons belonging to enemy countries that were found to have violated the laws of war or the laws of humanity.⁹⁶ US dissent over the precision and uncertain scope of the term 'laws of humanity' prevailed against endorsing the Commission's position, and so the 1919 Peace Treaty of Versailles excluded reference to crimes against humanity.⁹⁷ Until the establishment of the ICTY in 1993 and the incorporation therein of Art 5 no other international definition of crimes against humanity reappeared since the Nuremberg Statute.⁹⁸ Nonetheless, a number of national prosecutions did take place through the use of domestic statutes, which although influenced by the Nuremberg articulation proved to be a significant factor in the gradual development of the concept of crimes against humanity.⁹⁹

As Art 5 of the ICTY Statute now stands, it encompasses offences committed in armed conflict, whether international or internal in character, being part of an overall attack against any civilian population. Hence, the five elements that comprise this offence under the ICTY Statute are: (a) existence of an attack; (b) the perpetrator's acts

92 Treaty of Peace between the Allied Powers and Turkey (Treaty of Sevres), Arts 226, 230, reprinted in 15 *AJIL* (1921 Supp), 179.

93 Treaty of Peace between the Allied Powers and Turkey (Treaty of Lausanne), 28 LNTS 12.

94 CM Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1992, Dordrecht, Boston: Martinus Nijhoff, pp 175–76.

95 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919*, reprinted in 14 *AJIL* (1920), 95.

96 'All persons belonging to enemy countries, however high their position may have been, without distinction or rank, including Chiefs of Staff, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.' *Ibid*, p 123.

97 2 *Bevans* 43.

98 Unlike the Nuremberg Charter, Control Council Law No 10, enacted by the Allied Control Council for Germany (hence, it did not have the attributes of a treaty), excluded the requirement that crimes against humanity be committed in execution of or in connection with war crimes or crimes against peace. While some military tribunals entertaining cases pursuant to Control Council Law No 10 accepted that crimes against humanity could also be committed in time of peace, others did not. See WJ Fenrick, 'Should Crimes Against Humanity Replace War Crimes?', 37 *Columbia J Trans L* (1999), 767, p 775; both the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73, as well as the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, ETS 82, 13 ILM (1974), 540, referred to the definitions of the Nuremberg Charter and the 1948 Genocide Convention respectively.

99 In the *Barbie* case, French Court of Cassation Judgment (1988) 100 ILR 330, pp 332, 336, the accused who was the Head of the Gestapo in Lyon from 1942 to 1944 was convicted of crimes against humanity for his role in the deportation and extermination of Jewish civilians. The court held that the definition of crimes against humanity within the meaning of the Nuremberg definition consisted of enumerated inhumane acts against civilians 'performed in a systematic manner in the name of the State practising by those means a policy of ideological supremacy'; see also *Touvier* case, French Court of Cassation Judgment (1992) 100 ILR 337, and *R v Finta*, Canadian Supreme Court Judgment (1994) 104 ILR 284.

must be part of the attack; (c) the attack must be directed against any civilian population; (d) the attack must be widespread or systematic; and (e) the perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack. It is obvious that the ICTY definition has retained the armed conflict nexus of the Nuremberg Charter, but has accepted jurisdiction irrespective of the nature of the conflict. Furthermore, there exists no requirement, unlike Art 6(c) of the Nuremberg Charter, that crimes against humanity be connected to any other offences. The ICTY Appeals Chamber in the *Tadic* case held that Art 5 was narrower than customary international law, which did not require any nexus to armed conflict.¹⁰⁰ This aspect of customary law (that is, the absence of a nexus to armed conflict) is reflected in Art 3 of the ICTR Statute, which, however, requires the existence of a discriminatory intent on national, political, ethnic, racial or religious grounds. Discriminatory intent in Art 5 of the ICTY Statute is required only with regard to the specific offence of persecution. Art 3 of the ICTR Statute further qualifies an attack as a crime against humanity when it is perpetrated in either widespread or systematic fashion. This last element of a 'widespread or systematic' attack, although not expressly articulated in Art 5 of the ICTY Statute, follows the customary definition of crimes against humanity and was early elaborated by ICTY Chambers.¹⁰¹ The concept of 'attack' in the definition of crimes against humanity is significantly broader than that used in the context of the laws of war, and particularly Art 49(1) of the 1977 Additional Protocol I, since it 'may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention'.¹⁰² The underlying offence does not need to constitute an attack, but must form part of, or be linked with the attack, which itself is the crime against humanity.¹⁰³ In terms of ICTY temporal jurisdiction, although the attack must be part of the armed conflict, it can outlast it.¹⁰⁴ The list of offences which may constitute an 'attack' under the concept of crimes against humanity in the ICTY and ICTR Statutes is both exhaustive and identical. They comprise of the following:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

100 *Tadic* appeals jurisdiction decision (2 October 1995), paras 140–41.

101 *Nikolic* decision (20 October 1995), Case No IT-94-2-R61, 108 ILR 21, para 26.

102 *Prosecutor v Kunarac and Others*, Trial Chamber Judgment (22 February 2001) (*Kunarac* judgment), Case Nos IT-96-23-T and IT-96-23/1-T, para 416.

103 *Mrksic* r 61 decision (3 April 1996), para 30; *Tadic* appeals judgment (15 July 1999), para 248; *Kunarac* judgment, para 417.

104 *Kunarac* judgment, para 420.

As already observed, the offences enumerated above constitute crimes against humanity when they are perpetrated against any civilian population in a widespread or systematic manner. Evidence of either a 'widespread' or 'systematic' element suffices, although, in practice, it will not be unusual for both to co-exist. International law requires that only the overall attack, and not the underlying offences, be widespread or systematic. This means that a single offence could be regarded as a crime against humanity if it takes place under the umbrella of a widespread or systematic attack against a civilian population.¹⁰⁵

The *Blaskic* judgment held that the term 'systematic' requires the following ingredients: (a) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology that aims to destroy, persecute or weaken a community; (b) the perpetration of a crime on a large scale against a civilian group, or the repeated and continuous commission of inhumane acts linked to one another; (c) the preparation and use of significant public or private resources, whether military or other; and (d) the implication of high-level political and/or military authorities in the definition and establishment of the plan.¹⁰⁶ The *Akayesu* judgment defined a systematic attack as one that is 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.¹⁰⁷ Unlike the French Cassation judgments, the ICTR affirmed that there is no requirement that such policy be formally adopted as the policy of the State.¹⁰⁸ Moreover, the existence of a plan does not have to be expressly declared, nor clearly and precisely stated, in order to prove the 'systematic' element of crimes against humanity.¹⁰⁹ This does not mean that crimes against humanity may be the work of private individuals acting alone, but they can be orchestrated and executed by organised non-State entities.¹¹⁰ This was the conclusion reached by an ICTY Trial Chamber in its r 61 Review of the evidence against the leader of the Bosnian Serbs, Radovan Karadzic. The ICTY ascertained the existence of a policy of 'ethnic cleansing', consisting of a systematic separation of non-Serbian men and women with subsequent internment in detention facilities, extensive damage to sacred symbols with intent to eradicate them, shelling of Sarajevo in order to expel non-Serbian residents, and establishment of camps devoted to rape, enforced pregnancy and enforced prostitution of non-Serbian women. The purpose of these camps and the policy of sexual assaults in general was found to be the displacement of civilians and the incurring of shame and humiliation to the victims and their communities, thus, forcing them to leave.¹¹¹ As evidence of plans of this nature will seldom be retrieved in writing, it suffices if such planning can be inferred from relevant circumstances, even if not expressly declared or stated clearly and precisely. Such circumstances include

105 *Kupreskic* judgment (14 January 2000), para 550; *Kunarac* judgment (22 February 2001), para 431.

106 *Blaskic* judgment (3 March 2000), para 203; *Kordic and Cerkez* judgment (26 February 2001), para 179.

107 *Akayesu* judgment (2 September 1998), para 580.

108 *Ibid*; *Nikolic* decision (20 October 1995), para 26; *Kupreskic* judgment (14 January 2000), para 551.

109 *Blaskic* judgment (3 March 2000), para 204; *Kordic and Cerkez* judgment (26 February 2001), para 181.

110 ILC Report, *Draft Code of Crimes Against the Peace and Security of Mankind*, UN Doc A/51/10 (1996) Supp No 10, p 94; in the *Kayishema* judgment (21 May 1999), Case No ICTR-95-1-T, para 125, the ICTR convicted the accused Ruzindana, a local businessman, of crimes against humanity because he partook in the overall Hutu extremist policy to exterminate the minority Tutsis.

the overall prevailing political background, the general content of a political programme, the role of the media and incendiary propaganda, intentional alterations to ethnic compositions, the imposition of discriminatory measures, and the scale of acts of violence.¹¹² Since the concept of crimes against humanity refers not to a particular act, but to a 'course of conduct', a single act may constitute a crime against humanity when the perpetrator has the requisite *mens rea* and the offence is part of either a widespread or systematic attack against a civilian population.¹¹³

The 'widespread' element of crimes against humanity is probably easier to substantiate, as it necessarily refers to the scale of the acts perpetrated and the number of victims.¹¹⁴ The *Akayesu* judgment defined the element of 'widespread' as 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.¹¹⁵ The status and nature of the civilian population that is the target of an attack is also very important, since it is this which differentiates crimes against humanity from random attacks against civilian populations without any defining characteristics in the mind of the attacker. Civilian populations, defined generally as people not taking active part in hostilities, can never become legitimate objects of attack. Possible presence of non-civilians in such populations does not deprive them of their civilian character.¹¹⁶ The general approach in the ICTY has been to construe the term 'civilian population' broadly, encompassing persons who have been involved in resistance movements and also former combatants who no longer take part in hostilities at the time the attack against the civilian population took place, either because they had left their units, they no longer bore arms, or because they had been rendered *hors de combat*.¹¹⁷

Crimes against humanity differ from other war crimes from the fact that their perpetrators are engaging in particular unlawful acts with the knowledge and approval that such acts are committed on a widespread scale or based on a policy against a specific civilian population. Hence, it is the knowledge of the 'overall context' within which a crime is committed that makes a perpetrator criminally liable for a crime against humanity. It is the widespread or the policy elements that establish this overall context and not the perpetrator personally through multiple acts of violence. Therefore, as explained above, a single unlawful act perpetrated within an overall context of an attack against a civilian population constitutes a crime against humanity. In the *Jeliscic* case, the accused was the commandant of a Bosnian Serb POW camp in Brcko. He was eventually convicted of serious offences against prisoners and other detainees amounting to crimes against humanity. The ICTY Trial Chamber inferred Jeliscic's knowledge of a Bosnian Serb policy of annihilation of

111 *Karadzic and Mladic* decision (11 July 1996), Case Nos IT-95-5-R61 and IT-95-18-R61, 108 ILR 86, paras 60-64.

112 *Blaskic* judgment (3 March 2000), para 204; *Prosecutor v Jeliscic*, Judgment (*Jeliscic* judgment) (14 December 1999), Case No IT-95-10-T, para 53.

113 *Kupreskic* judgment (14 January 2000), para 550.

114 *Blaskic* judgment (3 March 2000), para 206.

115 *Akayesu* judgment (2 September 1998), para 580.

116 1977 Protocol I, Art 50; affirmed in *Akayesu* judgment (2 September 1998), para 582.

117 *Prosecutor v Mrksic and Others (Vukovar Hospital case)*, r 61 Decision, 108 ILR 53, paras 29-32; *Blaskic* judgment (3 March 2000), paras 210, 216; *Kayishema* judgment (21 May 1999), para 127.

non-Serb populations in the Brcko area on the basis of his appointment to the Brcko camp and his active participation in the operations against Moslems in the region.¹¹⁸

As already observed, a discriminatory intent is required in the definition of crimes against humanity contained in the ICTR Statute, but not in the ICTY Statute. Both provisions, however, include 'persecution' as an offence capable of producing crimes against humanity. This is triggered by the existence of a widespread or systematic attack against a civilian population, gross or blatant denial of a fundamental right reaching the same level of gravity as other acts contained in Arts 5 and 3 of the ICTY and ICTR Statutes, respectively, and the imposition of discriminatory grounds. The *Kurpeskic* judgment held that the *actus reus* for persecution in the ICTY Statute does not require a link to crimes enumerated elsewhere in the Statute, but being a broad offence, its definition may encompass crimes not listed in the Statute. However, there must be 'clearly defined limits on the expansion of the types of acts which qualify as persecution'.¹¹⁹ *Mens rea* for the particular act of persecution is higher than ordinary offences falling within the ambit of crimes against humanity, but lower than genocide. In the crime of persecution, the discriminatory intent may take many inhumane forms, while in genocide it must strictly be accompanied by the specific intent (*dolus specialis*) for genocide, that is, to destroy in whole or in part a specific group.¹²⁰

13.3.4 Genocide

Genocide has been described as the 'ultimate crime'.¹²¹ Although the Armenian massacre of 1915 did not result in any serious criminal proceedings,¹²² revulsion caused by the Jewish Holocaust eventually led to the adoption in 1948 of the Genocide Convention.¹²³ The prohibition of genocide as a *jus cogens* norm has been confirmed by the ICJ,¹²⁴ as has the non-contractual character of the 1948 Genocide Convention, that is, its capacity in creating obligations even vis-à-vis non-affected States (*erga omnes* obligations) on the basis of its compelling humanitarian nature.¹²⁵ The only two effective means of enforcing the *erga omnes* obligation arising from the prohibition of genocide, on the assumption that the State engaged in it will take neither legal nor material action, are individual or collective use of force, and interstate litigation.¹²⁶ With the exception of the Vietnamese invasion of Cambodia and the conviction of

118 *Jeliscic* judgment (14 December 1999), para 57.

119 *Kurpeskic* judgment (14 January 2000), paras 581, 618; *Kordic and Cerkez* judgment (26 February 2001), paras 193–94.

120 See *Kurpeskic* judgment, *ibid*, paras 627, 636.

121 P Akhavan, 'Enforcement of the Genocide Convention: A Challenge to Civilization', 8 *Harvard Human Rights Journal* (1995), 229.

122 VN Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications', 14 *Yale J Int'l L* (1989), 221.

123 78 UNTS 277.

124 *Advisory Opinion Concerning Reservations to the Genocide Convention* (1951) ICJ Reports 15, p 23; *Belgium v Spain, Barcelona Traction Light and Power House Co Ltd (Barcelona Traction case)* (1970) ICJ Reports 3, Second Phase.

125 *Barcelona Traction case* (1970) ICJ Reports 3, p 32, paras 33–34. See R Provost, 'Reciprocity in Human Rights and Humanitarian Law', 65 *BYIL* (1994), 383.

former Prime Minister Pol Pot by a people's revolutionary tribunal of genocide *in absentia*, there have been no other cases of humanitarian intervention in order to suppress the occurrence of genocide,¹²⁷ even though a rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities pointed out in his 1985 report on genocide that a significant number of such incidents had taken place after 1945, namely, the Hutu massacres by Tutsis in Burundi in 1965 and 1972, the 1974 Paraguayan eradication campaign of the Ache Indians, the Khmer Rouge massacres in Cambodia in 1975 and 1978 as well as the extermination of Baha'is in Iran—although in the case of the Baha'is their persecution commenced in the mid-19th century when they were first established as a religious minority.¹²⁸ The contentious jurisdiction of the ICJ, even if one assumes that such consent would exist in each case, offers little help to the victims of an ongoing genocide, irrespective of the severity of provisional measures ordered, and can at best serve to determine the existence of a genocidal plan or action for the purposes of State responsibility or its use in subsequent criminal proceedings. This has been illustrated from the case brought by the Republic of Bosnia and Herzegovina against FRY in 1993 on charges of genocide, which continued to persist—at least in the form of acute persecution against Bosnian Moslems—despite the ICJ's imposition of interim measures.¹²⁹ Notwithstanding these incidents of genocide, to date no non-affected State has held another accountable before the ICJ, thus, failing to give substance to the Genocide Convention's *erga omnes* nature.

The definitions of genocide and enumeration of punishable acts under Arts 2 and 4 of the ICTR and ICTY Statutes, respectively, constitute a *verbatim* reproduction of Arts II and III of the 1948 Genocide Convention. Article II of this Convention defines genocide as:

...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily harm or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

126 See L Kuper, *The Prevention of Genocide*, 1985, New Haven, London: Yale UP.

127 See H Hannum, 'International Law and Cambodian Genocide: The Sounds of Silence' 11 *HRQ* (1989), 82.

128 *Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN4/Sub2/1985/6 (1985), p 9.

129 *Bosnia and Herzegovina v FRY*, 'Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Order on the Request for Provisional Measures)' (1993) ICJ Reports 3.

Article III penalises, besides principal participation in genocide, conspiracy, direct and public incitement, attempt and complicity in acts of genocide. What is evident from this definition is that it is exhaustive and much more specific than that articulated for other grave offences, namely, crimes against humanity. Its specificity is not exhausted solely on the four groups that may become the target of genocide, but more importantly it is based on the particular *mens rea* of the perpetrator, whose intention must be to destroy in whole or in part an enumerated group. This element renders genocide a specific intent crime (*dolus specialis*) and differentiates it from other offences of mass destruction and extermination.

The ICTY had not, until January 2001, made a finding on the occurrence of genocide with regard to the former Yugoslavia nor, of course, did it convict any accused of this offence.¹³⁰ It did, however, urge the prosecutor in the *Nikolic* case to consider charging the accused also of genocide,¹³¹ and inferred Karadzic's genocidal intent from a variety of factors.¹³² In the *Jelisc* case, the accused was the commandant of a Bosnian Serb camp that was charged, *inter alia*, with participating in a campaign of genocide against Moslems. The Trial Chamber initially acquitted him of genocide on the grounds that the prosecutor had failed to prove Jelisc's genocidal intent beyond reasonable doubt.¹³³ It had reached this conclusion because the evidence (random acts of violence, albeit against Bosnian Moslems) and the disturbed personality of the accused (for example, narcissistic tendencies) did not demonstrate a *dolus specialis* against Brcko Moslems beyond a reasonable doubt. The Appeals Chamber disagreed with this evaluation of the evidence, finding instead that genocidal intent clearly existed, but did not see it in the interest of justice to order a retrial, and thus declined to reverse the acquittal.¹³⁴ The ICTY has been reluctant in convicting lower-ranking personnel of genocide, despite the large number of victims in particular cases.¹³⁵

The ICTR was established primarily to address the issue of genocide and, in the *Akayesu* case, authoritatively determined that genocide against the Tutsi did, in fact, take place in Rwanda in 1994.¹³⁶ The judicial assessment of the *dolus specialis* by the ad hoc tribunals begins by first examining the existence of a genocidal plan and the commission of genocide, and then inquiring into the genocidal intent of the accused, which is distinct but yet interrelated to that of the underlying plan.¹³⁷ A genocidal plan is not a legal ingredient of the crime of genocide, but ICTY Chambers have

130 On 2 August 2001, in the case of *Prosecutor v Krstic* (*Krstic* judgment), Case No IT-98-33, Bosnian Serb General Krstic was convicted of genocide for his role in the planning and execution of the Srebrenica massacre in 1995.

131 *Nikolic* decision (20 October 1995), para 34.

132 *Kamdzic* decision (11 July 1996), para 95.

133 *Jelisc* judgment (14 December 1999), paras 97–98.

134 *Prosecutor v Jelisc*, Appeals Chamber Judgment (*Jelisc* appeals judgment) (5 July 2001), Case No IT-95-10-A, paras 70–77.

135 *Prosecutor v Sikirica and Others*, Trial Chamber Judgment on Defence Motions to Acquit (3 September 2001), Case No IT-95-8-T.

136 *Akayesu* judgment (2 September 1998), para 126.

137 G Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals', 49 *ICLQ* (2000), 578, p 588.

consistently argued that it could nonetheless provide evidential assistance in proving the intent of the authors.¹³⁸

Although the case law of the Permanent Court of International Justice, as did also the early jurisprudence of the ICJ, suggested that membership of a specific group was a question of fact,¹³⁹ the *Akayesu* tribunal assessed such membership solely on subjective criteria, in accordance with recent developments in human rights law.¹⁴⁰ This approach is desirable in the construction of membership with regard to genocide, since each specific culture and society maintains its own distinct perception of membership to particular groups, which is not easily visible to outside observers, and in the case of Rwanda, there was an even more compelling reason, since the Tutsi did not fit into any of the four enumerated groups, sharing as they did the same language, culture and race as the Hutus.¹⁴¹ However, this approach does not necessarily conform to the travaux of the 1948 Genocide Convention, not with subsequent ICTY/ICTR judgments. The Trial Chamber in the *Akayesu* case, based on its aforementioned approach, resorted to an interpretation of particular membership on the basis of the preparatory work of the 1948 Genocide Convention, which intended to ensure the protection of only 'stable' groups.¹⁴² This interpretation was supported in *Rutaganda*, decided *obiter dicta*, but was not directly referred to in either *Kayishema*, *Ruzindana* or *Jelusic*.¹⁴³ The *Krstic* judgment actually disagreed altogether, arguing that the Genocide Convention does not protect all types of human groups, its application being confined solely to national, ethnical, racial or religious groups.¹⁴⁴ It is widely agreed, however, that the perception of a group in the mind of the perpetrators may be effected through either negative (that is, lack of certain characteristics) or positive criteria (that is, accumulation of certain characteristics).¹⁴⁵

The *dolus specialis* of genocide necessitates that the intention to commit this crime be formed prior to the execution of genocidal acts, although the individual offences themselves do not require any such premeditation.¹⁴⁶ The execution of genocide involves two levels of intent: that of the criminal enterprise as a collectivity and that of the participating individuals. In such cases of joint participation, the intent to commit genocide must be discernible in the criminal act itself, apart from the intent

138 *Krstic* judgment (2 August 2001), para 572; *Jelusic* appeals judgment (5 July 2001), para 48.

139 *Germany v Poland*, 'Rights of minority schools in Upper Silesia' (1928) PCIJ Reports, Ser A, No 15; *Liechtenstein v Guatemala* (*Nottebohm* case) (Merits) (1955) ICJ Reports 4.

140 See *Lovelace v Canada*, UN Human Rights Committee (1981) 68 ILR 17.

141 The term 'ethnic' is derived from the Greek word 'ethnos', meaning 'nation'. Thus, although the terms 'ethnic' and 'national' appear to be identical, the contemporary semantic application of the word 'ethnic', especially in minority law, refers to a category of people possessing some degree of coherence, being aware of their common origin and cultural interests—in whatever way this may be different from 'national'. See G Welhengama, *Minorities' Claims: From Autonomy to Secession, International Law and State Practice*, 2000, Aldershot: Ashgate, pp 64–65.

142 *Akayesu* judgment (2 September 1998), paras 510–11, 516. In fact, the 1948 Genocide Convention has come under increased criticism for excluding from its ambit political and other socially vulnerable groups.

143 *Prosecutor v Rutaganda*, Judgment (*Rutaganda* judgment) (6 December 1999), Case No ICTR-96-3-T, para 58; the *Musema* judgment also seems to agree with *Akayesu*, paras 161–63.

144 *Krstic* judgment (2 August 2001), para 554.

145 *Jelusic* judgment (14 December 1999), paras 70–71; *Prosecutor v Rutaganda*, Judgment (*Rutaganda* judgment) (6 December 1999), Case No ICTR-96-3-T, para 56.

146 *Kayishema* judgment (21 May 1999), para 91.

of particular perpetrators. The next step is to establish whether the accused shared the intention that genocide be carried out.¹⁴⁷ The *Jelisić* judgment opined that genocidal intent may manifest itself through a desire to exterminate a very large number of group members, or by killing a more limited number of persons selected for the impact their disappearance or extermination will have upon the survival of the group as such.¹⁴⁸ In most cases, there will be no direct proof of genocidal intent and, so, this must be inferred through circumstantial evidence. Jean Paul Akayesu, the first person to be convicted of genocide by the ICTR, was the Bourgmestre of Taba commune, a position that afforded him a very significant amount of influence and authority over all the public institutions of the commune. The accused had delivered passionate speeches against the Tutsi and moderate Hutus, whereby he advocated their extermination and was found to have ordered other acts of violence against his victims. These actions could only be classified as genocide if discriminatory intent could be demonstrated with the aim of destroying the perceived group in whole or in part. The ICTR reached this inference on the basis of the general context of other culpable acts systematically directed against the Tutsi, the multiplicity of offenders across Rwanda, the general nature of the crimes and the deliberate targeting of victims on account of their particular membership, while excluding others.¹⁴⁹ The *Kayishema* judgment added further elements, such as the use of derogatory language towards group members, methodical planning and systematic killing and the number of victims exterminated.¹⁵⁰ None of these factors alone can provide credible proof of genocidal intent; what is needed is a combination demonstrating the overall context of atrocities against a specific group of which the accused can only have been a substantial actor on account of his or her unlawful acts against the targeted group.

The definition of genocide encompasses the perpetration of acts that aim to destroy a group in whole or in part. The 'in part' element does not characterise the destruction of the group, but refers instead to the intent of the perpetrator in destroying the group within the confines of a limited geographical area.¹⁵¹ Thus, if an individual possesses the intent to destroy a distinct part of a group within a limited geographical area, as opposed to an accumulation of isolated individuals within it, that person would be liable for genocide. On this basis, the ICTY Trial Chamber convicted General Krstić of genocide for his participation in the extermination of thousands of Bosnian Moslem males in the area of Srebrenica in 1995.¹⁵² In terms of victim numbers, ICTY and ICTR

147 *Krstić* judgment (2 August 2001), para 549.

148 *Jelisić* judgment (14 December 1999), para 82.

149 *Akayesu* judgment (2 September 1998), para 523; reaffirmed in the *Rutaganda* judgment (6 December 1999), para 399.

150 *Kayishema* judgment (21 May 1999), para 93; the *Karadžić* decision (11 July 1996), para 95, inferred the accused's genocidal intent from the combined effect of his speeches, the massive scale of crimes, all of which were aimed at undermining the foundation of the group.

151 *Krstić* judgment (2 August 2001), paras 582–84.

152 This view was adopted by two recent German judgments: *Jorgić* case, Dusseldorf Supreme Court, 3 StR 215/98 (30 April 1999), upheld by the FRG Federal Constitutional Court, and the *Djajić* case, Bavarian Appeals Court (23 May 1997), 92 *AJIL* (1998), 528, cited with approval in the *Krstić* judgment, *ibid.*, para 589.

jurisprudence suggest that the intent to destroy a part of the group must affect a considerable number of individuals that make up a substantial part of that group.¹⁵³ In such cases the prosecutor must prove both the intent to destroy the targeted group in the particular geographical area, as well as the intent to destroy that group as such.¹⁵⁴

The enumerated criminal acts against members of a group on the basis of their membership in the group as such are exhaustive, but their ambit had not prior to the ICTR's jurisprudence been tested in practice. 'Killing members of the group'¹⁵⁵ includes only homicides committed with intent to cause death.¹⁵⁶ 'Causing serious bodily or mental harm'¹⁵⁷ to members of the group does not require, contrary to what the USA has been arguing since the adoption of the 1948 Genocide Convention,¹⁵⁸ that the harm be permanent or irreparable.¹⁵⁹ This provision is not limited to specific well known practices causing bodily or mental harm, such as torture, but is open, as the Israeli Supreme Court pointed out in the *Eichmann* case, to any acts designed to cause degradation, deprivation of humanity and cause physical or mental suffering.¹⁶⁰ 'Deliberately inflicting on a group conditions of life calculated to bring about its physical destruction'¹⁶¹ has been described as a method of slow death, of which rape can constitute a means of its accomplishment.¹⁶² The *Akayesu* judgment stated that this category comprises the methods of destruction that do not immediately intend to kill the members of the group, but they do so ultimately. This includes, *inter alia*, subjecting a people to 'a subsistent diet, systematic expulsion, and the reduction of essential medical services below minimum requirement'.¹⁶³ 'Imposing measures intended to prevent births within a group'¹⁶⁴ includes, but is not limited to, obvious practices such as sexual mutilation, sterilisation, forced birth control, separation of sexes, or prohibition of marriages. As was noted by the ICTR, in patriarchal societies, children follow the lineage of the father. Thus, impregnation of a woman by a rapist belonging to another group with the intention that the victim bear a child from his group would constitute genocide. Likewise, the mental effect of rape by which a woman is so traumatised that she refuses to procreate would also amount to genocide.¹⁶⁵ 'Forcibly transferring children of the group to another group'¹⁶⁶ prohibits not only forceful physical transfer, but

153 *Kayishema and Ruzindana* judgment (21 May 1999), para 97; *Prosecutor v Bagilishema*, Judgment (7 June 2001), Case No ICTR-95-1A-T, para 64; *Krstic* judgment, *ibid.*, paras 586–88.

154 *Sikirica* judgment (3 September 2001), para 61.

155 ICTR Statute, Art 2(2)(a).

156 *Akayesu* judgment (2 September 1998), paras 500–01; *Prosecutor v Musema*, Judgment (*Musema* judgment) (27 January 2000), para 155.

157 ICTR Statute, Art 2(2)(b).

158 *Op cit*, Verdirame, note 137, pp 580–81.

159 *Akayesu* judgment (2 September 1998), paras 502–04.

160 *Public Prosecutor v Eichmann*, Judgment (1962) 36 ILR 277, p 340. This passage from the court's judgment refers to the charge of 'crimes against the Jewish people', which is equivalent to that of genocide. The judgment rendered by the District Court of Jerusalem was subsequently upheld by the Israeli Supreme Court.

161 ICTR Statute, Art 2(2)(c).

162 *Kayishema* judgment (21 May 1999), para 116.

163 *Akayesu* judgment (2 September 1998), paras 505–06.

164 ICTR Statute, Art 2(2)(d).

165 *Akayesu* judgment (2 September 1998), paras 507–08.

166 ICTR Statute, Art 2(2)(e).

also the causing of serious trauma to the parents or guardians that would necessarily lead to such transfer.¹⁶⁷

The Rwandan genocide was conceived at the highest level by Hutu officials and was executed by lower level individuals, including Hutu youth teams and private individuals who had been incited through the mass media and public speeches. The seminal role of the media as a means of instigating hatred and calling for extermination of Tutsi by falsifying or exaggerating events was made clear in the case of former Prime Minister Kambanda, but more so in the case of *Georges Ruggiu*, a Belgian national, who was responsible for broadcasting these messages on Rwandan radio.¹⁶⁸ Public speeches given by influential individuals were found to have had the same effect, as was evident in the case of Akayesu's rallies with which he intended to directly create a particular state of mind in his audience that would lead to the destruction of the Tutsi. The ICTR defined incitement as 'encouraging, persuading or directly provoking another through speeches, shouts, threats or any other means of audiovisual communication to commit an offence'.¹⁶⁹ Incitement to commit genocide must further be committed in public and be direct on what its author wants to achieve. However, the 'directness' element, as correctly propounded by the ICTR, should be assessed in light of its cultural and linguistic content and the particular perception of each individual audience.¹⁷⁰

Since, as previously observed, the various forms of participation in genocide contained in Art 2(3) of the ICTR Statute, of which 'incitement' is one, do not require consummation of actual genocide in order to entail the criminal liability of the participants, it follows that unsuccessful incitement to commit genocide is a punishable act. Finally, in the *Krstic* judgment, the ICTY noted that besides the physical destruction of a group, the same result may also be achieved by a 'purposeful eradication of [the group's] culture and identity, resulting in the eventual extinction of the group as an entity distinct from the remainder of the community'. Although the Trial Chamber found that cultural genocide was excluded from the ambit of the 1948 Genocide Convention, it nonetheless pointed to more recent instruments and decisions that support criminalisation of this form of genocide. It finally determined that cultural genocide was not part of customary international law, and thus did not fall within the ICTY Statute, but since acts of genocide usually involve attacks against cultural and religious property, such attacks may be seen as evidence of genocide.¹⁷¹

13.4 RAPE AND SEXUAL VIOLENCE AS INTERNATIONAL OFFENCES

Although in the past rape had been explicitly¹⁷² or implicitly¹⁷³ prohibited under international humanitarian law, until the establishment of the ICTY it had never

167 *Akayesu* judgment (2 September 1998), paras 509–10.

168 *Prosecutor v Ruggiu*, Judgment (1 June 2000), Case No ICTR-97-32-I, paras 17, 44, 50.

169 *Akayesu* judgment (2 September 1998), para 555.

170 *Ibid*, paras 557, 559.

171 *Krstic* judgment (2 August 2001), paras 574–80.

172 Geneva IV, Art 27; Protocol I, Art 76(1); Protocol II, Art 4(2)(c).

173 Hague Regulations, Art 46; Geneva Conventions, Art 3; Geneva IV, Art 147; Protocol I, Art 85(4)(c); Protocol II, Art 4(1) and (2)(a).

been defined in any of the instruments in which it was contained. It was not elucidated even when prosecuted as a war crime at the International Military Tribunal for the Far East or its Charter.¹⁷⁴ Lack of specificity was not a pressing issue to the post-war tribunals because not only did rape not play a significant role in prosecutorial agendas that were then working under severe time constraints, but where reference to rape was made in the Tokyo Trials, its elements must have seemed to all parties as self-proven and in no need of further elaboration.¹⁷⁵ There is no doubt that Nazi and Japanese licence to commit rapes and forced prostitution (the so called practice of 'comfort women') was intended to both encourage soldiers and serve as an instrument of policy.¹⁷⁶ In any event, neither the relevant provisions of the 1949 Geneva Conventions nor of the 1977 Additional Protocols listed rape amongst their grave breaches provisions.

The practice and variety of rape in the conflicts occurring in the former Yugoslavia was both widespread and deliberate.¹⁷⁷ The special rapporteur of the UN Commission on Human Rights clearly pointed out the purpose of rape therein as constituting an individual attack and a method of ethnic cleansing designed to degrade and terrify the entire ethnic group.¹⁷⁸ Indiscriminate and widespread rape was also practised in the Rwandan genocide. Any assessment of rape must be viewed particularly in the context of gender-based crimes, that is, whereas 'sex' refers to biological differences, 'gender' refers to socially constructed differences, such as power imbalances, socio-economic disparities and culturally reinforced stereotypes.¹⁷⁹

Rape is a particular offence contained in the list of crimes encompassing crimes against humanity in both the ICTY¹⁸⁰ and ICTR Statutes,¹⁸¹ and a war crime of internal conflicts under the ICTR.¹⁸² Notwithstanding the absence of explicit reference to rape in the definition of other offences within the jurisdiction of the Tribunals, this egregious violation may also be prosecuted as a war crime or grave breach under 'inhuman treatment' or 'torture', as well as under genocide.¹⁸³ Although the two ad hoc tribunals basically agree on the definition of rape as a physical invasion of a sexual nature committed on a person under coercive circumstances,¹⁸⁴ there has been a substantial difference of opinion as to the sources of this definition and its scope. The *Akayesu* judgment viewed rape as a form of aggression and a violation of personal

174 4 Bevans 20.

175 Control Council Law No 10, Art II(1)(c) included rape as a crime against humanity.

176 T Meron, 'Rape as a Crime Under International Law', 87 *AJIL* (1993), 424, p 425.

177 C Niarcho, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', 17 *HRQ* (1995), 649.

178 *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, UN Doc A/48/92-S/25341, Annex (1993), pp 20, 57; *Kamdzic* decision (11 July 1996), para 64.

179 KD Askin, 'Sexual Violence and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 *AJIL* (1999), 97, p 107.

180 ICTY Statute, Art 5(g).

181 ICTR Statute, Art 3(g).

182 *Ibid* Art 4(e).

183 The use of rape as a process of 'slow death' was recognised as a means of deliberately inflicting on a group conditions of life calculated to bring about its physical destruction, thus, constituting genocide. *Kayishema* judgment (21 May 1999), para 116.

184 *Akayesu* judgment (2 September 1998), para 598; *Prosecutor v Furundzija*, Judgment (*Furundzija* judgment) (10 December 1998), 38 *ILM* (1999), 317, para 181.

dignity whose central elements could not be captured in a mechanical description of objects and body parts.¹⁸⁵ Variations of rape, the Rwanda Tribunal held, may include acts involving the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. This conceptual and flexible definition of rape, having subsequently been followed by other ICTR Chambers,¹⁸⁶ is in contrast with the *Furundzija* judgment which, in fact, relied on a detailed description of objects and body parts.¹⁸⁷ In inquiring into the precise ambit encompassed by the term 'rape' and, specifically, whether this included 'forced oral penetration', the Trial Chamber in the *Furundzija* case highlighted the lack of a definition in international law, but found that the various relevant international instruments distinguished between 'rape' and 'indecent assault'. Unable to discover any relevant customary law or other definition based on general principles of public international or international criminal law, the judges turned their attention to general principles of criminal law common to the major legal systems. Although they ascertained that the forcible sexual penetration by the penis or similar insertion of any other object into either the vagina or anus is considered as constituting rape in all the examined legal systems, there was still some discrepancy concerning 'oral penetration', as in some countries it was classified as 'rape' while in others as 'sexual assault'.¹⁸⁸ The court ruled, nonetheless, that the principle of respect for human dignity dictated that extremely serious sexual outrage such as forced oral penetration could be classified as rape, amply outweighing any concerns the perpetrator might have of being stigmatised as a rapist rather than as a sexual assailant.¹⁸⁹ Although the *Furundzija* approach purports to be specific oriented, in reality it does not seem to differ much from the conceptual position adopted in *Akayesu*, especially since it is obliged to employ a non-specific principle to categorise forced oral penetration. The *Furundzija* judgment adopted, therefore, the following definition of the *act us reus* of rape under international law:

- (i) the sexual penetration, however slight:
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.¹⁹⁰

The *Kunarac* judgment, although agreeing with this definition, argued that element (ii) of the definition is narrower than what is required under international law, since it omits any reference to factors that do not involve some form of coercion or force, especially factors that 'would render an act of sexual penetration non-consensual or

185 *Akayesu* judgment (2 September 1998), paras 596–98.

186 *Musema* judgment (27 January 2000), para 228.

187 *Furundzija* judgment (10 December 1998), paras 175–84.

188 *Ibid*, paras 175–82.

189 *Ibid*, paras 183–84.

190 *Ibid*, para 185.

non-voluntary on the part of the victim'.¹⁹¹ Finding that the common denominator underlying general principles of law with regard to the criminalisation of rape is the violation of 'sexual autonomy', it added two further components to the *Furundzija* definition. These are that:

- (a) the sexual activity be accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal, or:
- (b) the sexual activity occurs without the consent of the victim.¹⁹²

These specified circumstances, explained the Chamber, may include situations where the victim is put in a state of being unable to resist, particular vulnerability, or incapacity of resisting because of physical or mental incapacity, or was induced into the act by surprise or misrepresentation. These factors clearly rob the victim of the opportunity for an informed or reasoned refusal.¹⁹³

To the extent that an act of rape carries the attributes of the crime of torture—that is, infliction of severe physical or mental suffering by a State official whether for ascertaining a confession, rendering of punishment, intimidation, coercion or discrimination—it may be characterised as torture.¹⁹⁴ 'Outrages upon personal dignity' as a species of 'inhuman treatment' under Art 2 of the ICTY Statute, comprising acts animated by contempt for another person's dignity and whose aim is to cause serious humiliation or degradation to the victim, can also include rape.¹⁹⁵ Physical harm in this case is not necessary as long as the humiliation has caused 'real and lasting' suffering, whose effect is based on that of a reasonable person, whom the perpetrator intended to humiliate or at least perceived this result as foreseeable.¹⁹⁶

The inherently personal and sensitive object which rape violates should not allow for the use of regular principles of evidence pertaining to other offences. This notion was reflected in the Tribunals' Statutes, which provide guarantees for the protection of victims and witnesses,¹⁹⁷ further implemented by the Rules of Procedure, which do not require corroboration in cases of sexual assault.¹⁹⁸ This influence is evident in the ICC context, where r 70 of its Rules of Procedure and Evidence provides that consent cannot be inferred by words or conduct under situations that undermined the victim's ability to give voluntary and genuine consent, nor by silence or lack of

191 *Kunarac* judgment (22 February 2001), para 438.

192 *Ibid*, para 442.

193 *Ibid*, paras 446–60; see concurring decisions, adopted in *Prosecutor v Kvočka and Others*, Trial Chamber Judgment (2 November 2001), Case No IT-98–30/1-T, para 177, and *Prosecutor v Kunarac and Others*, Case Nos IT-96–23 and IT-96–23/1-A, Appeals Chamber Judgment (12 June 2002).

194 *Furundzija* judgment (10 December 1998), para 163.

195 *Prosecutor v Aleksovski*, Judgment (*Aleksovski* judgment) (25 June 1999), Case No IT-95–14/2-A, paras 54–56. The application of this particular ruling was unrelated to acts of rape.

196 *Ibid*.

197 ICTY Statute, Art 22; ICTR Statute, Art 21. Such measures include, but are not limited to, the conduct of *in camera* proceedings and the protection of the victim's identity. M Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused', 90 *AJIL* (1996), 235; C Chinkin, 'Due Process and Witness Anonymity', 91 *AJIL* (1997), 75.

198 ICTY Rules, r 96(1); see *Prosecutor v Tadić*, Opinion and Judgment, 36 *ILM* (1997), 908, para 536.

resistance. Moreover, the victim's prior sexual life or character will not be admitted as evidence. Nonetheless, in the ICTY Rules of Procedure (r 96) the description of 'consent' as a defence is used in a non-technical sense. Thus, the burden of proof is not shifted to the accused.¹⁹⁹ Finally, the establishment of a Victims and Witnesses Unit with authority to recommend protective measures and provide counselling and support has had a significant impact in cases of rape and sexual assault.²⁰⁰

13.5 THE DOCTRINE OF SUPERIOR RESPONSIBILITY

As early as the Leipzig Trials, conducted by German authorities at the end of the First World War, military commanders have been held criminally liable for offences committed by their subordinates where they failed to prevent or punish them, although such action was materially feasible. This doctrine of imputed liability, born for and applied to military personnel, was extensively utilised in the trials following the Nuremberg Tribunal—where it did not play any part, primarily because there was ample evidence of planning and ordering by the accused—as well as in the Tokyo Tribunal.²⁰¹ It was first codified in Art 86(2) of the 1977 Protocol I, and then again in Arts 7(3) and 6(3) of the ICTY and ICTR Statutes respectively.

The doctrine of superior responsibility (also known as 'command responsibility') has not been invoked to any large degree by the prosecutor of the Tribunals, simply because there has been overwhelming evidence in most cases that the accused had taken a direct part in the offences charged. The first case to deal extensively with this type of liability was the *Celebici* case, where three persons of varying authority over a prisoner of war camp, the deputy warden, the warden and a civilian co-ordinator of the camp's affairs, were charged with a number of offences against inmates perpetrated by camp personnel. The ICTY affirmed that the doctrine applied to all persons, whether civilian or military, as long as a superior-subordinate relationship was found to exist.²⁰² Such a relationship may be established either by law (*de jure* command) or by circumstantial evidence showing actual and effective possession of control over others (*de facto* control), as is the case with influential or highly regarded individuals who by virtue of such status are able to exact adherence to their commands.²⁰³ In the *Aleksovski* case, it was erroneously held that a camp commander carries no liability with regard to offences perpetrated by non-camp personnel against camp inmates, supposedly because of a lack of superior-subordinate relationship.²⁰⁴ The truth is that, like commanders of occupied territory, the responsibility of camp commanders is not based on a superior-subordinate

199 *Kunarac* judgment (22 February 2001), para 463.

200 ICTY Rules, r 34(A)(i) and (ii).

201 WH Parks, 'Command Responsibility for War Crimes', 62 *Mil L Rev* (1973), 1; I Bantekas, 'The Interests of States Versus the Doctrine of Superior Responsibility', 838 *IRRC* (2000), 391.

202 *Prosecutor v Delalic and Others*, Judgment (*Celebici* judgment) (16 November 1998), reproduced in 38 *ILM* (1998), 57, para 354.

203 *USA v Yamashita*, 4 LRTWC 94–95; *USA v von Leeb* (*High Command* case) 11 TWC 543–44; *Elastic* judgment (3 March 2000), paras 301–02, 335; *Celebici* judgment (16 November 1998), para 354.

204 *Aleksovski* judgment (25 June 1999), paras 111, 119, 137.

relationship; rather, their authority and responsibility extends over the institution and its personnel. In this sense, subordination in the case of camp commanders is irrelevant because their primary duty is over the welfare of their prisoners.²⁰⁵

A superior's knowledge of subordinate criminality may be ascertained through direct or circumstantial evidence. In the latter case, inference of knowledge can be imputed to a superior where the existence of sufficient indication to that effect, such as the occurrence of widespread offences, would have made it apparent to a reasonable person. Treading cautiously, the *Celebici* judgment refused to acknowledge the existence under international law of a presumption of knowledge in cases of widespread criminal activity, accepting instead that such events may serve only as circumstantial evidence.²⁰⁶ Besides actual knowledge, Art 7(3) of the ICTY Statute stipulates liability for failure to act on the basis of information that a commander 'had reason to know'. This should be understood as having the same meaning as the phrase 'had information enabling them to conclude', used in Protocol I.²⁰⁷ This interpretation is furnished by the ILC's commentary to the Draft Code of Crimes regarding draft Art 6, which is itself taken from the Statutes of the two ad hoc international tribunals.²⁰⁸ The 'reason to know' standard stipulates that a commander who is in possession of information of sufficient quantity and quality so as to be put on notice of subordinate criminal activity cannot escape liability by declaring his ignorance, even if such ignorance is amply established.

Liability is incurred either when no preventive means have been employed to prevent breaches, or no punishment—depending on the exigencies of conflict and terrain this may include simply a preliminary investigation, preservation of evidence, or prosecution by competent court—is inflicted on the culprits after the offence has taken place. The criterion for the imposition of either preventive or punitive means is dependent on a commander's material, and not legal, capacity to act.²⁰⁹

13.6 ENFORCEMENT CAPACITY OF THE TRIBUNALS

Article 29 of the ICTY Statute obliges Member States of the UN to co-operate and offer judicial assistance to the Yugoslav Tribunal without undue delay. Such calls for co-operation are to be addressed in the form of binding orders or requests, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;

205 See I Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *AJIL* (1999), 573, p 587.

206 *Celebici* judgment (16 November 1998), para 384; subsequently followed in *Blaskic* judgment (3 March 2000), paras 307, 408 and *Aleksovski* judgment (25 June 1999), para 80.

207 Protocol I, Art 86(2).

208 ICTY Statute, Art 7(3) and ICTR Statute, Art 6(3). *Report of the ILC on the Work of its 48th Session*, 6 May–26 July 1996, GAOR 51st Session, Supp No 10, UN Doc A/51/10 [ILC Draft Code Commentary], p 38.

209 *Celebici* judgment (16 November 1998), para 395.

- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.

Since the ICTY Statute constitutes a Security Council enforcement measure, any order or request by a Trial Chamber for the surrender and transfer of documents or persons is *ipso facto* binding.²¹⁰ A large number of States have enacted implementing legislation in order to harmonise their obligations under Art 29 and prepare national mechanisms to cope with the legal intricacies of possible future requests.²¹¹ Some of these domestic Acts have been criticised for not offering adequate safeguards and of permitting for extradition of offences under the ICTY Statute that are not contained in the criminal law of the extraditing State.²¹² These criticisms have no legal basis since, as Warbrick correctly points out, the obligation of States to surrender accused persons found on their territory does not amount to extradition.²¹³

In response to an ICTY subpoena for the production of documents addressed to Croatia, the latter challenged the Tribunal's authority to order sovereign States, and argued that, in any event, requests of this nature must adhere to national channels of communication and should not jeopardise national security. On appeal, the Appeals Chamber in the *Blaskic* case admitted that the ICTY possesses enforcement measures neither under its Statute, nor inherently by its nature as a judicial institution.²¹⁴ It pointed out that, as a general rule, States cannot be 'ordered' by other States or international organisations. The power to 'order' under Art 29 of the ICTY Statute, however, derives its binding force from Chapter VII and Art 25 of the UN Charter, laying down an *erga omnes* obligation, which every Member of the UN has a legal interest in fulfilling.²¹⁵

After deciding on the legitimacy of addressing binding orders, the Appeals Chamber next examined the requirements²¹⁶ which such subpoena *duces tecum* orders (that is, for the production of documentary evidence) must satisfy. These were held to be: (a) the identification of specific documents, rather than categories; (b) justification of the relevance of requested documents to each trial; (c) avoidance of unduly onerous requests; and (d) allowance of sufficient time for compliance. Where a State persists to

210 *Report of the Secretary General pursuant to Security Council Resolution 808* (1993), UN Doc S/25704 (1993), paras 125–26.

211 UK UN ICTY Order 1996 SI 1996/716; Australian International War Crimes Tribunals Act No 18 (1995).

212 H Fox, 'The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal', 46 *ICLQ* (1997), 434, regarding the UK's 1996 SI.

213 C Warbrick, 'Co-operation with the International Criminal Tribunal for Yugoslavia', 45 *ICLQ* (1996), 945, p 950; see R Kushen and KJ Harris, 'Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda', 90 *AJIL* (1996), 510.

214 *Prosecutor v Blaskic*, Appeals Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber I of 11 July 1997 (*Blaskic* appeals subpoena decision) (29 October 1997) (1997) 110 *ILR* 607, para 25.

215 *Ibid*, para 26; the ad hoc tribunals have at times found it necessary to go beyond the indicative list of orders and requests identified in their respective Statutes, such as in the case of ordering all UN members to freeze former FRY President Milosevic and co-accuseds' assets abroad. *Prosecutor v Milosevic and others*, Decision on Review of Indictment and Application for Consequential Orders (24 May 1999).

216 *Blaskic* appeals subpoena decision (29 October 1997), para 32.

defy compliance, the Tribunal is endowed with inherent power to make a judicial determination regarding a State's failure to observe the court's Statute or Rules. This power also includes formal notification to the Security Council.²¹⁷ The fact that Art 29 constitutes an *erga omnes* obligation empowers all UN Members to request termination of the breach once a relevant judicial determination has been made.²¹⁸

Binding orders in the form of subpoenas cannot be addressed to State officials acting in their official capacity. It is the prerogative of each State to determine the internal organs competent to receive and carry out the order.²¹⁹ The Appeals Chamber found that it possessed unlimited authority, on the basis of its incidental jurisdiction, to issue orders to private individuals within the framework of domestic channelling procedures, unless otherwise permitted by national law or when State authorities refuse to comply by hindering this process.²²⁰ The concept of private individuals for the purposes of Art 29 also includes State agents possessing information or material obtained before they accepted office, members of peace-keeping forces, because their mandate stems from the same source as the Tribunal, and State agents who refuse to obey national authorities.²²¹ As for possible national security concerns, although every possible protective measure should be observed, the Appeals Chamber emphasised the exceptional departure from Art 2(7) of the UN Charter relating to the Security Council's authority acting under Chapter VII to interfere in the domestic affairs of States, the establishment of the ICTY being one such specific application.²²²

In a related case in 1999, the ICTY was seized with a request by the prosecutor to order the ICRC to disclose information its employees had collected in the course of their duty. The Chamber held that admissibility of evidence may be limited not only by the ICTY Statute and Rules, but also by customary international law.²²³ The ICRC was found to be an independent humanitarian organisation organised under Swiss law, generally acknowledged as enjoying international legal personality, and whose functions and tasks were directly derived from international law, that is, the Geneva Conventions and Protocols.²²⁴ Based on the object and purpose of the Geneva Conventions, the ICRC is recognised by States parties as enjoying impartiality, neutrality and confidentiality, all of which are necessary in order to carry out its mandate. The ICTY noted that widespread ratification of these treaties, taken together with relevant State acceptance, reflected a customary international law right to non-disclosure by the ICRC.²²⁵ In any event, the Trial Chamber held that Art 29 of the ICTY Statute does not apply vis-à-vis international organisations.²²⁶

217 *Ibid*, para 33.

218 *Ibid*, para 36.

219 *Ibid* paras 38, 43.

220 *Ibid*, para 55.

221 *Ibid*, paras 49–51.

222 *Ibid*, para 64.

223 *Prosecutor v Simic and Others*, Decision on the Prosecution Motion under r 73 for a Ruling Concerning the Testimony of a Witness (27 July 1999), paras 41–42.

224 *Ibid*, para 46.

225 *Ibid*, paras 72–74.

226 *Ibid*, para 78. See S Jeannot, 'Recognition of the ICRC's Long Standing Rule of Confidentiality', 838 *IRRC* (2000), 403.

13.7 RIGHTS OF THE ACCUSED

The drafters of the ad hoc tribunals have paid heed to accusations of unfair proceedings that have in the past been levelled against the framers of the Nuremberg Tribunal, ensuring that not only customary international law would constitute applicable law,²²⁷ but that fair trial guarantees would permeate trial and pre-trial proceedings. Articles 20 and 21 of the ICTY Statute guarantee such fair and expeditious proceedings to all accused. Established in accordance with appropriate procedures under the UN Charter, providing further all necessary safeguards for a fair trial, both ad hoc tribunals are properly considered as being established by law.²²⁸ Their creation does not violate the right to be tried by one's national courts (known also as *jus de non evocando*), since transfer to the jurisdiction of the ICTY does not infringe or threaten the rights of the accused.²²⁹

Although the principle of 'equality of arms' underlies ICTY judicial proceedings,²³⁰ it is also true that the accused cannot compete with the Prosecutor's resources, despite being entitled to receive both legal and financial assistance to defend themselves.²³¹ In the later stages of the *Tadic* case, the accused claimed violation of the principle of equality of arms on account of the Republika Srpska's failure to co-operate with the ICTY, thus, depriving Tadic of adequate facilities for the preparation of his defence. The Appeals Chamber interpreted this principle as obligating a judicial body to ensure that neither party is put at a disadvantage when presenting its case, so far as this applies to situations which are within the control of the court.²³² Several safeguards exist in order to protect an accused from prosecutorial abuse of authority and to remedy the imbalance in resources. Most importantly, the 'presumption of innocence' principle constitutes a fundamental right under Art 21(2) of the ICTY Statute, as does also the right against self-incrimination.²³³ The Trial Chambers must ensure that these rights are observed, even in cases where the accused seems to have waived them. The Appeals Chamber in the *Erdemovic* case overturned a previous judgment which accepted a guilty plea that did not, however, satisfy the criteria for its admission. The accused was a soldier in the Bosnian Serb Army who took part in the execution of civilians during the Srebrenica massacres, albeit under severe duress. Although he pleaded guilty to crimes against humanity he also appended the said duress as a defence. The majority of the Appeals Chamber held that duress does not

227 In this regard, cautious use of domestic legal concepts and precedent has been made. The *Aleksovski* appeals judgment (25 June 1999), Case No IT-95-14/2-A, paras 107-08, categorically stated that ICTY Chambers should observe precedent 'in the interests of certainty and predictability', but be free to depart from previous decisions for cogent reasons in the interests of justice, such as in the case of a legally incorrect decision.

228 *Tadic* appeals jurisdiction decision (2 October 1995), para 47.

229 *Ibid*, para 62.

230 ICTY Statute, Art 21(1). This principle is also satisfied through the right to adequate time and facilities for preparation of one's defence, as well as to examine witnesses under the same conditions as the prosecutor, in accordance with Art 21(4)(b) and (e) respectively.

231 *Ibid*, Art 21(4)(d).

232 *Tadic* appeals judgment (15 July 1999), paras 44, 48-52.

233 ICTY Statute, Art 21 (4)(g).

afford a complete defence and consequently found the appellant's guilty plea to have been equivocal.²³⁴ In his dissenting opinion Judge Cassese correctly argued that a guilty plea must satisfy the following requirements under international law: it must be voluntary, that is, not obtained by threats, inducements or promises; the accused must be in good mental health; the plea must be entered knowingly, that is, the accused must be fully aware of its legal implications; and the plea must not be ambiguous or equivocal, that is to say the accused cannot be allowed on the one hand to admit his or her guilt and at the same time claim to be acting under some exculpatory reason.²³⁵ The criteria established by Cassese J's dissenting opinion have subsequently been upheld by ICTY and ICTR Chambers.²³⁶

The *Barayagwiza* case is perhaps highly instructive of the prosecutor's strict duty to adhere to all aspects of the 'fair trial' principle, or face dismissal of the charges. The accused was detained in Cameroon for 19 months at the request of the prosecutor without an indictment drawn against him before being transferred to the ICTR. He endured three further months of detention from the moment of transfer until his initial appearance before an ICTR Trial Chamber. On the basis of this lengthy delay, the Tribunal held that, although the prosecution may request other countries in cases of urgency to arrest and detain suspects,²³⁷ it certainly does not enjoy unlimited power to keep a suspect under provisional detention.²³⁸ The remedy for failure to issue a prompt indictment is the release of the suspect.²³⁹ Likewise, the Appeals Chamber held that when one State applies to another for a 'detainer', that is, a special type of warrant filed against a person already in custody so as to ensure his or her availability upon completion of present confinement, the accused is in 'constructive custody' of the requesting State, while the detaining State acts as an agent of the requesting State for all purposes related to habeas corpus challenges.²⁴⁰ Thus, despite lack of physical control the appellant was in ICTR custody because his detention in Cameroon was instigated upon request of the prosecutor. Even if not deemed to be in custody on behest of the ICTR, the appellant's detention was impermissibly lengthy.²⁴¹ The right to be tried without undue delay was found to have been violated by the 96 day interval between the accused's transfer and his initial appearance before a Trial Chamber.²⁴²

234 *Prosecutor v Erdemovic*, Appeals Judgment (7 October 1997) (*Erdemovic* appeals judgment), para 19.

235 *Erdemovic* appeals judgment (7 October 1997). Separate and dissenting opinion of Judge Cassese, para 10. Cassese J convincingly argued that in exceptional circumstances duress can be urged in defence to crimes against humanity or war crimes, paras 11–49.

236 *Prosecutor v Serushago*, Judgment (5 February 1999), Case No ICTR-98–34-S, para 1.

237 ICTY Rules, r 40.

238 *Barayagwiza v Prosecutor*, Appeals Decision (*Barayagwiza* decision) (3 November 1999), para 46.

239 *Ibid.*

240 *Ibid.*, paras 56–57; lack of an arrest warrant or evidence demonstrating the accused's responsibility over an offence is not required at the pre-trial stage of requesting States to detain a suspect, since the prosecutor's request will be determined in accordance with the requested State's domestic law. *Prosecutor v Kajelijeli*, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record (8 May 2000), Case No ICTR-98–44-I, para 34.

241 *Barayagwiza* decision (3 November 1999), paras 58, 61, 67, 100.

242 *Ibid.*, para 71.

The Appeals Chamber classified this case of prosecutorial incompetence, resulting in a lengthy detention and delay in trial, as 'abuse of process'. This concept comprises proceedings which although lawfully initiated are thereafter continued improperly or illegally in pursuance of an otherwise lawful process, such as resort to kidnapping. Under such circumstances, courts or tribunals enjoy judicial discretion to terminate proceedings, where it is felt that further exercise of jurisdiction in light of serious violations of the accused's rights would prove detrimental to the court's integrity.²⁴³ Such discretion, the Tribunal remarked, may be relied upon where the delay has made a fair trial impossible, or in the particular circumstances of a case, proceeding to the merits would contravene the court's sense of justice due to pre-trial impropriety.²⁴⁴ Barayagwiza's release understandably sparked vehement Rwandan condemnation, but it must be acknowledged that it was fully justified, reflecting an international tribunal that respects fundamental rights and the rule of law. The Appeals Chamber reconvened to examine the prosecutor's request for reconsideration of the release order on the basis of new information that could not have been submitted in 1999. In its Decision of 31 March 2000, the Appeals Chamber admitted the prosecutor's evidence as 'new', and held that these new facts diminished the role played by the failings of the prosecutor, as well as the intensity of the violation of the accused's rights. It, thus, revoked its earlier release and reparation order on the basis that this was disproportionate in relation to the prosecutor's role in the continued detention of the accused.

The protection of the rights of the accused has not caused neglect for safeguarding victims and witnesses. This has been made possible by a variety of measures, such as the non-disclosure of identities,²⁴⁵ assignment of pseudonyms,²⁴⁶ ordering of closed sessions,²⁴⁷ or the giving of testimony through image or voice altering devices and closed circuit television,²⁴⁸ or through video conference link.²⁴⁹ Furthermore, a Code of Professional Conduct for Defence Counsel was adopted by the ICTY Registrar on 12 June 1997, in an attempt to limit harassment and intimidation of victims and witnesses.²⁵⁰

243 *Ibid*, para 74.

244 *Ibid*, paras 77, 101.

245 ICTY Rules, rr 69(A) and 75(B)(i)(a) and (b).

246 *Ibid*, r 75(B)(i)(d).

247 *Ibid*, rr 75(B)(ii) and 79.

248 *Ibid*, r 75(B)(i)(c). This is not a novel conception, as some States in the US allow it. The US Supreme Court held in *Maryland v Craig*, 497 US 836 (1990) that closed circuit television depositions do not violate the sixth amendment right to confrontation where a court finds it necessary to protect a child witness from psychological harm.

249 *Ibid*, r 71(D).

250 See I Bantekas, 'Study on the Minimum Rules of Conduct in Cross-Examination to be Applied by the International Criminal Tribunal for the Former Yugoslavia', 50 *Rev Hel* (1997), (205).

THE PERMANENT INTERNATIONAL CRIMINAL COURT

14.1 INTRODUCTION

Following the adoption of the 1948 United Nations (UN) Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)¹ the General Assembly also invited the International Law Commission (ILC) 'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide'.² The ILC studied this question at its 1949 and 1950 sessions and concluded that a court of that nature was both desirable and possible.³ Subsequent to the ILC's report the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee first prepared a draft statute in 1951⁴ and a revised draft statute in 1953,⁵ but the Assembly decided to postpone consideration of the matter pending the adoption of a definition on aggression. Despite periodical consideration of the issue since 1953, it was in December 1989, in response to a letter addressed to the UN Secretary General by Trinidad and Tobago regarding the establishment of an international court with jurisdiction over the illicit trafficking in drugs, that the General Assembly once more requested the ILC to resume work on the creation of an international criminal court.⁶ Following the shocking first reports from the armed conflicts in the former Yugoslavia and the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the General Assembly urged the ILC to elaborate a viable statute as a matter of priority. This culminated in the production of a draft statute in 1994.⁷ In order to consider major substantive issues arising from the draft statute the General Assembly created an Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995.⁸ After consideration of the Ad Hoc Committee's work the General Assembly established the Preparatory Committee (Prep Com) on the Establishment of an International Criminal Court.⁹ The task of the Prep Com, unlike its predecessor, was to formulate a generally acceptable instrument and not simply to assess the viability and preliminary concerns regarding such a project, for eventual submission to a

1 GA Res 260(II) (9 December 1948).

2 This was in accordance with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Art VI, 78 UNTS 277, which provided for the establishment of an international penal tribunal with jurisdiction over acts of genocide.

3 *Report of the ILC on the Work of its Second Session* (5 June-29 July 1950) UN GAOR, Fifth Session, Supp No 12, UN Doc A/1316 (1950), para 140.

4 UN GAOR, Seventh Session, Supp No 11, UN Doc A/2136 (1952).

5 UN GAOR, Ninth Session, Supp No 12, UN Doc A/2625 (1954).

6 GA Res 44/39 (4 December 1989).

7 J Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 *AJIL* (1995), 404.

8 See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Session, Supp No 22, UN Doc A/50/22 (1995); see V Morris and CM Bourloyannis-Vrailas, 'The Work of the Sixth Committee at the Fiftieth Session of the UN General Assembly', 90 *AJIL* (1996), 491.

9 GA Res 50/46 (11 December 1995).

diplomatic conference. Upon concluding its work the Prep Com, having met six times since 1996, asked the General Assembly to convene a diplomatic conference for the purposes of finalising the statute in treaty form and adoption by the international community. A heavily bracketed draft treaty—the brackets indicating unresolved issues and details—was laid before a conference of plenipotentiaries for negotiation in July 1998 in Rome, where, after extremely intense negotiations and compromises on all sides, the International Criminal Court (ICC) Statute was signed on 17 July 1998.¹⁰ One hundred and twenty States voted in favour of the treaty, seven voted against (US, China, Libya, Iraq, Israel, Qatar, Yemen) and 21 abstained. Following the Rome Conference in the summer of 1998, the US proclaimed that it would not sign the Statute. However, after fears that the country would isolate itself from the proceedings of the ICC Preparatory Commission and create a bad international image,¹¹ the US finally signed the text of the Statute on 31 December 2000, but then withdrew its signature on 6 May 2002, making it clear that it had no intention of ratifying this instrument. This was not a symbolic act, since it connoted that the US was no longer bound to respect the object and purpose of the treaty, and as will become clear below in this chapter, from that moment onwards it openly adopted a hostile attitude towards it. Following the required sixtieth ratification, the ICC Statute finally entered into force on 1 July 2002.

Unlike the two *ad hoc* Tribunals for Yugoslavia and Rwanda, the ICC is a permanent international criminal court established by its founding treaty.¹² It has been endowed with international legal personality¹³ and, although it is an independent judicial institution, the drafters of the ICC Statute wished it to be related through an agreement with the UN.¹⁴ This is desirable because the Security Council plays a significant role in referring cases to the court and there is, further, a need to assert the Council's absolute authority over issues concerned with international peace and security, and thus maintain coherency in that field. There is no financial relationship between the ICC and the UN, except in cases where the court's expenses have been incurred as a result of Security Council referrals.¹⁵ All other expenses are to be borne from assessed contributions made by States parties, or voluntary contributions.¹⁶ The Preparatory Commission, established as a result of the 1998 Rome Conference, worked, *inter alia*, on a relationship agreement between the ICC and the UN. This provides for mutual respect and recognition by the UN of the ICC's international legal personality, and accordingly respect by the ICC of the UN's role in the maintenance of international peace and security, envisaging close co-operation between the two institutions. The draft agreement was approved by the Assembly of States Parties (ASP) in September 2002, but it will not be opened for signature until such time as it is approved by the UN General Assembly.

The court consists of a judicial, prosecutorial and administrative (registry) branch. The judicial section shall comprise 18 full time judges, which are to be elected for a

10 37 ILM (1998), 999.

11 DJ Scheffer, 'Staying the Course with the International Criminal Court', 35 *Cornell ILJ* (2002), 47.

12 ICC Statute, Art 1.

13 *Ibid*, Art 4(1).

14 *Ibid*, Art 2.

15 *Ibid*, Art 115(b).

16 *Ibid*, Arts 115(a) and 116.

non-renewable nine year term by the ASP.¹⁷ Unlike the ad hoc tribunals, there is a requirement that at least nine judges possess competency in criminal proceedings while a minimum of five judges must be experts in relevant areas of international law, such as international humanitarian law and human rights. Moreover, both the pre-trial and trial chambers are to be composed predominately of judges with criminal law experience.¹⁸ Under Art 43(4) the judges are also empowered to elect the registrar for a five year term, whose office is open to re-election only once. As will be shown below the prosecutor is an independent organ of the Court. He or she may designate appropriate deputy prosecutors whose candidacy must be approved by the ASP. They shall serve on a full time basis.¹⁹

The ICC enjoys subject matter jurisdiction over four core offences: genocide, crimes against humanity, war crimes and aggression.²⁰ No consensus was reached during the Rome diplomatic conference on a definition for the crime of aggression, which will remain dormant until such time as the ASP approves a definition that is consistent with the Charter of the UN. Before we proceed to examine these offences in detail, the regulation of the court's jurisdiction and admissibility procedures will be first analysed.

14.2 JURISDICTION AND ADMISSIBILITY

In accordance with Art 34 of the 1969 Vienna Convention on the Law of Treaties,²¹ international agreements are capable of binding only contracting parties. They do not bind third States without their consent. Practice suggests, however, that multilateral treaty arrangements may on the basis of political or legal reality impose certain constraints on the behaviour of third States. These constraints do not result from legal obligations, but accrue instead from the formation of a broad international consensus stemming from multilateral agreements that possess a 'constitutional' nature.²² Although this is true in the case of the UN, if this is also true with regard to the ICC, this means that the ICC, as an international legal entity, has the capacity through its Statute to affect States parties as well as non-parties, albeit in expressly defined and specifically limited circumstances. This result was confirmed by the International Court of Justice (ICJ) in its Advisory Opinion in the *Reparations* case, where it held that universal intergovernmental organisations possess 'objective international legal personality, and not merely personality recognised by [their members] alone'.²³

Under Art 12 of its Statute, the ICC's jurisdiction over a case or 'situation' may be triggered in any of the following cases; either where a situation or offence takes

17 *Ibid*, Art 35. If the workload of the court, however, does not justify the full time engagement of all 18 judges, the Presidency of the Court may decide from time to time to what extent the remaining judges shall be required to serve on a full time basis.

18 *Ibid*, Art 36.

19 *Ibid*, Art 42.

20 *Ibid*, Art 5.

21 1155 UNTS 331.

22 GM Danilenko, 'The Statute of the International Criminal Court and Third States', 21 *Mich J Int'l L* (2000), 444, p 448.

23 *Reparation for Injuries Suffered in the Service of the UN* (1949) ICJ Reports 174, p 185.

place in or by a national of a State party;²⁴ where the territorial State or the State of the nationality of the accused are parties to the Statute;²⁵ or where the Security Council acting under Chapter VII of the UN Charter refers a situation to the ICC prosecutor.²⁶ Whereas, under Art 12(1), a party to the Statute is subject to the automatic jurisdiction of the court, non-parties under para 2 (that is, the territorial State or the State of the accused's nationality) can accept ICC jurisdiction with regard to a specific case or situation by lodging a declaration to that effect.²⁷ The US vehemently opposed the type of jurisdiction envisaged under Art 12(2) because, in the opinion of its delegates, this provision violates the rule that treaties can only bind contracting parties.²⁸ This is a valid legal argument, since Art 12(2) establishes ICC jurisdiction if either the territorial or the State of nationality of the accused is a party to the court's Statute or has made a declaration under Art 12(3), despite the fact that one of these States may not be a party and be, thus, adversely affected. A relevant example would be where a US national—the US not being a party to the court's Statute—is accused of having committed an offence in State B, which is either a party to the Statute or has lodged a declaration, and by succumbing to the ICC's authority, thus gives the ICC jurisdiction over the accused. In this case, the US, although not a party to the ICC Statute, is nonetheless directly affected by its application. Justification for this provision cannot be substantiated with regard to the principles of territorial or active personality jurisdiction, because these are principles pertaining solely to the judicial competence of individual States and find no application vis-à-vis an international tribunal, whose competence is only delineated by its statute. Rather, jurisdiction under Art 12(2) is based on the court's character as a universal institution whose legal personality necessarily affects the interests of third States. Moreover, the court's jurisdiction is curtailed by a plethora of procedural and substantive safeguards against possible abuse. Article 12(2) is clearly inconsistent with treaty law, but it is not entirely clear whether it is also inconsistent with contemporary developments in international criminal justice, which have eroded the right of States to freely invoke the principle of 'domestic jurisdiction' in order to shield their nationals from serious human rights violations. After the adoption of the ICC Statute, the US concluded a number of bilateral treaties with other States, which precluded investigation and prosecution of US nationals accused of offences falling within the jurisdiction of the ICC. These so called 'impunity agreements' were signed among others by Romania, Tajikistan and Israel.²⁹ As far as Member States are concerned, these agreements violate their obligations under Art 86 of the Statute to co-operate with the court in the investigation and prosecution of alleged offenders. These States have argued that Art 98(2) of the Statute does not oblige them to adhere to ICC surrender requests that violate existing treaty obligations, thus legitimising the 'impunity agreements'. This is fallacious, since Art 98(2) concerns Status of Forces Agreements (SOFAs), ensuring that they will not be nullified—that is, that the sending State will retain

24 ICC Statute, Arts 12(1) and 14(1).

25 *Ibid.*, Art 12(2).

26 *Ibid.*, Art 13(b).

27 *Ibid.*, Art 12(3).

28 DJ Scheffer, 'The United States and the International Criminal Court', 93 AJIL (1999), 12, p 18.

29 Amnesty International (AI), *International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes*, AI Doc IOR/40/025/2002 (2 September 2002).

criminal jurisdiction over offences committed by its personnel on the territory of the host State—but does in no way grant a licence for impunity, as this would violate the object and purpose of the ICC Statute.

Of even more limitation to the ICC prosecutor's competence, and strong US signal of opposition to the court's aim and purpose, was the adoption of Security Council Resolution 1244, on 12 July 2002. The short history of this Resolution can be traced to 19 June 2002 when the US threatened to veto the continuation of the mandate of the UN Mission in Bosnia and Herzegovina (UNMIBH), because US troops could potentially be prosecuted by the ICC under Art 12(2) of its Statute.³⁰ Following several Council meetings concerning the future of UNMIBH, the Council decided to adopt Resolution 1244 under Chapter VII of the UN Charter, para 1 of which requested that, in accordance with Art 16 of the ICC Statute:

If a case arises involving current or former officials or personnel from a contributing State not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, [then the ICC] shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.

The Resolution went on to say that such deferral may be extended for further twelve month periods by the Council, and that UN Member States must take no action inconsistent with para 1 and their international obligations. This Resolution is worrying in the sense that, besides the impunity it grants, it implies that the application of justice constituted under the Rome Statute represents a threat to international peace and security!

One of the safeguards that should alleviate some of the mistrust and apprehension is the principle of complementarity, which is found in the Statute's preamble and its Art 1, which establishes that the court may assume jurisdiction only when national legal systems are genuinely unable or unwilling to do so, or where an accused has already been tried for the same offence.³¹ In determining unwillingness in a particular case, the court shall consider whether national proceedings are intended to shield the accused or avoid impartial prosecution.³² The establishment of truth commissions whose purpose is to avoid criminal proceedings would generally be incompatible with a party's obligation to diligently prosecute under the ICC Statute. The granting of amnesties in accordance with national law does not release a person from criminal responsibility under international law. A determination by the court of either shielding or lack of impartiality can be challenged by the accused, the State which has commenced or completed investigation of the case, or a State from which acceptance of jurisdiction is required under Art 12(2).³³ Thus, unlike the ICTY and International Criminal Tribunal for Rwanda (ICTR), national courts enjoy primacy in cases of concurrent jurisdiction with the ICC, but, clearly, this is neither unlimited nor without challenge from the prosecutor and other States with concurrent jurisdiction or custody of the accused. In fact, there is no requirement that the custodial State should even consent to the jurisdiction of the ICC where an order for

30 UN Press Release SC/7430 (21 June 2002).

31 ICC Statute, Art 17(1).

32 *Ibid*, Art 17(2).

33 *Ibid*, Art 19(2).

the accused's surrender has been issued.³⁴ Another safeguard is contained in Art 98, which recognises that compliance with an ICC order for surrender should not violate the custodial State's obligations under international law. Article 98(1) requires the third State's express waiver of State or diplomatic immunity over persons and property situated in a country that has accepted the court's jurisdiction.³⁵ Similarly, para 2 requires the consent of the sending State in all cases of ICC surrender orders with regard to accused persons forming part of status-of-forces agreement contingents, and stationed at the time of the order in the receiving State.

Although the concept of 'universal' jurisdiction in this treatise is reserved for national judiciaries, it is worth mentioning a German proposal that the ICC be entitled to try anyone surrendered to it, irrespective of whether that person is a national of a State party or of a relevant declaration having been made. This approach, Germany contended, was consonant with the practice of national courts under customary law.³⁶ Although Art 12 of the Statute refutes such universal jurisdiction, it recognises a single exception where the Security Council itself refers a situation under Chapter VII of the UN Charter. That the ICC assumes primacy upon Security Council referral is evident from the wording of Art 12(2), which specifically excludes Security Council referrals from the general requirement of consent to which the territorial or the State of nationality is entitled.³⁷ In any event, if the Security Council were to adopt a resolution referring a case to the court in which it expressly or impliedly excluded the exercise of jurisdiction by national courts, the ICC would enjoy primacy in accordance with Art 103 of the UN Charter.

The court's jurisdiction can be triggered by referral from a State party³⁸ or the Security Council³⁹ and, also, *proprio motu* by the prosecutor.⁴⁰ To alleviate the concerns of many States regarding possible abuse of the prosecutor's independent right of referral, a variety of mechanisms serve to counterbalance his or her authority. Article 15(1) demands that the prosecutor submit a case to a pre-Trial Chamber for authorisation of an investigation, only if there exists a 'reasonable basis' to proceed with the investigation. The pursuance of an investigation may be refused not only where a reasonable basis is lacking, but also where a situation is considered inadmissible under Arts 17–19 (that is, breach of lawful complementarity, *non bis in idem*, and where it is not of sufficient gravity to justify action by the court). Nonetheless, whether a case is deferred to national authorities or pending a ruling by the pre-Trial Chamber on the court's jurisdiction, the Prosecutor is not prevented from seeking authority to take necessary measures for preserving both material and

34 D McGoldrick, 'The Permanent International Criminal Court: An End to the Culture of Impunity?', *Crim LR* [1999], 627, p 642.

35 Presumably, State officials who cannot claim immunity *ratione personae* must try to prove that they enjoy immunity *ratione materiae* under customary international law. *Op cit*, Danilenko, note 22, p 472.

36 UN Doc A/AC 249/1998/DP2 (1998).

37 For a contrary argument, see M Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *AJIL* (1999), 22, p 28.

38 ICC Statute, Arts 13(a) and 14(1).

39 *Ibid*, Art 13(b).

40 *Ibid*, Art 15(1).

oral evidence which could subsequently be impaired or lost.⁴¹ In the event that a situation is deferred to the jurisdiction of a national court, the prosecutor retains authority to request periodical progress reports of investigations and judicial proceedings, as well as review national investigations at any time a significant change of circumstances has occurred, indicating a State's unwillingness or inability to proceed.⁴² The Security Council acting under Chapter VII of the UN Charter may also defer investigation or prosecution of a situation for a period of 12 months, which is renewable under the same procedure.⁴³ Indeed, Art 16 could work against Chinese and US desire to dominate ICC referrals,⁴⁴ as the other permanent members of the Security Council can effectively use their veto power against such resolutions.

14.3 SUBJECT MATTER JURISDICTION

As already explained, the ICC enjoys subject matter jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression. Although the inclusion of other treaty crimes, especially drug-trafficking, terrorism and offences against UN and associated personnel, was contemplated, both before and during the Rome conference, they were finally excluded since it was felt that investigation of drug-trafficking and terrorism involved sensitive and long term planning operations, best suited for domestic authorities, while there does not yet exist an international definition of terrorism.⁴⁵ Similarly, the Convention on the Safety of United Nations and Associated Personnel⁴⁶ came into force in early 1999. Therefore, in order to salvage the Statute and avoid time consuming revisions detracting from more serious issues, only the four aforementioned core crimes were included. There is provision in Arts 121 and 123 for a future review of the list of crimes contained in Art 5, which may encompass possible amendment to the existing offences or the addition of new ones.

The Statute is applicable only to natural persons, and then only if they were 18 years of age at the time of the alleged offence.⁴⁷ The gravity of the four offences has further necessitated their exclusion from any statute of limitations.⁴⁸ Let us now examine each of the prescribed crimes in more detail.

14.3.1 The crime of aggression

The absence of an acceptable binding definition of 'crimes against peace', since that offence first appeared as Art 6(a) of the Nuremberg Charter, coupled with resistance from the permanent members of the Security Council over its definition and identification by another body, meant that the definition of aggression for the

41 *Ibid*, Arts 17(6) and 19(8).

42 *Ibid*, Art 18(5) and (3).

43 *Ibid*, Art 16.

44 *Op cit*, Scheffer, note 28, p 13.

45 *Op cit*, Arsanjani, note 37, p 29.

46 34 ILM (1995), 482.

47 ICC Statute, Art 26.

48 *Ibid*, Art 29. This is in accordance with the 1968 Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Art 1, 754 UNTS 73.

purposes of the Statute had become too cumbersome to negotiate in time. Clearly, an appropriate definition under Art 5(2) of the Statute would need, as is clearly required for reasons of coherency, to take cognisance of the UN Charter, but it is less clear whether this obligation extends beyond Arts 2(4) and 51 of the Charter to encompass also Security Council determination of an act of aggression under Art 39 of the Charter. Whilst it would be prohibited to implicitly or explicitly amend the UN Charter when defining any aspects of the crime of aggression, the referral of acts of aggression as international offences by a concerned State or the prosecutor, especially in cases where the Security Council is blocked by veto, does not necessarily amend the UN Charter, nor does it usurp Security Council powers. Let us consider these issues in light of developments a little prior to and subsequent to the Nuremberg process.

A century apart, both Napoleon and Kaiser William II of Germany were arraigned for international offences akin to crimes against peace. In the case of the Kaiser, Art 227 of the 1919 Peace Treaty of Versailles contemplated his arraignment on the basis of initiating war in violation of international morality and the sanctity of treaties. Whereas Napoleon was exiled twice, the Kaiser fled prosecution. As already explained in Chapter 12, no international instrument between 1919 and 1939 contained provision to the effect that individuals would incur liability for acts of aggression. Thus, the inclusion of crimes against peace in the Nuremberg Charter, and later in the International Military Tribunal for the Far East (IMTFE) Charter, was criticised as violating the principle *nullum crimen sine lege*. Article 6(a) of the Nuremberg Charter stipulated individual criminal responsibility for crimes against peace, constituted of the following elements:

Planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

The Nuremberg Tribunal held that Germany had violated a number of bilateral anti-aggression pacts, as well as other multilateral agreements prohibiting the use of armed force, especially the 1928 Kellogg-Briand Pact.⁴⁹ From a legal point of view, however, neither the bilateral agreements nor the Kellogg-Briand Pact stipulated individual criminal responsibility, merely State responsibility. Therefore, and in accordance with the *nullum crimen sine lege* rule, no one could be tried for crimes against peace, since they had not been recognised as offences in international law prior to the enactment of the Nuremberg Charter. The Tribunal brushed aside the *nullum crimen sine lege* objections to the charge, by relying on the unlawfulness of the force used by Nazi Germany and by making an analogy with the 1907 Hague Convention IV, which it found to stipulate personal responsibility despite the absence of an express provision to that effect. Nonetheless, the allocation of responsibility to individual defendants reflected the precise and actual function of each accused in the commission of the ingredients of crimes against peace under the Charter.⁵⁰ The inclusion of the crime of aggression sparked two dissenting opinions by Pal and Roling JJ in the IMTFE judgment.

⁴⁹ 94 LNTS 57.

⁵⁰ C Antonopoulos, 'Whatever Happened to Crimes Against Peace?', 6 *Journal of Conflict & Security Law* (2001), 33, p 38.

Despite the inclusion of crimes against peace in the set of the Nuremberg Principles, adopted by the General Assembly in 1946,⁵¹ the crime of aggression has not featured in any legally binding instrument since. The explanation is simple. Unlike war crimes, crimes against peace and genocide which require that the perpetrator commit the *actus reus* of the offence, crimes against peace require that an act typically associated with the functions of a State must first occur; namely, an act of aggression in violation of the rules of international law dealing with the use of force.⁵² If this is so, then the criminality of aggression depends to a large extent on the legal definition of armed force under international law, which itself is a controversial matter. In brief, Art 2(4) of the UN Charter prohibits all instances of armed force by one State against another, save for two express exceptions. The first concerns force as a means of self-defence, in accordance with Art 51 of the Charter, whereas the second relates to authorisation by the Security Council to use force under Art 42 of the Charter. Art 51 permits the use of armed force only in cases where a State is under an 'armed attack', clearly suggesting that an armed attack constitutes a significant amount of force against the defending State. Controversies arise from the various interpretations of the concept of self-defence, as enshrined in Art 51, and specifically the precise meaning of the word 'Inherent', describing the right of self-defence. Some States argue in favour of the validity of pre-Charter use of force law, such as anticipatory self-defence, humanitarian intervention, and others, whereas the majority of States adhere to a restricted interpretation of Art 51, as allowing for no other exceptions. This controversy in the scope of and the precise definition of the permissible exceptions to the use of force by States has necessarily imposed a stalemate in the construction of an internationally agreed definition of aggression as a crime. This ambiguity, both in terms of permissible uses of force as well as the contours of the crime of aggression, was not fully resolved even by the General Assembly's Definition of Aggression of 1974, despite the fact that it called a 'war of aggression' an international crime.⁵³ Antonopoulos correctly argues that the 1974 Definition was intended to serve as a guide for the Security Council in determining acts of aggression, and therefore did not precisely elaborate who and under what particular circumstances an individual would incur personal liability as a result. It did, however, strongly suggest that the criminality of aggression is to be sought at the level of State action.⁵⁴ It is true to say that the 1974 Definition gave a satisfactory construction as regards the term 'aggression', but not one that satisfies the needs of criminal law in assessing criminal responsibility.⁵⁵

The assessment of culpability regarding the crime of aggression necessitates, as already stated, determination of aggression undertaken on behalf of a State. It is not entirely obvious that this task befalls the ICC. Rather, the ICC Preparatory Commission has put forward a proposal whereby the ICC will defer the task of determining the existence of aggression to the UN system for a certain period of

51 GA Res 95(1) (11 December 1946).

52 *Op cit*, Antonopoulos, note 50, p 37.

53 GA Res 3314(XXIX) (14 December 1974).

54 *Op cit*, Antonopoulos, note 50, p 39.

55 GA Res 2625(XXV) (24 October 1970), confirmed in Principle I that a war of aggression is a crime against peace entailing individual responsibility.

time, after the lapse of which the ICC would be seized of the matter.⁵⁶ It is clear that the allocation of responsibility for the crime of aggression incorporates the following elements: (a) the unlawfulness of a specific resort to force of some magnitude; and (b) only those persons that played a direct, actual and influential role in the aggression and the decision making behind it, in accordance with the Nuremberg principles and judgment. Thus, the mere fact that someone was a member of the government or a high-ranking official in the armed forces does not *ipso facto* render that person culpable of the offence.

14.3.2 Genocide

Article 6 of the Statute has been taken *verbatim* from Art II of the 1948 Genocide Convention, receiving a quick and unanimous consensus.

14.3.3 Crimes against humanity

The definition of this offence under Art 7 is different in a number of respects from that found in the statutes of the ICTY and ICTR, as a result of a compromise in accommodating varying demands regarding the threshold standard for this offence. The general threshold for crimes against humanity is set out in Art 7(1), comprising any act contained in an exhaustive list of offences when committed 'as part of a widespread or systematic attack' against any civilian population. Up to this point the definition is identical to the jurisprudence of the ad hoc Tribunals. However, since it was agreed by all participants at the Rome Conference that not every inhumane act should amount to a crime against humanity, the concept of an 'attack' in the ICC Statute is elaborated in Art 7(2)(a), meaning a 'course of conduct involving the multiple commission of acts pursuant to or in furtherance of a State or organisational policy to commit such attack'. To substantiate a charge of crime against humanity, the Prosecutor would have to demonstrate that an attack against a civilian population involves multiple acts and a policy element, further showing the attack to be either widespread or systematic.⁵⁷ The prosecutor can choose to prove either the 'widespread' or 'systematic' element. The *mens rea* for crimes against humanity in Art 7(1) requires that the perpetrator acts with knowledge that his or her particular offence was part of an overall widespread or systematic attack against a civilian population. While the perpetrator must be aware of the overall attack, it is also necessary that the elements of the particular offence be proven. For example, a person killing two civilians from group A is guilty for a crime against humanity only if it can be proven that the *mens rea* elements for the offences of extermination or murder have been satisfied, and also that either of these offences was committed with the knowledge that group A was specifically targeted by the perpetrator's affiliate organisation. Likewise, and following the jurisprudence of the ad hoc tribunals, crimes against humanity can be committed by State entities and their agents, as well

⁵⁶ ICC Doc PCNICC/2000/L.3/Rev.1 (12–30 June 2000), pp 10–12.

⁵⁷ D Robinson, 'Defining Crimes Against Humanity at the Rome Conference', 93 *AJIL* (1999), 43, p 51.

as by non-State entities. However, unlike the ICTY and ICTR Statute Art 7 of the ICC Statute does not require a nexus to an armed conflict, or a discriminatory intent.

The list of offences included in Art 7 comprises certain acts which had in the past received recognition as crimes against humanity, and whose status was reaffirmed in the ICC Statute as depicting customary law. Of particular significance are the offences of 'apartheid' and 'enforced disappearance', both of which have been identified as crimes against humanity in earlier instruments. 'Apartheid' is defined in Art 7(2)(h) as:

...inhumane acts [intentionally causing great suffering, or serious injury to body or to mental health] committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

This definition and characterisation as a crime against humanity is consistent with Art I of the 1973 Convention on the Prevention and Suppression of Apartheid,⁵⁸ as well as Art 1(b) of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Although apartheid could, and does in the context of the ICC, fall within the ambit of 'inhumane acts' of Art 7(1)(k), it was purposely included as an individual offence in order to reaffirm universal condemnation of this practice.⁵⁹ Similarly, the enumeration of 'enforced disappearances', reflecting policies exercised mainly by South American dictatorial regimes, echoes vociferous condemnation already found in international instruments and the case law of international human rights judicial organs.⁶⁰ It is defined in Art 7(2)(i) as:

...the arrest, detention or abduction of persons by or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The inclusion of 'persecution' in the list of enumerated acts contained in Art 7 of the ICC Statute follows well established precedent stemming from both Nuremberg and the ad hoc tribunals. It is defined, however, for the first time in para 2(g) as the 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. Many delegates at the Rome conference expressed concern that this provision could be used to criminalise all forms of discrimination. To alleviate such fears it was finally agreed that persecution as a crime against humanity in the ICC context refers only to extreme forms of discrimination with a clearly criminal character. Furthermore, persecution

58 1015 UNTS 243.

59 See RC Slye, 'Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission', 20 *Mich J Int'l L* (1999), 267.

60 *Velasquez Rodriguez* case (Merits) (29 July 1988) (1994) 95 ILR 232; UN Human Rights Committee, General Comment No 20, regarding ICCPR, Art 7, para 15, UN Doc CCPR/C/21/Rev 1/Add 3 (7 April 1992); see GA Res 47/133 (18 December 1992), entitled Declaration on the Protection of all Persons from Enforced Disappearances; the preamble to the 1994 Inter-American Convention on the Forced Disappearance of Persons affirms that the systematic practice of forced disappearances constitutes a crime against humanity. Reprinted in 33 ILM (1994), 1259.

can only be characterised as a crime against humanity if it is connected to any of the other 10 enumerated acts articulated in Art 7 or any other offence within the court's jurisdiction (that is, war crimes, genocide, or aggression), notwithstanding that such nexus is required neither by the ICTY and ICTR, nor customary law.⁶¹ There is no need to prove that the connected acts themselves were committed on a widespread or systematic scale; however, if found to be connected to severe criminal persecution, this, in effect, furnishes evidence of either widespread crimes or a particular policy. The ICC Statute includes 'political, racial, national, ethnic, cultural, religious and gender' in its list of discriminatory grounds, as well as 'other grounds that are universally recognised as impermissible under international law'.⁶² The latter, although an open-ended sub-provision, introduces a high threshold category of acts, whose existence the future court can ascertain only if they are clearly established under the competent sources of international law.

The ambit of offences of a sexual nature comprising crimes against humanity has been considerably expanded in comparison to the ICTY and ICTR, including besides rape, 'sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity'.⁶³ Fears from western countries that reference to 'forced pregnancy' might be interpreted as affecting national laws relating to the right to life of the unborn or that of a mother regarding the termination of her pregnancy were removed with the addition of para 2(f). Similarly, to allay concern of Moslem countries that the definition of torture might affect their practice of corporal punishment, para 2(e) excludes pain or suffering arising from lawful sanctions.

14.3.4 War crimes

Article 8, dealing with war crimes, is the longest and most elaborate provision in the Statute. Undoubtedly, it is influenced to a large extent by the precedent of the Yugoslav and Rwanda Tribunals and the subsequent consolidation of the laws of war relating to non-international armed conflicts, particularly as elaborated in the early jurisprudence of the ICTY. However, and despite the unequivocal customary nature of the 1949 Geneva Conventions, some key States were not parties to the two 1977 Additional Protocols, nor to treaties regulating the use of land mines and nuclear weapons. This became an insurmountable impediment in the incorporation of relevant offences and, to a large degree, attempts to do so were finally abandoned for a future review conference of the ICC Member States. In order to accommodate conflicting positions, Art 8 was structured in four sections, namely grave breaches, war crimes under Protocol I, violations of common Art 3 of the 1949 Geneva Conventions and breaches under Protocol II, although the final draft does not

61 *Op cit*, Robinson, note 57, pp 53–55.

62 ICC Statute, Art 7(1)(h). The term 'gender' in Art 7(3) refers to 'the two sexes, male and female, within the context of society'. The inclusion of gender related crimes acknowledges the distinction between sex and gender, the latter referring to socially constructed rather than biological differences. See *Report of the Secretary General on Integrating the Human Rights of Women throughout the UN System*, UN Doc E/CN4/1997/40 (1996), para 10.

63 *Ibid*, Art 7(1)(g).

maintain such distinct divisions. As the court is designed to address the most serious international offences, it is only natural that violations of such an egregious character, committed as part of a plan or policy or as part of a large scale commission, will be entertained at its docket, although the degree of violence is not itself a separate jurisdictional requirement.⁶⁴

Article 8(2)(a) penalises grave breaches of the 1949 Geneva Conventions, which as already noted, include offences of a serious nature committed against persons and property protected under the Conventions when taking place in international armed conflicts.

Sub-paragraph (2)(b) supplements the grave breaches provision by incorporating other serious offences under international humanitarian law applicable in international armed conflicts. The qualification that such offences lie within the 'established framework of international law' means that individuals incur liability as long as they violate certain principles underpinning the laws of war, such as those relating to proportionality and military necessity.⁶⁵ Of particular significance, in sub-para (2)(b), is the inclusion of offences against UN personnel and the prohibition of certain weapons. In order to reconcile resistance against including a separate offence regarding attacks against the property and persons of peace-keeping missions, it was finally agreed that such attacks would constitute war crimes within the sphere of Art 8 where such missions 'are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'.⁶⁶ This protection is afforded so far as the civilian or military personnel of peace-keeping missions are not engaged in hostilities.⁶⁷ It is unclear whether the protected status of a peace-keeping mission is dependent solely on its non-engagement in hostilities, or whether its mandate under Art 42 of the UN Charter is also a determinant factor. For example, with the adoption of Resolution 794 on 2 December 1992, the Security Council, acting under Chapter VII of the UN Charter, welcomed a US offer to establish a humanitarian assistance operation in Somalia and authorised participating States 'to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations'. A UN mission, such as the one established for Somalia, which is mandated to use force, even if classified as a humanitarian mission, is undoubtedly subject to the *jus in bello* and does not enjoy the protection stipulated in Art 8(2)(b)(iii). The aim of this provision is to specifically deter attacks against UN humanitarian missions involving a military character and, hence, does not apply with regard to private humanitarian operations (that is, aid workers) which are afforded the protection of civilians not taking any part in hostilities.

The weapons explicitly prohibited under the Statute do not make any departure from customary law and include the use of poison or poisoned weapons,⁶⁸

64 *Ibid*, Art 8(1).

65 *Op cit*, Arsanjani, note 37, p 33.

66 ICC Statute, Art 8(2)(b)(iii) and (e)(iii).

67 *Prosecutor v Kamdzic and Mladic (Karadzic and Mladic decision)* r 61 Decision (11 July 1996), Case Nos IT-95-5-R61 and IT-95-18-R61, 108 ILR 86, para 20.

68 ICC Statute, Art 8(2)(b)(xvii); see 1907 Hague Regulations, Art 23(a).

asphyxiating, poisonous or other gases, liquids or materials,⁶⁹ and the employment of bullets which expand or flatten upon impact with the human body.⁷⁰ The prohibition of these weapons represents just about all the consensus achieved at the Rome conference, since a substantial number of delegations refused to accept an open-ended provision containing a general description of weapons that could be prohibited in the future. This, it was argued, would offend the principle of legality and would further deter nuclear powers from adopting the Statute. Eventually, it was agreed that the inclusion of new weapons whose use would be considered criminal was permissible, but subject to three cumulative criteria. First, new weapons are prohibited and their use criminalised if they are 'of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate'; secondly, such weapons must be the subject of a 'comprehensive prohibition'; and thirdly, they must be specifically included in an annex to the Statute by a future amendment, in accordance with the constitutional arrangements of the Statute under Arts 121 and 123.⁷¹ Despite the exclusion of nuclear,⁷² biological, blinding laser weapons and anti-personnel mines from Art 8, the use of these weapons may still constitute a criminal offence under sub-para (2)(b)(iv), which prohibits intentional attacks causing incidental loss of civilian life or property, or disproportionate widespread, long term and severe damage to the environment in relation to the concrete and direct overall military advantage anticipated.⁷³

Sub-paragraphs (b)(xxvi) and (e)(vii) penalise the conscription of children into both national armed forces and other groups engaged in non-international armed conflicts. Although attempts were made at the Rome conference to raise the lawful age of conscription to 18 years, proposals of this nature were rejected as they were deemed to be incompatible with the age limit under customary law prescribed in the 1989 Convention on the Rights of the Child,⁷⁴ as well as the two additional 1977 Protocols.⁷⁵ Conscription or enlistment of children constitutes a war crime only if the child was below the age of 15 at the time. Furthermore, the ICC Statute prohibits only the 'active' participation of children below the age of 15 in hostilities and, thus, seems to allow their involvement in other support functions. This conclusion is

69 *Ibid*, Art 8(2)(b)(xviii); see 1899 Declaration Concerning Asphyxiating Gases, reprinted in 26 Martens NRTG (2nd Ser), p 1002; 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65; 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 32 ILM (1993), 804.

70 ICC Statute, Art 8(2)(b)(xix); see 1899 Declaration (IV, 3) Concerning Expanding Bullets, reprinted in 26 Martens NRTG (2nd Ser), p 998.

71 *Ibid*, Art 8(2)(b)(xx).

72 In its *Advisory Opinion on the Legality of the Use or Threat of Use of Nuclear Weapons* (1996) [*Nuclear Weapons Advisory Opinion*], the ICJ stated that UN Charter, Arts 2(4) 51 and 42 do not refer to specific weapons, noting that a weapon that is unlawful by treaty or custom does not become lawful by reason of it being used for a legitimate purpose under the Charter. It concluded that the illegality of a certain weapon, in accordance with State practice, depends not on an absence of authorisation, 'but is formulated in terms of prohibition', paras 39–44, 52. Reprinted in 35 ILM (1996), 809.

73 In its *Nuclear Weapons Advisory Opinion (ibid)*, the ICJ stated that the prohibition of indiscriminate attacks against civilians and civilian objects was a cardinal principle of international humanitarian law.

74 1989 Convention on the Rights of the Child, Art 38(2) and (3).

75 Protocol I, Art 77(2); Protocol II, Art 4(3)(c).

erroneous for two reasons. First, the ICC provisions are premised on Art 77(2) of Protocol I, where the prohibition of taking a 'direct' part in hostilities does not necessarily imply a right of conscription with regard to indirect activities, as the purpose of that provision is to keep children below 15 outside armed conflicts.⁷⁶ Secondly, the stipulation contained in Art 77(2) of Protocol I, reflected also in the Convention on the Rights of the Child and Protocol II, codifies customary law, which the signatories to the ICC Statute are obliged to respect.

During the Rome conference some delegations insisted that offences taking place in internal armed conflicts be excluded from the court's jurisdiction, despite the affirmation to the contrary by the ICTY and ICTR. As it was becoming clear that the majority of States were adamant in penalising such war crimes, care was taken to accommodate dissenting concerns by explicitly declaring that the list of war crimes encompassed in sub-para (c) and (e) did not 'apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature',⁷⁷ borrowing the language of Art 1(2) of Protocol II. Likewise, the qualification in para 3 that the inclusion of internal war crimes in the Statute shall not 'affect the responsibility of a government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means' echoes the language of Protocol II,⁷⁸ and helped ensure wider participation.

Technically, sub-para (c) explicitly refers to violations of common Art 3, while sub-para (e) is concerned with breaches contained in Protocol II and customary law governing non-international conflicts, but, in reality, they overlap and supplement each other. In fact, the offences listed in both sub-paragraphs could have been incorporated in a single provision, since sub-para (e) clearly does not require the high threshold of Art 1(1) of Protocol II, but simply the existence of a 'protracted armed conflict between governmental authorities and organised armed groups or between such groups'.⁷⁹ Thus, the material field of application of both sub-para (c) and (e) is the same, and for all practical purposes the distinction between the two is redundant.

The list of offences does not depart from customary law, and the only innovation is the protection afforded to buildings dedicated to 'education', besides those devoted to religion, art, science and other historic monuments.⁸⁰ Such buildings and monuments are protected as long as they do not constitute military objectives. Military objectives under Art 52(2) of Protocol I are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action, and whose destruction or capture offers a definitive military advantage. Protected

76 C Pilloud *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987*, Geneva: Martinus Nijhoff, para 3187. The commentary notes, however, that the spontaneous taking of arms or engagement in support functions of children below the age of 15 does not render their superiors culpable, as long as the children's services are not legally or otherwise required.

77 ICC Statute, Art 8(2)(d) and (f).

78 Protocol II, Art 3(1).

79 ICC Statute, Art 8(2)(f). The wording of this provision was taken from the Appeals Chamber Decision on Jurisdiction in *Prosecutor v Tadic* (2 October 1995) (1995) 105 ILR 453, para 70.

80 *Ibid*, Art 8(2)(b)(ix) and (e)(iv).

monuments or buildings forfeit this status only where, and in accordance with Art 8(3) of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (Cultural Property Convention), they are deemed to be used or connected to activities which are directly or indirectly linked to military operations.⁸¹

Exceptionally, Art 124 of the ICC Statute allows an opting-out procedure with regard to war crimes covered by Art 8. A State may, thus, declare that for a period of seven years after the Statute comes into force for the State concerned it does not accept the jurisdiction of the court over Art 8 when a crime is alleged to have been committed by its nationals or on its territory. This is a compromise provision intended to accommodate French insistence on extending the stipulation of Art 124 also to crimes against humanity. Notwithstanding the express terms of Art 124, Security Council referrals should override such opt-outs on the basis of Art 103 of the UN Charter.⁸²

Despite the ICC Statute's detailed nature, the signatories thereto, and especially the US, felt that it would better serve the accused and international justice if the elements of the crimes contained in Arts 6, 7 and 8 received further elaboration.⁸³ This task was assigned to a Preparatory Commission, whose conclusions were to be adopted by a two-thirds majority of the members of the ASP. Once adopted, the Elements of Crimes, which elaborate in great detail the elements of each in order to ensure legal certainty, would become binding and form an integral part of the Statute, but, in the unlikely event of a conflict with the Statute, the latter would prevail. The primacy of the Statute is not evident from Art 21(1)(a), which does not clearly prioritise between the two, but may be discerned from the wording of Art 9(1) which points out that the Elements of Crimes 'shall assist the court in the interpretation' of Arts 6–8. The Elements of Crimes were finally adopted by consensus during the ASP's first session in September 2002.⁸⁴

14.4 GENERAL PRINCIPLES OF CRIMINAL LAW

Part 3 of the Statute sets out the bases for both incurring and excluding individual criminal responsibility. Unlike the ad hoc Tribunals, the ICC enjoys jurisdiction over natural persons, even if the alleged offence is not completed, but is at least attempted.⁸⁵ The Statute penalises four forms of participation in criminal acts: principal participation, ordering, aiding or abetting and acting with a common purpose. Incitement to commit an offence within the jurisdiction of the court is limited only to the crime of genocide, which under customary law does not require that genocide actually take place. The court does not have jurisdiction over persons that were below the age of 18 when the alleged offence was perpetrated.⁸⁶ An additional form of responsibility confirmed in the Statute is that attaching to military or civilian persons

81 1954 Cultural Property Convention, 249 UNTS 240.

82 *Op cit*, McGoldrick, note 34, p 636.

83 ICC Statute, Art 9.

84 ICC Doc ICC-ASP/1/3 (3–10 September 2002).

85 ICC Statute, Art 25(3).

86 *Ibid*, Art 26.

in positions of authority, who fail to prevent or punish criminal acts committed by their subordinates. Article 28(a)(i) requires either actual knowledge of the offences or the 'should have known standard', which being similar to Art 86(2) of Protocol I 1977 stipulates the liability of the superior where, 'owing to the circumstances at the time', he or she should have known that the forces under his or her command were committing or about to commit such crimes. Although the Yugoslav Tribunal's jurisprudence has been consistent in denying a rebuttable presumption of knowledge in similar circumstances,⁸⁷ Art 28(a)(i) of the ICC Statute seems to accept such presumption.

Criminal liability may be excluded on several grounds. Persons suffering from a mental disease or involuntary intoxication which renders them unable to control or appreciate the nature of their conduct, as well as persons acting reasonably under self-defence are completely exculpated from liability.⁸⁸ Similarly, the invocation of duress may serve to relieve one from liability, if the criminal conduct caused by duress resulted from:

...a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.⁸⁹

The characterisation of duress as a full defence that is capable of excluding liability has clearly been influenced by the dissenting opinion of Cassese J in the *Erdemovic* case before the ICTY.⁹⁰

Another possible defence is the invocation of a mistake of fact or of law. While none of these constitute general grounds for excluding criminal responsibility, exceptionally they will do so if the perpetrator's mistake as to fact or law actually negates the mental element required for the particular crime.⁹¹ Similarly, the fact that an offence within the jurisdiction of the court was committed pursuant to orders received from a superior does not as a rule relieve the recipient perpetrator from liability. The ICC Statute, carefully following customary law,⁹² excludes the recipient's liability where: (a) that person was under a legal obligation to obey the orders; (b) he or she did not know that the order was unlawful; and (c) the order was not manifestly unlawful.⁹³ Although two schools of thought have emerged on whether the plea of superior orders offers a complete defence, the jurisprudence of the post-Second World War military tribunals, as well as subsequent military legislation, suggests that the plea of superior orders has excluded liability where a 'moral choice was in fact available' to the accused, and where the order was not 'manifestly unlawful'. On

87 *Prosecutor v Delalic and Others*, Judgment (*Celebici* judgment) (16 November 1998), para 384; subsequently followed in *Prosecutor v Blaskic*, Judgment (*Blaskic* judgment) (3 March 2000), paras 307, 408, and *Prosecutor v Aleksovski*, Judgment (*Aleksovski* judgment) (25 June 1999), para 80.

88 ICC Statute, Art 31 (1)(a)–(c).

89 *Ibid.*, Art 31(1)(d).

90 *Prosecutor v Erdemovic* (7 October 1997), Appeals Judgment, dissenting opinion of Cassese J, paras 11–49.

91 ICC Statute, Art 32.

92 C Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied', 836 *IRRC* (1999), 785.

93 ICC Statute, Art 33(1).

this basis, para (2) expressly points out that orders to commit genocide or crimes against humanity are, in every case, considered to be manifestly unlawful.⁹⁴

14.5 INTERNATIONAL CO-OPERATION AND JUDICIAL ASSISTANCE

Parties to the Statute are under a general obligation to co-operate with the court in accordance with Art 86. The court enjoys broad authority to make requests of a varying nature, where these are relevant to the investigation and prosecution of crimes within its jurisdiction. In the execution of any requests, States are permitted to comply with their national procedural law.⁹⁵ Non-parties to the Statute are not obliged to co-operate with the court, but may choose to do so on the basis of an *ad hoc* arrangement.⁹⁶ Under Art 87(4) binding requests of any kind may demand that measures be taken for the protection of evidence or the physical and psychological well being of victims, witnesses and their families. The court may also ask any intergovernmental organisation to provide information or documents, in accordance with Art 87(4), but, since such entities are not parties to the Rome Statute, they are not bound to adhere. The same would apply to non-governmental organisations (NGOs) and the International Committee of the Red Cross. In practice, however, NGOs will provide substantial assistance, as has been the case with the ICTY, where organisations of this kind actively supported many crucial areas of the tribunal's work, such as the taking of depositions, affidavits and the collection of other forms of evidence.⁹⁷ Unlike the *ad hoc* Tribunals, Art 15(2) of the ICC Statute actually empowers the Prosecutor to seek additional information from a variety of sources, including NGOs.

Besides material evidence, the court has the authority to request the arrest and surrender of persons from the custodial State.⁹⁸ While this process would normally be defined as 'extradition' in the context of interstate criminal co-operation, the terminology applied in the Statute, as indeed in the context of the ICTY and ICTR, refers to it as 'surrender' of persons. The accused may challenge the ICC request as being contrary to the principle *non bis in idem* and, once surrendered, the court must respect the principle of specialty, unless the requested State waives it.⁹⁹ In cases of competing requests between the ICC and other countries for the surrender of a person, and where both requests relate to the same offence, the custodial State shall give priority to the court's request, if it has already determined that the case is admissible. The same applies where the competing requests are for the same person, but not for the same crime. In all other cases, the custodial State is free to decide which request it shall give primacy to.¹⁰⁰

94 For a detailed analysis of defences, see Chapter 6.

95 ICC Statutes, Art 88.

96 *Ibid*, Art 87(5).

97 'The ICTY and NGOs' (1996) 4 *ICTY Bulletin*, 15 March, p 4.

98 ICC Statute, Art 59.

99 *Ibid*, Art 101.

100 *Ibid*, Art 90.

A party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence that relates to its national security.¹⁰¹ In such cases, Art 72(5) envisages a co-operative procedure whereby conciliatory attempts are to be made to modify the request, determine the relevance of the contested evidence or seek an alternative source, or convince that State to provide the information in terms that do not prejudice its national security, particularly through *in camera* or *ex parte* proceedings.¹⁰² If, after this procedure, the dispute has not been resolved and the court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, it may either request further consultations, inform the Assembly of States Parties or the Security Council of that State's refusal to comply, or make an inference as to the existence or not of a fact at trial.¹⁰³ The right to confidentiality afforded to States parties under Art 93(4) is not absolute, as sub-para (7)(b)(i) of Art 72 empowers the court to order the disclosure of evidence in all other circumstances. Sub-paragraph (b)(i) seems to adhere to the ICTY Appeals Chamber decision in the *Blaskic* appeals subpoena case, where it was held that, although all possible modalities accommodating national security concerns must be provided, States cannot invoke such concerns where a binding obligation for disclosure has been issued.¹⁰⁴

In practical terms, however, refusal to comply with an order for disclosure of sensitive national information will be dealt with in the same way as all other instances of failure to comply with the court's binding requests. In general, the court will make a finding of non-compliance and thereafter refer the matter to the Assembly of States Parties, or, where the Security Council referred the matter to the court, to the Security Council.¹⁰⁵ The experience of the Yugoslav Tribunal demonstrates that State co-operation and Security Council support are inextricably linked issues, and are themselves dependent on the court's image as a powerful institution. If the ICC manages to attain this status, as did the ICTY after 1996, it, too, will receive obeisance not only from parties to its Statute, who are under an express obligation to do so, but also from intergovernmental organisations, especially in the form of arrests and detaining of suspects by peace-keeping missions, an aspect which has proved seminal to the ICTY's judicial function.

14.6 RESERVATIONS AND AMENDMENTS TO THE STATUTE

Article 120 does not permit reservations to the Statute. This prohibition must also include all interpretative declarations whose effect is that of reservations, except in cases where parties are expressly afforded discretion under the Statute. An example

101 *Ibid*, Art 93(4).

102 The ICTY made use of *in camera* proceedings in relation to sensitive information, such as satellite photographs of the Srebrenica mass grave sites, which were utilised to compare the ground before and after its excavation. While this type of evidence may be excluded following official requests, States may allow for it to be made available. See 'Special: exhumations' (1996) *ICTY Bulletin*, 19 July, p 8.

103 ICC Statute, Art 72(7)(a)(i)–(iii).

104 *Prosecutor v Blaskic*, Appeals Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber I of 11 July 1997 (29 October 1997) (1997) 110 ILR 607, paras 61–69.

105 ICC Statute, Art 87(5)(b) and (7).

of an acceptable interpretative declaration would be one that describes those national procedures required for co-operation with the court, under Art 88. The prohibition of reservations follows similar practice adopted with regard to human rights and humanitarian law treaties, even though such practice entails smaller participation of States.¹⁰⁶ Although less so in the case of the ICC, most provisions contained in human rights and humanitarian treaties constitute miniature treaties in their own right, rendering, thus, any possible reservations, by and large, contrary to the purpose and object of these instruments. While it is true that the obligations incorporated in the ICC Statute are not reciprocal, in practice, States find that to accept the unconditionality of such obligations impairs their strategic or other interests. This *erga omnes* nature of the Statute, even against non-parties, is recognised in Arts 12(2) and 13(b), which permit the court to exercise jurisdiction irrespective of a non-party's consent.

The body responsible for the functioning of the court and the highest authority regarding all its substantive and procedural aspects is the ASP, established under Art 112. The ASP is composed of all parties to the Statute, every one of which is represented by one official, accompanied by alternatives and advisers, holding a single vote. Decisions in the Assembly should be reached by consensus. If this proves untenable, decisions on matters of substance must be approved by a two-thirds majority of those present and voting, provided that an absolute majority of States parties constitutes the quorum for voting. Decisions on matters of procedure will be taken by a simple majority of States parties present and voting.¹⁰⁷ The Assembly shall have a bureau consisting of a president, two vice presidents and 18 members elected by the Assembly for three year terms, and its purpose is to assist the Assembly in the discharge of its responsibilities.¹⁰⁸

Amendments to the Statute can be proposed and considered only seven years after the Statute has entered into force. If the States parties cannot reach consensus on the amendment, a two-thirds majority is required to adopt it. This amendment would enter into force for all parties after its ratification by seven-eighths of them. This amendment procedure applies also with respect to a proposed amendment to Arts 5–8, which contain the four core crimes comprising the jurisdiction of the ICC. In this case, however, the court cannot exercise its jurisdiction regarding a crime covered by the amendment, where the party on whose territory or whose national committed the offence has not accepted the said amendment.¹⁰⁹ A practical implication of this latter procedure could arise with regard to a possible future

106 1993 Chemical Weapons Convention, Art 22; 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Art 19, 320 IRLR (1997), 563; the Human Rights Committee stated in its General Comment No 24, entitled 'General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Art 41 of the Covenant', that because human rights treaties are not a web of interstate exchanges of mutual State obligations, reservations should not lead to 'a perpetual non-attainment of international human rights standards', UN Doc CCPR/C/21/Rev 1/Add 6 (2 November 1994), paras 17, 19, reprinted in 107 IRLR 64. This *erga omnes* character of human rights and humanitarian treaties was early recognised by the ICJ in its *Advisory Opinion in the Genocide* case (1951) ICJ Reports 15.

107 ICC Statute, Art 112(7).

108 *Ibid*, Art 112(3).

109 *Ibid*, Art 121.

prohibition of nuclear weapons, in which case, nuclear powers would remain parties to the Statute, but be excluded from the application of the nuclear weapons prohibition.¹¹⁰ A Review Conference is to be convened seven years after the entry into force of the Statute, under Art 123(1). This shall consider possible amendments to the Statute, which may include expanding upon the list of crimes currently contained in Art 5. It is not unlikely that, by that time, parties will have agreed on the inclusion of new offences to be added to the existing list. During its first session, the ASP adopted a number of instruments, and established a number of bodies in order to implement and execute its administrative functions. First, it adopted its own Rules of Procedure, which allow the presence of non-party observer States to attend its meetings. It further appointed a Credentials Committee, adopting its first report. It then agreed to a set of basic principles governing a Headquarters Agreement and an Agreement on the Privileges and Immunities of the ICC.

The court is to be funded not from the regular budget of the UN, as was proposed by some States, but from assessed contributions of States parties, adjusted in accordance with the principles on which the scale adopted by the UN for its regular budget rests.¹¹¹ In cases where a situation is referred to the court by the Security Council, the UN will cover any expenses incurred.¹¹² During the first meeting of the ASP in September 2002, a set of financial regulations and rules was adopted. It was decided that assessments would be determined based on membership of the ASP at the date of the adoption of this decision (that is, 3 September 2002), and that assessments after this date would be treated as miscellaneous income.¹¹³ Article 116 permits the court to receive and utilise voluntary contributions from governments, international organisations, individuals and other entities, in accordance with criteria to be established by the ASP.¹¹⁴

14.7 REPARATION OF VICTIMS

Unlike the ICTY and ICTR, the Permanent International Court has been empowered to offer reparation to the victims of crimes, including restitution, compensation and rehabilitation.¹¹⁵ Although a substantial number of arbitral tribunals have adjudicated tort claims in the past, this is the first time an international judicial organ whose mandate is to render criminal justice faces this dual task. Hence, the court is legally required to establish principles relating to reparations. This is a particularly sensitive issue, since there are no clear guidelines on whether monetary reparation need be made from the property, assets or instrumentalities of crimes as suggested by Arts 75(4) and 93(1)(k), or whether every asset belonging to the convicted person's estate

110 *Op cit*, McGoldrick, note 34, p 631.

111 ICC Statute, Arts 115(1) and 117.

112 *Ibid*, Art 115(2).

113 ICC Doc ICC-ASP/1/3 (3–10 September 2002), Resolution 14.

114 *Ibid*, Resolution 6.

115 ICC Statute, Art 75; in their plenary meeting in July 2000 the judges of the ICTY considered the issue of the right of victims to seek compensation. Upon completion of a report containing compensatory methods and practical recommendations in September of that year they invited the UN to consider its application. ICTY Doc JL/PIS/528-e (14 September 2000).

is liable to forfeiture. The Statute merely subjects any measures which the court might order to possible rights of *bona fide* third parties.¹¹⁶ Consistent with their obligations under the Statute, States parties must comply with any such order made by the court. In order to facilitate the purpose of such reparations, Art 79 provides for the creation of a trust fund for the benefit of victims and their families. The fund will be managed by a Board of Trustees, whose members participating in an individual capacity will serve on a *pro bono* basis. The fund will not accept those voluntary contributions that create a manifest inequality between the recipient victims.¹¹⁷ Finally, the right to compensation is also granted to victims of unlawful arrest, detention, or wrongful conviction entailing a miscarriage of justice under Art 85.

116 *Ibid*, Art 93(1)(k).

117 ICC Doc ICC-ASP/1/3 (3–10 September 2002), Resolution 6.

INTERNATIONALISED DOMESTIC CRIMINAL TRIBUNALS

15.1 INTRODUCTION

In the two previous chapters we examined two types of tribunals: those established under Security Council resolutions as ad hoc tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), and a permanent institution that was created through a treaty. The Nuremberg Tribunal before these was premised on a treaty between the victorious allies of the Second World War. The judicial institutions examined in this chapter have all been established on different legal bases. Their common feature is that they are domestic tribunals, albeit with international elements. In that sense they can be considered as mixed, or internationalised domestic criminal tribunals. The Sierra Leone Special Court, for example, is an extension of the Sierra Leonean judicial system, established by treaty between the government of that country and the United Nations (UN); the East Timor Special Panels are similarly an extension of the local judiciary, established by law under UN Transitional Administration in East Timor (UNTAET)'s mandate, as is the case with the jurisdiction of Kosovo courts under UN Interim Administration Mission in Kosovo (UNMIK). The Extraordinary Chambers of Cambodia are premised *in toto* on Cambodian law, although the relevant law envisages the participation of international judges from a list proposed by the UN Secretary General. Finally, the Lockerbie Tribunal is a Scottish court that operated on neutral territory, in The Netherlands, applying Scottish law. Such internationalised domestic tribunals attempt to balance their obligations between domestic and international law, and this is not always easy. Moreover, in the majority of the cases, the countries in which they operate have recently surfaced from devastation. These courts must, furthermore, function in a legal environment where amnesties have been granted, and while these are not valid under international law, especially where they serve to preserve impunity for serious violations, they may well be deemed to be valid under domestic law.

15.2 THE SIERRA LEONE SPECIAL COURT

Since 23 March 1991, the West African country of Sierra Leone has been the battleground of fierce fighting, initially between the Revolutionary United Front (RUF) led by Foday Sankoh and the one party military regime of the All People's Congress (APC).¹ Hostilities have continued relentlessly since then but ceased for a short interlude with the signing of the Abidjan Peace Agreement on 30 November 1996 between a newly elected democratic government and the RUF. No sooner had

1 Soon after Sankoh's arrest on 27 May 2000 by Sierra Leonean (SR) forces, his wife applied for habeas corpus before the High Court in London, on the grounds that at the request of SR forces, British troops provided assistance in transporting Sankoh, and as a result he was under British custody and control. Both the High Court and Court of Appeal rejected these arguments. *In the Matter of Sankoh* (2000) 119 ILR 386.

the ink dried on the Peace Agreement, than fighting on an even larger scale broke out again. The new circle of violence culminated in a *coup d'état* orchestrated by the Armed Forces Revolutionary Council (AFRC), an ally of the RUF, which seized power over the greater part of Sierra Leone on 25 May 1997.² In an attempt to take control of the capital Freetown a combined force of AFRC/RUF forces launched a military operation which was marked by widespread atrocities against the civilian population, although serious violations of international humanitarian law had ensued since the 1997 coup, especially mass rape and abduction of women, forced recruitment of children, mutilations and summary executions.³ Likewise, during its retreat in February 1999, RUF forces abducted hundreds of people, particularly young women who they then proceeded to use as forced labourers, fighting forces, human shields and sexual slaves.⁴ The Lome Peace Agreement, signed on 7 July 1999 by the democratically elected government of President Ahmed Kabbah, the RUF and the Special Representative of the UN Secretary General, granted amnesty to RUF members—although the Special Representative expressly rejected the validity of any amnesties to international crimes—and set up a Truth Commission to investigate and document violations in lieu of prosecutions.⁵ In further disregard of its commitments and the rule of law, the RUF resumed attacks against government troops and the civilian population, and, despite being quickly defeated and its leader captured, RUF forces had found time to commit yet more widespread atrocities against civilians.⁶

The Government of Sierra Leone subsequently asked the UN to establish an international tribunal to prosecute those responsible for violations of international humanitarian law during the civil war. On 14 August 2000, the Security Council instructed the Secretary General to negotiate with Sierra Leone the establishment of an independent special court, recommending that its subject matter jurisdiction include crimes against humanity, war crimes and other serious violations of international law, as well as crimes under Sierra Leonian law committed by 'persons who bear the greatest responsibility for [these] crimes'. The resolution requested the production of a detailed statute. After two rounds of successful negotiations, the Secretary General presented the Security Council with a report on the creation of a Special Court, to which both the agreement⁷ and the statute⁸ were annexed.

Unlike the ICTY and ICTR, the Special Court was established through a treaty between the UN and the Government of Sierra Leone on 16 January 2002, and not on the basis of a Security Council resolution. This means that the Special Court lacks

2 Acting under UN Charter, Chapter VII, the Security Council adopted Resolution 1132 on 8 October 1997, demanding that the RUF relinquish power and cease acts of violence, further imposing a general embargo.

3 See SC Res 1181 (13 July 1998).

4 *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, UN Doc S/2000/915 (4 October 2000), paras 25–26.

5 See M Scharf, 'The Special Court for Sierra Leone' (October 2000) *ASIL Insight*.

6 Following international concern at the role played by the illicit diamond trade in fuelling the conflict in Sierra Leone, the Security Council adopted Resolution 1306 (5 July 2000) imposing a ban on the direct or indirect import of rough diamonds from areas not controlled by the government through the establishment of a certificate of origin regime.

7 Draft Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2000, contained in *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, UN Doc S/2000/915 (4 October 2000), p 15.

8 Statute of the Special Court for Sierra Leone.

primacy over other national courts and public authorities of third countries, whether this involves requests for surrender of evidence or of accused persons. In examining measures to enhance the deterrent powers of the court, the Secretary General invited the Security Council to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the court.⁹ The Security Council never responded to that request. The Agreement and the Statute should be read together as a single instrument, rather than two separate ones, in light of the fact that there is considerable overlap between them.¹⁰ Under Art 8 of its Statute, the court has concurrent jurisdiction with Sierra Leone courts but enjoys primacy over them. The Special Court is to be composed of two Trial Chambers, each consisting of three judges, and an Appeals Chamber consisting of five judges. Sierra Leone is to appoint one of the three trial judges in each chamber, as well as two of the judges that will serve in the Appeals Chamber, with the remaining judicial vacancies to be filled by the UN.¹¹ Similarly, the Secretary General is to appoint the court's Registrar¹² and prosecutor, who shall be assisted by a Sierra Leonian deputy Prosecutor.¹³ In accordance with Art 2 of the 2002 Agreement, from the three judges serving in the Trial Chamber, one shall be appointed by Sierra Leone, whereas the remaining two by the Secretary General, upon nominations forwarded by Member States of the Economic Community of West African States (ECOWAS) and the Commonwealth. Under Art 3 of the 2002 Agreement, the Prosecutor shall be appointed on the basis of a consultation between the Government of Sierra Leone and the Secretary General.

The subject matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonian law. The first category includes crimes against humanity,¹⁴ violations of common Art 3 to the Geneva Conventions and of Additional Protocol II,¹⁵ as well as 'other violations of international humanitarian law'.¹⁶ Article 4 includes the intentional targeting of civilians, *hors de combat* and personnel along with material of peace-keeping missions, as well as abduction and forced recruitment of children under the age of 15 for the purpose of using them to participate actively in hostilities. The Secretary General points out in his report on Art 4 that, although the prohibition on child recruitment has acquired customary international law status,¹⁷ it is not clear to what extent it is recognised as a war crime entailing individual criminal responsibility, despite its classification as a war crime in the 1998 ICC Statute.¹⁸ Despite the Secretary General's comment that

9 *Op cit*, Report of the Secretary General, note 7, para 10.

10 A McDonald, 'Sierra Leone's Shoestring Special Court', 84 *IRRC* (2002), 121, p 126.

11 Statute of the Special Court for Sierra Leone, Art 12(1).

12 *Ibid*, Art 16.

13 *Ibid*, Art 15(3) and (4).

14 *Ibid*, Art 2.

15 *Ibid*, Art 3.

16 *Ibid*, Art 4.

17 See particularly 1977 Protocol II, Art 4(3)(c); 1989 Convention on the Rights of the Child, Art 38(3), 1577 UNTS 3; 1998 International Criminal Court (ICC) Statute, Art 8(2)(b)(xxvi). The Secretary General expressly differentiated the crime contained in Art 4 of the Sierra Leone Special Court Statute from that of the ICC Statute, Art 8(2)(b)(xxvi) on account of the doubtful criminal customary nature of the ICC provision. *Op cit*, Report of the Secretary General, note 7, para 18.

18 *Op cit*, Report of the Secretary General, note 7, para 17.

the Special Court's list of crimes against humanity follows the enumeration included in the ICTY and ICTR Statutes, one readily observes that Art 2(g) contains 'sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence', whereas the two *ad hoc* Tribunals make reference only to 'rape'. It must be presumed, however, that in every other respect Art 4 of the Statute of the Special Court for Sierra Leone follows the ICTY Statute and not that of the ICC. Recourse to SR law has been provided in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law.¹⁹ The crimes considered to be relevant for this purpose and included in the Statute²⁰ are: offences relating to the abuse of girls under the SR 1926 Prevention of Cruelty to Children Act (ss 6, 7 and 12) and offences relative to wanton destruction of property, and in particular arson, under the SR 1861 Malicious Damage Act (ss 2, 5 and 6). Genocide was not included because the Security Council was not furnished with evidence of intent to annihilate an identified group as such.

Article 10 does not consider amnesties granted with respect to offences included in Arts 2–4 of the Statute of the Special Court for Sierra Leone as posing a bar to prosecution. This provision refers to Art IX of the 1999 Lome Peace Agreement, to which the Special Representative of the Secretary General appended a reservation to the effect that amnesties under Art IX shall not apply to international crimes.²¹ The bar on amnesties seems to apply only to crimes under international law and not domestic offences, and regarding domestic offences, the court's temporal jurisdiction may begin on 7 July 1999.²² After agreement with the Sierra Leone Government, it was decided that the temporal jurisdiction of the court would commence from 30 November 1996.

The prosecution of children for war crimes and crimes against humanity has presented a 'difficult moral dilemma' for a number of reasons.²³ Although they were feared for their brutality, the Secretary General noted that these children have been subjected to a process of psychological and physical abuse and duress that has transformed them from victims into perpetrators.²⁴ In a balancing act catering on the one hand for the concerns of humanitarian organisations responsible for rehabilitation programmes, who objected to any kind of judicial accountability for children below 18 years of age, and on the other adhering to vociferous popular feeling demanding punishment of offenders, the Secretary General decided in favour of prosecuting juveniles above 15 years of age, but instructed the prosecutor in cases of juvenile offenders to:

...ensure that the child rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.²⁵

19 *Op cit*, Report of the Secretary General, note 7, para 19.

20 Statute of the Special Court for Sierra Leone, Art 5.

21 *Op cit*, Report of the Secretary General, note 7, para 22.

22 M Frulli, 'The Special Court for Sierra Leone: Some Preliminary Comments', 11 *EJIL* (2000), 857, p 859.

23 *Op cit*, Report of the Secretary General, note 7, para 32.

24 *Op cit*, Report of the Secretary General, note 7, para 32.

25 Statute of the Special Court for Sierra Leone, Art 15(5).

Finally, the Special Court has no legal links with the ICTR and ICTY, except in so far as it is bound to apply the Rwanda Tribunal's Rules of Procedure²⁶ and its Appeals Chamber is to be guided by the decisions of the ad hoc Tribunals' common Appeals Chamber,²⁷ in order to produce a coherent body of jurisprudence. As to its financing, the Secretary General had initially suggested this should take place through assessed contributions, rather than by voluntary emoluments.²⁸ Finally, Art 6 of the 2002 Agreement provided that the court's expenses be borne by voluntary contributions from the international community, the court becoming operational when sufficient funds have been gathered. Article 6 further provides that should voluntary contributions prove insufficient for the court to implement its mandate, the Secretary General and the Security Council will explore alternate means of financing.

15.3 THE EAST TIMOR SPECIAL PANELS

East Timor had been a Portuguese colony. During the post-Second World War decolonisation period, Portugal was unwilling to forgo its power completely on the half-island entity. In 1960 the UN General Assembly declared East Timor to be a non-self-governing territory, administered by Portugal,²⁹ and this was generally the case as East Timor was looking towards complete independence. This process was abruptly interrupted, however, when on 7 December 1975 the territory was invaded and subsequently occupied by Indonesian armed forces. During the 24 year occupation of the half-island, there were frequent reports of extreme brutality and genocide, but the Indonesian Government remained in power essentially because its purchase of military material from western States helped to silence its critics before international fora. After conclusion of a 'General Agreement' between Indonesia and Portugal on 5 May 1999 on the question of East Timor, a referendum was held on 30 August 1999.³⁰ This, although supervised by a UN body, UNAMET, was conducted in the midst of intimidation and violence by East Timorese militias with the full support of the Indonesian Armed Forces, and 78.5% of the population voted in favour of independence. The widespread violence sparked by the election result prompted the Security Council to adopt Resolution 1264 by which it mandated an international force (INTERFET) to restore peace and security in East Timor, facilitate humanitarian assistance and protect and support UNAMET in the fulfilment of its duties.³¹ The presence of INTERFET secured significant stability on the island, and paved the way for the Council to establish the UN Transitional Administration in East Timor (UNTAET), through Resolution 1272,³² headed by a Special Representative of the Secretary General who acts as Transitional Administrator of the Territory, until complete devolution to the people of East Timor is secured.

26 *Ibid*, Art 14(1). In accordance with Art 14(2) the judges may amend or adopt additional rules where the applicable rules do not adequately provide for a specific situation.

27 *Ibid*, Art 20(3).

28 *Op cit*, *Report of the Secretary General*, note 7, para 71.

29 GA Res 1542(XV) (15 Dec 1960).

30 UN DocS/1999/513, AnnexI.

31 SC Res 1264 (15 Sep 1999), operative para 3.

32 SC Res 1272 (25 Oct 1999).

A significant function of UNTAET's mandate was the establishment of an effective judicial system, which includes the administration of criminal justice. This was no easy task, as prior to 1999 the East Timorese as a general rule were excluded from public office or the civil service. Further compounded by the fact that 500,000 civilians became internally displaced as a result of the 1999 events, there was no effective local judiciary on the island.³³ Moreover, under such circumstances, it would have been logistically impossible to prosecute offences that occurred during the 24 year Indonesian occupation, even if an ad hoc tribunal of the ICTY type was to be set up. A UN Commission of Inquiry, specifically established for this purpose, concluded that an international tribunal should be set up, comprising both Indonesian and East Timorese judges, but precluded the examination of cases referring to the period of Indonesian occupation.³⁴ UNTAET, however, urged in part by Indonesian promises that they would investigate and prosecute alleged offenders, decided to enhance the local judicial system, albeit augmented with an international presence. This development was not welcomed by the East Timorese, in part because they allege they were not sufficiently consulted on this issue.³⁵

Finally, UNTAET established the Serious Crimes Project, for the prosecution of serious criminal cases perpetrated in the period between 1 January and 25 October 1999, through the District Court of Dili. On the basis of its authority to adopt legislation, it promulgated Regulation 2000/11,³⁶ s 10.1 of which gave the District Court exclusive jurisdiction over the following offences: genocide, war crimes, crimes against humanity, murder, sexual offences, torture. Section 10.3 envisaged the creation of Special Panels composed of East Timorese and international judges. The final composition of the Panels was elaborated through Regulation 2000/15,³⁷ s 22.2 of which requires that the Panels be composed of two international and one East Timorese judge, whereas in cases of special gravity or importance, it may be composed of three international and two local judges. The judgments of the Panels can be appealed to the Court of Appeal. Interestingly, s 10.4 of Regulation 2000/11 did not rule out the creation of a possible *ad hoc* or other tribunal with jurisdiction over the same offences.

Section 2.1 of Regulation 2000/15 endowed the Special Panels with a species of 'universal jurisdiction' over the listed offences (although that term was not expressly used), the correct interpretation of which would encompass any crimes irrespective of the nationality of the offender or the victim, as long as the relevant offence was either consummated or commenced on the territory of East Timor. In accordance with s 2.4, the Panels do have jurisdiction over offences that occurred in East Timor prior to 25 October 1999, which would cover the period during the Indonesian occupation, but the applicable law for that period would be whatever Indonesian criminal law existed during the relevant time. This is consistent with the principle

33 For an overview of the problems facing UNTAET, see H Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', 95 *AJIL* (2001), 46.

34 *Report of the International Commission of Inquiry on East Timor to the Secretary General*, UN Doc A/54/726, S/2000/59 (2000), para 153.

35 S Linton, 'New Approaches to International Justice in Cambodia and East Timor', 84 *IRRC* (2002), 93, p 106.

36 UNTAET/REG/2000/11 (6 March 2000), on the organisation of courts in East Timor.

37 UNTAET/REG/2000/15 (6 June 2000), on the establishment of panels with exclusive jurisdiction over serious criminal offences.

of inter-temporal law, which may demonstrate that the concept of grave breaches and the prohibition of genocide and crimes against humanity were binding upon Indonesia during relevant parts of its occupation of the island. The definition of the offences is almost identical to definitions encountered in other international legal texts. Hence, s 4 of Regulation 2000/15 adopts the customary definition of genocide codified by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and the ICC Statute. Section 5.1 reproduces the definition of crimes against humanity found in the ICC Statute, with the sole difference that both the punishable act and the widespread and systematic attack must be directed against the civilian population. Section 6.1 on war crimes once again mirrors Art 8 of the ICC Statute. The fact that no distinction is made with regard to the international or non-international character of the conflict implies either that the matter was left to be decided by the Panels, or that the formulation of Art 8 of the ICC Statute represents generally accepted law on war crimes.³⁸ The definition of the crime of torture in s 7.1 is wider than that found in the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, since it does not limit the commission of the offence to public officials or other persons acting in an official capacity. This may be due to the fact that many of the offences charged were committed by militias whose links with the Indonesian State authorities were not sufficiently clear for the purposes of attributing them to the Jakarta regime.³⁹ As for murder⁴⁰ and sexual offences,⁴¹ Regulation 2000/15 states that the 'provisions of the applicable Penal Code in East Timor' will apply.⁴²

As expected, the functioning of the Panels has generated significant problems. First, despite the existence of a Memorandum of Understanding between UNTAET and Indonesia, signed on 5 April 2000, by which the latter agreed to provide, *inter alia*, transfer of accused to the Special Panels, has not been adhered to. The second point of frustration relates to the perceived impartiality of the Panels. In one of the first judgments rendered by the Panels, the *Los Palos* case,⁴³ it was accepted that the existence of an extensive attack by 'pro-autonomy armed groups supported by Indonesian authorities targeting the civilian population in the area... had been proven beyond reasonable doubt'.⁴⁴ The Panel's reasoning was based on the report of the UN Commission of Inquiry, as well as certain witness testimonies and physical evidence supported by the Commission's findings. However, before reaching this conclusion, the Panel examined the possible existence of an armed conflict in East Timor during 1999, wrongly assuming the requirement of a nexus between the crimes under consideration and an armed conflict.⁴⁵ No such nexus is required in Regulation

38 See D Turns, "'Internationalised" or Ad Hoc Justice for International Criminal Law in a Time of Transition: The Cases of East Timor, Kosovo, Sierra Leone and Cambodia', 7 *ARIEL* (2002).

39 *Ibid.*

40 Section 8.

41 Section 9.

42 UNTAET/REG/1999/1, s 3 provides that the applicable law in East Timor is that in force before 25 October 1999 (ie, Indonesia of law), as long as such law does not conflict with international human rights law, the mandate or other UNTAET Regulations.

43 *Prosecutor v Joni Marques and Others (Los Palos case)*, Judgment (11 December 2001), Case No 09/2000.

44 *Ibid.*, para 686.

45 *Ibid.*, para 684.

2000/15, nor international law in general, except for in the ICTY Statute, which in any event is irrelevant for the purposes of the Special Panels, because Regulation 2000/15 is premised on the ICC Statute. The judgment was flawed in some other respects, such as the omission of the fact that East Timor was occupied by Indonesia, and that alone is enough under common Art 2 of the 1949 Geneva Conventions to substantiate the existence of an armed conflict. Moreover, in the *Leki* case, which did not involve crimes against humanity, the Panel made findings about Indonesia's role in the 1999 events, without any evidence submitted by the parties, and without the issues being litigated, by relying on a test of 'what even the humblest and most candid man in the world can assess'.⁴⁶ If such mistakes can be forgiven to the inexperienced East Timorese judiciary, it is difficult to do the same with regard to internationally appointed judges.

15.4 UNMIK AND THE KOSOVAR JUDICIAL SYSTEM

Until 21 March 1989 Kosovo was an autonomous region within the Socialist Federal Republic of Yugoslavia (SFRY). In order to appease Serbian nationalism, in part of his own making, the then President Milosevic removed Kosovar autonomy, in violation of the SFRY Constitution. This was the starting point of mounting ethnic tension, which culminated in the establishment of ethnic Albanian pro-independence military movements, particularly the Kosovo Liberation Army (KLA), which clashed with FRY—the SFRY had by then disintegrated—security and armed forces. Clashes of this sort, and mounting military activity from both sides, had been reported since 1997, with evidence suggesting that both sides were responsible for serious atrocities. By 1999, and with Milosevic having lost all international credibility, NATO commenced a bombing campaign of dubious legality—if not complete illegality—against FRY on 24 March 1999. By early summer of that year, with FRY having sustained severe blows to its infrastructure and economy, it concluded an agreement with NATO States on 9 June, whereby it agreed to remove its security forces from Kosovo, while retaining its sovereignty over the territory. This agreement is reflected in Security Council Resolution 1244 which was adopted on the following day. Operative para 10 of the Resolution authorised the Secretary General to establish an interim administration in Kosovo,⁴⁷ including, as provided in operative para 11, maintaining civil law and order. This task was part of the UN Interim Administration Mission in Kosovo's (UNMIK) mission.

Although not on top of UNMIK's agenda, it had to decide how it would administer criminal justice in Kosovo; that concerned issues of applicable criminal law, organisation of courts, and possible establishment of special panels for serious violations of humanitarian law. In its first Regulation, 1999/1,⁴⁸ s 3 provided that the laws applicable in the territory of Kosovo prior to 24 March 1999 were to apply

46 *Prosecutor v Joseph Leki*, Judgment (11 June 2001), Case No 5/2000, reported in *op cit*, Linton, note 35, p 111.

47 R Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', 95 *AJIL* (2001), 583.

48 UNMIK/REG/1999/1 (25 July 1999), on the authority of the interim administration in Kosovo.

again so long as they did not conflict with international law standards, UNMIK's mandate, or any subsequent UNMIK regulation. Since, however, pre-1999 law was FRY Milosevic-inflicted law, the Albanian judges either resigned from their posts or refused to enforce it, applying instead pre-1989 Kosovar criminal law, which in any event did not differ much from FRY criminal law.⁴⁹ As a result of this intransigence, and in the face of a judicial vacuum, Regulation 1999/1 was amended by Regulation 1999/24,⁵⁰ which held as applicable law all primary and secondary UNMIK instruments, as well as the law in force in Kosovo on 22 March 1989. In case of conflict between the two, the former takes precedence, and where a matter is not covered by the laws set out in a regulation but is instead covered by another law in force in Kosovo after 22 March 1989, which is not discriminatory and complies with international legal standards, that law is, as an exceptional measure, applicable. Moreover, s 3 of Regulation 1999/24 rendered this amendment retroactive as of 10 June 1999. However, between 10 June and 12 December 1999, at which time the amendment was adopted, some Kosovar courts had already convicted a number of defendants on the basis of the pre-1989 Kosovar criminal law, which as Turns correctly points out 'had the highly objectionable effect of retrospectively validating convictions that had been handed down under a non-operative law'.⁵¹ The saving grace in all this confusion, as far as the rights of the accused are concerned, is the fact that defendants are to benefit from the most favourable provision in the criminal laws which were in force in Kosovo between 22 March 1989 and 10 June 1999, in accordance with Regulation 1999/24.⁵²

Unlike UNTAET, UNMIK did not introduce a regulation establishing special panels, nor international offences for adjudication before Kosovar courts. Nonetheless, on 13 December 1999, an UNMIK Commission recommended the creation of the Kosovo War and Ethnic Crimes Court (KWECC), with jurisdiction over war crimes, crimes against humanity and other serious offences on the grounds of ethnicity, and functioning with in the Kosovo legal system, albeit staffed also by international judges. Although the project was endorsed, it was eventually abandoned.⁵³ Finally, Regulation 2000/64⁵⁴ should be mentioned. This allowed the Prosecutors and defendants to petition the UNMIK Department of Judicial Affairs for the substitution of international judges where the impartiality of a local judge was in doubt; it also included petitions for the change of venue. The petition is of no avail once trial or appeal proceedings have commenced, hence the petitioner is required to institute proceedings in advance of such judicial proceedings.

49 *Op cit*, Turns, note 38.

50 UNMIK/REG/1999/24 (12 December 1999), on the law applicable in Kosovo.

51 *Op cit*, Turns, note 38.

52 Regulation 1999/24, s 1.

53 For an excellent overview of the post-1999 Kosovo legal system, see M Bohlander, 'Kosovo: The Legal Framework of the Prosecution and the Courts', in K Ambos and M Othman, *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, 2003, Freiburg Br.

54 UNMIK/REG/2000/64 (15 December 2000), on assignment of international judges/ prosecutors and/or change of venue, as amended by UNMIK/REG/2001/34 (15 December 2001).

15.5 THE CAMBODIAN EXTRAORDINARY CHAMBERS

The Khmer Rouge seized power in Cambodia on 17 April 1975. By all accounts, although during their reign information from the country was extremely difficult to obtain, the Khmer Rouge, led by Pol Pot, eliminated their so called internal enemies, which included Buddhist monks, the Muslim Cham, Chinese and Vietnamese communities, as well as anyone who was or even resembled an intellectual. Those urban dwellers that survived the genocide which ensued were sent to rural camps as part of the regime's peasant revolution, purging the country of all foreign elements as well as of economic, scientific or cultural institutions.⁵⁵ Following an invasion by the Vietnamese armed forces on 6 January 1979, Cambodia was liberated from Pol Pot—who regrouped and launched a guerilla war—but the latter's legacy resulted in the extermination of at least 1.7 million people, amounting to 20% of the entire population.

Despite the aforementioned atrocities, Cold War politics, which viewed the post-1979 Government of Heng Samrin as an instrumentality of the Vietnamese 'communists', were responsible for retaining for some time the Khmer seat at the United Nations. Following the Vietnamese withdrawal in 1989 and the subsequent Paris Conferences on Cambodia which resulted in the signing of a Comprehensive Settlement Agreement on 23 October 1991, the UN installed an interim administration, the Transitional Authority in Cambodia (UNTAC).⁵⁶ It was only after the departure of UNTAC that any attempted prosecution of Khmer Rouge members could take place. In 1997 the Cambodian Government requested UN assistance. Thereafter, a Group of Experts was appointed with the task of evaluating the feasibility of trials, ascertaining an appropriate legal basis and court structure, and assessing the viability of apprehensions.⁵⁷ Among five possible types of tribunals, the Group of Experts recommended the establishment of an ad hoc international tribunal under the aegis of the UN, partly due to well documented and widespread corruption within the Cambodian judiciary.⁵⁸ By March 1999, however, when the report was circulated to the General Assembly and the Security Council, the Cambodian Government had rejected the option of an ad hoc tribunal, and the UN eventually agreed on a compromise position, whereby jurisdiction would be vested in a tribunal situated within the Cambodian legal system and composed of both national and international judges. The UN pledged its co-operation in the process only if the Cambodians agreed to incorporate in their implementing law the modalities set out in a draft Memorandum of Understanding. Their failure to do so was explained as the most serious reason for the UN's first withdrawal from the negotiations. The truth remains that the UN was not prepared to support a corrupt judicial system over which it had no effective control.

55 See B Kierman, *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975–79*, 1996.

56 R Ratner, 'The Cambodian Settlement Accords', 87 *AJIL* (1993), 1, pp 3–5; SC Res 717 (16 October 1991).

57 GA Res 52/135 (12 December 1997), para 16.

58 *Report of the Group of Experts for Cambodia*, UN Doc A/53/850-S/1999/231, para 129; see R Ratner, 'The United Nations Group of Experts for Cambodia', 93 *AJIL* (1999), 948.

This UN withdrawal did not deter the Cambodian Government. Following a second approval by the Cambodian Senate on 23 July 2001, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Cambodia was adopted.⁵⁹ The 2001 Law establishes distinct chambers within the Cambodian legal system, with a number of international elements. First, it includes international as well as domestic judges; secondly, all international judges and prosecutors, although appointed by Cambodia's Supreme Council of Magistracy, will be selected from a list prepared by the UN Secretary General.⁶⁰ Moreover, the UN will contribute to the funding of the Chambers through the creation of a special fund soliciting voluntary contributions.⁶¹ Thirdly, some of the listed offences have drawn heavily on definitions found in international instruments. In a surprising move, the UN brokered an agreement with the Cambodian Government in mid-March 2003, allowing for UN participation in this project. This development was premised on earlier efforts to revive negotiations, especially General Assembly resolution 57/228, adopted in December 2002, which urged the Secretary General to make the UN an active participant in the trials. At the time of writing the details of the agreement remained unknown, but there was consensus on funding, retaining of the 2001 law, though agreeing to streamline the court to two levels from the previously planned three, thus eliminating a final appeal option.

The Extraordinary Chambers possess jurisdiction over offences under the 2001 law, as well as under international law. As far as the former is concerned, Art 3 of the law includes homicide, torture and religious persecution under the 1956 Cambodian Penal Code. Art 4, on the other hand, relating to genocide, is similar to that found in the 1948 Genocide Convention, while Art 5, on crimes against humanity, has been taken from the Statute of the ICTR—that is, including the requirement that they be committed on national, political, ethnical, racial or religious grounds—which does not conform with customary international law, where this particular requirement is absent. Article 6 gives jurisdiction over grave breaches of the 1949 Geneva Conventions, Art 7 over destruction of cultural property during armed conflict, in accordance with the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict,⁶² and Art 8 relates to crimes against internationally protected persons, in accordance with the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents⁶³—although the relevant provision refers to the 1961 Vienna Convention on Diplomatic Relations.⁶⁴ An unsatisfactory aspect of the 2001 Law is the fact that it omits references to defences, except for superior orders,⁶⁵ which may constitute an excuse only if they came from a legitimate authority. Other than that, the accused will have to rely on the 1956 Penal Code and the 1992 UNTAC Supreme National Council Decree on

59 Translation reprinted in 34 *Critical Asian Studies* (2002), 611.

60 2001 Law on the Establishment of Extraordinary Chambers, Art 11(2) and (3); *op cit*, Linton, note 35, p 99.

61 *Op cit*, Linton, note 35, p 103.

62 249 UNTS 240.

63 13 ILM (1974), 41; see Chapter 2.

64 500 UNTS 95.

65 2001 Law on the Establishment of Extraordinary Chambers, Art 29(4).

Criminal Law and Procedure, because the status of the relevant international criminal defences—which themselves are ambiguous—is uncertain, as they are not mentioned in the 2001 law.⁶⁶

As we have already mentioned, the Chambers will also include international judges. The Chambers, based on the existing Cambodian court structure, will comprise a trial court, consisting of three Cambodian and two international judges and a Supreme Court composed of five Cambodian and four international judges.⁶⁷ Decisions are to be reached by unanimity, and where this is not possible, qualified majority voting will apply.⁶⁸ This formula, known as the ‘Super-Majority’ rule, represents a compromise between the UN and the Cambodian Government. Essentially, it requires that even if the Cambodian judges are unanimous among themselves they would still need the favourable vote of at least one international judge. Article 46 of the 2001 law allows the Supreme Council of Magistracy to appoint judges, co-prosecutor and investigating judges, where the foreign candidates do not assume their posts. It is also difficult to assess the future of the Extraordinary Chambers in relation to the regime of amnesties, especially those granted to senior Khmer leaders, such as Ieng Sary, Pol Pot’s second in command. In any event, Art 40 of the 2001 law, rather confusingly, does not render amnesties a bar to prosecutions. The 2003 UN-Cambodia Agreement clearly states that the Agreement is the principal instrument for the trials. Hence, any conflicting provision in the 2001 law would be devoid of legal force and the Chambers would be compelled to apply the law stipulated under the Agreement.

15.6 THE LOCKERBIE TRIAL

On 22 December 1988, Pan Am flight 103 exploded above the village of Lockerbie in Scotland, having taken off from London, killing all of its 259 passengers and crew as well as 11 Lockerbie residents killed by the debris. Investigations immediately commenced in the UK and US, involving also law enforcement authorities around the world. All relevant investigations implicated two Libyan agents, Al-Megrahi and Fhimah, as having concealed plastic explosives in a suitcase on an Air Malta flight KM180 to Frankfurt, rerouted from there to London, and subsequently transferred onto the tragic 103 flight bound for JFK airport at New York city. The explosives were detonated by an electronic timer, with the then alleged perpetrators managing not to board flight 103, and the luggage being stored on the aircraft without being counted or x-rayed.⁶⁹

While ongoing investigations had been conducted in secrecy, on 27 November 1991 the Lord Advocate obtained an arrest warrant for the two Libyans, on charges of conspiracy to murder, murder and breaches of the 1982 Aviation Security Act.

66 *Op cit*, Turns, note 38; *op cit*, Linton, note 35, pp 100–02.

67 The previously envisaged Appeal Chamber, consisting of four Cambodian and three international judges is, based on our present information of the 2003 UN-Cambodia Agreement, now eliminated.

68 2001 Law on the Establishment of Extraordinary Chambers, Art 14.

69 See A Klip and M Mackarel, ‘The Lockerbie Trial—A Scottish Court in The Netherlands’, 70 *Revue Internationale de Droit Penale* (1999), 777; R Black, ‘Analysis: The Lockerbie Disaster’, 3 *Edinburgh LR* (1999), 85.

Thereupon, the US and UK Governments demanded through the Security Council that Libya surrender the accused so that they could stand trial in either of the two countries. At the behest of the two Governments Resolution 731 was initially adopted,⁷⁰ requesting Libyan condemnation of terrorism and lack of co-operation. The Libyan Government protested that it was fulfilling its obligations under Art 7 of the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, which imposes an obligation to either prosecute or extradite. The Libyans sued the US and UK before the International Court of Justice (ICJ), arguing that since they had submitted the case to a competent judicial authority they had fulfilled their obligations under the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention). Before the ICJ could reach a judgment on its jurisdiction, the Security Council adopted Resolution 748,⁷¹ under chapter VII of the UN Charter, demanding that within two weeks Libya establish its responsibility over the acts and essentially surrender the accused for trial, otherwise a range of sanctions would have to be imposed, as they were.⁷² The ICJ, somewhat crippled by Resolution 748, held that on the basis of Art 103 of the UN Charter, according to which obligations under the Charter supersede all other obligations of Member States, the Council's authority to adopt binding resolutions prevailed over the terms of the 1971 Montreal Convention. The majority of the judges noted, however, that had it not been for Resolution 748, Libya would not have been at fault.⁷³ During this time, and until 1998, Libya maintained that not only was it precluded by constitutional constraints from surrendering its own nationals, but because of the inevitable media coverage in the US and UK, the accused would not receive a fair trial. Nonetheless, Libya offered to surrender the accused for trial in a neutral country, but this proposal was resisted.

The impasse was finally resolved in 1998 when the UK agreed to a proposal envisaging the trial in a neutral country and heard by a Scottish court. The Netherlands concurred to host it on its territory, and an agreement was signed between the two countries on 18 September 1998.⁷⁴ Subsequently, Council Resolution 1192 welcomed the end to the stalemate, asking all States to co-operate, further designating The Netherlands as the detaining power once the accused had been surrendered for trial.⁷⁵ The Agreement between the UK and The Netherlands entered into force on 8 January 1999. Unlike the two ad hoc tribunals (that is, the ICTY and ICTR), and other internationalised domestic tribunals (that is, Sierra Leone Special Court and East Timor Special Panels), the court (the Scottish High Court of Justiciary) specified in the 1998 Agreement did not have a Security Council mandate and did not sit in the territory of the country exercising territorial jurisdiction. In that sense, it is a unique creature, adapted to the particular exigencies of the case, demonstrating a flexibility that is rare for international criminal justice. Under the Agreement, Scots

70 SC Res 731 (21 January 1992).

71 SC Res 748 (31 March 1992).

72 Further sanctions were imposed more than a year later through SC Res 883 (11 November 1993).

73 *Libya v UK, Libya v USA*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Order of 14 April 1992 (1992) ICJ Reports 3.

74 Agreement between The Netherlands and UK Concerning a Scottish Trial in The Netherlands, 38 ILM (1999), 926.

75 SC Res 1192 (27 August 1998).

law was applicable only in relation to the accused and the offences, whereas Dutch law was generally applicable in every other respect. Thus the jurisdiction of the Scottish court was limited to the trial, which included all investigative and pre-trial phases in accordance with Scots law and practice.⁷⁶ Thus, the Agreement was ultimately an instrument for delineating sensitive matters of sovereignty. Besides the particular details agreed to between the parties, the Agreement fell in the category of host country treaties and the international law applicable with regard to official foreign premises. Under the terms of the Agreement, the court was, *inter alia*, empowered to issue regulations concerning its day-to-day affairs,⁷⁷ exchange Letters of Understanding with the Dutch Ministry of Justice,⁷⁸ while The Netherlands was obliged to allow the entry, and protection, of witnesses⁷⁹ and international observers,⁸⁰ among others.

Although the matter of jurisdiction and the seat of the court were resolved in terms of international law, this was not self-evident as a matter of UK law. Council Resolution 1192, which had called on the UK to facilitate the arrangements for establishing the court, would have had to be implemented through the adoption of an Order in Council, approved by Parliament and given royal assent by the Queen, in accordance with the requisite procedure under the 1946 UN Act. Thus, the High Court of Justiciary (Proceedings in The Netherlands) Order 1998 (1998 Order) was adopted,⁸¹ giving authority to the Scottish High Court to hear the case against the two accused, who were specifically named in the 1998 Order.⁸² Contrary to Scots criminal procedure law, the case was not heard by a jury, although this need not have been so had the accused consented to a trial by jury in Scotland.⁸³

Finally, the two accused, apparently with their consent, were handed to a UN official in Libya and were flown to The Netherlands to stand trial. The trial began on 3 May 2000, and on 31 January 2001 the High Court handed down its judgment, finding only one of the accused, Al-Megrahi, guilty of murder in respect of the bombing of Pan Am flight 103 and the ensuing deaths caused both in mid-air and on the ground at Lockerbie. The lengthy judgment did not analyse points of law in any great detail, but instead focused on the examination of evidence and fact. Although the evidence that was accumulated was circumstantial, it was such that it established Al-Megrahi's guilt beyond a reasonable doubt. He was sentenced to serve life imprisonment, which he appealed not on grounds of the sufficiency of evidence, but on the treatment by the trial court of the evidence presented and the submissions made to it by the defence. By its judgment of 14 March 2002, the Appeal Court of the High Court of Justiciary rejected the appeal and the case was officially closed.⁸⁴

76 1998 Agreement, Art 1(I).

77 *Ibid*, Art 6.

78 *Ibid*, Art 27.

79 *Ibid*, Art 17.

80 *Ibid*, Art 18.

81 SI 1998/2251 (16 September 1998), entering into force two days later.

82 1998 Order, s 3(1).

83 *Ibid*, Art 16(2)(a).

84 *Al-Megrahi v HM Advocate*, Opinion in Appeal against Conviction, 14 March 2002 (Appeal No C104/01).

15.7 NATIONAL TRUTH COMMISSIONS AND AMNESTIES

While many view the processes of criminal accountability as the only viable and reliable mechanisms for reconstruction and reconciliation of devastated societies, some States have come to the conclusion that the same purpose may alternatively be served through Truth Commissions.⁸⁵ The purpose of these commissions is to administer restorative rather than retributive justice, and their application may be complementary to judicial proceedings, as in the case of South Africa, or the sole mechanism of accountability, as was the case with El Salvador. Such commissions are mechanisms used to investigate and accurately record human rights violations in a particular country, but very often result in sweeping amnesties.⁸⁶ Investigatory commissions of this type have been established at transitional phases in the democratic process of various States, in which civilian governments had recently replaced repressive regimes, with the aim of either investigating human rights abuses of prior regimes, as was done with the panels created in Argentina and Chile, or as a means of resolving a civil war through a political agreement, as in El Salvador. In one instance, however, it was the Security Council that established an international commission of inquiry, in order to investigate the violence that resulted from the 1993 coup in Burundi.⁸⁷

Although most of these commissions were established and functioned at a purely domestic level, in every case it was evident that the involvement of international personnel would potentially lift suspicions of impartiality. Hence, the staff serving on the El Salvador commission were entirely foreign, as were those in Burundi, assigned and sponsored by the UN.⁸⁸ The purposes of investigative or Truth Commissions can vary, but in general their purpose is to create an authoritative record, provide redress for the victims, make recommendations for reform and establish accountability of perpetrators.⁸⁹ However, the primary purpose of most commissions is not to identify perpetrators, but to document repression and crime. This is best achieved only by permitting victims and culprits to come forward and recount their personal testimony as regards their participation in particular events. To secure such testimony, commissions are generally empowered, depending on their mandate, to grant amnesties to those who confess their prior crimes. This process may, and does, come into conflict with particular State obligations such as the duty to either prosecute or extradite persons accused of serious offences, or simply to prosecute those responsible for having committed serious international crimes. This has been the adamant position of the UN, so irrespective of the process utilised to grant amnesties for serious international offences, such amnesties cannot constitute

85 P Hayner, 'Fifteen Truth Commissions 1974 to 1994: A Comparative Study', 16 *HRQ* (1994), 597.

86 See M Scharf, 'The Case for a Permanent International Truth Commission', 8 *Duke J Intl & Comp L* (1997), 1; T Klosterman, 'The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?', 15 *Ariz J Intl & Comp L* (1998), 2.

87 SC Res 1012 (25 August 1995).

88 See T Buergethal, 'The United Nations Truth Commission for El-Salvador', 27 *Vand J Trans L* (1994), 498.

89 M Ratner and J Abrams, *Accountability for Human Rights Atrocities in International Law*, 1997, Oxford: OUP, p 196.

a bar to subsequent prosecution by other national or international judicial bodies.⁹⁰ Both the Inter-American Commission of Human Rights and the UN Human Rights Committee have found particular Latin American amnesties incompatible with the victims' right to an effective remedy, which includes a right to an impartial judicial investigation in order to establish the facts and identify the perpetrators. The two bodies did not, however, recommend that the imposition of criminal punishment was required of States parties under the Inter-American Convention on Human Rights and the International Covenant on Civil and Political Rights respectively.⁹¹ At the same time, it should not be forgotten that the Security Council approved the Governors' Island Agreement in Haiti, which provided a broad amnesty.⁹²

Let us examine the most significant Truth Commission of the last decade, the South African Truth and Reconciliation Commission (TRC).⁹³ It was set up in 1993 on the basis of the 1993 interim Constitution and the Promotion of National Unity and Reconciliation Act, No 34 of 1995, and comprised of three branches: a Committee on Human Rights Violations (HRV), a Committee on Amnesty and a Committee on Reparation and Rehabilitation (R & R). The mandate of the HRV Committee has been to investigate human rights abuses that took place between 1960 and 1994, based on statements made to the TRC. Its aim is to establish the identity and fate of victims, the nature of the crimes suffered and whether the violations were the result of deliberate planning by the prior regimes or any other organisation, group or individual. Victims are then referred to the R & R Committee, which considers requests for reparation only in regard to those formally declared victims by the TRC or their relatives and dependants. The primary purpose of the Amnesty Committee is to ascertain whether or not applications for amnesty are in respect of human rights violations that were committed within the ambit prescribed by the 1995 Act, that is, whether they relate to omissions or offences associated with political objectives and committed between 1960 and 1994, in the course of the struggle for internal self-determination. An amnesty is granted only in those cases where the culprit makes a full disclosure of all the relevant facts. Therefore, in cases where an offence was committed for purely private motives, no amnesty will be granted.

The internationalised domestic tribunals examined in the present chapter, except for the Lockerbie Tribunal, have been established alongside Truth Commissions. Their operation is problematic because: (a) the boundaries between the two institutions are not clearly delineated; (b) similarly problematic and ambiguous is the application of the rule *ne bis in idem* (that is, that one cannot be tried twice for the

90 D Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale LJ* (1991), 2537; M Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?', 31 *Texas ILJ* (1996), 1; the South African Supreme Court in *Azanian Peoples Organisation v President of the Republic of South Africa* (1996) 4 SA 671, wrongly held that international human rights law does not compel domestic criminal prosecution of human rights abuses. Summarised in 91 *AJIL* (1997), 360.

91 J Gavron, 'Amnesties in the Light of Development in International Law and the Establishment of the International Criminal Court', 51 *ICLQ* (2002), 91, pp 94–99.

92 *Ibid*, p 106.

93 See generally P Parker, 'The Politics of Indemnities: Truth Telling and Reconciliation in South Africa', 17 *HRLJ* (1996), 1.

same offence) in both domestic and international law; and (c) where truth commissions grant blanket amnesties, or amnesties excusing serious international offences, neither the UN nor most individuals⁹⁴ will be inclined to recognise or respect them in their respective legal systems. Where the UN is involved in the interim administration of a war-torn nation, the Truth Commission does not supersede the jurisdiction of criminal tribunals, but supplements them.⁹⁵ The same is not true for Cambodia, however, where the status of amnesties granted prior to the creation of the Extraordinary Chambers remains uncertain.

As even the most conciliatory commissions involve some kind of punitive judicial mechanisms, Truth Commissions are generally able to serve the purposes of both restorative and retributive criminal justice. To the extent they are not used as platforms for granting sweeping amnesties they are a welcome supplement to the international criminal justice system.

94 As far as subsequent claims in tort are concerned.

95 UNTAET/REG/2001/10 (13 July 2001), on the establishment of a Commission for Reception, Truth and Reconciliation in East Timor.

INDEX

Abduction

- extradition 218–25
- abuse of process 222–23
- European Court of Human Rights 221–22
 - male captus, bene detentus* rule 218–19
- seriousness of crime 224–25
- United States 219–21

Abuse of process 127

- extradition 222–23

Achille Lauro incident 21, 98

Act of State 169–70

Active personality

- principle 151–52

Aggression, crime of

- Permanent International Criminal Court 381–84

Air piracy 24–25

Al-Qaeda 42

Amnesties 411–13

Apartheid 121–22

- Convention 8
- Convention on the Elimination of All Forms of Racial Discrimination 121, 122
- crimes against humanity 122
- customary law 122
- erga omnes* obligation 122
- inhuman acts 121–22
- International Convention on the Suppression and Punishment of the Crime of Apartheid 121–22
- segregation 122
- State criminality 12

Appeals

- evidence before ad hoc tribunals 322–23

Armed conflict

- Geneva Conventions 119–20
- submarine cables and pipelines 102
- superior orders 131–35
- torture 119–20

Australia

- cybercrime 82

Aut dedere aut judicare 9, 35, 160–62

- extradition 179, 191

Aviation

- air piracy 24–25
- bombings 18
- hijacking 18, 23–24, 26
- hostage taking 18
- jurisdiction 162
- Lockerbie 27–28
 - See also* Lockerbie
- Montreal Convention 25–27
- terrorism 17, 23–28
 - air piracy 24–25
 - Hague Convention 23–24
 - hijacking 23–24, 26
 - Lockerbie 27–28
 - See also* Lockerbie
 - Montreal Convention 25–27
 - plastic explosives 26
 - State entities 26–27
 - Tokyo Convention 23
 - UNCLOS 24–25
- Tokyo Convention 23, 162
- UNCLOS 24–25

Banking

- money laundering 62–63

Basle Committee 61

Bombings

- terrorism 18, 30–32

Bribery

- foreign public officials 83–86

Bride-price 111, 112

Cables and pipelines

- See* Submarine cables and pipelines

Cambodian Extraordinary

- Chambers 406–08

Canada

- extradition 179, 180

Capital punishment

- extradition 188–89

Character evidence

- evidence before ad hoc tribunals 306–07

Children

- pornography 91, 116
- prostitution 113
- slavery 111, 112–13, 116

Clause française 47

Co-operation

- enforcement of international

- criminal law 9
- money laundering 66–67
- Permanent International Criminal Court 392–93
- police
 - See Police co-operation
- transnational
 - organised crime 51–52
- Commission on Narcotic Drugs** 55, 56
- Consular immunities** 174–76
- Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others** 6
- Corroboration**
 - evidence before ad hoc tribunals 297, 316
- Corruption**
 - drug-trafficking 54
 - transnational organised crime 49, 50
- Council of Europe**
 - cybercrime
 - Convention on Cybercrime 74–75
 - initiatives 74–75
 - money laundering 61
- Custom ary law**
 - apartheid 122
 - consistent objection 3
 - criminalisation 6
 - General Assembly
 - resolutions 2–3
 - hot pursuit, right of 104
 - jus cogen* norm 3
 - national legal systems
 - principles derived from 3–4
 - objections 3
 - objective element 2
 - piracy 95, 97
 - slavery 110
 - sources of international law 2
 - subjective element 2
 - torture 118
- Cybercrime** 73–83
 - Australia 82
 - Council of Europe
 - Convention on Cybercrime 74–75
 - initiatives 74–75
 - e-commerce 73
 - European Union
 - COMCRIME study 76
 - EU Safer Internet Action Plan 79–80
 - European Commission
 - Cybercrime and Communication 76–79
 - initiatives 76–80
 - freedom of expression 73
 - G8 States, action by 74
 - growth 73
 - international initiatives 81
 - jurisdiction 73
 - national initiatives 81–83
 - OECD Security Guidelines 81
 - offences 73
 - privacy, right to 73
 - recent developments 73
 - self-regulation 73
 - technical measures
 - to prevent 73
 - United Kingdom 82–83
 - Dayton Peace Agreement** 342
 - Debt bondage** 111–12
 - Defences in international criminal law** 127–42
 - abuse of process 127
 - actus reus* 127
 - burden of proof 128
 - concept of defence 127
 - duress 135–38
 - exclusion of criminal responsibility 129
 - general defences 127
 - intoxication 140
 - manifest illegality 133–34
 - meaning of defence 127
 - mens rea* 127
 - mental incapacity 141–42
 - mistake of fact or law 141
 - ne bis in idem* 127
 - necessity 135–38
 - nullum crimen nulla poena sine lege scripta* 127

- presumption of innocence 128
- procedural defences 127
- retroactivity of
 - criminal law 128
- self-defence 138–39
- special defences 127
- Statute of the
 - International Criminal Court 127, 128, 129
 - domestic defences 129–31
 - duress 135–38
 - necessity 135–38
 - superior orders 131–35
 - statute of limitations 127–28
 - substantive defences 127, 128
 - superior orders 131–35
 - theoretical
 - underpinnings 127–31
- Deportation order**
 - terrorism 21
- Deposition evidence**
 - evidence before ad hoc tribunals 304–06
- Diplomatic immunities 174–76**
- Disappearances 122–24**
 - crimes against humanity 123, 124
 - definition 123–24
 - enforced 122–24
 - human rights 124
 - investigations 123
 - jurisdiction 124–25
 - meaning 123
 - non-State actors 124
 - torture 124
 - UN General Assembly's Declaration in the Protection of All Persons from Enforced Disappearance 123
 - UN Human Rights Commission Working Group 123
 - voluntary 122–24
- Documentary evidence**
 - evidence before ad hoc tribunals 301–02, 316–17
- Double criminality**
 - extradition 181–84
- Double jeopardy**
 - extradition 181, 189–90
- Drug-trafficking 53–60**
 - bribery of public officials 54
 - Commission on Narcotic Drugs, 55, 56
 - Convention on Psychotropic Drugs 57
 - corruption 54
 - crime against international law, as 59–60
 - decriminalisation 54
 - development of international measures 54–59
 - enforcement 54
 - International Narcotics Control Board 56
 - International Opium Commission 54–55
 - psychotropic drugs 55
 - Schengen Implementing Convention 59
 - sea, trafficking at 58–59
 - Single Convention on Narcotic Drugs 56
 - Protocol 56–57
 - social problems 54
 - States, involvement of 54
 - terrorism 54
 - United Nations 55
 - agencies 55–56
 - conventions 55
 - Fund for Drug Abuse Control 56
 - Vienna Convention 55, 57–58
- Duress**
 - defences in international criminal law 135–38
- East Timor**
 - Special Panels 401–04
- Effects doctrine 146–47**
- Electronic information**
 - terrorism 37
- Enforcement of international criminal law**
 - Apartheid Convention 8
 - aut dedere aut judicare* 9

- co-operation 9
- direct 8–9
- extradition 9
- Genocide Convention (1948) 8
- International Covenant on
 - Civil and Political Rights 11
- international tribunals 8–9
- private organisations 11
- process 11–12
- Erga omnes* obligation**
 - apartheid 122
- Eurojust 280–81**
- European arrest warrant 199–200, 282–83**
- European Convention on the Suppression of Terrorism 19–20, 46–47**
- European Court of Human Rights**
 - extradition 221–22
 - mutual legal assistance 254
- European Judicial Network 283**
- European Police College 283–84**
- European Public Prosecutor 281–82**
- European Union**
 - cybercrime,
 - COMCRIME study 76
 - EU Safer Internet Action Plan 79–80
 - European Commission,
 - Cybercrime and Communication 76–79
 - initiatives 76–80
- European arrest
 - warrant 199–200, 282–83
- European Convention
 - on Mutual Assistance in Criminal Matters 237–40, 284
- European Judicial Network 283
- European Police College 283–84
- Europol 273–77
- extradition 194–95
- money laundering 61
 - initiatives 68–69
- mutual legal assistance
 - European Convention on Mutual Assistance in Criminal Matters 237–40
 - initiatives 235–42
 - Schengen Implementing Convention 236–37
 - Third Pillar 235–36
 - Treaty on European Union 236
- police co-operation
 - corpus juris* 284–85
 - Eurojust 280–81
 - European arrest warrant 282–83
 - European Convention on Mutual Assistance in Criminal Matters 284
 - European Court of Justice 272–73
 - European Judicial Network 283
 - European Police College 283–84
 - European Public Prosecutor 281–82
 - Europol 273–77
 - initiatives 270–85
 - procedural safeguards 285
 - Schengen *Acquis* 277–79
 - Schengen Information System 279–80
 - terrorism 36
- Europol 273–77**
- Evidence**
 - See also* Mutual legal assistance
 - ad hoc tribunals
 - See* Evidence before ad hoc tribunals
 - exclusionary rules 214–16
 - extradition 180, 214–16
- Evidence before ad hoc tribunals 287–323**
 - admissibility 298–300
 - affidavits 294
 - analysis of rules 295–98
 - appeals 322–23
 - authenticity 299
 - best evidence rule 299
 - burden of proof 289–90
 - case law 290
 - character evidence 306–07
 - civil law influence 295, 296, 297
 - competence 297
 - confessions 292

- consistent pattern of conduct,
 - evidence showing 293–94
- corroboration 297, 316
- cross-examination 292
- cultural aspects 321–22
- dead persons, written
 - statements in lieu of 293
- definition of evidence 289
- deposition evidence 304–06
- differences between ICTR
 - and ICTY rules 289
- documentary evidence 301–02, 316–17
- exclusionary rules 296–97
- expert evidence 322
- expert witnesses 294, 309–13
- fairness of the trial 291, 298
- hearsay evidence 299, 302–04, 317–18
- improperly obtained
 - evidence 313–15
- interpretation of rules 296
- investigator's report 307–09
- involuntary statements 300
- irregularly, evidence
 - obtained 296
- language problems 321
- lapse of time 318
- legal admissibility 299
- legal framework 289–98
- national rules
 - of evidence 295
- oppression 300
- presumption of
 - innocence 290
- prior statements 320–21
- privilege 294, 296–97
- probative value 300–301
- qualification
 - as evidence 300
- relevance 300
- reliability 295–96, 300, 301
- reversal of decision
 - to exclude
 - evidence 299
- role of judges 287–88
- Rules of Procedure
 - and Evidence 287–88, 290–98
- self-incrimination 292
- sexual assault cases 294
- standard of proof 290, 292, 298
- system of proof 297
- testimony of
 - witnesses 291–92
- ultimate issue rule 309
- weight of evidence 297, 299, 300
 - corroboration 316
 - cultural aspects 321–22
 - determination 315–23
 - documentary
 - evidence 316–17
 - expert evidence 322
 - general principles 315–16
 - hearsay evidence 317–18
 - language problems 321
 - lapse of time 318
 - prior statements 320–21
 - traumas 319–20
- witness statements 293
- witnesses 291–92
- written statements 293
- Expert witnesses**
 - evidence before ad hoc tribunals 294, 309–13, 322
- Extradition 9, 179–229**
 - abduction 218–25
 - abuse of process 222–23
 - collusion by law, enforcement agencies 223–24
 - European Court of Human Rights 221–22
 - male captus, bene detentus* rule 218–19
 - seriousness of crime 224–25
 - United States 219–21
 - abuse of process 222–23
 - accused person, meaning of 180–81
 - aims 179
 - alternatives to 179
 - assumptions 179
 - aut dedere aut judicare* 179, 191
 - bilateral treaties 179
 - Canada 179, 180
 - capital punishment 188–89
 - comity 179
 - Convention Relating to Extradition 196–99
 - Convention on Simplified

- Extradition Procedure 195–96
- Council Framework
 - Decision on the European arrest warrant 199–200
- death row cases 181, 188–89
- domestic fair trial
 - safeguards 213
- double criminality 181–84
- double jeopardy 181, 189–90
- EC law and
 - expulsion of nationals 203–05
 - free movement
 - of workers 204–05
- enforcement of
 - international criminal law 9
- European Convention
 - on Extradition 193–94
- European Court of
 - Human Rights 221–22
- European Union 194–95
- evidence 180, 214–16
- exclusionary rules
 - of evidence 214–16
- executive discretion
 - to surrender
 - fugitive 180
- exemption from 180
- fiscal offences 189
- fundamental rights,
 - protection of 181
- general principles 179–92
- good faith 180
- human rights 205–12
 - European Convention
 - on Human Rights 206–07
 - inhuman and degrading
 - treatment, prohibition
 - against 207–09
 - International Covenant
 - on Civil and
 - Political Rights 211–12
 - Soering* principle 209–10
 - torture, prohibition
 - against 207–09
 - UN Convention Against
 - Torture and Other Cruel,
 - Inhuman or Degrading
 - Treatment or Punishment 212
- hybrid system 179
- increased use 179
- inhuman and degrading
 - treatment, prohibition
 - against 207–09
- International Covenant
 - on Civil and
 - Political Rights 211–12
- international initiatives 192–201
- interpretation of treaties 180
- legal basis 179, 180
- male captus, bene detentus* rule 218–19
- meaning 179
- military and
 - religious offences 181, 189, 193–94
- money laundering 67
- motive 180
- multilateral regional
 - treaties 179
- non-inquiry, rule of 180, 191–92
- Pinochet* case 225–29
- political offence
 - exception 181, 186–88
- procedural law, as 180
- process 179–92
- purposive
 - interpretation 180–81
- re-extradition 185–86
- reciprocity 179
- refusal of request 181
- requests 179–80
- review by domestic
 - authorities 216–18
- Soering* principle 209–10
- sovereign act, as 181
- specialty, rule of 181, 184–85
- surrender
 - of nationals 190–91
- third State,
 - re-extradition to 185–86
- torture, prohibition
 - against 207–09
- transnational
 - organised crime 49, 51–52
- UN Convention Against
 - Torture and Other Cruel,
 - Inhuman or Degrading
 - Treatment or Punishment 212
- UN Model Treaty on
 - Extradition 192–93
- United Kingdom, 179, 180

- Extradition Bill 2002 200–201
- United States 179, 180, 219–21
- Extradition**
 - EC law and 201–05
- Financial Action Task Force on Money Laundering** 62, 63, 64, 65–66
- Firearms Protocol 53**
- Foreign public officials**
 - bribery 83–86
- Freedom of expression**
 - cybercrime 73
 - obscene publications 90
- General Assembly**
 - resolutions 2–3
 - transnational
 - organised crime 49–50
- Geneva Conventions**
 - armed conflict 119–20
 - International Criminal
 - Tribunals for the Former Yugoslavia and Rwanda 348–50
 - torture 119–20
- Genocide**
 - Armenians 12
 - definition 358–64
 - International Criminal
 - Tribunals for the Former Yugoslavia and Rwanda 358–64
 - Jews 14
 - Permanent International
 - Criminal Court 384
 - Tutsi 12
- Genocide Convention (1948)** 5
 - enforcement 8
- Grotius** 9
- Hearsay evidence**
 - evidence before ad hoc
 - tribunals 299, 302–04, 317–18
- High seas**
 - piracy on 98
 - unauthorised
 - broadcasting from 103–04
- Hijacking** 18, 23–24, 26
- Hostage taking**
 - terrorism 18, 28–30
- Hot pursuit, right of** 104–08
 - commencement 106–07
 - constructive presence 107–08
 - continuous nature 106–07
 - customary law 104
 - enforcement action 105
 - High Seas
 - Convention 104
 - lawful pursuit 107
 - operation 104–05
 - signals 107
 - UNCLOS 104, 105–07
- Human rights**
 - disappearances 124
 - extradition 205–12
 - European Convention
 - on Human Rights 206–07
 - inhuman and
 - degrading treatment, prohibition against 207–09
 - International Covenant
 - on Civil and Political Rights 211–12
 - Soering* principle 209–10
 - UN Convention
 - Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 212
 - obscene publications 90
 - terrorism 18, 42, 46–48
 - theory of international
 - criminal law 14–15
 - torture 117, 120–21
- Humanitarian law**
 - breaches 7
- Humanity, crimes against**
 - apartheid 122
 - International Criminal
 - Tribunals for the Former Yugoslavia and Rwanda 353–58
 - Permanent International
 - Criminal Court 384–86
- Immunities**
 - Act of State 169–70
 - armed forces abroad 173–74
 - consular immunities 174–76
 - criminal jurisdiction 165–70

- diplomatic 174–76
- domestic law 170–72
- general concept 165–68
- international criminal
 - jurisdiction 176–77
 - jus cogens* norms 170–72
 - ratione materiae* 168, 169
- Inhuman and degrading treatment, prohibition against**
 - extradition 207–09
- Intergovernmental organisations 4**
- International Cable Protection Committee 11, 103**
- International comity**
 - extradition 179
 - mutual legal assistance 231
- International Committee of the Red Cross 11**
- International Covenant on Civil and Political Rights**
 - enforcement of
 - international criminal law 11
 - extradition 211–12
 - mutual legal assistance 254
 - terrorism 46
- International crimes**
 - categories 5–6
 - criminalisation 4–8
- International Criminal Court**
 - See also* Permanent International Criminal Court
 - core crimes 164
 - jurisdiction 163–64
 - limitations 164
- International criminal law**
 - criminalisation 4–8
 - enforcement 8–12
 - objectives 10
 - reconciliation 10
 - sources of international law
 - See* Sources of international law
 - theory
 - See* Theory of international criminal law
- International Criminal Tribunals for the Former Yugoslavia and Rwanda 339–74**
 - accused, rights of 372–74
 - background 339–42
 - command responsibility 368–69
 - enforcement capacity 369–71
 - equality of arms 372
 - establishment 339
 - evidence
 - See* Evidence before ad hoc tribunals
 - formative years 342–46
 - Geneva Conventions 348–50
 - genocide –64
 - grave breaches of
 - Geneva Conventions 348–50
 - humanity, crimes against 353–58
 - interpretative means
 - of the Statutes 341
 - jurisdiction 163, 164, 346–68
 - concurrent 346
 - failure to prevent
 - or punish crimes 348
 - genocide 358–64
 - grave breaches of
 - Geneva Conventions 348–50
 - humanity, crimes against 353–58
 - national authorities 346–47
 - preparatory and execution stages
 - of prescribed offences 347–48
 - subject matter 347
 - violations of laws or customs of war in
 - internal conflicts 351–53
 - legality of establishment 341
 - mutual legal assistance 254
 - powers 164
 - presumption
 - of innocence 372
 - rape 364–68
 - Security Council 339–40
 - sexual offences 364–68
 - submission of cases to 347
 - superior responsibility, doctrine of 368–69
 - Vienna Convention 341–42
 - violations of laws or customs of war in

- internal conflicts 351–53
- International custom**
 - sources of
 - international law 2
- International Law**
 - Commission**
 - role in post-Nuremberg era 335–37
- International Military**
 - Tribunal at Nuremberg 132, 133**
 - See also* International military tribunals
 - criticism 333–34
 - establishment 8
 - jurisdiction 327–33
 - law of 327–33
 - legal basis 333–34
 - Second World War 133
- International Military**
 - Tribunal for the Far East 334–35**
 - See also* International military tribunals
 - background 334–35
 - establishment 8, 335
 - procedural law 335
 - substantive law 335
- International**
 - military tribunals**
 - See also* International Military Tribunal at Nuremberg; International Military Tribunal for the Far East
 - background to
 - establishment 326–34
 - establishment 325
 - First World War, after 325
 - Second World War, after 325–26
- International Narcotics**
 - Control Board 56**
- International Opium**
 - Commission 54–55**
- Internationally**
 - protected person, attacks against 18, 28–30**
- Interpol 265–70**
 - background 265–66
 - establishment 265
 - Executive Committee 267
 - General Assembly 267
 - General Secretariat 267
 - membership 266
 - National Central Bureaux 267–68
 - operational activities 268–70
 - organisation 266–68
 - role 265, 266
- Intoxication**
 - defences in international criminal law 140
- Investigator's report**
 - evidence before ad hoc tribunals 307–09
- Israel**
 - terrorism 38
- Jurisdiction**
 - active personality
 - principle 151–52
 - armed forces abroad 173–74
 - aut dedere aut judicare* 9, 35, 160–62
 - aviation 162
 - civil aviation,
 - crimes against 162
 - criminal 143–44
 - immunities
 - See* Immunities
 - international 164
 - International
 - Criminal Court 163–64
 - international criminal
 - jurisdiction 162–64
 - International Criminal Tribunals for the Former Yugoslavia and Rwanda 163, 164, 346–68
 - concurrent
 - jurisdiction 346
 - failure to prevent
 - or punish crimes 348
 - genocide 358–64
 - grave breaches
 - of Geneva Conventions 348–50
 - humanity,
 - crimes against 353–58
 - national authorities 346–47
 - preparatory and
 - execution stages of
 - prescribed offences 347–48
 - subject matter 347
 - violations of laws or
 - customs of war in
 - internal conflicts 351–53
- passive personality
 - principle 152–54

- Permanent International Criminal Court 377
 - admissibility 377–81
 - aggression, crime of 381–84
 - genocide 384
 - humanity,
 - crimes against 384–86
 - subject matter 377, 381–90
 - war crimes 386–90
 - protective principle 154–55
 - territorial
 - See* Territorial jurisdiction
 - universal jurisdiction 156–60
- Jus cogens norms 170–72**
- objections to 3
 - terrorism 18
 - torture 117
- Korean War 134**
- Kosovo**
- UN Interim Administration Mission in Kosovo 404–05
- Kuwait**
- Iraqi annexation of 11–12
- Law of the**
- Sea Convention**
 - See* UNCLOS
- Legal assistance**
- See* Mutual legal assistance
- Letters rogatory 231**
- Libya**
- terrorism 12
- Lockerbie 27–28**
- extradition 27
 - State criminality 12, 27–28, 39
 - The Netherlands,
 - court in 27–28
 - trial 408–10
- London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 4**
- Male captus, bene detentus rule 218–19**
- Maritime crime**
- See* Piracy; Sea, law of the; UNCLOS
- Mens rea**
- piracy 1
 - terrorism 17
- Mental incapacity**
- defences in international criminal law 141–42
- Mistake of fact or law**
- defences in international criminal law 141
- Money laundering 35, 60–72**
- banking supervisory authorities 62
 - Basle Committee 61, 62
 - co-operation 66–67
 - common factors 60
 - compensation orders 66
 - concealment or disguise of source 60
 - Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 67–68
 - conversion or transfer of property 60
 - Council of Europe 61, 67–69
 - definition 66
 - EC Money Laundering Regulations 72
 - European Union,
 - Directives 61, 68–69
 - initiatives 68–69
 - extradition 67
 - Financial Action Task Force on Money Laundering 62, 63, 64, 65–66
 - globalisation 61
 - information exchange 66
 - integration phase 60
 - investigations 66
 - Know Your Customer standards 62
 - layering phase 60
 - meaning 60
 - Model Legislation on Laundering, Confiscation and International Co-operation in Relation to the Proceeds of Crime 66

- mutual legal assistance 67
- mutual technical assistance 67
- national laws,
 - United Kingdom 69–71
- placement phase 60, 61
- regaining access
 - to money 60
- Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures 68
- self-regulation 61–64
- serious crime,
 - proceeds from 65
- surveillance 66
- three stage process 60
- transnational
 - organised crime 50, 51, 52, 65
- treaties and
 - conventions 61
- UN Office for Drug Control and Crime Prevention 61
- United Kingdom 69–71
- United Nations
 - initiatives 64–67
- Vienna Convention 61, 63–64
- Mutiny 98–99**
- Mutual legal assistance 231–63**
 - bilateral treaties 231
 - criticisms 232
 - development 231
 - effectiveness 231
 - European Convention
 - on Mutual Assistance 232
 - European Convention on Mutual Assistance in Criminal Matters 234–35, 237–40, 284
 - European Court of Human Rights 254
 - European Union,
 - European Convention on Mutual Assistance in Criminal Matters 234–35, 237–40, 284
 - initiatives 235–42
 - Schengen Implementing Convention 236–37
 - Third Pillar 235–36
 - Treaty on European Union 236
- execution of requests 231
- failure to use
 - provisions 256–60
- forms of assistance 231
- Home Office Mutual Legal Assistance Section 231–32
- human rights standards,
 - evidence obtained in breach of 254–56
- individual rights 260–61
- informal methods 259–60, 261–63
- international comity 231
- International Covenant on Civil and Political Rights 254
- International Criminal Tribunals for the Former Yugoslavia and Rwanda 254
- judicial authorisation of request 231–32
- letters rogatory 231
- misuse 232
- money laundering 67
- multilateral treaties 231, 260–61
- Permanent International Criminal Court 392–93
- procedural
 - requirements of requesting State 231
- refusal of request 232
- Schengen Implementing Convention, 236–37
- transnational
 - organised crime 49
- treaties 231
- United Kingdom,
 - Crime (International Co-operation) Bill 242
 - initiatives 240–42
 - procedure 240–41
 - reform of law 240
- United Nations,
 - initiatives 233–35

- Model Treaty on Mutual Legal Assistance 233–34
- use of evidence
 - obtained abroad 242–53
 - breach of foreign law, evidence obtained in 243–46
 - local law, evidence which is irregular under 246–53
 - outside UK, evidence obtained 243
- Narcotics**
 - See also* Drug-trafficking Convention 50
 - piracy 95
 - transnational organised crime 50
- National law**
 - cybercrime 81–83
 - implementation of
 - offences in treaties 6–7
 - money laundering 69–71
 - terrorism 20–22
- National liberation movements**
 - terrorism 18, 19, 40–42
- National security**
 - terrorism 21
- Natural persons 4**
- Ne bis in idem* 127
- Nuclear terrorism 32**
- Nullum crimen**
 - nulla poena sine lege scripta* 127
- Obscene publications**
 - Agreement for the Suppression of the Circulation of Obscene Publications 89
 - child pornography 91
 - circulation and trafficking in 88–91
 - Convention for the Suppression of and Traffic in Obscene Publications 89
 - definition of obscenity 90
 - freedom of expression 90
 - human rights 90
 - United Kingdom 90, 91
 - United States 90–91
 - UPU Convention 89
- Obstruction of justice**
 - transnational organised crime 50
- OECD Security Guidelines**
 - cybercrime 81
- Offences against the person**
 - See* Apartheid; Disappearances; Slavery; Torture
- Organised crime**
 - See* Transnational organised crime
- Pacta sunt servanda* 3
- Passive personality principle 152–54**
 - terrorism 21
- Penalties**
 - theory of international criminal law 2
- Permanent International Criminal Court**
 - aggression, crime of 381–84
 - amendments to
 - the Statute 393–95
 - background 375–77
 - co-operation 392–93
 - constitution 376–77
 - criminal law, general
 - principles of 390–92
 - establishment 376
 - general principles
 - of criminal law 390–92
 - genocide 384
 - humanity,
 - crimes against 384–86
 - international co-operation 392–93
 - judges 377
 - judicial assistance 392–93
 - jurisdiction 377
 - admissibility 377–81
 - aggression,
 - crime of 381–84
 - genocide 384
 - humanity, crimes
 - against 384–86
 - subject matter 377, 381–90
 - war crimes 386–90
 - mutual legal

- assistance 392–93
- reparation
 - of victims 395–96
- reservations
 - to Statute 393–95
- subject matter
 - jurisdiction 377, 381–90
- war crimes 386–90
- Person, offences against**
 - See* Apartheid; Slavery; Torture
- Pinochet* case 225–29**
- Piracy**
 - acts constituting 97
 - animus furandi* 95
 - belligerents 96
 - categories 94
 - concept 1
 - constituent elements
 - of offence 97
 - customary law 95, 97
 - definition under
 - international law 4, 95–99
 - enemy of mankind 96
 - eradication 99–100
 - exclusive economic
 - zone, in 98
 - High Seas Convention 97
 - high seas, on 98
 - historical background 95–97
 - increase 94, 95
 - intention 95
 - jure gentium* 1, 4, 94–100
 - mens rea* 1
 - methods of operation 94–95
 - narcotic drugs 95
 - organised 94
 - organised crime 95
 - political motives 96
 - prevention 99–100
 - private ends proviso 97, 98
 - proposals to tackle 99–100
 - recognition 96
 - registration of ships 94
 - statistics 94
 - theory of international
 - criminal law 1
 - UNCLOS 1, 4, 97, 99
 - United States 96
- Piracy Reporting Centre 11**
- Police co-operation 265–85**
 - Eurojust 280–81
 - European arrest
 - warrant 282–83
 - European Judicial
 - Network 283
 - European Public
 - Prosecutor 281–82
 - European Union
 - corpus juris* 284–85
 - Eurojust 280–81
 - European arrest
 - warrant 282–83
 - European Convention
 - on Mutual Assistance
 - in Criminal Matters 284
 - European Court
 - of Justice 272–73
 - European Judicial
 - Network 283
 - European Police
 - College 283–84
 - European Public
 - Prosecutor 281–82
 - Europol 273–77
 - initiatives 270–85
 - procedural safeguards 285
 - Schengen *Acquis* 277–79
 - Schengen Information
 - System 279–80
 - generally 265
 - improving 265
 - Interpol 265–70
 - background 265–66
 - establishment 265
 - Executive
 - Committee 267
 - General Assembly 267
 - General Secretariat 267
 - membership 266
 - National Central
 - Bureaux 267–68
 - operational activities 268–70
 - organisation 266–68
 - role 265, 266
 - procedural
 - safeguards 285
 - transnational
 - organised crime 265
- Political offence**
 - exception**
 - extradition 181, 186–88
 - terrorism 17
 - theory of

- international criminal law 1–2
- Pornography**
 - children 91, 116
- Postal offences**
 - mail fraud 88
 - transnational offences 87–88
 - United States 88
 - UPU Conventions 87–88
- Presumption of innocence**
 - defences in international criminal law 128
 - evidence before ad hoc tribunals 290
 - International Criminal Tribunals for the Former Yugoslavia and Rwanda 372
- Prior statements**
 - evidence before ad hoc tribunals 320–21
- Private organisations**
 - enforcement of international criminal law 11
- Privilege**
 - evidence before ad hoc tribunals 294, 296–97
- Prostitution**
 - children 113
 - Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others 6
 - serfdom 114–15
 - slavery 114–15
- Protective principle 154–55**
- Rape**
 - International Criminal Tribunals for the Former Yugoslavia and Rwanda 364–68
- Reconciliation 10**
- Reparation of victims**
 - Permanent International Criminal Court 395–96
- Schengen Acquis 277–79**
- Schengen Implementing Convention 236–37**
- drug-trafficking 59
- Sea, law of the 93–108**
 - See also* Hot pursuit, right of; Piracy; UNCLOS
 - mutiny 98–99
- Second World War,**
 - Nuremberg Tribunal 133
 - State criminality 12
- Security Council,**
 - International Criminal Tribunals for the Former Yugoslavia and Rwanda 339–40
 - Resolution 1368 39
 - Resolution 1373 34–35
- Self-defence,**
 - defences in international criminal law 138–39
- September 11 terrorist attacks 5, 18–19, 22, 28, 34, 39**
- Serfdom, 111, 113–14**
- Sexual offences**
 - evidence before ad hoc tribunals 294
 - International Criminal Tribunals for the Former Yugoslavia and Rwanda 364–68
- Ships,**
 - Achille Lauro* incident 21, 98
 - mutiny 98–99
 - piracy
 - See* Piracy
 - violence against 98–99
- Sierra Leone**
 - Special Court 397–401**
- Slavery 109–17**
 - abolition 109
 - bride-price 111, 112
 - children 111, 112–13, 116
 - customary law 110
 - debt bondage 111–12
 - definition 110
 - enforcement measures, international 116–17
 - evaluation of incidences of 109
 - exploitation 115
 - forced labour 115
 - high seas, trade on the 110
 - international

- agreements 109
- prostitution 114–15
- remedies 116–17
- search and seizure
 - of ships 110
- serfdom 111, 113–14
- slave trade 111–16
- Slavery Convention 110
- traffic in persons 114–15
- transnational
 - organised crime 115
- UN Working Group 116
- UNCLOS 116–17
- WTO Agreement 17
- Smuggling Protocol 52, 53**
- Soering principle* 209–10
- Sources of**
 - international law 2–4**
 - customary law 2–3
 - decisions of
 - international courts 2
 - general principles
 - of law 2, 3–4
 - international custom 2
 - primary 2
 - publicists, writings of 2
 - secondary 2
 - Statute of the
 - International Court of Justice 2
 - Statute of the
 - International Criminal Court 4
 - treaties 2
- Specialty, rule of 181, 184–85**
- State**
 - criminality 12–13, 18
 - terrorism sponsored
 - by 12, 18, 38–40
- State responsibility**
 - ILC Draft Articles 12–13
 - individual responsibility and 13
- Statute of the International Court of Justice**
 - general principles
 - of law 4
 - sources of
 - international law 2, 4
- Statute of the International Criminal Court**
 - defences in
 - international
 - criminal law 127, 128, 129
 - domestic defences 129–31
 - duress 135–38
 - necessity 135–38
 - superior orders 131–35
 - sources
 - of international law 4
- Statute of limitations 127–28**
- Submarine cables and pipelines**
 - armed conflict 102
 - freedom to lay 101
 - International Cable Protection Committee 103
 - jurisdiction 102
 - offences against 100–103
 - prosecution of cases 102–03
- Superior orders 131–35**
- Superior responsibility, doctrine of 368–69**
- Territorial jurisdiction 144–51**
 - assumption
 - of jurisdiction 144–45
 - continuing act
 - doctrine 147
 - effects doctrine 146–47
 - legal persons 147–48
 - national territory,
 - ambit of 149–51
 - objective territoriality 146–48
 - qualified territoriality 145
 - real and substantial
 - link theory 145–46
 - sovereignty 144
 - subjective
 - territoriality 145–46
 - territoriality principle 144
 - United Kingdom 148–49
- Terrorism 17–48**
 - Achille Lauro* incident 21
 - Al-Qaeda 42
 - aviation 17, 23–28
 - air piracy 24–25
 - Hague Convention 23–24
 - hijacking 23–24, 26
 - Lockerbie 27–28
 - See also* Lockerbie
 - Montreal Convention 25–27
 - plastic explosives 26

- September 11
 - terrorist attacks 18–19, 22, 28
- State entities 26–27
- Tokyo Convention 23
- UNCLOS 24–25
- bombings 18, 30–32
- clause française* 47
- computer networks,
 - use of 37
- conventions 17–18
- definition 17, 18, 20
- deportation order 21
- drug-trafficking 54
- electronic information 37
- European Convention
 - on the Suppression
 - of Terrorism 19–20, 46–47
- European Union 36
- events shaping
 - regulation 17
- financing
 - of operations 18, 32–35
- hijacking 18
- hostage taking 18, 28–30
- human rights 18, 42, 46–48
- ideological European
 - movements 40–41
- International Covenant
 - on Civil and
 - Political Rights 46
- Israel 38
- jus cogens* norms 18
- Libya 12
- Lockerbie
 - See* Lockerbie
- mens rea* 17
- Munich Olympic
 - Games 19
- national laws 20–22
- national liberation
 - movements 18, 19,
 - 40–42
- national security 21
- nuclear terrorism 32
- organised crime 18, 43–44
- passive personality
 - principle 21
- political offence
 - exception 17
- political offences 44–46
- pre-emptive attacks 38
- procedural safeguards 46
- regional mechanisms 35–37
- Resolution 1373 34–35
- revolutionary
 - movements 40
- root causes 19
- self-defence, inherent
 - right of 39
- September 11
 - terrorist attacks 18–19,
 - 22, 28, 39
- South America 40
- State sponsored 12, 18, 38–40
- thematic approach 19–20
- transnational
 - organised crime 33, 43–44
- treaties and
 - conventions 17–18, 19–20
- United Kingdom 20–21
- United Nations
 - General Assembly,
 - discussions in 19
 - United States 21–22, 38–40
 - Vienna Declaration 47
- Theory of international criminal law 1–15**
 - criminalisation process,
 - international 4–8
 - enforcement 8–12
 - human rights 14–15
 - legal disciplines 1
 - penalties 2
 - piracy 1
 - political offence
 - exception 1–2
 - practice of States 5
 - sources
 - See* Sources of international law
 - State criminality 12–13
- Torture 117–21**
 - armed conflict 119–20
 - complicity in
 - other offences 121
 - customary law 118
 - definition 118–20
 - disappearances 124
 - Geneva Conventions 119, 120
 - human rights 117, 120–21
 - extradition 207–09

- Inter-American Torture
 - Convention 118
 - jus cogens* norms 117
 - public official
 - requirement 120–21
 - threshold 119
 - UN Committee
 - Against Torture 120
 - UN Torture
 - Convention 118
- Traffic in persons**
 - slavery 114–15
- Trafficking Protocol 52**
- Transnational offences**
 - bribery of foreign public officials 83–86
 - obscene publications, circulation and trafficking in 88–91
 - postal offences 87–88
 - See also* Cybercrime; Drug-trafficking; Money laundering; Transnational organised crime
- Transnational**
 - organised crime 49–53**
 - See also* Drug-trafficking
 - co-operation 51–52
 - collection of information 52
 - corruption 49, 50
 - direct or indirect benefit 51
 - exchange of information 52
 - extradition 49, 51–52
 - Firearms Protocol 53
 - General Assembly 49–50
 - migrants, smuggling of 52
 - money laundering
 - See* Money laundering
 - mutual legal assistance 49, 52
 - Naples Political
 - Declaration 49–50
 - narcotics 50
 - obstruction of justice 50
 - offences 50
 - participation in
 - organised criminal groups 50, 51
 - police co-operation 265
 - Smuggling Protocol 52, 53
 - structured groups 51
 - technical assistance
 - programs 52
 - terrorism 33, 43–44
 - Trafficking Protocol 52
 - transnational
 - nature, offences 50
 - UN Convention
 - Against Transnational Organized Crime 50–52
 - protocols 52–53
 - UNCLOS 53
 - weak States 49
- Treaties and conventions**
 - definitions 7
 - drafting 1
 - failure to incorporate
 - into national law 7
 - fortifications to 7
 - money laundering 61
 - ratifications 6
 - reservations 6
 - signatories 1
 - terrorism 17–18, 19–20
 - violations 7
- Truth commissions 10, 411–13**
- UN Convention Against Transnational Organized Crime 50–52**
 - See also* Transnational organised crime protocols 52–53
- UNCLOS**
 - See also* Piracy;
 - Sea, law of the archipelagic States 93
 - aviation 24–25
 - baselines 93
 - contiguous zones 93
 - continental shelf 93
 - exclusive economic zone 93
 - high seas 93–94
 - hot pursuit, right of 104, 105–07
 - innocent passage,
 - right of 93
 - maritime belts 93
 - piracy 1, 4, 97, 99
 - slavery 116–17
 - sovereignty 93
 - status 1
 - territorial sea 93
 - transit passage 93
 - transnational
 - organised crime 53
- United Kingdom**

cybercrime 82–83
extradition 179, 180
 Extradition
 Bill 2002 200–201
money laundering 69–71
mutual legal assistance,
 Crime (International
 Co-operation) Bill 242
 initiatives 240–42
 procedure 240–41
 reform of law 240
obscene publications 90, 91
territorial jurisdiction 148–49
terrorism 20–21

United Nations

blanket immunities,
 opposition to 10
money laundering
 initiatives 64–67
mutual legal assistance,
 initiatives 233–35
 Model Treaty on
 Mutual Legal
 Assistance 233–34
peace-keeping forces, 173–74
Security Council
 See Security Council

United States

extradition 179, 180,
 219–21

obscene publications 90–91
piracy 96
postal offences 88
terrorism 21–22,
 38–40

Universal crimes 5

Universal

jurisdiction 9, 156–60

Vienna Convention

drug-trafficking 55, 57–58
International Criminal
 Tribunals for the Former
 Yugoslavia and Rwanda 341–42
money laundering 61, 63–64

Vietnam War 134

War crimes

concept 331
London Agreement for
 the Prosecution and
 Punishment of the Major
 War Criminals of the
 European Axis 4
Permanent International
 Criminal Court 386–90

Witnesses

evidence before
 ad hoc tribunals 291–92