International Humanitarian Law Series

The Challenge of Conflict: International Law Responds

Edited by
Ustinia Dolgopol and Judith Gardam

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The Challenge of Conflict

International Humanitarian Law Series

VOLUME 13

The International Humanitarian Law Series is a series of monographs and edited volumes which aims to promote scholarly analysis and discussion of both the theory and practice of the international legal regulation of armed conflict.

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The Challenge of Conflict
International Law Responds

Edited by

Ustinia Dolgopol and Judith Gardam

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For
Aleksandr
U.D.

For
Elizabeth and Richard
J.G.

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Foreword

These excellent papers derived from contributions to the International Law Conference held in Adelaide in February 2004 deal with the principal aspects of modern armed conflict: the causes and prevention of conflict, conflict resolution and peace building, the law applicable in armed conflict (international humanitarian law, international criminal law, and state responsibility), and the roles of the United Nations, humanitarian organisations and peacekeepers. It is necessarily a wide ranging survey, since armed conflict (which used to be termed "war") nowadays encompasses or engages all these aspects.

Is the law helpless when faced with the prevalence and enormity of armed conflict, actual and potential, throughout the world? As these essays reveal, structures and processes have been developed that provide a framework within which effective measures can be taken to deal with all aspects of contemporary conflicts. What is most urgently required is the political will to make these structures work.

One should confront the view of the sceptics that international law is worse than helpless in dealing with armed conflict. The view has been propounded that by seeking to regulate armed conflict international law legitimates it and indirectly encourages it. That view has been especially directed against the principles and rules of international humanitarian law – the law governing the conduct of hostilities (*jus in bello*), as distinct from the law governing resort to the use of armed force (*jus ad bellum*). The very notion of "international humanitarian law" has been attacked as cruelly deceptive.

There are two versions of this thesis. One is that all legal and other efforts should be directed towards securing peace and none diverted to the development of bodies of law that assume failure of those efforts. The other recognises the practical inevitability of armed conflict but proposes that its conduct should be as short as possible, victory going to the stronger party and not painfully protracted through the observance of legal restraints.

Those views are not represented in the present collection of essays, but it is as well to have them in mind when measuring and evaluating the law's response to armed conflict. Ultimately the refutation of these "realist" or "deconstructionist" views rests on the application of right reason to the realities of the human condition and on a recognition of the instincts for order, justice and compassion implanted in human beings. Moreover, *ubi societas, ibi jus:* "wherever society exists so does law". The law is inextricably a hallmark of civilised society, and the law habit runs deep.

The issues with which the contributors to this volume grapple are: what law, and with what results? We must constantly adjust our focus and refine our application of

legal rules as particular, and sometimes novel, types of dispute, and circumstances of armed conflict, arise. But the fundamental principles of the law remain constant. We should not despair of their abiding value and their intrinsic rightness.

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Acknowledgements

The papers in this collection are revised and expanded versions of a number of papers that were originally presented at an International Conference entitled 'The Challenge of Conflict: International Law Responds', held in Adelaide in February 2004. The idea to hold such a conference came from Andrew Tokley, an Adelaide barrister. It was Andrew's wish to bring together a diverse range of individuals, scholars, activists, United Nations officials, representatives of civil society and the military, to facilitate a cross disciplinary discussion of the causes of armed conflict and strategies for its prevention, as well as issues pertaining to justice for victims and survivors of armed conflict and the re-building of war torn societies. It was also his vision to provide an occasion for students at the Law Schools of the University of Adelaide and the Flinders University of South Australia to interact with those working and writing in this field. The editors therefore wish to acknowledge the debt we owe to Andrew in putting forward the initial proposal for the Conference.

We also wish to acknowledge the contribution of the organising committee of the Conference whose dedication and imagination led to a very successful outcome. The committee consisted of Dr Chris Bleby, Justice David Bleby, Ms Wendy Lacey, Ms Rebecca LaForgia, Mr Grant Niemann, Justice John Perry, Dr Melissa Perry Q.C, Mr Andrew Tokley and the editors of this collection.

Many people contributed to bringing this book to fruition. We are very grateful for the assistance of Robyn Whyatt, Shane Stewart, the Deans of our respective Law Schools, our universities for their financial assistance with the publication of this book and the anonymous referees who devoted their time to reading the papers in the collection. We thank the contributors for their hard work without which this volume would not have been possible. Finally, Lindy Melman from the publishers was a pleasure to deal with and we appreciate her constant support.

Introduction

Conflicts continue to rage around the globe. In spite of decades of efforts to address the underlying causes of such events and to prevent their occurrence their catastrophic consequences can be seen in all regions of the world.

Considerable attention has been given to the causes of such conflicts and the ways in which they can be prevented. Although it is widely acknowledged that ethnicity, race, religious intolerance and economic inequality play a role, other factors such as lack of resources, political repression and corruption also play a part.

The re-vitalised United Nations system has responded to this epidemic of violence by prioritising the need for strategies that promote conflict resolution and peace building. Recently more attention has been given to prevention of the re-ignition of conflict in war torn states, and the concomitant need for effective and long-term reconstruction. Crucial to the process of re-building a cohesive society is the creation of mechanisms for a dialogue that is inclusive of all members of the society. In particular, it is now recognised that the full participation of women in post-conflict initiatives is fundamental to their long-term success.

Bringing the perpetrators of violence to justice is part of the peace building process. Both national and international courts have a role to play in assisting societies to re-establish conditions conducive to the maintenance of the rule of law. Recognition has also been accorded to alternatives to the criminal justice system, such as truth and reconciliation commissions.

These issues and others are explored in this collection. The organisation of the papers in the collection has four main themes namely, the causes and prevention of conflict, conflict resolution and peace-building, international criminal law, humanitarian law and state responsibility and the role of the United Nations, humanitarian organisations and peace-keepers in post conflict situations.

A recurrent theme of the papers addressing the causes and prevention of conflict is that conflict is less likely to occur in societies that are committed to a democratic form of government. Of crucial importance is the creation of a government that operates in a transparent fashion and which can be held accountable. Identity and its potential for both disharmony and unity is touched upon by several authors. Another issue that emerged from the papers was the necessity of creating a societal dialogue that allows for the participation of a range of interest groups. It is argued that the existence of mechanisms for such a dialogue would allow for the peaceful transition of societies and the development of a shared identity.

In his analysis of the causes and prevention of violent conflict, Kevin Clements poses some fundamental questions, such as '[t]o whom are we or should we be respon-

sible and accountable.' This is then developed into an argument about the importance of interdependence both as a means of relating to others and as a method of working by those engaged in conflict resolution, peace building and economic development. The creation of a secure well governed state requires that we move forward from our present thinking about assistance that separates funding for security from development, as the most likely barometer of the potential for conflict is whether or not the political system in a given country is democratic.

Andrew Goldsmith suggests that our notion of the 'Responsibility to Protect' has been too narrowly focussed on humanitarian intervention and does not take sufficient account of the necessity to build an accountable police force that can effectively protect a population rebuilding after conflict. Despite the burgeoning literature on state building there has been an insufficient effort to understand and explore the role of an ethical police force in building community trust. He notes that the police are perceived by many people as the public face of the state and that it is vital if peace-building efforts are to succeed that a police force be established that is perceived as impartial and accountable.

The Chief Justice of the Solomon Islands, the Honourable Justice Albert R Palmer, also highlights the central role of the police in establishing stable conditions that lessen the prospect of the outbreak of violence. Against the background of the 2000 coup d'état in the Solomon Islands he details the long history of ethnic tensions leading up to the conflict and describes in detail how the coup d'état unfolded. His Honour shares his insights into the causes of the conflict and how such outcomes could be avoided, stressing in particular the integral role of a strong effective police force to ensure the maintenance of the rule of law.

The very difficult issue of collective identity is tackled by Christophe Dongmo. He argues that the complexities involved in the creation of identity in Africa have to be understood if the continent is to move toward a more peaceful process of social, political and economic development. The lack of national identities has allowed some political and military leaders to abuse identity politics convincing people to narrow their conception of themselves, thereby encouraging allegiance to a small particularised group. He argues that this trend has to stop and that a 'unifying' collective identity could be a force for social cohesion, allowing people to focus on national growth. This requires the acceptance of a need for social interaction and a commitment to a new form of identity.

Kim Rubenstein also grapples with the complex concept of identity; her focus is its affect on both the development and application of international law. She notes that nationality has played a key role in international humanitarian law in determining the status of both the accused and the victim and that this has a profound effect upon the allegations that can be raised by the prosecution in terms of grave breaches of the Four Geneva Conventions and their additional protocols. Because of the inherent difficulty in defining nationality during wars of secession or conflicts where states are disintegrating there has been a suggestion that criteria, such as ethnicity, be used to determine the relevant status. She argues even this may be too simplistic and calls for a closer look at the feminist concept of transversalism that promotes the idea of a multiplicity of group memberships.

Caroline Foster provides a detailed account of the role international courts and tribunals have played and could play in the prevention of armed conflicts, in particular through their ability to settle disputes pertaining to borders, the award of provisional measures that may restrain armed conflict, pronouncements on the legality of the use of force and the provision of Advisory Opinions on questions pertaining to actual and potential armed conflicts. An interesting development in the area of provisional measures is the willingness of some judges to consider the right to life and human security in their decision-making process, demonstrating an awareness of the individuals who reside in a state and eschewing an analysis that views the state as a totally abstract entity.

The potential of national human rights commissions to promote and protect human rights and to address religious and ethno-religious conflict is discussed by Carolyn Evans. Whist recognising the limits of such organisations, in particular their inability to make enforceable decisions, she argues that such institutions can assist in reducing tensions and in influencing government policy. After providing an overview of the competence and powers of commissions in the Asia-Pacific region, she focuses on the efforts of the Malaysian and Indian commissions to address sensitive religious issues in their respective countries. The Malaysian example highlights the ability of such commissions to open a dialogue with the government on matters not open to public deliberation whilst the Indian example demonstrates the ability of a national commission to speak out forcefully about ongoing violations

The papers that deal with conflict resolution and peace-building contain contributions on that topic from a diverse range of perspectives. Some of the authors write from personal experience whilst others offer academic commentary. All bring interesting and perceptive insights to the debate.

His Excellency Sukehiro Hasegawa, Deputy Special Representative of the Secretary-General for East Timor, writes of the contribution of the United Nations Mission of Support in East Timor (UNMISET) towards conflict resolution and peace-building in Timor Leste. Against the background of the struggle for self-determination by the Timorese, His Excellency canvasses the internal and external security threat facing Timor Leste, the requirements for building a sustainable peace and the achievements of UNMISET concluding that it represents "one of the most comprehensive and successful peace-keeping and peace-building missions of the organisation".

Colin MacMullin focuses on the effect armed conflict has on children and argues that there is a paucity of research with respect to the effectiveness of programmes designed to work with children who have either lived through the experience of armed conflict or participated in military activities. Speaking from personal experience MacMullin observes that the international literature does not address vital areas such as the different reactions to trauma that may occur in collectivist versus individualistic societies or the differences that may occur in approaches to problem-solving in various cultures. There is also little information about the manner in which community and family support may influence the outcomes of structured donor-funded reintegration programmes.

Christophe Dongmo takes the African continent and in particular the ongoing insurrection in the previously stable Cote d'Ivoire, as his case study of conflict resolution and peace building. He laments the low priority accorded this conflict by the international community but discerns a new era of cooperation amongst regional organisations that he sees as of great potential for future state building in Africa.

Examining the methodology by which state-sponsored and international agencies undertake reconstruction of the justice system, Gilles Blanchi sets out a number of issues that should be addressed by such groups prior to the commencement of their work. He notes that account has to be taken of the place of judges in society prior to the conflict in order to appreciate the general population's attitude toward the judiciary as well as the rule of law. Further, reform of a country's legislation must be undertaken simultaneously with the training of the judiciary.

Against the background of the "disappeared" during the era of the Argentine dictatorship Barbara Hocking and Michele Harvey-Blankenship consider new scientific techniques that provide hope of family reunification for those affected by the all too pervasive product of modern conflict - the shattering of family ties. Despite the potential of these advances the authors point out the challenging ethical and moral dilemmas they pose for *inter alia* international law.

How to achieve a stable and lasting peace in the post conflict era is the theme of Wendy Lambourne's paper. After identifying the wide range of factors that contribute to the form that transitional justice takes after any given conflict, she highlights the pervasive failure to seek the input of the local population into these decision-making processes. In her view this neglect compromises the peace building process and she argues for a change of approach.

Finally, Justice Michael Kirby exhorts those working in the fields of international law and human rights to focus on the future as it is 'on the side of human progress and international law.' Although clearly recognising the difficulties lawyers have faced when attempting to encourage the use of international law in the development of domestic law he offers examples from various regions of the world where judges have relied on international norms and offers the hope that those still reluctant to embrace international law may ultimately be influenced by their peers. He also praises the work of the 'unsung' UN officials who assist hundreds of thousands if not millions of people around the world rebuild their lives and gain access to the protection of human rights standards.

The third topic addressed by the collection is that of international criminal law, humanitarian law and state responsibility. Strategies for achieving transitional justice for all victims and survivors of armed conflict are an ongoing challenge for the international community but are integral to a lasting and sustained peace. A satisfactory legal regime and the assumption of responsibility by states for ensuring compliance with its requirements are also a component of achieving this outcome.

The newly established International Criminal Court (ICC), not unexpectedly, features prominently in the papers in this section. Despite the current climate of pessimism in relation to the Court, most of the authors share a commitment to the idea of a permanent international criminal court as the way forward for justice and accountability for criminal activities in times of conflict. Her Excellency

Louise Arbour, former Chief Prosecutor at the International Criminal Tribunal for the Former Yugoslavia and since July 2004 United Nations High Commissioner for Human Rights, commences with an analysis of the choices currently available to states in relation to the criminal enforcement of International Humanitarian Law, ranging from the ad hoc tribunals established by the Security Council to the newly operational permanent ICC. After assessing the advantages and disadvantages of the various models of accountability, she comes out strongly in favour of the ICC despite the limitations imposed on it by the principle of complementarity.

The next paper by Gillian Triggs focuses specifically on the ICC and highlights the current legal and political climate in which it must strive to achieve its potential as an effective global and even-handed mechanism for enforcement of international criminal law. Professor Triggs takes a realistic look at some of the pressing legal challenges to the effectiveness of the Court. In particular she considers the extent to which the jurisdiction of the Court is tailored to the activities of terrorists, the significance of the immunity agreements brokered by the United States and of the range of national initiatives to counter international criminal acts that have emerged in recent years.

Roderic Pitty supplements this legal inquiry with a comprehensive analysis of the shifting political attitudes of states to the Court that will ultimately determine its viability. In particular he assesses the concerted international campaign of the United States to ensure the Court's impotence and how effective this has been vis à vis other states.

Geoff Gilbert throws a wide net in his search for the ideal form that post-conflict justice should take. In doing so he provides a comprehensive assessment of the advantages and disadvantages of the various judicial strategies adopted in recent years to bring perpetrators of crimes to trial. These range from the ad hoc tribunals to the so-called third generation courts that incorporate international judges in the domestic legal system. Despite identifying shortcomings in all models he finds solace in the fact that they collectively represent an end to the culture of impunity.

Also searching for the way forward are the next two papers in the collection both of which focus on the role of civil society in transitional justice. Grant Niemann highlights the poor record of enforcement of criminal law at the international level and identifies the influence of state sovereignty as the primary culprit for this failure. He sees little prospect of an effective permanent ICC. One possibility he envisages is the manner in which global civil society could function through a "world people's court" and coexist side by side with state-centric structures to act as a system of checks and balances to ensure an improved enforcement of international criminal law.

Ustinia Dolgopol also sees considerable potential for achieving more comprehensive justice for victims and survivors of conflict through the resources of civil society. She argues that criminal trials only achieve partial or no justice at all for so many and that we must look further afield in our pursuit of justice and reconstruction in war torn societies. Using the Tokyo Women's Tribunal as a case study she demonstrates the achievements of one such initiative of civil society and argues it provides an avenue forward.

The traditional failure of the international community to acknowledge and deal with the suffering of women in times of armed conflict, an underlying theme of Ustinia Dolgopol's paper, is specifically addressed by two other contributors. Carrie McDougall considers the achievements of the two ad hoc Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), in developing jurisprudence to overcome the prevailing silence on sexual violence against women in times of armed conflict. However, she argues that their work is just the beginning of a major challenge facing states in this area to ensure that the law on violent crimes against women continues to be developed.

The sufferings of the so-called "Comfort Women" and what we can learn from this tragedy is the focus of Etsuro Totsuka. Drawing on recently uncovered research he provides insights into how the Japanese domestic legal system and the prevailing political situation led to a failure to prevent these atrocities.

In a change of focus, Stuart Beresford turns his attention to the right of the accused to a fair trial. He stresses the importance of procedural safeguards, not only to the accused themselves but to the integrity of the international criminal justice system. After examining the practices of the ICTY and ICTR in this context he concludes that in many cases procedural justice has not been delivered and explores reasons why this has occurred. He concludes by proposing some strategies to achieve recompense to those injured by these miscarriages of justice.

Two of the contributions address aspects of the responsibility of states in the context of armed conflict rather than that of the criminal liability of individuals. Susan Anderson considers whether or not there has been a change, as is argued by some commentators, in the way in which the norms of customary international law are formed in the era of one superpower seemingly wedded to unilateralism. This alleged change is of course particularly relevant to the rules governing the use of force by states. After a thorough survey of scholarly views she concludes that the components of custom, state practice and *opinio juris* remain much as they have always been and that the law cannot be so readily subverted by the actions of the powerful within the international community.

Alex Conte also takes the rules on the use of force as his focus. In particular he considers whether the doctrine of pre-emptive force in the era of the so called "War on Terror" is consistent with current international law and how the role of non-state actors in this phenomenon could be harmonized with the rules on attribution of responsibility.

The papers in the fourth section of the volume fall into two broad themes, with some addressing the role of both the United Nations and peacekeepers in post conflict situations and others looking at some of the structural issues that face the United Nations in its attempt to respond to conflict. Not surprisingly the significant role of the United Nations High Commissioner for Refugees (UNHCR) is highlighted in two of the papers. This agency is the one most associated in the public's mind with meeting the needs of people caught up in periods of conflict, yet the international community has not addressed the limitations of its mandate or the

precarious position of it staff when governments do not actively cooperate with the agency.

Susan Harris Rimmer, formerly an employee of the Office of the High Commissioner for Refugees, provides a detailed account of the operational issues faced by the organisation including the maintenance of security within refugee camps. She also discusses the Agenda for Protection programme adopted by the UNHCR that gives increased attention to durable solutions and has brought about a change in the agencies working methods.

The significance of UNHCR's role in the post-conflict period is also highlighted by Geoff Gilbert. He notes that the very nature of modern conflict demands that UNHCR work with traditional refugees and internally displaced persons, yet the wording of the UNHCR mandate could be viewed as an impediment to the latter. He offers both a legal and practical analysis of this situation, and stresses the need to give a broad reading to the concept of protection because of the organisation's expertise and broad humanitarian focus.

Barbara von Tigerstrom suggests that the concept of human security could usefully be employed by legal scholars when examining both the substance and application of international law. Human security as a principle starts with the premise that it is 'the security of individuals rather than … of states that should be [the] primary concern.' She notes that our traditional state-centred view assumes that the well-being of individuals will automatically follow if the state is secure, but experience is to the contrary. A human security approach would require agencies and states to be pro-active and to assess the likely impact of policies as well as structures on individuals, particularly the vulnerable.

Military forces are utilised in peace-keeping operations in part because they are often able to bring their own equipment and have extensive logistics experience. However the interaction of forces from varying countries as well as their interaction with the local population and the United Nations may give rise to a range of problems. David Letts writes from personal experience as the Chief Legal Adviser to deployed peacekeeping troops from Australia. He emphasises the importance of planning both by those states sending troops and the international community. States must have a comprehensive understanding of the process of peacekeeping. All actors (the sending state, the recipient state or entity and organisations such as the United Nations) need to be clear about the rules of engagement as well as the content of Status of Forces Agreements.

Some of the structural and political issues being faced by the United Nations in the changing global environment are addressed by two of the authors. The lacunae existing in international law with respect to the regulation and obligations of non-state actors is the theme of Christopher Harding's paper. He observes that the traditional notion of international law as regulating the behaviour of states is outdated and that the range of actors from corporations, intergovernmental organisation, nongovernmental organisations, insurgents, governments in exile to terrorist organisations has to be accommodated by the formal processes of international law if it is to address adequately the issue of armed conflict.

Stephen Bouwhuis challenges the view taken by some commentators that the intervention in Iraq raises questions about the effectiveness of the United Nations in dealing with the resolution of international conflicts and its ability to ensure the non-use of force as a basic premise of international relations. He argues that there have been prior non-sanctioned interventions, but when examined closely what emerges is a picture of states attempting to demonstrate their compliance with international law. Even if such justifications are not considered adequate the fact that states feel compelled to make them reinforces the basic principle of non-intervention.

In conclusion the strength of this collection is its diversity both of subject matter and of discipline areas. The editors did not attempt to have the authors conform to the traditional legal style of writing or of footnoting. The papers in this volume reflect the law as at 1 December 2004.

The experience of working on this volume offered both editors the chance to engage in a constructive and fruitful collaboration and we are grateful for being given this opportunity.

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The University of Adelaide

Part I

Causes and Prevention of Conflict

The Causes and Prevention of Violent Conflict

Kevin P. Clements

There is no topic more important for modern societies than understanding the sources of violent conflict and identifying ways in which such violence might be prevented, managed, resolved or transformed. If we, as global citizens, do not face up to and develop some creative answers to these questions it will be extremely difficult if not impossible to establish and maintain civilised communities in relatively secure, carefree environments.

The prevention of violence is a pre-requisite for the development of what Martin Luther King called 'The Peaceable Kingdom'. King understood this goal in terms of violence prevention and community building. Both of these processes are complex and difficult. Each requires a radical commitment to co-operative, collaborative processes and the intentional development of respect for the rule of law within a culture of peace and non-violence. They both require deep personal and social courage in the face of adversity and a willingness to generate and exhaust non-violent options before contemplating the use of violence. It was Mahatma Gandhi who said

> I object to all violence because when it appears to do good, the good is always only temporary but the evil it does is permanent.

We cannot combat violence with violence. We combat violence with non-violence. This is a critical component for maintaining tolerant, democratic societies where all persons can realise their individual potentialities within supportive communities.

How we constitute non-violent communities and advance the good within them, however, are not simple questions, nor are they ever finally settled. Individuals and groups are constantly negotiating and constructing social and community realities for themselves. The determination of who becomes a privileged citizen, for example, and who is included or excluded from collective benefits are divisive issues within contemporary western communities and if they remain un-addressed they can generate frustration and aggression.

The character and quality of the normative and institutional frameworks that we develop for ourselves, therefore, are central to whether or not we will develop sustainable peace and harmonious relationships within and between states. What sorts of positive and negative incentive structures can we develop to ensure a commitment to non-violent problem solving?

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 3-20.*
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The questions that need to be asked are relatively timeless. To whom are we or should we be responsible and accountable and why? Are we our brother's and sister's keepers and who do we want to include in these categories? What does this mean in terms of ethics and behaviour? How do we ensure that our core political, economic and social institutions generate real security for citizens rather than security for some and insecurity for many? In other words how are we connected to each other and how can we ensure that we work in ways which satisfy rather than frustrate basic human needs and which utilise diversity for the benefit of all?

My old friend and colleague Adam Curle argues that peacemaking is the art of seeing that things which appear apart are really connected. How do we make sense of the whole, therefore, and of the distinctive role that each part makes in the construction of that whole? Curle, along with other Buddhist writers, argues that in addition to arguments about congenital or learned aggression, at the root of most violence are what he calls three poisons.

The first poison is that of ignorance.[1] By this he does not mean ignorance of facts or ideas but rather ignorance of our nature. In particular the foolish belief that we are all separate and self existent beings when in fact we are all radically interconnected and subject to common dynamics and influences which affect us all individually and collectively. In our ignorance we cut ourselves off from others and in doing so feel off balance and lost. We will only overcome this existential ignorance if we focus on the ways in which we are truly interdependent. Only with this recognition will we acquire an active sensitivity to others and start developing right relationships with them.

The second poison is that of yearning, longing, wanting, lusting and greed, which is generated by our ignorance and the consequent sense of insufficiency and loss.[2] We compensate for our loneliness and feeling of a lack of power over our lives by acquisition, status, wealth and position. Out of these things we build up an identity, or an image of self of which we can be proud. This is the first line of defence against insecurity, despair and futility but it is very fragile and in the end often quite insatiable and a source of deeper frustration and aggression.

The third poison follows from the failures and disappointments of the second. It is the jealousy and hatred of those who have more of what we desire or who we think are obstructing us in the pursuit of our own objectives.[3] We develop negative feelings because of our ignorance and the pursuit of happiness through competition and acquisitiveness.

> The Three Poisons provide the basis of selfishness, alienation from others, acquisitive greed, competitiveness and dislike from which most violence grows.[4]

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1 Adam Curle, *Another Way: Positive Responses to Contemporary Violence* (1995 Jon Carpenter Press) p. 16.

2 Ibid., p. 18.

3 Ibid., p. 19.

4 Ibid., p. 20.

To these must also be added the experience of pain and suffering itself. This suffering can be specific experiences of rejection, (particularly in childhood and within the family) and experiences of violence, displacement, or destitution. One of the interesting features of most violent conflict is the way in which those who have been victims of it or have experienced deep trauma and suffering carry that pain throughout life and somewhat perversely often inflict it on others, thus perpetuating the cycle.

If this analysis is right we have to ensure that our education and our analyses of conflict focuses on ways of revealing our interdependence, while working individually and collectively on ways of dealing with yearning, longing and greed and the feelings and behaviour motivated by jealousy and hatred. We must also direct attention to dealing with the after effects of trauma.

These are not easy tasks as there are powerful structural dynamics working in the opposite direction focussing attention on the virtues of possessive individualism and a radical assertion of self-interest. Thus, we need to understand the complex relationships between attitudes, emotions, behaviour and contexts and how these, taken together, generate a disposition towards violence. In particular, we need to pay attention to the impact and significance of specific contexts since text without context is pretext. We must never underestimate the significance of place and location. If Australia does not become more sensitive to ways of doing business with Asia, for example, this will generate deep miscommunication and conflict in the future. Similarly if there is no desire to revisit the relationship between Aboriginal and Settler Australians there will be no long-term stability either. How do we ensure that anything which generates vicious cycles is turned into something more virtuous and that conflict generates positive rather than negative outcomes?

Turning to the international context, peace remains elusive in the Middle East, Iraq continues to unravel, Dafur and the wider conflict in the Sudan affects the lives of thousands of people as do the continuing conflicts in Northern Uganda, the Eastern Congo and West Africa and the unsettled civil wars in Nepal and Sri Lanka. They all add up to a very dismal picture.

The Department of Peace and Conflict Research at Uppsala University recorded a total of 226 armed conflicts for the years 1946-2002.

> Of these, 116 were active in the period 1989-2002, including 31 in 2002. There were five wars in 2002. Numbers were the lowest for this period. Seven interstate – armed conflicts were recorded from 1989 to 2002, of which one was still active in 2002. In 2002, a larger proportion of complex major armed conflicts were resolved, compared with new and minor armed conflicts. Although the data on armed conflict presented here suggests that there is a decline in the use of armed force, there is an increased feeling of fear and insecurity in many parts of the world because of terrorism incidents.[5]

5 Mikael Erikson, Peter Wallensteen and Margareta Sollenberg, 'Armed Conflict 1989-2002,' (2003) 40 (5) *Journal of Peace Research* 593. The Uppsala team divide conflicts into three categories. Minor armed conflict where the number of battle related deaths is at least 25 but below 1,000. In 2002 there were 10 such conflicts, the same number as in 2001. Intermediate armed conflict with more than 1,000 battle related deaths recorded during the course of the conflict, but fewer than 1,000 in any given year. In 2002 there

These data do not cover the wars and conflicts that have erupted or escalated in 2003 or 2004. In particular they exclude the rapid deterioration of the situation in Palestine/Israel and the continuing war in Iraq. The general trend, downwards, is confirmed by other data sources as well. The total numbers of inter-state and civil wars is declining. Those that persist, however, are proving remarkably resistant to resolution. The unresolved and intractable internal conflicts that have persisted last on average for 7 years.[6]

Conflict Regions

The main regions of current and prospective intrastate conflicts are Sub-Saharan Africa (SSA), the former Soviet Union (FSU), the Balkans and parts of Asia. In the Middle East, the Arab-Israeli conflict continues, as do the wars in Iraq and Afghanistan. Serious intrastate violence occurs in North Africa, especially Algeria. There is a clear African Crisis Zone and a Central Asian Crisis Zone. Elsewhere specific countries, such as Burma, Colombia, Nepal, Sri Lanka, Indonesia, the Philippines plus a number of microstates in the South West Pacific are also in conflict. There is a tendency for conflicts to spill over borders and become regional especially in Central Africa where a variety of armed groups are involved in a number of inter-related though separate conflicts. There is growing internal unrest and cross-border violence in Central Asia. Three strategic countries in the region, Uzbekistan, Tajikistan and Kyrgyzstan, are plagued by a host of internal political and security problems, aggravated by poor and deteriorating economic and social conditions.

Major conflict in Western Europe is highly unlikely although low-intensity secessionist violence in Northern Ireland and the Basque Country continues. The rise of extreme-right terrorism in parts of Europe is likely to continue in terms of xenophobic antagonism towards minority communities but is probably containable. Enlargement of the European Union could lead to destabilising effects in neighbouring regions, such as south-eastern Europe, the former Soviet Union, Turkey and North Africa but more positively the enlargement processes can also be used to prevent conflict as candidate states change their economic, political and legal systems in compliance with European Union norms.

The Changing Nature of Conflict

The nature of violent conflict has changed in subtle ways since the end of the cold war. The proxy conflicts of that time have by and large been resolved. But the conflicts that remain are proving more persistent and resistant to solution. They are

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were 16 such conflicts compared with 14 in 2001, and War, with more than 1,000 battle related deaths in any given year. In 2002, there were 5 such conflicts, down from 11 in 2001'. p. 597.

6 Monty G Marshall and Ted Robert Gurr, *Peace and Conflict 2003* (2003 Centre for International Development and Conflict Management, University of Maryland) p. 15.

taking place against a backdrop of a world system where coercive capacity rather than problem solving ability is temporarily in the ascendant.

Power in the modern world system is distributed in a complex three-dimensional pattern.

(1) Military power is largely unipolar. The United States, for example, now wields unprecedented global military power. The United States defence budget is $379 billion after a recent rise of 14%. This is the biggest rise in 20 years. The defence budget is larger than the combined total of the next nine biggest defence spenders. In the past this military power has been used to deter aggression but in recent years it has been used both more pro-actively and pre-emptively to promote American political interests. Where these happen to coincide with global interests there is a commonality of purpose where they do not the current US administration is willing to proceed unilaterally.

This is sending signals that enshrine 20th century perspectives that might is right, or as Thucydides put it many years ago: '[t]he powerful will do as they will while the weak do as they must.'[7]

The 2003 14% increase in US defence expenditure of $49 billion is equivalent to global spending on Overseas Development Assistance (in 2002 this was $51 billion). One of the challenges facing the world community, therefore, is how to ensure that US hegemonic military power is utilised to stabilise rather than destabilise, and to advance the global good rather than narrow national and allied interest.

(2) Economic power, on the other hand is tri-polar, with the United States, Europe and Japan representing two thirds of world product. China's rapid economic growth will make this tri-polar concentration quadri-polar within twelve years. Similarly India is also finding its stride in relation to economic development. The huge size of the internal markets in both China and India make them formidable international competitors. How other economic engines within the world economy respond to these competitors will determine whether trade relationships are peaceful or not. The economically powerful are in a position to ensure the long-term structural prevention of conflict. If they choose to utilise this power to advance their self interests on the backs of the rest of the world, however, instability and envy will be the result.

(3) 'Soft power', political persuasive power, remains largely a Western preserve. English is the global language for trade and commerce; Western values dominate most multilateral institutions and western states exercise disproportionate influence within them. This is one reason why many non-Western actors feel alienated and excluded. This power manifests itself in a certain altruism (led by Western Europe) in terms of overseas development assistance and other kinds of humanitarian intervention. These transactions generate gratitude and anger. Who benefits from these transactions and who does not? Who is viewed as marginal and who central? Who is listening to the voices coming out of

7 Jeffrey S. Rusten, *Thucydides: The Peloponnesian War, Book II* (Cambridge University Press 1989) p. 81.

> the world's peripheries? If Martin Luther King is right and '[r]evolutions are the cries of the unheard', it could be argued that terrorism is also a cry of the excluded and unheard as well.

An analysis of conflict trends cannot be separated from wider analysis of technological, economic, political and social development or from the ways in which the world system is organised into top dogs and underdogs. There is no simple causal explanation for stable peaceful relationships which is why the best analyses of the structural and proximate sources of conflict are holistic and systemic. What we can do is identify a number of critical economic, political and social factors that increase the probability of violence and war.

Economic Sources of Conflict

Although there is a serious debate about the relationship between economic factors and peace it is clear that most modern wars are concentrated in the poorest countries. 56% of those countries classified as having low development by the UN Human Development report experienced civil war in 1997-2001. Only 2% of those countries classified as having high development experienced civil war in the same period.[8]

The World Bank in its recent report *Breaking the Conflict Trap – Civil War and Development Policy*[9] argued that war causes poverty but poverty also increases the likelihood of civil war. Countries with low, stagnant, unequally distributed per capita incomes and heavily dependent on primary commodities face 'dangerously high risks of prolonged conflict'. This is further exacerbated by what the Bank calls 'the conflict trap'. This trap reflects the fact that once countries have experienced a conflict they double their chances of having another conflict within a 5 – 10 year period. If they have experienced two conflicts their chances of another are quadrupled. In the last five years much attention has been devoted to the role of greed as a source of conflict. As always in relation to these arcane debates it is neither one factor nor another that is most important. Rather there is an agreement that greed coupled with grievance is a prime propellant of violent conflict. This combination becomes especially lethal when connected to failed and failing political systems or what Mansoob Murshed at the Institute of Social Studies in The Hague calls a 'disintegrating social contract' between ruler and ruled.[10]

This means that all of us have to become better at thinking about ways of addressing economic discontent and satisfying basic human needs. It is also important to focus on some of the historic legacies of violent conflict. Both sources of conflict need to be addressed simultaneously if citizens of countries in conflict are not to be paralysed by their past and /or doomed to repeat old patterns of violence.

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8 See Dan Smith, *The Atlas of War and Peace* (2003 Earthscan Publication) p. 10.

9 Paul Collier et al., *Breaking the Conflict Trap: Civil War and Development Policy* (2003 Oxford University Press and World Bank).

10 Presentation to International Alert, 14 September 2002.

Political Systems and Conflict

Violent conflicts also tend to occur more frequently within autocratic and non-democratic political systems or within systems that are in transition. In terms of established democracies for example, only 12% were involved in civil war whereas 45% of one party dictatorships were involved in civil war and 30% of states with transitional or uncertain democracies were involved in civil war.[11] Because of these associations it is important to identify whether or not state systems are moving in a more or less democratic direction. Monty Marshall and his team at Maryland University have been analysing movements towards democratisation. They identify a post cold war 'wave of democratisation' which has slowed down over the past three years.

> There were 83 countries classified as democracies in early 2002, nearly double the number of democracies counted in early 1985 (42). The 80 autocracies in 1985 fell by nearly two thirds to 28 in 2002. At the same time, the nearly three fold jump in the number of states that fall in our middling category of regimes, the transitional polities or 'anocracies' (from 16 in 1985 to 47 in 2002) appears to have levelled off. [12]

They argue that the sharp rise in the number of 'anocracies' is cause for serious concern. Such regimes are highly unstable and over 50% experience major regime change within five years and over 70% within 10 years. They are about six times more likely than democracies and two and half times as likely as autocracies to experienced armed societal conflict. They are also three times more likely to experience major reversions to autocracy than democracies.[13] These trends suggest that governmental and non-governmental organisations working to prevent violent conflict need to direct more attention to the promotion of stable democratic regimes and the enhancement of effective and capable government with high levels of popular participation. In particular it is important to promote the rule of law, oppose any drift towards a culture of impunity and to advance and promote multilateral institutions like the International Criminal Court which are aimed at generating some international sanctions for gross violations of human rights in war. None of this is simple and there are some very complex variables at work.

There is, for example, a nearly linear relationship between wealth creation and effective democratic governance – stable democracies are associated with high per capita incomes. But it is not clear how much or in what ways democracy fosters peace, economic growth and structural stability. Thus in terms of Curle's three poisons while individual greed may be dysfunctional a collective commitment to generating public wealth is essential.

> ... it is only the fully and deeply institutionalised forms of democracy that are truly stable, resilient and peaceful. These 'perfect' democracies are clearly superior over

11 Dan Smith op. cit., p. 14.

12 See Monty Marshall and Ted Robert Gurr, op. cit., p. 17.

13 Ibid.

> the other forms of governance on nearly all measures of effectiveness and performance. Yet open forms of governance in general have shown themselves to be extremely fragile political systems that are highly vulnerable to internal challenges. They are particularly ill equipped to manage or repress violent challenges, whether revolutionary, separatist or predatory, and they are ill suited to withstand the twin pressures of grievance and contention in war torn societies.[14]

These arguments suggest that we need to pay more attention to the precise relationship between development, governance and stable peaceful relationships. What is known as the development and security or development and peace-building nexus, therefore, is a key part of developing adequate conflict prevention mechanisms. The development of effective and capable democratic systems is critical to maintaining the rule of law and avoiding the culture of impunity that often occurs when the rule of law is subverted as it has been in Georgia, Zimbabwe and in many other areas of conflict.

Human Rights and Conflict

Violent conflict (war) is also strongly and positively correlated with minor or major violations of human rights – especially civil and political rights. Political regimes which violate a wide variety of civil and political rights are much more likely to experience political violence than those which do not violate such rights. Seventy two percent of states involved in civil wars also reported extra judicial executions, torture, police and prison violence, as well as the mistreatment of refugees and immigrants.[15]

This information suggests a need for much closer liaison between individuals, groups and organisations working on conflict prevention and those monitoring and promoting Human Rights. There is something of a paradox here, however, in that effective peace work in a zone of violent conflict is problematic if the antagonists feel that the external intervenors are from the human rights rather than the conflict prevention community. What is absolutely certain though is that state repression of political dissent or the denial of political rights to any section of the population is a major trigger to armed conflict.

Many of the world's current violent conflicts, however, flow from what can be called 'vicious identity politics' and deep horizontal inequality (i.e. marginalisation and exclusion of groups from economic, social and political benefits on the basis of class, identity, and ethnicity). This systematic marginalisation of whole groups generates high levels of systemic instability and can only be maintained with high levels of state repression.

What is much more problematic, however, is how to address this exclusion non-violently and politically. What incentives, for example, might be applied to persuade the minority Tutsi population in Burundi to share their economic, political

14 Ibid., p. 25.

15 See Dan Smith, op. cit., p. 12.

and military power with the majority Hutu population? In the absence of systematic efforts to address these gross inequalities, the prospects for stable peace seem very bleak indeed.

Ethnicity and Conflict

It is now becoming common wisdom in the field that ethnicity itself is not a source of conflict. Rather it is the particular demographic mix of different ethnic groups that is likely to have an impact on whether or not violence is more or less probable. There are more violent conflicts in those countries which have ethnic, racial or national minorities of more than 30% with a very rapid rise in those with more than 50%. The demographics of Burundi for example where there is a concentration of economic and political power in the hands of the Tutsi generate a strong disposition towards violence either (a) to protect power and privilege or (b) to challenge such power and privilege.

Another source of conflict related to and flowing out of identity politics are violent movements for self-determination. The number of such movements has been diminishing in recent years but once these movements embark on a strategy of violent rebellion this tends to become normal if the ends are not realised. Rebel movements that have employed violence in the past have a 77% greater likelihood of using that strategy in the future than those movements which have expressed their interests and concerns through peaceful non-violent protest[16] Once again the challenge facing the conflict prevention/ transformation community is how to break cycles of violence and revenge and replace them with more virtuous ones. Or more optimally, how might those interested in conflict prevention reinforce and consolidate the expression of self-determination claims through non-violent means. When and where there is an initial commitment to non-violence, there is a tendency for this form of protest to reinforce itself.

Asymmetric Conflict

Those who lack political, military and economic resources have always resorted to what is now known as 'asymmetric conflict'. (This is where small and dedicated groups of people, social and political movements challenge larger dedicated powerful nations and peoples). The tactics that these groups employ to secure recognition of their social and political needs always rely on surprise, cunning, and probing for vulnerability in the powerful.

The September 11 attacks on the Twin Towers in New York were a particularly graphic, tragic illustration of modern asymmetric warfare. These attacks have changed many of our underlying assumptions about security, insecurity and the supposed omnipotence of state systems in relation to the protection of citizens.

Asymmetric conflict therefore is likely to have very profound implications for all sorts of state (top down) and non-state (bottom up) sponsored violence into the

16 Monty Marshall and Ted Robert Gurr op. cit., p. 36.

21st century. The politics of terror (whether it is US/ UK 'Shock and Awe tactics') or the deliberate use of violence by small groups claiming to represent massive constituencies and seeking to provoke 'enemy over-reactions' has become a sad reality of the first few years of the 21st century. The terrorist acts against the United States and the military responses to it in Afghanistan and Iraq (and lower level responses in other parts of the world) have given a new legitimacy to the application of force to destabilise or defend existing regimes. This is already generating imitative responses as state systems start reviewing their defensive and offensive military capacity and as a wide variety of new political movements contemplate the use of violence as a political tactic in their respective struggles.

September 11 2001 not only reminded the most powerful nation in the world of its vulnerabilities; the subsequent 'war against terror'; the forceful overthrow of the Taliban regime in Afghanistan, the overthrow of Saddam Hussein and the occupation of Iraq, the unresolved conflict in Israel/Palestine, have resulted in some fairly fundamental challenges to traditional conceptions of peace, security, and liberty and placed some question marks over taken for granted concepts of open, pluralistic and democratic societies.

When 67% of United States citizens suggest that they are willing to sacrifice First Amendment Rights for strong national security or when political movements use suicide tactics in pursuit of their cause it is clear that political philosophy is being changed by current political and military practices. These are likely to have very profound implications for our understanding of freedom, politics and violent forms of communication.

Somewhat paradoxically the heightened stress on national and state security is arousing some of the threats it is intended to allay. These are turbulent times. New divisions are occurring within and between different states and regions and too many actors are choosing violence as a means of securing recognition and promoting their personal and political interests.

Conflict Actors

It is important to link some of the macro dynamics underlying conflict to specific actors. These actors have been changing over the past twenty years as different individuals and groups resort to violence in pursuit of their interests. Internal conflicts are generally fuelled by urban elites, allied with the local political/religious power structure and the military. Rebel movements, for example are often led by disaffected or excluded urban-based leaders who take their grievances to rural areas. These groups are often closely linked with organised criminal groups that launder money, sell illicit arms and dispose of looted minerals. Disaffected and unemployed youth, and children, often provide the muscle to these rebel movements. The Coalition to Stop Child Soldiers estimates that there are some 300,000 child-soldiers worldwide.

Multi-national corporations are conflict-actors in their own right. For example, in Colombia, Indonesia and Sudan a number of different oil companies have directly or indirectly financed government security forces deployed against rebel groups.

The principal victims of violent conflict, however, continue to be unarmed civilians killed or injured either directly by warfare or as a result of the breakdown of government health and other social programmes. In the Eastern Congo for example, the ICRC has estimated that 2.5 million deaths have occurred since the second Congo war began in August 1998 of which 350,000 can be attributed directly to violent conflict. The rest were due to conflict-related disease and malnutrition.

These conflicts will inevitably lead to an outflow of refugees and increased numbers of internally displaced persons. Such movements of people in turn disrupt normal patterns of production, leading to food and other shortages and increased poverty and deprivation. Neighbouring countries can become destabilised as guerrilla movements are often formed from refugees groups and conflicts slip across borders.

The Dynamics of Future Conflict

As has been noted above conflict dynamics will continue to be driven by autocracy, anocracy, state repression, poverty, vicious identity politics as well as religious and ethnic grievances. There will always be struggles for control of mineral and other resources as well. These diverse sources of conflict are always inter-related. While they can be separated for heuristic purposes in fact they should be held together. This means that more attention needs to be paid to holistic analyses and the development of more integrated responses.

If the experience of the past three years is anything to go by we can expect that these economic, political, ethnic and others conflicts will be exacerbated to a large extent by an increase in world population from 6.1 billion now to 7.2 billion by 2015. Ninety five percent of this increase will be in developing countries, mostly in rapidly expanding urban areas. Given that a good number of these countries have fragile political systems, the combination of population growth, inadequate economic capacity and urbanisation will encourage instability.

Many states for example, now have a disproportionate number of children. About 30% of Afghans, for example are under the age of 20. The increasing number of unemployed or under-employed youth will provide a ready pool of people who see themselves as having nothing to lose by joining political (or pseudo-political) movements willing to use violence to realise their aims.

When these demographics are added to location it becomes a very poisonous mix indeed. Most of the new 'hot' conflicts that have occurred in the past three years have done so in regions already afflicted by warfare. In general new incidents of collective violence (with between 25 – 1,000 war deaths) have occurred in regions or 'bad neighbourhoods' with on going serious armed conflict occurring somewhere in the vicinity. We need more sophisticated regional analyses of conflict and better-integrated regional responses to such conflict.

Focus on the Prevention of Deadly Conflicts[17]

How do we ensure that these negative dynamics are transformed into more benign and virtuous ones and that the early warning/early response gap is reduced so that national, regional and global actors can respond proactively and immediately to signs of incipient violence? How do we take advantage of this rather bleak moment in history to rethink the role of the non-violent, unarmed peace builder and peacemaker? How do we start living relatively 'carefree' lives free of fear, pessimism and despair? What do we need to do to start thinking of a different kind of politics which places the service of the weakest and most vulnerable at its heart rather than the promotion of the richest and most powerful? How do we deal with terrorist threats and challenge them non-violently rather than violently? And how do we ensure that there is an open-ended pursuit of human security and a desire for deeper relationships between peoples in order to guarantee stable peaceful relationships?

A promising new area for conflict prevention lies in a better use of both official and unofficial development assistance to generate structural stability. This has been conceptualised in terms of a development/peace building nexus or what some others think of as the development/security nexus. For too long these areas of national and international policy have been thought of as relatively independent spheres of activity. The national security apparatus-police, intelligence, military and all other coercive agencies of the state have tended to receive the lions share of public recognition and funding. These agencies are the iron fist that lies beneath the velvet glove of State legitimacy. They confer the monopoly of power that lies at the heart of national sovereignty. Development, anti-poverty, emergency relief, preventive diplomacy and conflict prevention programmes of most wealthy states (with some

17 The Carnegie Foundation made a major contribution to this debate with its report on the Prevention of Deadly Conflict. See *Carnegie Commission on The Prevention of Deadly Conflict* (1998 Oxford University Press). In this they argued for the prevention of deadly conflict through the development of capable states, rule of law, social safety nets, protection of Human Rights and the development of robust human societies, the prevention of ongoing conflicts spreading by creating appropriate economic, social, political and military barriers, methods for preventing the re-emergence of violence in the aftermath of conflict through smarter use of security forces, police etc. They also placed a lot of stress on early reaction to signs of trouble particularly early responses to early warning and the development of comprehensive balanced approaches to alleviate pressures triggering violent conflict. There was also a strong commitment to extended and expanded effort to deal with underlying root causes of violence and many suggestions in relation to the operational prevention of conflict, the development of more enlightened political and military leadership and reform of regional and global organisations. Throughout all of their recommendations, however, there was a strong emphasis on dealing with the underlying structural sources of conflict and violence by focussing on new concepts of security, abolishing Weapons of Mass destruction, promoting cooperative security arrangements, and more attention to security within states, adequate law, justice and penal systems, long term development and more clarity about how to utilise state leaders, civil society leaders and professional NGOs in short and long term prevention processes.

notable European exceptions) on the other hand receive little public or political recognition and have been relatively deprived of funds.

> From 2002 to 2004, for example, US defence budgets increased by US$90 billion or 27% more than the 2001 level. US AID's total budget (grants and loans) in 2001, however, was only US$10.7 billion which means that the increase in defence expenditure is over 8 times larger than the total USAID budget. Although these amounts are not that large in terms of total GDP (below 1%) or the Federal budget (below 5%) they are being financed largely through deficit financing. This has cushioned the negative impact on social sectors. In the long term, however, this rate of military expenditure will result in reduced government and private expenditure on other things.[18]

In addition to a rather unequal allocation of resources between the development and the security sectors, there has also been some conceptual confusion about the ways in which the policy agendas of these two sectors intersect, complement or contradict each other. It is assumed that the 'hard' side of State activity is primarily responsible for law, order and social harmony while the 'soft' development side provides safety nets for the impoverished and disadvantaged, slightly higher levels of general welfare and some general incentives to economic growth nationally and globally.

The rich and powerful, for example, value development and aid agencies much less than they do foreign ministries, intelligence agencies, departments of defence and other coercive agencies. The result of all this is that for the past fifty years the development and security spheres have been viewed as relatively autonomous – security is viewed by policy makers as essential to development but development, for most, has not been seen as central to security.

The central concern of national security specialists has been and still is 'what dangers might threaten the survival of the state'? How might these dangers manifest themselves in the short and medium term and what are the appropriate responses to them? The central concerns of development and nation-building specialists has been the factors that constitute the right sets of institutional and other arrangements that will deliver true human welfare and real human security. For soft power specialists, force should only be used when all non-violent methods have been exhausted. Wars of necessity are legitimate in self-defence – wars of choice such as Iraq are rarely if ever legitimate and certainly not for the purpose of regime change by an external power.

While national security specialists have been happy to promote a certain amount of multilateralism to generate more order in the international system they have not and do not focus much, if any, attention on the achievement of order through the cultivation of trustworthy relationships, justice or the systematic pursuit of human security (or care-free-ness) for the weakest and most vulnerable. This has been left to the UNDP and the Canadian and Japanese governments. All of these actors

18 See Francis Stewart, 'Development and security', Unpublished paper prepared for Fifth Annual Global Development Conference, New Delhi 25 – 26 January 2004 p. 20.

have recently developed the concept of 'human security' to encompass not just the achievement of minimal levels of material satisfaction but also the absence of severe threats of an economic or political kind.

The traditional realist security equation stands in stark contrast with this. It was and is dominated by the fear of war and the security of states rather than the security of individuals and groups. It has relied heavily on the concept of 'peace through strength' and shibboleths about waging peace by preparing for war. It does not worry too much about whether or not regimes are treating their individual citizens and minorities with justice and fairness. On the contrary it is preoccupied with whether or not states are good allies and friends or more optimally willing to be vassals under a benign imperium. Traditional realists are worried about coalitions of the strong and powerful, who is on 'our' side and who is not.

In the recent evolution of political systems market and state security institutions have remained privileged but social, community, and civil society spheres have tended to be both relatively and absolutely neglected. Unless we start thinking in terms of conflict sensitive development strategies and developmentally sensitive security strategies the world is going to get more and more insecure and the quest for true human security will become more elusive than ever.

The Biblical Psalmists, 2,000 years ago looked forward to the time when '[l]ove and faithfulness met together and justice and peace kissed each other'. (Psalm 85.) Despite this ancient aspiration, justice, development, peace, and reconciliation remain elusive irrespective of globalisation processes and a hugely enhanced global productive capacity. How do we explain to the world's poorest, for example, that the richest fifth of the world's people consumes 86% of all goods and services while the poorest fifth consumes just 1.3% of this amount? How do we justify the fact that the three richest people in the world have assets that exceed the combined gross domestic product of the 48 least developed countries or that the world's 225 richest individuals (of whom 60 are American with total assets of $311 billion) have a combined wealth of over $1 trillion which is equal to the annual income of the poorest 47% of the entire world's population? How do we explain to Africans that the average African household today consumes 20% less than it did 25 years ago while Americans spend 8 billion a year on cosmetics or $2 billion more than the estimated annual total needed to provide basic education for everyone in the world?

These sorts of figures reflect a deep and expanding division between rich and poor, a global inequality that is unjust, unacceptable and untenable over the medium to long term. This central divider is the global backdrop, however, against which any discussion of development and peace building must take place and where long-term conflict prevention must start.

> There is evidence, for example, of widening differentials between Moslems and Westerners. The 1975 – 1999 annual growth in per capita incomes in Arab States was 0.3% while that of high-income OECD countries was 2.2%. Similarly there is a widening gap in the per capita incomes between Israelis and Palestinians. Israeli per capita incomes have been growing at 5% per annum (1990 – 1999) while GDP

> in Palestine has been declining at a rate of 7.5%. Unemployment in the areas under Palestinian authority is 40% compared to 9% in Israel.[19]

Clearly there is no direct causal relationship between these divisions and global terrorism nor is there a direct relationship between global economic inequality and the 37 persistent internal conflicts that exist in 2004. These inequalities, however, do feed negative perceptions of concentrated wealth, power and military might.

The cost of achieving and maintaining universal access to basic education, basic health care for all, reproductive health care for women, adequate food for all and clear water and sewers for all is roughly $40 billion a year or less than 4% of the combined wealth of the 225 richest people in the world. Another way of putting this is to remind ourselves that this figure is very close to the 14% extra defence expenditure of $48 billion which President Bush asked for and received from Congress in 2003.

Conflict sensitive development planning and more synergy between the development and security or the development and peace building agendas is, therefore, absolutely critical to the achievement of stable peace and conflict prevention. Violence generates huge development costs. To tackle violence involves meeting these costs not with an enhanced and expanded military but with more targeted resources for smarter development. This involves a mainstreaming of conflict sensitivity across a range of different development sectors – how can the educational, health, justice, welfare and environmental sectors for example, be utilised to advance structural stability and peaceful relationships? What role should the private sector play in this? How much can state systems intervene to rectify gross inequalities without constraining market growth? These are the issues that confront those who wish to promote the development and peace building agenda. It is a huge intellectual undertaking which requires considerable courage and political will.

In the first instance it is important to develop some vision of change that combines the development, security and democratisation agendas in an integrated and organic fashion. 'Without a vision the people perish!' (Proverb 29, verse 18) It is also important within this to highlight inclusive patterns of development, which are participatory, just and oriented towards the generation of stable and trusting relationships. This is critical to the achievement of lasting peace and security. In these processes it is vital to incorporate a wide range of civil society stakeholders in order to focus more systematic political attention on who is included and who excluded from the allocation of scarce national resources. All of this work has to be imbedded, however, in some theory of social and political change. What is our vision of a desirable future, what are the visions of parties to conflict, where do they intersect? How sensitive are we to visions that we have difficulty accepting but which might be very salient for others? How do we let go of our own visions so that we might enable the realisation of those of others and in that process discover some deeper meanings for our selves?

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19 Francis Stewart op. cit., p. 22.

Secondly, it is vital to get the analysis right. There are some crucial economic, political and social sources of violence that need to be distinguished very carefully if conflict resolvers are to design adequate processes for dealing with them. If there is a strong and consistent association of economic and political factors with violent conflict, it is imperative that these be assigned rather more primacy in the design and implementation of intervention strategies than has been the case until now. To ignore such dimensions and to focus intervention processes on coercive processes without addressing the underlying sources of structural or direct violence will generate very inadequate foundations for stable peace. These projects may enhance the 'feel good factor' but will generate even deeper despair at the capacity of government and state systems to perform their social functions.

Thirdly, many good initiatives are subverted by the actions of corrupt governments, and the increasing criminalisation of politics. It is vital, therefore, to understand the linkages within and between different political complexes and the networked nature of relations between the state, civil society, the formal and non formal economic spheres, criminal and non criminal groups, paramilitary, police and military elements.

Fourth, most of these conflicts are occurring in environments with undemocratic political systems, where there are persistent patterns of gross violations of human rights, widespread state repression of dissidents and large minority populations. There are huge dangers, however, in trying to generate regime change and 'instant democracy' in countries that have been habituated to repressive authoritarian rule. The transition periods are the most dangerous. Conflict resolvers need to develop more integrated analyses of these problems and devise intervention strategies that enable more organic evolution of different systems. Despite what President Bush hopes for in Iraq, the US will be unable to impose democracy from the ashes of an authoritarian system. It will require much more than a few months to devise a constitutional arrangement that satisfies the needs of Shia, Sunni and Kurds.

Fifth, the structural sources of organised violence generate challenges for peace builders which often seem far greater than their current capacity to respond to them. This means that peace builders need to maximise their resources wherever possible seeking higher levels of communication, cooperation and positive working relations with like minded actors in the governmental, inter-governmental, private and non-governmental sectors. We need clarity about different competencies and a more efficient division of labour between all actors. We need radical systemic perspectives to generate the right sorts of policies. The NGO conflict resolution (peace-building) sector, for example, is expanding, professionalising and acquiring more resources to engage in long-term conflict transformation processes. It remains predominantly Northern, however, and its resources are miniscule compared to those available to the world's military and armed non-state actors. It has a limited capacity to challenge the political and economic dynamics of organised violence. It certainly has difficulty dealing with the criminalisation of politics, failed states, predatory states, institutionalised corruption and widespread subversion of the rule of law amongst other issues. The NGO sector cannot 'mediate with muscle' nor can it enforce solutions to problems. Its strengths lie in other areas. It has flexibility and an ability

to respond to human suffering without being politically constrained. It needs to acknowledge the limits of its competence as does the state. Both need to join forces in the difficult task of achieving sustainable peace and development simultaneously. Both need to build on the unifiers rather than the dividers in society since strong and resilient communities are fundamental pre-requisites for human existence and security.

Sixth, although reducing fear, building trust and restoring confidence are all necessary elements of any move towards a cessation of violence, they are not sufficient. This requires a much less adversarial much more problem solving orientation to politics. Perhaps this is the major contribution that the Conflict resolution community can make to transform corrupt and deficient state and economic systems. It can begin modeling political processes which are collaborative rather than competitive, unconditionally constructive rather than adversarial and where the interests of all are placed at the heart of the political process. This may sound rather utopian but it is essentially where most of the major development donors are moving.[20] (This is also beginning to happen within the private sector as well). Conflict prevention is well and truly at the heart of the political and development agendas.

Seventh, we need more political commitment and greater recognition of how conflict sensitive development strategies might be mainstreamed and most importantly implemented in macro policy and micro programme and project cycle frameworks. There are ongoing first, second and third track discussions about what constitutes the right programming needs and priority responses at all phases of violent conflicts and there are certainly many discussions about specific roles, responsibilities, burden sharing and basic operational coordination among development agencies. The fact that these discussions are taking place is in itself a positive sign and there is now general agreement that peace, stability and human security should be at the centre of bilateral, regional and multilateral development planning, funding, and implementation in violent conflict zones.

All of these elements are going to require new perspectives, new ways of thinking about old problems and new processes for designing truly empowering and emancipatory partnerships between donors and recipients in war torn societies. Only by addressing these issues, however, will we start dealing with the fundamental

20 See Cynthia Caigals and Manuela Leonard, *Conflict Sensitive Approaches to Development* (2001 Safer World, International Alert and International Development Research Centre) for an elaboration of all the diverse ways in which different national governments, multilateral agencies are addressing these issues. There are, however, many other more official reports which are signalling political dissatisfactions with the old relief/development model and a desire for new ways of addressing complex issues. (See e.g. the 2000 OECD DAC Guidelines on Conflict Peace and Development Cooperation which also resulted in the development of the Conflict Prevention and Post Conflict Reconstruction Network (CPR) which brings together aid and development policy makers to work out how they can be more efficient in terms of conflict prevention and post conflict reconstruction.) The EU's recent policy papers on Conflict Prevention and different UNDPA (United National Department of Political Affairs) and UNOCHA (United Nations Office for the Coordination of Humanitarian Assistance) reports etc are all moves in this same direction).

asymmetries. The fact that both the development and conflict resolution communities have realised this need is an optimistic sign. The major message which politicians need to hear, however, is that military and development policies based on fear, vulnerability, revenge or a desire for revenge are doomed to generate insecurity for all of us.

As Seamus Heaney in his poem *The Cure at Troy*[21] puts it:

> Human beings suffer,
> They torture one another,
> They get hurt and get hard.
> No poem or play or song
> Can fully right a wrong
> Inflicted and endured.
>
> The innocent in gaols
> Beat on their bars together.
> A hunger striker's father
> Stands in the graveyard dumb.
> The police widow in veils
> Faints at the funeral home.
>
> History says, Don't hope
> On this side of the grave
> But then, once in a lifetime
> The longed for tidal wave
> Of Justice can rise up
> And hope and history rhyme
>
> So hope for a great sea change
> On the far side of revenge
> Believe that a further shore
> Is reachable from here
> Believe in miracles
> And cures and healing wells

21 Extract from Seamus Heaney, *The Cure at Troy* (1990 Faber and Faber) p. 77.

Policing after Conflict: Peace-Building and the Responsibility to Protect

Andrew Goldsmith[1]

'Policing has been the great lacuna of peacekeeping.'[2]

'[T]he modern role of civilian police in peace-building needs to be better understood and developed.'[3]

Introduction

In a survey of approximately 1200 Iraqis in late 2003, the Baghdad-based Independent Institute for Administration and Society Studies found that only 28% were confident that the coalition forces could improve the situation in Iraq. Still, some 57% said they would feel less safe if the coalition forces were to leave immediately. In terms of what was wanted, 95% supported the right to criticize the government, and 86% supported the right of freedom of religion. Even more than improved job opportunities in government, eighty per cent of those polled stated that 'the institution that could most improve things was the police.'[4]

Despite findings of this nature, policing in the aftermath of major conflict is a largely neglected theme within the fields of international law, strategic studies, human rights, criminal justice and development studies.[5] And given its obvious rel-

1 I would like to thank Eloisa Calabio, Flinders law graduate, for her thorough research assistance and in the preparation of this paper for publication. This work forms part of my research on policing and insecurity in weak states, for which I would like to acknowledge the previous support of the Australian Research Council. The comments of the anonymous reviewer are also gratefully acknowledged.

2 Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Polity Press, 1999) 125.

3 United Nations, Report of the Panel on United Nations Peace Operations (2000) ('Brahimi Report,' A/55/305-S/2000/809) 7.

4 David Ignatius, 'Iraqis Want to Embrace the Future but Prepare for Civil Strife' (2004) 29 January – 4 February *The Guardian Weekly* 31.

5 Alice Hills, 'The Policing of Fragmenting States' (1996) 5 *Low Intensity Conflict and Law Enforcement* 334; Andrew Goldsmith, 'Policing Weak States: Citizen Safety and State Responsibility' (2003) 13 *Policing and Society* 3; Arrick Jackson, 'Policing after Ethnic conflict: Culture, Democratic Policing, Politics, and the Public' (2001) 24 *Policing: An International Journal of Police Strategies and Management* 563.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 21–48.*
 ISBN 90 04 14599 0.

evance in relation to the now-blossoming state-effectiveness literature,[6] its omission from much of this literature is very curious.[7] As Mary Kaldor has noted[8] it is even treated marginally in the peace-keeping literature.[9] Consequently, how policing can contribute to peace-building after periods of instability and internal conflict through the competent, impartial performance of the mundane tasks of order maintenance and law enforcement remains a largely open question for scholars, policy makers and practitioners alike.

As a humanitarian issue, it is one for the international community as well as for individual states. Given the prevalence of this kind of conflict in the last decade of the twentieth century,[10] the lacuna should be a matter of concern for governments, citizens and international assistance agencies. It is widely recognized that effective state policing can reduce the incidents of violence-prone situations. The police undertake the practical task of protecting individuals from predatory and abusive attacks by fellow citizens. Developing thinking in this area is therefore pertinent for states recovering from violent crises as well as for those foreign governments, NGOs and other agencies seeking to assist the processes of recovery in those states.

Policing's importance beyond the domestic criminal justice sphere has grown significantly in recent years by reason of changes in the nature of human conflict. Conflict since the end of the Cold War has become predominantly internal or intrastate in nature, rather than external and interstate.[11] We live in an era of 'new wars,' in which conflict for most citizens of the planet is more likely to be defined by Kalashnikov rifles than by Tomahawk missiles.[12] Pressures for greater attention to police and law enforcement have also grown as a consequence of greater concern about transnational crime[13] and international terrorist networks. While many of the factors underlying internal conflicts have their roots in transnational or even global phenomena, the principal impact of violence and conflict continues to be felt locally. Police, as a quintessentially local, state-based institution, I will suggest, have a crucial role to play in establishing peace in societies fractured by internal violence and longstanding social conflicts. In terms of humanitarian relief and longer term development assistance, they are the key state, and indeed, key social institution in the practical implementation of what a recent commission has called 'the responsibility

6 Francis Fukuyama, *State-Building: Governance and World Order in the Twenty-First Century* (Profile Books, 2004).

7 One scans the indexes and tables of contents of books on this topic largely in vain in the search even for passing references to the role of police forces.

8 Kaldor, above n 2.

9 E.g. Alex Bellamy, Paul Williams and Stuart Griffin, *Understanding Peacekeeping* (Polity, 2004); Ronald Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge University Press, 2004).

10 Ibid.

11 Ibid.

12 Michael Howard, *The Invention of Peace: Reflections on War and International Order* (Profile Books, 2001).

13 Ethan Nadelmann, *Cops Across Borders: The Internationalization of US Criminal Law Enforcement* (Penn State University Press, 1993).

to protect.'[14] Without the provision of secure conditions in which ordinary citizens can reconcile and rebuild, progress at the grassroots level in terms of economic and social development as well as human rights will remain elusive.[15]

This paper examines some dimensions of this theme and proposes some key elements for a framework by which theory and practice in this area can be advanced. The focus of the paper includes the forms of international intervention and assistance in the field of police reform in addition to some of the country-specific challenges to have arisen in the context of reforming the police as part of wider peace-building and reconstruction efforts. I shall argue that in addition to a timely need to respond to the relative neglect of policing by the international community, we face the risk of de-centering responsibility for the improvement of personal security away from the state, instead turning to non-government organizations (NGOs) and civil society for solutions. The state, I shall argue, must and inevitably will, continue to play the key role in ensuring the personal safety of persons.[16]

Conflict and Insecurity in the Twenty-First Century

At the beginning of the twenty first century, life conditions for many citizens of the world remain both parlous and perilous:

> The personal security of people all over the world is still under threat – from conflicts, political oppression, and, in some countries, increasing crime and violence. War and internal conflicts in the 1990s forced 50 million people to flee their homes – 1 person of every 120 on earth. In the past decade civil wars have killed 5 million people world wide. At the end of 1998 more than 10 million people were refugees, 5 million were internally displaced and another 5 million were returnees.[17]

The end of the Cold War in 1989-90 did not, contrary to some hopes, bring about an end to fears of violent exploitation and loss of life and livelihood around the world. A range of non-state actors, as well as corrupt and brutal regimes, has added to the sum of human misery. The threat of nuclear destruction has been overtaken, if not replaced, by a range of politically destabilizing factors operating at the state and sub-state level. While some are local and distinct in nature, in many cases, instability is fuelled if not motivated by competing groups pursuing narrowly based economic and/or political advantage. Globalization of illicit as well as licit markets has meant

14 International Commission on Intervention and Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (ICISS, 2001).

15 This reasoning is increasingly evident in publications by the World Bank dealing with conditions needed for successful development in developing countries. See particularly World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (Oxford University Press, 2004), chapter 4, 'Stability and Security'.

16 Goldsmith, above n 5.

17 United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development* (Oxford University Press, 2000) 36.

that human trafficking, mineral extraction, drug trafficking and other transnational crimes now act as threats or counters to the traditional nation-state structure. This political and legal construct, 'the state', has been the foundation upon which not just global order but local law and order has been premised for more than two hundred years. As against the juridical notion, the reality for many people has proven to be very different.

Victims of the 'new wars'[18] are now more likely to be non-combatants. The conventional distinctions between people, army, and government have been dissolved in these conflicts, rendering ordinary people much more vulnerable to armed struggles and conflict. Without means and mechanisms for, firstly, containing conflict, and then maintaining peace at the domestic or local level, the costs to ordinary people will inevitably grow. As Shearer notes:

> The costs of continued conflict are borne overwhelmingly by civilians… Moreover, as violence continues, the desire for retribution and revenge can intensify and the underlying reasons for the conflict may become obscured. These make eventual reconciliation even more difficult.[19]

But merely suggesting that states in post-conflict societies need better police forces risks ignoring some fundamental, and often entrenched, difficulties.

The State as Threat

For many people, the state remains a menace rather than a source of protection and reassurance. Human rights reports attest voluminously to the shortcomings of many states in terms of active repression, including the use of torture against ordinary citizens. The role of the police as the principal domestic security agency of the state has meant that the character of particular regimes has tended to be expressed through the police. Hence, we find a common symbolic association made by many people between 'the police' and 'the state.'[20] Moreover, it has been ordinary people who have borne the brunt of police actions in support of those regimes. Police have very often acted as the repressive arm of brutal and/or corrupt regimes, resulting in their activities being focused upon perceived threats to the regime and to the neglect of 'normal' policing. Police in all countries for nearly all citizens tend to be the most commonly encountered state agents vested with powers of coercion. The very distinction between maintaining order, as opposed to fighting wars, means that police rather than soldiers come to represent the state in the eyes of the populace, for better or for worse. It is no coincidence that in many conflict-stricken countries, local police garrisons and police stations have become the targets for violent attacks

18 Martin van Creveld, *The Transformation of War* (New Press, 1991).

19 David Shearer, 'Exploring the Limits of Consent: conflict Resolution in Sierra Leone,' (1997) 26 *Millennium: Journal of International Studies* 845, 847.

20 It is thus no coincidence that much of the violence in post-war Iraq during 2004 has been directed against Iraqi police stations and personnel.

by popular resistance and guerrilla movements. Recent events in Haiti and Nepal, to choose just two examples, confirm this observation.

However, shortcomings in state policing can take several forms apart from repression. There is also state incompetence, state corruption and state neglect of basic service provision.[21] States unable or unwilling to train and maintain police to a reasonable level of competence must expect their police to be vulnerable to corruption, outside influence and personal distractions that undermine their effectiveness. These are police forces operating in the context of 'weak,' 'failing' or even 'collapsed' states.[22]

In some instances, state weakness can be linked to police activities done in large measure to appease powerful external constituencies. An example here is the 'war on drugs' conducted by the Colombian National Police in poor marginal rural areas of southern and eastern Colombia. The logistical support provided by the CNP to the fumigation of coca crops as part of Plan Colombia has undoubtedly caused enormous harm to the standing of the police with local *campesinos* for whom coca offers the best economic prospect for making a living. Not the least important reason for police-community alienation is the limited or non-existent application by the police to providing basic security to ordinary citizens in these areas. So long as the internationally-fuelled 'war on drugs' overshadows other aspects of state-society relations at the local level, policing will remain an alien presence ill-suited as well as scantly disposed to providing basic citizen security.[23] In other countries, the post-colonial nature of these societies has meant that they have been left with police traditions more designed to suppress local political resistance than to foster consent-based policing strategies for the benefit of all persons. Within this constellation of factors, we can locate a number of small states on Australia's regional 'doorstep', including the Solomon Islands and Papua New Guinea that many analysts would categorise as 'weak' or 'failing.'[24]

However, getting good policing established in post-conflict situations also requires coming to terms with the characteristics of civil society. In poorly resourced societies, this injunction becomes even more important as ways of ensuring order in spite of meagre state funding are crucially needed.

Violent Entrepreneurs and Informal Power Structures

An underlying premise of the 'weak states' thesis is that there are non-state actors impacting upon community safety and affecting levels of internal conflict.[25] These

21 Goldsmith, above n 5.

22 Ibid.

23 Andrew Goldsmith, Maria Llorente and Angela Rivas, 'Foreign Assistance in Colombian Policing' in Andrew Goldsmith and J Sheptycki (Eds), *Crafting Transnational Policing* (2005) (in preparation).

24 See Australian Strategic Policy Institute, *Our Failing Neighbour: Australia and the Future of the Solomon Islands* (ASPI, 2003).

25 Goldsmith, above n 5.

groups threaten not just the effectiveness of states in terms of providing basic security but also the legitimacy of those states. People unable to find sanctuary from violence within the state will quickly seek it elsewhere. The groups undermining state authority, as noted earlier, commonly take the form of organized crime, insurgent, and terrorist organizations, with many groups being involved in more than one if not all of these state-destabilizing activities. In extreme cases, we see the 'criminalization of the state' in which government leaders and officials become integrated into personalized, rent-seeking criminal activity.[26] International markets and actors help to promote these irregular forms of entrepreneurship at the same time as they undermine the authority and competence of the state. The networks and markets involved in heroin and cocaine production have impacted severely upon the political authority and competence of countries such as Afghanistan and Colombia in recent decades.

Duffield refers to these networks as *emerging political complexes*, signifying that often those engaged in illegal activities of this kind cannot be dismissed as merely criminal, partly because they exercise political power, frequently in tandem with the formal political structures of weak or transitional states.[27] As Duffield notes, 'while usually intersecting the institutions of recognised states'[28] these groups have the authority and capacity to mobilize resources for redistribution of wealth in new ways. These parallel power structures also present new alternatives in terms of security provision. Ironically, as they undermine the capacity of the state to protect, they often provide new means of providing protection, at least for some elements within the societies affected.[29] 'Normal policing' is no longer (if it ever was) viable. As Lutz and Donnini[30] have noted, in these situations, the police and military forces oscillate between despotic coercion and violence towards citizens caught in the middle of conflicts and a systematic disregard of 'the need for protection by vulnerable rural populations subject to predation by militarized non-state actors.'[31]

In analysing the motives of these groups, as indeed in seeking to distinguish the state's actions and interests from those of civil society, there are often no 'bright lines' to enable assessment and ready policy responses:

> Conflict resolution approaches also tend to assume a clear division between pro-war and pro-peace constituencies or between a criminalised war economy and a licit peace economy. … war dissolves conventional distinctions between people, army

26 William Reno, *Warlord Politics and African States* (Lynne Rienner, 1998); Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (Zed Books, 2001).

27 Duffield, above n 26.

28 Ibid., 163.

29 Goldsmith, above n 5.

30 Catherine Lutz and Donald Donnini, 'The Economies of Violence and the Violence of Economies' in Henrietta L Moore (Ed), *Anthropological Theory Today* (Polity Press, 1999) 73.

31 Ibid., 97.

> and government. The networks which support war cannot easily be separated out and criminalised in relation to the networks that characterise peace.[32]

This fuzziness in both moral and practical terms must be reckoned with in terms of addressing the issue of how police can be reformed in ways to reduce rather than promote conflict and to promote individual well-being.

'Horses for Courses'? – Police and Military Roles in Conflict

As Sir Henry Maine noted over a century ago, while '[w]ar appears to be as old as mankind … peace is a modern invention.'[33] It is therefore useful to think about the police as contributing to processes of pacification, alongside soldiers and civilians of various categories, without becoming deluded by the prospect of achieving a permanent peace or indeed insisting upon it as a necessary goal. We should also flag the distinction here between 'police' and 'policing' in order to recognize that the changeable and often unpredictable nature of conflict will mean that policing (keeping the peace, enforcing the law, providing protection to individuals) will not always feasibly be limited to specially trained non-military personnel (police).

Distinguishing between policing and military functions in conflicts and providing for separate security mechanisms to reflect those functional differences in post-conflict or indeed still volatile situations in part depends upon how we analyze conflict. Terms such as 'conflict' and 'dispute' are often used loosely to describe a wide variety of situations in which disagreement and often latent hostility or violence is present. Bloomfield[34] has proposed a multi-step 'dynamic phase model' to capture the stages through which conflicts can move. He notes that political differences invariably start with a *dispute* – 'a quarrel … about … resources, borders, race, tribe, language, religion, minorities or who is to rule a particular territory.'[35] A *conflict* commences when one or other party to the dispute 'begins[s] to consider settling the dispute with force; that is, one or another party begins to arm seriously, to import offensive weaponry or to employ symbolic forms of violence. Then, as a third stage, things can move to a state of *hostilities* involving 'outright, recognizable warfare involving organized sides generating significant casualties.'[36]

Policing has a clear role in relation to disputes, and indeed in relation to conflicts, as we shall see later. The police role in hostilities is less clear-cut. When configured and deployed in paramilitary formations, their role in practical terms can vary from public order policing to partisan repressive action on behalf of a regime or elite. This operational unpredictability, even carried out within the confines of the rule

32 Jonathan Goodhand, 'Aiding Violence or Building Peace? The role of International Aid in Afghanistan' (2002) 25 *Third World Quarterly* 837, 849.

33 Quoted in Howard, above n 12, 1.

34 Lincoln Bloomfield, 'Why Wars End: A Research Note' (1997) 26 *Millennium: Journal of International Studies* 709.

35 Ibid., 712.

36 Ibid., 713.

of law, can prejudice public acceptance of police actions. Outside the framework of law, human rights reports frequently attest to the difficulty of ensuring that these 'public order' police don't descend into brutality towards groups perceived as hostile to government. In Indonesia, the police's public order division, BRIMOB, has been criticized along these lines.[37]

Separating the functions of policing from military-style engagement is therefore highly desirable in any conflict situation, but especially in the case of open hostilities where police risk being seen as partisan rather than impartial servants of the common good. Sometimes though, the common good in policing will lie in selective engagement in conflict reduction or prevention. As Bloomfield notes, preventing or stifling conflict may not be an appropriate policy goal if confronted by a greater policy evil such as the threatened use of weapons of mass destruction or genocide.[38] For example, by permitting the democratic forces within civil society to openly contest the Milosevic government in its final days without police intervention, the former chief of the Yugoslavian police, Sreten Lukic, has been credited with playing a vital role in effecting the removal of Slobodan Milosevic from power.[39] In this regard, the police action was hardly neutral in its effects; however, as I will suggest later, there is a strong case for police acting impartially in post-conflict and conflict prevention settings. Given the crucial structural position of police in societies undergoing change, the development of guiding principles for police caught in such situations is a matter of considerable importance that has received little attention.

How police and military roles will, and should, be defined then is partly a reflection of the extent and kind of conflict as well as the degree of state viability. The greater the violence and the weaker the state, the more likely it is that military as well as police intervention is appropriate. The differences between 'weak,' 'failing' and 'failed' or 'collapsed' states point to a spectrum of impacts of conflict upon state effectiveness. In a conflict or post-conflict situation, especially one arising after prolonged or intense hostilities, there will often not be a functioning state in place to carry on basic government function including policing. Here, through military defeat or bureaucratic paralysis, the state may be said to have 'collapsed.' This describes the situation faced in the Solomon Islands in early 2003 prior to the Regional Assistance mission to the Solomon Islands (RAMSI) intervention. In these cases, the need to reconstruct will be great from the base level upwards.

In such cases, ensuring that the peace is maintained through disarmament, demobilization and rapid attention to immediate needs (shelter, food, healthcare, clean water, clothing) will be important. Ensuring disarmament and demobilization of combatants would seem to demand an initial military presence, as the Solomons case arguably showed. In many such cases, the unavailability of a trained international police force to quickly intervene will mean that in the short-term, very often a military force is the only option. They inevitably will be called upon to perform

37 International Crisis Group, *Indonesia: National Police Reform, Asia Report no. 13* (ICG, 2001).

38 Bloomfield, above n 34, 713.

39 Tim Judah, 'The Fog of Justice' (2004) 15 January *New York Review of Books* 23.

a variety of traditional policing as well as military tasks. On the other hand, the responses needed in states which appear trapped in long-term conflict situations that are severely affecting the capacity of the police to work effectively, will be different in some regards and perhaps less extreme. These states are of the 'weak' or 'failing' kind. On this basis, Papua New Guinea may well warrant a different response from the Solomon Islands, though any volatile situation probably demands contingency planning in terms of rapid deployment of military capacity.

Responding to Conflict and Insecurity

In looking at how foreign police do and should get involved in still-volatile and post-conflict situations, we need to recognize the degree of violence and volatility that they are likely to face as well as the kinds of immediate and longer-term needs of the communities they are seeking to assist. The functional distinction between *peace-keeping* and *peace-building*, as well as the implications of pursuing *relief* rather than *reconstruction*, enable us to develop a grasp of the different implications for police and policing.

In terms of deciding how to respond, we should distinguish the 'here and now' dimension from longer-term issues. The first dimension refers to urgent relief of situations immediately following the cessation or pause of hostilities (the typical 'failed' state scenario, e.g. Liberia, Somalia, or post-war Iraq) – the humanitarian *relief* scenario. In this situation, we will very often be looking at UN CIVPOL (or UNPOL) peace-keeping operations, in which a rapid response capacity including the ability to provide an interim police service may be required. Ensuring that order is maintained and that further breaches of the law do not occur warrant the involvement of police at this early stage. In the collapsed state situation, of course, the need for joint military-police operations in tandem will usually be real, given the need for 'normal' policing to develop within an environment in which demilitarization and demobilization are taking place, presumably with the involvement of the foreign military forces. This response is largely then directed to immediate needs to stabilize and pacify communities that have been in conflict.

The second response scenario is one of *reconstruction*. It may either follow or occur simultaneously with the relief situation, or it may occur in circumstances where urgent relief is not needed. This is more the 'weak' state situation. In the case of longer-term reconstruction, the replacement or wholesale rebuilding of domestic police forces may be required, but in less extreme cases, there may be specific programs designed to enhance capacity and effectiveness in still-functioning police forces. This response involving police is more immediately linked to the practice of peace-building.

Peace-keeping, Peace-making and Peace-building

Peace-building can be distinguished from *peace-keeping* and *peace-making*. The last is more directly involved with efforts to bring currently warring parties to cease hostilities and find a common settlement of their differences.

Peace-keeping has been described as:

> A fifty year old enterprise that has evolved rapidly in the past decade from a traditional, primarily military model of observing ceasefires and force separations after inter-State wars, to incorporate a complex model of many elements, military and civilian, working together to build peace in the dangerous aftermath of civil wars.[40]

The extent and forms of police contributions to peace-keeping has steadily increased in recent decades. It has evolved from monitoring and observing local security forces to on occasions providing an interim police force where the local alternatives are deemed untenable.[41] Assuming this role in a proliferating number of conflicts and situations from the 1990s onwards however does not mean that the ways of doing so have been particularly clear or that there has been a large well-developed stock of knowledge and experience to draw upon for these purposes.

Peace-building has a more clear-cut longer term, development focus. Thus, it has been defined as comprising:

> Local or structural efforts that foster or support those social, political and institutional structures and processes which strengthen the prospects for peaceful co-existence and decrease the likelihood of the outbreak, reoccurrence or continuation of violence.[42]

In the security context, it includes such activities as:
- reintegration of former combatants
- rule of law strengthening programs (police training, human rights training, judicial and penal reform)
- monitoring and investigation of human rights abuses
- providing technical assistance in areas such as police investigations and the conduct of elections
- promotion of conflict resolution and reconciliation methods[43]

After successful reintegration of former combatants, the scope for police assistance and police reform at the local level becomes greater as this list suggests. Assisting local policing capacity in these ways implies both an ongoing role for police monitors and trainers provided by governments and agencies assisting the host country in reconstruction and the importance of establishing viable local police capacity.

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40 Brahimi Report, above n 3, 2-3.

41 Duncan Chappell and John Evans, 'The Role, Preparation and Performance of Civilian Police in United Nations Peacekeeping Operations,' (1999) 10 *Criminal Law Forum* 171; Also Simon Chesterman, *You the People: The United Nations, Transitional Administration and State-Building* (Oxford University Press, 2004).

42 Goodhand, above n 32, 839.

43 Brahimi Report, above n 3, 3.

Challenges for Police in Peace-Building and Reconstruction

Some recent examples from Timor-Leste and the Solomon Islands, as well as some from the limited wider extant literature, assist in illuminating the nature of many of the challenges associated with foreign assistance work in the policing area. The two cases represent examples of two common scenarios faced by peace-builders: 'failed' or 'collapsed' states in which the police have ceased to function even formally, and 'failing' or 'weak' states in which policing, if not actively contributing to problems of insecurity and corruption, is functioning at a very low level of effectiveness. In the former case, Timor-Leste, there is the question of building anew from the bottom up while the second scenario, the Solomon Islands, there is a need for a resuscitation or renewal strategy.

Timor-Leste

Timor-Leste has provided Australian police with two recent experiences of significance in terms of responding to conflict. Australia's strategic interest in this small country is clear enough; its proximity also has made it a practical choice in terms of playing a key role in peace-keeping and reconstruction.[44] Australian police were first part of the UN mission to prepare and supervise the conduct of elections on 30 August 1999. This mission, which was multinational in character, was known as the United Nations Mission in Timor-Leste (UNAMET). Subsequently, in the aftermath of the violence that occurred during September 1999 and the 'disappearance' of the Indonesian police, Australian police formed part of the United Nations Transitional Administration in Timor-Leste (UNTAET), which took over in February 2000. Police from over forty other countries shared the policing responsibility with police drawn from the Australian Federal Police (hereinafter AFP) and state police forces. While there is some literature reflecting on the Australian involvement in the UNAMET phase (for example Savage), it is to the transitional phase (UNTAET) that the following discussion principally applies.

Sites of police assistance such as Timor-Leste almost naturally challenge the efficacy and appropriateness of what takes place in terms of reconstruction and police reform. Aside from logistical obstacles, the lack of familiarity with local conditions that foreign police bring with them sets the scene from the beginning for difficulties of various kinds. These are in turn compounded by the exigencies governing police assistance missions, including the need to respond quickly in many instances, and the rotation of police personnel through such postings every six or twelve months. The policing vacuum in the aftermath of Indonesia's withdrawal posed huge challenges. Predictably, many miscalculations and shortcomings in police assistance became evident during and after the operation. The Conflict, Security and Development Group (CDSG) commented on the effectiveness of UNPOL in the following terms:

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44 Cedric de Coning, 'The UN Transitional Administration in Timor-Leste (UNTAET): Lessons Learned from the First 100 Days' (2000) 6 *International Peacekeeping* 83.

> The effectiveness of UNPOL was generally reduced by a lack of local language skills and a shortage of interpreters; inadequate understanding of the East Timorese situation and culture; confusion over the applicable law, including customary law, non-availability of legal texts and unfamiliarity with civil law systems; and a lack of official records, forensic pathologists and judicial follow-up. The quality and length of the one-week induction training in Dili prior to deployment were judged to be inadequate.[45]

The primacy accorded to relief objectives among police assistance personnel can prejudice longer-term objectives. Inadequate arrangements were made for UNPOL staff to contribute to the transition phase. UNPOL officers lacked capacity-building skills. As a result, capacity-building and specifically the building of the Timor-Leste Police Service as a new institution was neglected. According to some Timor-Leste police officers, the UNPOL tended to 'police themselves rather than teach East Timorese officers how to police.'[46] The CSD Group's report concludes on this point:

> Capacity-building is a specific skill, and the dual responsibility of executive policing and capacity building represents a significant challenge. UNPOL might have benefited from the advice and guidance of capacity-building experts.[47]

One of the persistent themes to emerge from the literature on police in peace-keeping and related operations as well as from the development sector is the importance of integrating policing objectives and reforms with wider governance and indeed economic and social development objectives. It is artificial, as well as politically mistaken, to treat policing and security issues as technically separable from other issues confronting societies in post-conflict situations. The overlap between police and broader issues will be addressed further below.

Another area of difficulty (and controversy) generally relates to the fate of ex-combatants and in particular their future (if any) in the rebuilt police and military forces supported through international development assistance.[48] In this regard, Timor-Leste has been no exception. Local people with relevant experience tend to be few in moments of reconstruction, but the antecedents of those available will often be tainted. Whether association with the previous regime should preclude any involvement in the new security forces is a longstanding and difficult issue for many countries in which reconstruction is or has been attempted. It seems to be the case that it will often be impracticable to exclude all those involved in the previous regime, as recent experience in Iraq has shown. However, some mechanism logically

45 Conflict Security and Development Group, *A Review of Peace Operations: A Case for Change – East Timor* (CDSG, 2003) [76].

46 Ibid., [100].

47 Ibid.

48 Rachel Neild, 'Democratic Police Reforms in War-Torn Countries' (2001) 1 *Conflict Security and Development* 1.

is needed to sift through local applicants if the habits of the past are to be avoided and the general public is to be reassured that the new police force is worthy of their support and trust.

The recruitment of some former Indonesian police to the Timor-Leste Police (PNTL) offered mixed returns in as much as there has been criticism of former abusers being rewarded with police jobs when unemployment is high and many ex-combatants cannot get the same jobs. The recruitment of ex-soldiers and other combatants meant that persons with backgrounds quite distinct from the tasks of police officers joined the new police force. Again, more needs to be done to explore how and when ex-combatants should be taken into policing roles as part of reconstruction. Overall in the Timor-Leste case, it has been perceived as detrimental.[49] Here again, the structural imperative of much reconstruction work to 'do something quickly' is likely to have imposed costs in terms of how successful this change has been.

The inadequate accountability of UNPOL and post-conflict police forces has also arisen in the Timor-Leste setting. Given the alien nature of much that comes with police assistance missions and the already inflamed nature of the setting in which these foreign personnel and practices will operate, grievances and concerns about abuse of power against locals perhaps should come as no surprise. If that is indeed true, it is surprising that more thought was not given to mechanisms and standards of accountability for police personnel involved. In relation to UNPOL, their exemption from the application of local laws introduced a distinction between them and those Timorese with whom they were working or policing. Another problem was the general public distrust of security forces, arising as a consequence of Timor-Leste's prior history of Indonesian control. In such settings, establishing trust requires among other things the creation of transparent internal and external accountability mechanisms capable of applying the law against police officers as well as against ordinary citizens. In Timor-Leste, the need has arisen especially with regard to the Special Units, against whom most complaints of excessive force have been made.[50] These matters, it seems, received little attention during the transition period.

Timor-Leste also reveals the risks associated with the uncritical adoption of ideas and practices about policing from the West. This was evident in the promotion there of 'community policing' as part of UNPOL's operations.[51] UNPOL was mandated to implement this concept in its own policing and in what was transmitted to Timor-Leste's new police. An attempt was made under this initiative to introduce the Japanese Koban system, in which police established neighbourhood level policing posts and forged close relationships with citizens on security and order matters. However, according to Mobekk, the lack of clarity generally about the import of the

49 Eirin Mobekk, Law Enforcement: *Creating and Maintaining a Police Service in a Post-Conflict Society – Problems and Pitfalls*, Working paper no. 127 (Centre for the Democratic Control of Armed Forces, 2003) 12.

50 Ibid., 18.

51 Conflict Security and Development Group, above n 45, [105].

idea, and its wide-ranging attempts at implementation by a police force comprised of over forty different nationalities, has meant that its impact has been 'mixed at best'.[52] An unanticipated problem identified against the background of Indonesian control of Timor-Leste was that efforts by the police to enlist community support through programs such as the Koban system could be viewed as spying on one's neighbours, and thus reminiscent of the previous regime.[53]

Here, in part, the problem may lie in failing to see a distinction between the idea and basic principles behind community policing (working in partnership with the community), and particular institutional expressions of such ideas and principles. In other words, there may well have been other ways of building the partnership idea into police/community relations, but this might be expected to require an extended and thorough period of consultation and consciousness-raising. It may also reflect upon the alacrity with which foreign concepts are expected to be adopted and implemented.[54] Slavish adoption of Western policing ideas comes naturally and easily to police practitioners from those jurisdictions, but efficiencies of this kind do not ensure a successful transplant. A 'can do' mentality among foreign personnel is no substitute for adequate local consultation and input.[55] A greater awareness of institutional transplant experience from the wider governance and development sectors might well have led to a different approach being taken.

Another perennial issue arising in the transition phase is the appropriate relationship between the police and the military. Ensuring that the military do not get involved in internal security issues is difficult in places such as Timor-Leste where the new institutions of security are weak and there can be pressure for the army as well as the police to deal with crime and disorder. This has been a problem in Timor-Leste. Observers point out that apart from lacking training and authority for policing, the deployment of the military in such operations is likely to strengthen the relative power of the military and undermine the credibility and legitimacy of the new police force to tackle such matters.[56] The continued existence of militias and informal security groups within Timor-Leste society similarly threatens to overshadow the strengthening of police capacity and its identification in the public eye as the principal agent responsible for public safety.[57]

There is unlikely to be a single or easy answer to this challenge. Different historical experiences and contemporary circumstances will point to the inevitability of different balances struck between police and military functions and personnel across time as well as space. While having clear cost implications especially for countries undergoing reconstruction, there is an obvious desirability in trying to

52 Mobekk, above n 49, 22.

53 Ibid., 23.

54 Andrew Goldsmith 'Police Accountability Reform in Colombia: The Civilian Oversight Experiment' in Andrew Goldsmith and Colleen Lewis, Eds, *Civilian Oversight of Policing: Governance, Democracy and Human Rights* (Hart Publishing, 2000).

55 Chesterman, above n 41, 248.

56 Mobekk, above n 49, 21-2.

57 Ibid., 20-1.

preserve the functional separation and practical distinction between police and military, as the latter's stronger customary reliance upon the use of force renders its relationships with the public more episodic and also of a different order to those expected of police in relatively free societies. Where police have tended to assume paramilitary roles, experience has shown that positive, cooperative relationships with the public have tended to be rare or even non-existent.[58]

Finally, the decision to apply Indonesian (modified to comply with international human rights standards) rather than Portuguese law, and the slowness in creating and the difficulties of maintaining judicial and detention facilities have contributed to the problem of establishing the PNTL as competent force in the eyes of Timorese. Locating lawyers and judges to prosecute and sit on cases has also been difficult. Moreover, there has been criticism of the failure of the UN interim administration to look at indigenous justice concepts and principles in fashioning a legal system that was comprehensible and sustainable in the local environment.[59] In terms of sustainability of changes, including their sympathetic integration with local custom, this failure is perhaps again symptomatic of the broader failure to integrate police reform objectives derived from the West with more locally appropriate approaches that are consonant with development perspectives and objectives. In this regard, the decision of the post-independence Timor-Leste government to adopt Portuguese as the official language of the country seems not to have mitigated these difficulties, as problems of communication, acceptance, and professional competence in justice and legal affairs have not diminished.[60]

The Solomon Islands

This case presents a clear example of Australia attempting to assist an existing police force (and government generally) in a classic 'failing' state scenario. Australia's role in the Regional Assistance Mission to the Solomon Islands (RAMSI) began in July 2003. Until the announcement of RAMSI in early 2003, Australia had adopted a policy of non-intervention, declining a prior invitation from the prime minister of the Solomon Islands in 2000 to intervene to prevent a coup.[61] However, the re-framing of the 'problem' in the Solomons as one of lawlessness has provoked a different response from the regional powers.[62] The once 'weak' state had entered a terminal stage – growing lawlessness was indicative of state paralysis and imminent failure.

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58 Andrew Goldsmith, 'Police Reform and the Problem of Trust' (2005) *Theoretical Criminology* (forthcoming).

59 Tanja Hohe, 'Justice Without Judiciary in Timor-Leste' (2003) 3 *Conflict, Security and Development* 335.

60 Andrew Goldsmith, Interviews with Timor-Leste lawyers, Dili (2002).

61 Australian Strategic Policy Institute, above n 24, 9.

62 Sinclair Dinnen, 'Winners and Losers: Politics and Disorder in the Solomon Islands 2000-2002' (2002) 37 *The Journal of Pacific History* 285.

Police assistance is a major component of the Assistance mission. The most significant policing component of the multinational intervention has been that of the Australian Federal Police. The assistance provided by Australia is intended to restore peace and reverse economic decline in the Islands. Serious crime, as well as political violence and endemic corruption, have been identified as key social problems affecting the economic and social well-being of the population. The police, it seems, have been part of the problem, failing to act cohesively to uphold the rule of law.[63] The police were also widely viewed as engaged in partisan and/or rent-seeking behaviour, often along ethnic or elite group lines. Needless to say, 'normal' policing suffered.

As noted, the construction of regional security threats in terms of the risks posed by crime lay at the heart of justifying this initiative. The Australian Strategic Policy Institute, whose report on the Solomon Islands anticipated and, directly or indirectly, provided a policy platform for the RAMSI exercise, stated that:

> [w]ithout an effective government upholding the rule of law and controlling its borders, Solomon Islands risks becoming ... a petri dish in which transnational and non-state security threats can develop and breed.[64]

Moreover, there was the risk of reversion 'not to a pre-modern tropical paradise, but to a kind of post-modern badlands, ruled by criminals and governed by violence.'[65] However, formally, the basis for the intervention was an invitation from the Solomon Island Government. The initial phase, which was defined as a police-led intervention, consisted of nearly 250 members of the AFP and Australian Protective Services and 1500 Australian Defence Force personnel as back up. Press reports indicate that in addition to restoring peace in the immediate or short term, the aims of the mission included the longer-term reconstruction of the institutions of government. Policing is being regarded as part of a whole-of-justice sector program that will also address the courts, prisons, and government administration. The time scales mentioned have been of the order of 8 or 10 years.[66]

Early in the mission, the focus for police attention was the rounding up of more than 3,400 illegal weapons, organizing the surrender of key militia leaders, and the arrest of many, including senior police officers. Much of this work has required the police acting with the protection of the military personnel. One of the objectives in the early stage was to establish a reputation of impartiality, so that different parties to the various conflicts did not identify the actions of the police as being partisan. This has been achieved, as indicated, by ensuring that persons suspected of criminal actions from all sectors of society and government have been targeted. Press reports suggest that of the approximately 1,000 member Royal Solomon Islands Police Force, more than 120 police officers are under investigation for crimes such as intimidation,

63 Tarcisius Kabutaulaka, *A Weak State and the Solomon Islands Peace Process* (East-West Center, 2002).

64 Australian Strategic Policy Institute, above n 24, 13.

65 Ibid.

66 Mark Dodd, 'A Good Start' (25 September 2003) *Far Eastern Economic Review* 28.

rape, embezzlement and murder.[67] More recently, it has been reported that since the implementation of RAMSI, over 25 per cent of serving officers have either resigned or been dismissed.[68] A palpable and early commitment to upholding the rule of law as well as to the restoration of order in the range of stabilization activities undertaken by RAMSI stands in contrast to some earlier examples of police peace-keeping and reconstruction activities.[69]

Drawing Lessons, Developing Doctrine in Support of Peace-Building

Putting people into police uniforms does not make those people effective protectors of the peace and impartial enforcers of the law. Improving police effectiveness in places where policing has tended to be arbitrary and brutal demands confronting many difficult issues, including whether it is better to scrap existing deficient police forces and start from scratch in building a new police or to build upon some elements of the old police. Clarifying the mandate for new police forces in these situations is fundamental in terms of setting out the functions and roles of the new police. Some guidance from the norms in the international arena is available and is inevitably required where policing has previously been driven by self-interest.

State Responsibility and the Fragility of Individual Freedom

States must accept that they bear the primary responsibility for good policing as the alternatives either would be unpalatable or would lead to the interference of actors outside the control of the state.[70] How police can be encouraged or shown ways to better protect ordinary citizens is a fundamental policy challenge for those committed to reducing the negative consequences of conflict, whether at the stage of providing urgent relief, contributing to peace-making, or examining the longer-term development needs.[71] As the International Commission on Intervention and State Sovereignty (ICISS) put it, '[w]hat is at stake here is … delivering practical

67 United Press International, 'Solomon Islands Police Officers Arrested' (3 September 2003).

68 Sinclair Dinnen, 'Aid Effectiveness and Australia's New Interventionism in the Southwest Pacific' (2004) 65 *Development Bulletin* 76, 78.

69 Chesterman, above n 41. Balancing order maintenance with enforcing the law lies at the heart of the challenge of democratic policing in developed as well as developing countries. It is rarely an easy balance to strike as a matter of policy or operational decision-making, particularly in the context of highly charged issues around which civil society is divided. In societies in which previously the police have acted as regime police, overcoming public mistrust is another obstacle to building consensus on police actions.

70 Here, I refer to forms of self-help within civil society that can often descend to vigilantism as well as to privatised security mechanisms that work only for paying customers, thus excluding the poor. Both forms of non-state security want for clear methods of accountability to the general public. See further Goldsmith, above n 5.

71 Lionel Cliffe and Robin Luckham, 'Complex Political Emergencies and the State: Failure and the Fate of the State' (1999) 20 *Third World Quarterly* 27.

protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them.'[72]

The Responsibility to Protect: The Idea

The recent work by the ICISS attempts to develop a doctrine of the responsibility to protect as a way of advancing the so-called 'right of humanitarian intervention.' This has emerged essentially with regard to the circumstances justifying the use of coercive military force against another state in order to protect persons at risk in that other state. The value of this work, however, also lies in its reminder of the central importance of states assuming primary responsibility for the safety and well-being of their citizens and of how this might be approached. Only when a state chooses not to or is unable to do so does the issue become one for the international community. While the pathway to acceptance of this doctrine at the state level looks fraught with resistance and opposition,[73] at the inter-state level, in international theory and international law terms, the case in favour is indisputable. States that fail to protect their citizens, or which threaten them in ways that disrespect their basic human rights, have no moral claim to authority and legitimacy.

ICISS puts forward three aspects of a responsibility to protect. Each bears implications for policing:

> The substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk. This responsibility has three integral and essential components: not just the responsibility to *react* to an actual or apprehended human catastrophe, but the responsibility to *prevent* it, and the responsibility to *rebuild* after the event.[74]

The simultaneous focus on underlying factors or 'root causes' fits very well with most, if not all, conceptions of peace building.[75] This is 'problem-oriented policing'[76] elevated to a new level as well as under often radically different settings from those in which the idea first emerged and has since been discussed. How policing fits with issues of development and reconstruction has scarcely been addressed in the humanitarian aid and development literatures.[77]

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72 International Commission on Intervention and Sovereignty, above n 14, 11.

73 Patricia Marchak, *Reigns of Terror* (McGill-Queens University Press, 2003).

74 International Commission on Intervention and Sovereignty, above n 14, 17.

75 See eg Rachel Opie, 'International Human Rights Promotion and Protection Through Peace Operations: A Strong Mechanism' (2001) 7 *International Peacekeeping: The Yearbook of International Peace Operations* 99, 110.

76 H Goldstein, 'Improving Policing: A Problem Oriented Approach' (1979) 25 *Crime and Delinquency* 236.

77 Neild, above n 48.

Police Reform and the Responsibility to Protect

There is some common ground in terms of guidance to police operations arising from the general policing literature as well as from the doctrines to have grown up through the development of CIVPOL/UNPOL operations.[78] They are relevant to governing external police interventions of a short or long duration, as well as to the facilitation of local police forces over the longer term. Their political and philosophical underpinnings are universalistic in nature and reflect liberal democratic ideals. While these will not be met by unanimous acceptance in many quarters, experience over the past century or longer teaches us that it is when police act illiberally and/or without popular support that the police are more likely to be part of the security problem rather than contributing to its alleviation.

Minimum Force

This is a core principle of good policing. Its practical achievement in situations of latent or actual violence is also very difficult. It stands in marked contrast to the military principle of lethal (and even overwhelming) force in tackling enemy combatants. Employed in the civil society context, in addition to its practical importance, there is an important symbolism in this idea – that the state will engage forcefully with citizens only when other means of persuasion or prevention are not feasible. A trigger-happy, aggressive police force too readily resembles the kind of military or militias that have been widely found in the Least Developed Countries (hereinafter LDCs). In peace-keeping as indeed in regular policing, the case for having unarmed police is still maintained by some experienced operators, based on community trust as well as officer safety considerations. Availability of arms all too frequently contributes to conflict escalation, as recent experience in the Solomon Islands has shown.[79] Training local police in minimum force is vital to meeting human rights as well as civil liberties objectives, but will often be difficult in cases where police and non-state actors have been accustomed to bearing arms. Enforcement of illegal arms amnesties is an important preliminary step in ensuring a significant improvement in the climate of post-conflict situations. This can be risky work for police or indeed for soldiers. Nonetheless, one might argue, as Kaldor does in defining what she calls 'cosmopolitan law enforcement,' that adherence to minimum force may mean 'risking the lives of peace-keepers in order to save the lives of victims.'[80]

Consent of the People

Where police are able to operate with the broad support of the public, less use of force is required. People will either cooperate themselves more readily with police inquiries or will assist the police by persuading or cajoling others to cooperate. Where this consent is lacking, police operations will occur in a more hostile environment,

78 See Brahimi Report, above n 3.

79 Kabutaulaka, above n 63.

80 Kaldor, above n 2, 130.

and police will be deprived of the kinds of local intelligence vital to effective normal police work. Of course, obtaining the consent of the people can be anything but straightforward, especially in societies marked by strong social divisions and histories of inter-group hostilities. Ongoing scepticism in some quarters to the new Police Service of Northern Ireland is one such example. Outsiders will be particularly vulnerable to manipulation in this regard by dominant or experienced parties.[81] On this issue, Kaldor argues that what 'is important is widespread consent from the victims, the local population, whether or not formal consent has been obtained from the parties at an operational level.'[82]

While acknowledging these difficulties, interventions or longer-term reconstruction and reform efforts must nevertheless devise strategies for building trust and improving communication between the police and different sectors of the community.[83] Educating the media about the new police role, and providing points of positive contact between the police and ordinary citizens, are needed. A clear implication here is the importance of transparency about what the police do.[84] People unaccustomed to receiving assistance from police officers will need to be reassured through a blend of openness and tangible acts of assistance by the police. In keeping with the Brahimi Report, police engaged especially in peace-building should be empowered to make a demonstrable difference in the quality of life of the most vulnerable citizens within their areas of responsibility.[85] This implies the ability to respond to calls for assistance in a prompt and effective manner and the strength to protect the most vulnerable from the depredations of others within the society.[86] Lessons can be learned from previous mistakes in relation to implementing community policing programs that can assist in providing tangible reasons for greater public trust and cooperation with new police forces. This leads to a related point. In contrast to relief operations, long-term police development depends upon a sustained commitment from those working with local police. This throws doubt on the previous practice of frequent rotation of civilian police trainers,[87] and the tendency for outside police experts to live separately from the local police and communities.[88] Further commitments and capacities inevitably will fail if insufficient resources are provided to fund and sustain the program of change.

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81 Brahimi Report, above n 3.

82 Kaldor, above n 2, 127.

83 Goldsmith above n 58.

84 David Bayley, *Democratizing the Police Abroad: What to Do and How to do It* (US Department of Justice, 2001).

85 Brahimi Report, above n 3, 7.

86 Goldsmith, above, n 58.

87 Brahimi Report, above n 3.

88 John McFarlane and William Maley, *Civilian Police in United Nations Peace Operations*, Working Paper no. 64 (Australian Defence Studies Centre, 2001).

Impartiality

As suggested earlier, impartiality is distinct from neutrality. The latter indicates a reluctance to take sides whatever the issue or the circumstances, whereas the former points to the exercise of an authority which is not beholden to particular interests or elites. As the history of peace-keeping has shown, neutrality can come at a high cost in terms of human life.[89] Instead, an impartial decision-maker will reach decisions based upon evidence and taking the views of the different parties involved into account. Those decisions will ideally be governed by principles that are public and that will usually have been the outcome of some kind of discussion and agreement. However, in individual cases, an impartial action will not necessarily be a popular one. As Kaldor has noted, 'neutrality may be important for an organization like the Red Cross which depends on consent for its activities'[90] or in normal peace-keeping, but in the context of protecting people, it is 'at best confusing and, at worst, undermines legitimacy.'[91]

The need to construct an impartial police force requires that issues of recruitment and ethos are addressed, backed by appropriate systems of incentives to reinforce cultural change. Public trust in the new police will almost certainly require that those responsible for the policies and worst excesses of the previous police be prevented from joining the new police. In the case of the police, their position of impartiality emerges in large measure from their duties as a constable and officer of the peace, an ethos in many LDCs that will often be ill-understood and poorly reinforced by previous mechanisms of organizational control. Where this is the case, it points to the need for long-term mentoring type support rather than short-term training courses.

Establishing police impartiality in highly visible ways is desperately needed in many societies undergoing police reform. A recent example makes the point well. In anti-government protests in January 2004 in Port au Prince, Haiti, police intervened to protect the protesters from the concerted, armed attacks upon the protesters by pro-government supporters. The Reuters report of the incident succinctly captures the significance of the police action under the circumstances:

> The police, recently criticised by demonstrators and the international community for failing to protect anti-Aristide demonstrators, were repeatedly applauded by protesters as they chased and arrested attackers.[92]

Even in Serbia in the early 1990s, the police acted to check many of the excesses threatened by local nationalist militias against local Muslims, in part through their

89 Chesterman, above n 41.

90 Kaldor, above n 2, 128.

91 Ibid.

92 Reuters, 'Police Shield Haiti Protesters from Gunmen' (2004) 20 January *The Australian* 7.

use of powers of arrest of militia leaders for infractions of the law.[93] In both cases, the law provides a basis for police to take action against persons or groups acting violently or in an intimidating manner towards others and thus offers an important doctrinal justification for police acting impartially when under pressure to cede to partisan extra-legal pressures.

Accountability to the Law

The law provides important guidance to the actions of police officers. Their authority derives individually from the law, rather than depending upon obedience to orders of their commanding officers, as is the case with soldiers. Police are more vulnerable than military personnel in this sense to legal repercussions under domestic law. Under law, police officers can exercise discretion in how the law is enforced, meaning that police officers have some room to negotiate how they enforce the law and maintain order. This has the effect of permitting police to operate flexibly, constituting a tool in itself for encouraging public trust in the police. Of course, holding police accountable under law can be difficult, given their crucial location in the justice system and their familiarity with the ways of law enforcement. Accountability becomes even more elusive under conditions of hostility and internal conflict. 'War-like' conditions can justify for many citizens as well as political leaders 'turning a blind eye' to police improprieties and abuses. However, the symbolism of police impunity to law is likely to undermine justice sector reform efforts in conflict situations, by suggesting 'business as usual.' It also stands in open contradiction to the increasingly powerful global currents of human rights norms that link to country standing and political legitimacy internationally and domestically. Accountable as well as effective police are therefore essential to public confidence in the restoration of internal security and the relevance of the rule of law.[94] The efforts made to arrest even senior police officers in the Solomon Islands accused of serious crimes can be seen in this light.

Establishing clearly which set of laws will govern police operations in peace-keeping and reconstruction is a basic requirement of ensuring accountability. It raises not just which law should be applied by the police to those they are policing, but also which laws should govern foreign police taking part in such missions.[95] In the past, insufficient attention has been paid to this issue, resulting in a lack of clarity in some situations and consequent local resentments.[96] Conformity with UN basic documents and principles relevant to law enforcement and use of force inevitably will influence the development or application of any set of regulatory norms in peace-keeping and subsequent reconstruction. This can present particular problems in the context of multi-national policing operations in relief contexts, especially

93 James Ron, *Frontiers and Ghettos: State Violence in Serbia and Israel* (University of California Press, 2003) 72.

94 International Crisis Group, *Rebuilding Liberia: Prospects and Perils – Africa, Report no. 75* (ICG, 2004) 19.

95 Brahimi Report, above n 3.

96 Chesterman, above n 41.

when language, legal traditions, and adequate training divide rather than unify such policing teams.

Recognizing the different sources of law and order in particular communities is another facet of police reform after conflict. While state law may have previously acted largely in a selective manner in order to protect the regime, communities will usually have had their own local justice norms and practices. This is true in both the Timor-Leste and Solomon Islands cases. It appears little attention has been given to these questions, yet they relate to establishing the authority of police officers on a consensual rather than forcibly imposed basis. Legitimacy in re-building policing at the local level is likely to depend upon taking account of pre-existing values and practices. How this is done will vary, and will often pose difficult questions of choice, especially where local custom treats certain offences in a far more punitive way than formal legal systems. However, there will also be areas of overlap and consensus which can provide a core for the activities of new police. Finding areas of agreement and integrating local ordering practices into the new arrangements will also contribute positively to the crucial challenge of sustainability in reconstruction efforts.

Commensurate Justice Sector Reforms

There is little point in police acting more effectively and responsibly if there are no prosecutors, courts, judges, detention facilities or prison staff to ensure that the complementary aspects of the criminal process can operate at the same time.[97] Effective articulation of policing with the judiciary and other justice institutions remains a fundamental challenge.[98] In the past, international financial institutions have fostered judicial reform initiatives without any or sufficient regard to the implications of a judiciary operating without the support and protection of a competent investigative and protective police force. Equally, police reform cannot take place realistically in an institutional vacuum. One important reason is that the means of ensuring the police remain accountable to the law (the courts, prosecution system) will be absent. An independent legal profession and media are also components of a balanced approach to legal sector reform that is supportive of police effectiveness and accountability.

The Role of Transnational Institutions and Groups

So far discussion of police in peace-building has taken for granted the involvement of external assistance. Without such assistance in many violence-stricken countries, relief and reconstruction in relation to public safety and policing will not occur. Leaving to one side the grounds for humanitarian intervention (of which policing would only form a relatively minor part), it is clear that consent provides an important, common basis upon which peace-building around policing does and might occur. The unequal material power of the international community and of significant

97 Neild, above n 48.

98 See Hohe, above n 59, on the Timor-Leste experience.

players within it, relative to many LDCs including the micro-states of the Pacific, means that inducements to reform the police, as indeed other parts of the public sector, are real and substantial. Here, we must be realistic about the likely sources of tangible support, especially during the reconstruction phase which might last eight, ten years or even longer. Human rights NGOs and other NGOs will have limited capacity in this regard. Those with economic clout are needed. The integration of police reform within the wider agendas of economic and social development needs to advance further than at present. The agendas of international monetary and financial assistance agencies such as the World Bank and the International Monetary Fund must do more to promote police reform as part of their wider assistance programs.[99] Other aid donors can assist also by conditioning their assistance upon pursuit of measures that materially advance the security situation of ordinary citizens, not just prop up the elites of weak states.

Peace-building needs more than just material resources; it also needs ideological support. By this I refer to a body of ideas, principles, and knowledge that can guide the reconstruction and reform efforts within states in need at a very practical level. Inevitably, this points to the involvement of experts of different kinds in areas such as policing:

> World order cannot be created simply by building international institutions and organizations that do not arise naturally out of the cultural disposition and historical experience of their members. Their creation and operation require at the very least the existence of a transnational elite that not only shares the same cultural norms but can render those norms acceptable within their own societies and can where necessary persuade their colleagues to agree to the modifications necessary to make them acceptable.[100]

While we now see the development of a more harmonized body of learning and thought about matters such as policing,[101] especially in technical aspects of criminal investigation, counter-terrorism, and public order policing, the conceptual development of a police 'duty to protect' requires substantial further work. One of the challenges in police reform is finding suitable candidates for such work, which must often take place in uncomfortable and even dangerous circumstances. Recent experience in areas such as the former Yugoslavia and now Iraq has pointed to the recruitment of large numbers of often ill-suited and poorly prepared ex-police officers.[102] It has also shown the trend towards the deployment of 'corporate warriors,'[103] para-police and para-military personnel employed by large foreign companies. As well as problems of the suitability of ex-soldiers and ex-combatants

99 Cf Marchak, above n 73.

100 Howard, above n 12, 105.

101 Martin Elvins, *Anti-Drug Policies of the European Union: Transnational Decision-Making and the Politics of Expertise* (Palgrave, 2003).

102 Dana Priest, *The Mission* (Norton, 2003).

103 Peter Singer, *Corporate Warriors* (Cornell University Press, 2003).

for domestic peace-building, these trends raise disturbing questions about adequate supervision and accountability.

Internationally speaking, human rights NGOs and other less materially endowed organizations can contribute much through their research and policy recommendation efforts, but must offer more than the traditional 'documentation and denunciation' that has tended to characterize their efforts historically. Their contributions need to be contextually sensitive if they are to be relevant.[104] This includes looking at the limitations upon acting effectively even for well-meaning and principled police officers in some societies where the threats to law and order lie outside as well as within the state. The recent International Council for Human Rights Policy report[105] is an encouraging development in this regard, drawing together criminal justice as well as human rights expertise.

The United Nations and the United States

Both the UN and the US have unquestionably (and almost inevitably) played a significant role in influencing the kinds of policing that have been 'exported' to countries experiencing conflict and inadequate forms of policing. The hegemony of US law enforcement, emerging from a number of departments and agencies at the federal level, has been particularly significant in Central and Latin America in historical terms, but more recently as well in Central and Eastern Europe and elsewhere.[106] Police advisers from the US have had a significant role to play, for example, in the reconstruction process in Timor-Leste. The US embassy in Jakarta, Indonesia oversees a police reform program. So the thumbprint of the US is a large one in this regard. The UN role has been similarly pervasive, though primarily in the peace-keeping function, rather than in reconstruction. The recommendations in the Brahimi Report suggest a greater capacity for the UN in police reconstruction in the future.[107] Police reform of particular kinds is also on the agenda of the UN Development Program (UNDP) and of the UN drug control agency, the UN Office on Drugs and Crime (UNODC).

The complexity of forms of US involvement in policing and law enforcement reform, rendered even more acute in the aftermath of 9/11, is therefore to some extent mirrored in the UN. One needs to appreciate both the elements of this complexity and the relationship between the US and UN on matters affecting policing in LDCs. First, there are arguably several, conflicting US priorities in terms of police reform. Drug law enforcement has been of enormous importance to US foreign policy since the 1930s.[108] While other countries participate in programs of this kind, none

104 Goldsmith, above n 5.

105 International Council on Human Rights Policy, *Crime, Public Order and Human Rights* (ICHRP, 2003).

106 Nadelmann, above n 13.

107 Brahimi Report, above n 3.

108 Ethan Nadelmann, 'Global Prohibition Regimes: the Evolution of Norms in International Society' (1990) 44 *International Organization* 479.

matches the scale or significance of the US in this regard. The level of investment since the 1980s in drug law enforcement in Latin American (particularly Andean) police forces has been immense. The amounts invested in such programs would certainly dwarf the amounts spent on other kinds of police assistance, for instance community policing. Programs of the latter kind, sponsored by agencies such as the US Department of Justice and USAid, the overseas development agency of the US federal administration, are more likely to be geared to more general capacity-building objectives.

Drug law enforcement programs, on the other hand, tend to have a much narrower strategic vision and a more militaristic tactical orientation. The counter-drug framework adopted by the US in countries such as Colombia resembles the Pentagon's counter-insurgency handbook produced for El Salvador.[109] While money is often provided for 'alternative development' (crop substitution), it is typically a small percentage compared to the resources dedicated to such items as aerial spraying, and equipping and training of anti-narcotic units. In Plan Colombia, for instance, the most ambitious attempt to date to link foreign support for the 'war on drugs' in Colombia, of the total US provided budget of $862 million dollars, only slightly over $200 million (or approximately 25%) was earmarked for social and economic development.[110] The balance was spent on strengthening the operational strength of the police and the military forces to tackle forcibly the groups involved in coca cultivation and cocaine production in the remote areas of Colombia. The failure to distinguish policing from drug law enforcement and the failure to account for the impact of drug interdiction on local economies and social structures has the impact of further distancing the police from much of the community. Police reform needs therefore to have a broader strategic focus, one which integrates diverse interests and groupings within the community. The problem has tended to be that US policy has been heavily 'narcotized,'[111] skewing and impoverishing the possibilities for police reform

In the post 9/11 environment, Australia, as an ally in the 'war on terror,' will need to be careful that counter-terrorism does not become the only or even principal strategic goal of police involvement in capacity-building and reform in states that are weak in law enforcement terms. In the context of Indonesia, Australia faces some obvious limitations in terms of what it can offer to the Indonesian National Police (hereinafter INP), a huge force of over 200,000 personnel. Counter-terrorism training programs are currently playing a leading role in the relationship between the INP and the AFP. However the adoption of a broader perspective on police reform may offer some tactical and longer-term advantages in terms of the bilateral relationship given recent indications of significant Indonesian public support for the

109 William LeoGrande and Kenneth Sharpe, 'Two Wars or One? Drugs, Guerrillas and Colombia's New Violencia' (Fall 2000) *World Policy Journal* 1, 6.

110 Ibid.

111 Russell Crandall, 'Explicit Narcotization: US Policy toward Colombia during the Samper Administration' (2000) 43 *Latin American Politics and Society* 95.

methods as well as objects of terrorism.[112] This implies that in the Indonesian case, as indeed generally, assistance by Australia to building more effective as well as peace-building police should be cast in broader terms than simply, for example, counter-terrorism, drug trafficking or people smuggling.

Conclusion

> Civilian police in our time are as much an investment in society's future as an instrument for the security of the present.[113]

In the past, the administration of justice has not ranked as highly in post-conflict and transition circumstances as it should have. The problem has not been assisted by simplistic analyses of 'security forces' by human rights groups[114] nor by the limited interest in policing issues of analysts of state failure from the disciplines of international relations, political science[115] and even the sub-field of peace-keeping and peace-building. In such a knowledge vacuum, capacity-building activity for law enforcement and the maintenance of order through the development of civil police institutions has been weaker, less consistent, and hence less effective than has been required.

These failures themselves tend to contribute to the cycles of violence in those communities, and undermine the legitimacy of both the international assistance missions and the new domestic justice sector institutions. Effective domestic policing is a necessary 'conflict-dampening' institutional measure in terms of establishing the basis for a functioning state – one which has the monopoly over the legitimate use of force within a particular territory.[116] In the opinion of Chesterman:

> Failure to prioritize law enforcement and justice issues undermined the credibility of the international presence in Kosovo and led to missed opportunities in East Timor. In Afghanistan, it has simply not featured on the agenda.[117]

This mistake has not so far occurred in the Solomon Islands case; it is too early to say what the outcome will be with the Enhanced Cooperation Program taking place in Papua New Guinea, but certainly law enforcement has been given top priority in this assistance initiative.

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112 Sian Powell, 'Anti Western feeling grows in Indonesia' (2004) 6 December *The Australian* <http://www.theaustralian.news.com.au/printpage/0,5942,11596742,00.html>.

113 Boutros Boutros-Ghali in *United Nations and Human Rights, 1945-1995 (Department of Public Information, United Nations 1995).*

114 Goldsmith, above n 5.

115 Eg Marchak, above n 73.

116 Roland Paris, above n 9.

117 Simon Chesterman, *Justice Under International Administration: Kosovo, Timor-Leste and Afghanistan* (International Peace Academy, 2002) 12.

Measuring success in reforming the domestic police will need to be sensitive to incremental change. It will have to be capable of distinguishing the significance of improvements in technical capacity in very particular areas of police work (eg DNA testing) from changes in the policing of public order or preventive patrolling which affect the community at large. This in many instances will require a fundamental re-orientation in police-government relations, away from regime policing.[118] Organizational values, constitutional relationships, and legal frameworks will need to be developed alongside the raw capacity to perform elements of police work. These values and relationships will need to embody the duty to protect all peoples, not just the elites. Alongside this cosmopolitan dimension, there will need to be an effort to ground policing in the cultural expectations and community preferences, to some measured degree, if overall reform objectives are likely to be achieved.[119]

How 'democratic' a police force will be as a consequence of peace-building and reconstruction, and what form it will take, will vary from place to place. It seems fair to predict that without a threshold of effectiveness, no police force based upon public legitimacy is likely to survive. However, a threshold of 'liberal' attitudes and behaviours is needed if enhanced police capacity is to be applied to good, as opposed to bad, ends. A test of success therefore might be the following one suggested by Marenin:

> When a person can yell, even offensively at a police officer to her/his face and not get beaten up for it, for neither police culture, nor organizational norms, nor political preferences would sanction this exercise of force, then democratic policing exists … [T]o bring such solutions into existence is the ultimate goal of policing aid.[120]

118 Goldsmith, above n 5.

119 Bayley, above n 84.

120 Otwin Marenin, 'The goal of democracy in International Police Assistance Programs' (1998) 21 *Policing: An International Journal of Police Strategies and management* 159, 172.

The Ethnic Conflict in Solomon Islands

Chief Justice Albert Palmer

Introduction

The history of Solomon Islands under British rule and protection can be traced back to the year 1877.[1] It was then known as the *British Solomon Islands Protectorate* until 7th July 1978 when it obtained its independence. This was the first intervention by a European power into the island affairs of a culturally diverse group of people. There was very little in common between the members of the group apart from fleeting contacts either during war raids or in more peaceful encounters for bartering purposes etc. People lived in hamlets and close knit settlements governed by their customs, traditions and practices that had direct connections to their pagan beliefs and rituals. Headhunting was rife; frequent raids into and skirmishes with neighboring tribes and islands, commonplace. The cycle of life was very much governed by their relationship to their "gods", and ties and obligations to their tribes. This was the "culture" that had emerged and which partly explains why when law and order collapsed or was brushed aside, that "culture" became a driving force or cause for the unlawful activities that occurred on the island of Guadalcanal. Those tribal connections/obligations have endured to the 21st Century and help explain and account for some of the disturbing atrocities and payback killings committed during the ethnic disturbances from about October 1998 to December 2001.

The safety, security and protection of individuals during those times were found primarily in their membership of a tribe. It was an unwritten code of honour, but understood by each and everyone and crucial to the survival and continuity of the tribe. An attack on one was an attack on the whole tribe.

The first documented contact made by Europeans was in February 1568 when a Spanish expedition under the command of Alvaro de Mendana made contact on the east coast of Santa Isabel at Estrella Bay. In an attempt to attract settlement in the islands that he had discovered, he told of exaggerated tales of a land flowing with gold and that this was where King Solomon had obtained his gold. The official description of this territory – "Isles of Solomon" – emerged from those tales.

1 With the promulgation of the *Western Pacific Order in Council of 13 August 1877* as amended by the *Western Pacific Order in Council of 14 August 1879* – see *Hertslets Treaties*, vol XIV, p. 871 and 1245.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 49-65.*
 ISBN 90 04 14599 0.

There were intermittent contacts thereafter by European explorers; Abel Tasman in 1643, Philip Cataret in 1767, Louis Bougainville in 1768, Jean Surville in 1769, La Perouse and Shortland in 1788, Sir Alexander Bell in 1792 and Durmont d' Urville in 1838.

The first attempts by missionaries to establish a foothold in the islands occurred between 1845 and 1880.

In 1870 the first recruiting vessel appeared seeking labour for plantations in Fiji, Queensland and to a lesser extent in New Caledonia and Samoa. Those were known as the black birding days. It was to stem this evil that the British Government intervened in the history of these islands and declared the islands a British Protectorate. From 1877 to 1953, the islands were governed by the High Commissioner for the Western Pacific based in Suva, Fiji. In 1953, its headquarters was transferred to Honiara, Guadalcanal where it has remained since.

There are six main islands and many smaller ones divided up into nine provinces. The recent census in 1999[2] gave the total population as 408,000. The majority of the people are Melanesian (95%); a large sector still lives in rural enclaves and hamlets, and practice subsistence or cash crop farming apart from fishing by those in the coastal areas.

There are about 87 vernaculars, but the lingua franca is "pidgin" (a broken form of English). Solomon Islands is a country of great cultural and linguistic diversity, a strength in times of peace and prosperity, but this also can be a weakness as seen during the ethnic troubles.

The second foreign intervention into these islands came in the form of an attempt by the Japanese Imperial army to extend its Emperors' control into these islands. Fearing a domino theory of control by the Imperialist Army through the South-West Pacific, through Australia, New Zealand and eventually having access to the United States of America, an all out war took place in these islands which produced some of the fiercest and bloodiest battles of the Second World War. Thousands of lives from both sides were lost during those battles. In 1999/2000 the scene of those fierce battles was witness to another form of fierce battle this time between two ethnic groups within the country itself.

After the Second World War, thousands of people from Malaita Island migrated to Guadalcanal. They found work in Honiara, the capital, a former United States' military base, and in other cocoa and coconut plantations in the outskirts of Honiara and other islands operated by British traders and plantation owners. Many Malaitans were recruited as indentured labourers usually on a two year contract to work in these plantations and to be repatriated to their home island on completion of their two year term: Malaitan workers were preferred by those plantation owners and traders because they were willing, hard working and loyal. Over time some did not return to their home island on completion of their contracts, others got married to the local neighbouring tribes and settled in the surrounding areas with their families, resulting in settlements and enclaves springing up around those plantations. Some purchased land in custom from the local landowners and estab-

2 Solomon Islands Government 1999 Population Census, Provisional Data, March 2000.

lished settlements. Those settlements were to become sources of friction over unresolved social, customary and legal differences with local landowning groups. In some instances petty differences in customary practices, mannerisms and attitudes over the years began to take root into ethnic jealousies, resentments and hatred. Where cultures collide/conflict, usually one will prevail but not without building up resentments and dislike over the years. In some instances it may have been disagreements or differences over hunting and fishing grounds, felling of trees or the making of gardens on customary land without permission; in others it may have been breaches in custom caused through cultural differences, misunderstandings and lack of basic tolerance and respect. In some cases the concerns of the local landowners were justified. There were those who took advantage of the situation to misbehave, cause disturbances and commit crimes in and around the vicinities of those settlements. In most instances they were the work of only a few criminals, but their actions and behaviours helped fuel and perpetrate a culture of ill feeling and resentment that had accumulated over the years.

It is important to appreciate that this sense of injustice and feelings of disrespect did not occur over night. It seems they were the culmination of twenty or so years of frustration. It would seem that by having the capital in Honiara, Guadalcanal people felt they had been heavily colonized to their detriment, neglect and to some extent, loss; their land and properties "grabbed" by other people from other islands, their cultures "trod upon" and "derided" and a general feeling that their people had been "killed" and mistreated. Malaitans were the target because they happened to be the majority of people that had settled on most of the lands on the outskirts of Honiara city.

Those migratory movements can be likened to the early migration of European settlers, in the Americas, Australia and New Zealand resulting in the local indigenous population being dispossessed of their lands and property, whether legitimately or not.

In the American, Canadian, Australian and New Zealand context, the migrating settlers through superior force and might, overcame any resistance put up by the indigenous peoples fighting for their lands and property. In some, treaties were signed with the tribal peoples, in others purchases were made.

In the Solomon Islands context, peoples of different cultures and background were brought together under British rule and made to live together as one people under one nation flying a common flag through the introduction of civil and democratic government and the rule of law. Although this resulted in the movement of people across cultural barriers and therefore was bound to cause problems, so long as the Government machinery was working normally, so as to protect and secure the rights of the individual, it did not matter that there were conflicts and disagreements; these were sorted out in accordance with the introduced law of the land. The effective application of the introduced rule of law was the binding force for all the different island groupings and peoples forming the Solomon Islands of today.

The 7th July 1978 saw the emergence of a nation, in my respectful view ill-prepared to handle the stresses and strains of nation building, development and peaceful coexistence under the rule of law. Notions of parliamentary democracy, transparency,

accountability and good governance through the rule of law were yet to take root in the hearts and minds of many of our young leaders when independence was sought. Even today this remains a major problem and concern in government and in the nation. The people exhibited a cultural bias towards their own people, tribal or island groupings. Such traditional and cultural loyalties and ties of politicians and leaders towards their home islands and provinces were to weaken parliamentary democracy as the nation emerged from independence. Some of our leaders of that time, though brimming with confidence were yet to fully appreciate what it meant to provide good governance through the rule of law. It was subtle. Cronism and nepotism set in and took a foothold in government. General Orders and Financial Instructions, that provided guidelines on the delivery of service and operations of government departments, including how Government finances operated, were ignored or bypassed as leaders (especially in the political arena) began to assert themselves on how things in the public service and the Treasury were to be done etc. It was made worse when the office of the permanent secretaries changed from permanent to fixed term appointments. In this way, the Government of the day was able to appoint men who were either their political supporters or yes men. The Prime Minister appoints persons to the Office of the Permanent Secretaries after consulting with the Public Service Commission under section 128 of the Constitution. Through this, the post of the Permanent Secretaries became politicized resulting in the appointment of some who knew little or nothing about the culture in the public service. The Public Service built up by the British was through promotions, it was career oriented. The highest post a serving officer in the Pubic Service could hope to attain is the post of the Permanent Secretary in a Ministry. The impact was negative and serving officers became increasingly frustrated. Work practices in turn were affected.

The evil tentacles of compromise insidiously worked their way in and with them corruption. This helped fuel long held grievances and heightened differences between island groupings and peoples. It is interesting to note that in an analysis of the conflict published in Solomon Islands newspapers, Prime Minister Ulufa'alu blamed businessmen and politicians led by his predecessor, the late Solomon Mamaloni, for encouraging the ethnic violence.[3] In certain instances, deals and Government transactions etc. were being struck on the basis of whom you know rather than whether you were the best person for the task. On the surface things looked normal but below the waters of Government service there was growing disquiet.

The Demands of the Indigenous People of Guadalcanal

The twelve demands that were presented to the Government of Prime Minister Ulufa'alu on 4th February 1999 by the Guadalcanal Province led by its Premier Ezekiel Alebua ('Alebua') were not new. They could be traced back to 1978[4] and

3 Solomon Star, 25 February 2000 – Also quoted in Solomon Islands: A forgotten conflict', Amnesty International, August 2000 Issue, p. 3 and 4.

4 At that time a total of nine demands were presented to Government in response to an offensive article published in the local newspaper 'Solomon Toktok' on 27th September

1988.[5] Over the years they had been quietly fermenting in the soils of the hearts and minds of the people of Guadalcanal.

Those demands had been preceded by a number of incidents in 1998, which had the effect of reactivating the latent resentments and grievances bottled up by Guadalcanal people. What sparked that outburst of ethnic resentment may have been linked to the payment of compensation by the National Executive Government ('EG') to the parents and guardians of two female students from Malaita allegedly raped at Ruavatu Secondary School.[6] No one was apprehended for that crime. Aggrieved parents and relatives demanded payment of compensation from the Guadalcanal Provincial Government. When this was rejected, they turned to the EG who agreed to make payment for the alleged individual crimes. It seems that the Attorney General was not consulted, and if consulted his advice ignored.

There was no basis in law or custom for such compensation to be paid by the Government of Solomon Islands. Naturally, it caused outrage amongst Guadalcanal Provincial leaders, *a fortiori* when they were informed that the payment of $16,000.00 was to be deducted from their Province's Education Grant; fueling further resentments.

This was the spark which ignited the long held belief, whether justifiable or not, by Guadalcanal leaders, that they had been stepped on, pushed around and brushed aside for too long by successive Governments over their claims and demands.

In a letter to the Minister for Provincial Government and Rural Development dated 22nd July 1998, Alebua reacted to that compensation payment by invoking for the first time a compensation claim for the lives of twenty five people from Guadalcanal 'killed without reasons at all' at a price of $100,000.00 per person, bringing the total amount claimed to $2,500,000.00. This claim also had no basis in law or custom, but the precedent of 'compensation payments' by Government to pay for the misdeeds of others in an attempt to pacify another ethnic group had been given recognition as part of 'custom law'.

Compensation payments by Government can be traced as far back as 1977/78 when the Government paid compensation to the people of Western Province to

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1978. The demands included *inter alia*, compensation of $4 million to be paid for the defamatory article against Guadalcanal people, demand for state government, demand for control of Government lease of lands outside of Honiara boundary to non-indigenous Guadalcanal people and a demand for the squatter problem around the town fringes to be removed.

5 This was in the form of a petition addressed to the Prime Minister dated 24th March 1988 and sparked off by the brutal killing of three people, a woman, her son in law and a child at Barana village, Mt. Austin. The killers had been apprehended, tried in the courts of the land and convicted. The demands included inter alia, state Government, a fairer distribution of services, schools and hospitals, economic development to be decentralized and distributed to other provincial centers, internal migration to be controlled, repatriation of squatters, legislation to be introduced to control sale of customary land and to facilitate the transfer of all alienated land in and around Guadalcanal including Honiara land to the Guadalcanal Province.

6 A boarding National Secondary School located on the north eastern part of Guadalcanal.

pacify an outcry against the publication of a defamatory article 'Ode to the West Wind' in the newspaper by a Malaitan. This was despite the fact that the offender was eventually arrested, charged, prosecuted and sent to prison. The payment of compensation by the Government had no basis in law or custom.

In 1989, aggrieved Malaitans residing in Honiara demanded payment of compensation for an alleged defamatory statement written on a wall at the main market. The offender(s) was alleged to come from Rennell and Bellona Province. A violent demonstration by aggrieved Malaitans took place in the capital, compensation was demanded and paid[7] by the Government. The Attorney General was never consulted[8] by the Executive Government of the late former Prime Minister Solomon Mamaloni before payment was made. The payment again had no basis in custom or law. If any such breaches or offences were to be settled according to custom for instance, it would have been a matter for the culprit (if identified) and his people to sort the matter out with the offended party. The Government through its agent (most appropriately the Police) may assist to facilitate such custom settlements if such a need arises, but it is not for the Executive Government to seek to pay for the misdeeds of its citizens, *a fortiori* where a crime may have been committed! The structures of Government are governed by law and if Government is to pay for any compensation claims it must be with the sanction of the Attorney-General. It seems that most of the payouts of compensation referred to above had no legal basis and amounted to a wrong exercise of so-called executive authority.

A bad precedent had been set in motion by the Government and perpetrated by successive Governments.

This was the backdrop to the twelve demands of the Guadalcanal people put before Ulufa'alu's Government in 1998.

The twelve demands can be summarised as follows:

1. State Government to be introduced;
2. The National Constitution to be reviewed to accommodate that;
3. Land:
   (i) The *Land and Titles Act* to be amended to accommodate their wishes,
   (ii) Title to Perpetual Estates over certain Plantations on Guadalcanal to be transferred to the Guadalcanal Province,
   (iii) Honiara land on which the capital was located, TOL's and other lands illegally settled to be leased by Government or those living on them;
4. Shares of Government in Solomon Islands Plantation Limited (a joint venture company between the Government, Landowners and Commonwealth Development Corporation – United Kingdom) to be transferred to the Province;
5. That revenue earned through investments within the Province and collected by Government were to be shared on a 50% basis;

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7 $250,000.00 in compensation was paid to Malaita leaders.

8 'Submission on the Royal Solomon Islands Police Force' (unpublished) by Hon. Justice Frank O. Kabui CMG, OBE, CSI of the High Court of Solomon Islands.

6. That the national capital be relocated elsewhere or that the Provincial capital be relocated;
7. Control of internal migration;
8. The *Electoral Act* be amended to restrict qualification of people eligible to stand for national elections;
9. Payment of compensation for twenty-five people murdered on Guadalcanal;
10. Conduct of Police to be investigated against the backdrop of the killing of a man on Bungana Island that the Police were pursuing; also allegations of harassment to be investigated;
11. Compensation for the killing of that man; and
12. Coastal reefs in front of Honiara city to be acquired from original landowners.

The Response by Government

There was nothing 'wrong' about the twelve demands of the Guadalcanal Provincial Executive ('Guadalcanal Executive'). Demands on governments by different groups of people are common occurrences. This is normal and indicative of a healthy democracy, provided they are within the law and present no direct threats to peace and good governance. As a provincial authority however, exercising executive authority within the National Government structure, one would have expected them to have sought independent legal advice or filtered their demands through the Attorney General's Chambers. As leaders, they were expected to act responsibly and maturely. That includes ensuring their demands had legal basis. If the claims had no basis in law it was their duty to inform and explain this to their people and advise them about the appropriate manner of doing things. All leaders in the country have this inherent obligation. Any leader, whether in National Government or Provincial Government, is required to uphold the principles of good governance and the rule of law. If he/she cannot do that, he/she should resign the leadership to others who are more committed to such a cause. There is a price or cost attached to good leadership.

Provincial Government authorities are extensions of the National Government structure, not separate entities; unfortunately, it was not seen that way in this instance. Principles of good, transparent and responsible government, which applied equally to the Guadalcanal Executive requiring them to put forward legally viable demands, were thrown overboard!

The response of the EG's was interesting. It set up a Task Force on Guadalcanal Demands ('the Task Force') consisting of ten members: one minister of Government from Guadalcanal as Chairman, eight Secretaries to various Government Ministries and the Attorney General. The Task Force completed and presented a comprehensive report to the Prime Minister on 2nd March 1999 with its recommendations.

In addition, the nine Provincial Premiers convened a meeting on 17th December 1998, also in an attempt to address the pressing issues before the Government. Their recommendations are contained in the Communiqué released on the same date. It sought to gain support for the baseless compensation claim for the twenty five people murdered on Guadalcanal by recommending that those other Provinces who have had their people murdered in Honiara forward similar claims to Government for

its consideration. This did not assist in redirecting the minds of the people towards the rule of law. Instead, it further confused issues by seemingly giving legitimacy to a demand that had no basis in law. Regrettably, this was the kind of misconception and confusion, which gripped the mind of many leaders during that time. Customary forms of settlements were preferred over applicable principles of law as being more appropriate to deal with such situations. Unfortunately, they were misguided. Custom does have its place, but the focus at that time should have been on the application of the rule of law. The problem facing the country at that time was a law and order problem; lawlessness. This prompted responses from the Attorney General's Department,[9] the Department of Lands and Housing,[10] the Department of Provincial Government and Rural Development and the Department of Police and National Security as to the legality of the issues raised by the twelve demands and the Communiqué of the Premiers.

Other Actions Taken by the Guadalcanal Provinicial Executive to Address the Ethnic Conflict

- Included an invitation and appointment of the Commonwealth Special Envoy Major General Sitiveni Rabuka and Professor Ade Adefuye. Major Sitiveni Rabuka and Professor Ade Adefuye were invited and appointed under the Commonwealth initiative to address the problems encountered by the Government and to broker peace agreements or efforts between the warring factions and ethnic divide.
- As part of that initiative, the Multi-National Police Peace Monitoring Group was set up to monitor the peace movements and efforts. Unfortunately, what was needed at that time was a peacekeeping force, not a peace-monitoring group, as peace was hardly ever seriously upheld by the Guadalcanal Militants, despite the various efforts and attempts by their provincial, national and community leaders to enter into peace agreements and ceremonies with the affected people from Malaita. There was little peace on the ground to monitor in any event and it was all wasted efforts.
- Numerous Peace Accords were facilitated and brokered by the EG with the assistance of the Australian and New Zealand Governments, for the warring factions. These included the Panatina Peace Accord, Honiara Peace Accord and Buala Peace Accord.[11] These were genuine attempts by the EG to try to find a way out from the political impasse and law and order problem that had descended upon the country.

9 Written Opinion by Solicitor General – Ranjit Hewagama.

10 Opinion written by the Hon. Minister of Lands and Housing then Hon. Jackson Piasi.

11 Held at Buala, Isabel Province 4th – 5th May 2000.

- On or about 26th May 1999, the then Minister of Police and National Security,[12] issued an order,[13] declaring all public ways in Honiara City and Guadalcanal Province to be restricted areas or places. Section 84 creates an offence if a person is found carrying or in possession of a weapon in a restricted area or place without reasonable excuse. Section 84 also gives Police wide powers on reasonable belief to stop, search and detain persons, vehicles and to take possession of any weapon.
- On the same date (26/5/99), the same Minister issued an order[14] prohibiting the possession of firearms in Honiara City and Guadalcanal Province with the exception of Police Officers and licensed firearm holders. Those orders were issued for the purpose of assisting Police Officers in the discharge of their duties to curb the lawlessness that was gripping the country at that time.
- On 24th February 2000 an order[15] declaring the Guadalcanal Revolutionary Army ('GRA'), Isatabu Freedom Movement ('IFM') and Malaita Eagles Force ('MEF') as dangerous societies was made by the Governor General of Solomon Islands. Again this was done with the aim of making the task of the Police in enforcing the law easier. Whilst it was a measure of caution, it was somewhat superfluous as it was common knowledge that such groups were engaged in blatant criminal and lawless activities and that Police had right to charge any such person suspected of being a member under section 68[16] of the Penal Code in any event.
- There were also Peace and Reconciliation Ceremonies facilitated and funded by the EG between the affected groups. Chiefs and leaders were brought in from both islands to meet at the Cultural Village[17] in Honiara, where custom gifts and money, food and cash were exchanged, with speeches and many tears being shed. It was a moving time for all who participated and witnessed the ceremony. It was supposed to be the mother of all custom peace ceremonies between the

12 The Hon. Robin Mesepitu.

13 *Penal Code (Designation of Restricted Area or Place) Order 1999* pursuant to section 84 of the *Penal Code*, L.N. 50 1999 published as a Supplement to the Solomon Islands Gazette 27/5/99.

14 *Fire and Ammunition (Prohibition of Firearms) Order 1999* LN 51/99 issued under section 25 of the *Fire and Ammunition Act* (Cap. 80).

15 Order under section 66 (2) declaring certain societies to be dangerous to the good government of Solomon Islands LN15/2000 published in the Supplement to the Solomon Islands Gazette 28/2/2000.

16 Section 68 criminalizes membership of an unlawful society as a felony – penalty 3 years. Section 66(2)(i) provides a definition of an unlawful society inter alia as including, killing, injuring persons, destroying property, committing or inciting acts of violence, disturbing or inciting the disturbance of peace and order in any part of Solomon Islands. Note the Police did not need any declaration by the Governor-General to effect arrest of the members of such groups – the definitions were broad enough.

17 A big custom ceremony was conducted at the Cultural Village involving chiefs and leaders from both island communities. That same weekend however further breaches of the law were committed by members of the Isatambu Freedom Movement ('IFM') led by notorious warlord Harold Keke.

warring parties that would seal a peace treaty in custom between the parties. It was an attempt to settle the dispute according to custom, 'the Melanesian Way'! Alas, it too was in vain, with thousands of Government money wasted! Whilst there may have been genuine intentions on the part of those taking part, it was obvious the Guadalcanal Chiefs and their leaders had little control over the Guadalcanal Militants/Rebels. The right ingredients for a successful custom ceremony were missing from the beginning and therefore the ceremony was bound to fail. In any custom ceremony, the persons affected must be present or represented. Some of the militant groups from Guadalcanal were not present and did not give their mandate to the chiefs and leaders from Guadalcanal to represent them.

– It was also hurriedly entered into. That same weekend Harold Keke and his rebels committed further unlawful activities. The custom ceremony was a complete failure and with it went any last hopes of a customary solution to the conflict.

Breaches of the Law

Every conflict has a beginning, a starting point. The ethnic conflict in Solomon Islands had a tiny beginning; one commentator described it in the news media as a 'storm in the teacup'. The terrible mistake made however, was in not ensuring that the storm was contained in the teacup. With the first hints of criminal activities surfacing in the outskirts of the city, the offenders should have been arrested and dealt with under the criminal process. That was not done. Life, limb and properties of people should have been protected; that too was not done. Why this was not done at the outset, demands a public inquiry. As more and more criminals escaped punishment, they became bolder and support swelled until the momentum of lawlessness got out of control. Serious breaches and violations of the criminal law and the Constitution were committed with impunity. There was blatant disregard and disrespect for the rule of law. Had the Police acted decisively from the beginning, the acts of lawlessness would have been stopped from gathering momentum and support.

Instead of having to cope with only the demands of the Guadalcanal Executive, the Government had to deal also with the criminal activities of Guadalcanal militants/rebels.

Some have claimed evidence of direct links or connections between the two fronts, I leave that to others to substantiate; the political leaders of Guadalcanal Province did issue a communiqué dated 28th January 1999 disassociating themselves from the ethnic related criminal activities and condemning them.

The Role of the Police

The role of the Police Force as the enforcement agency of the Government in the maintenance of the rule of law in Solomon Islands cannot be overstated. In the context of the ethnic conflict that plagued the country, it was the linchpin to an orderly society and a successful democratic government under the rule of law. When the

Royal Solomon Islands Police Force failed or could not carry out its duties effectively, the rule of law and the due processes of democratic government were insidiously undermined.

The warning was sounded by the Court in Regina v. Victor Tadakusu[18] judgment delivered on 8th November 1999, when it demanded that three other co-accused, Joseph Sangu, Harold Keke and Henry Rokomane be arrested and brought to the Court to answer charges:

> On their arrest the Accused with the other three were remanded in custody but later released on bail on application being made by their Counsel. Unfortunately all the accuseds (sic) skipped bail and absconded. Only this Accused has been re-arrested; the other three are still at large. The charges raised against this Accused and the other three are very serious charges and therefore Police must actively seek the re-arrest of those other accuseds (sic), Joseph Sangu, Harold Keke and Henry Rokomane and have them brought before this Court to answer and account for the charges laid against them. I stress their re-arrest (no exceptions, discretions or questions to be asked whatsoever) because until that is done, justice will not have been done in this instance, where there are four accuseds (sic) acting in consort to prosecute a common purpose and only one is being tried…

Those three accused with Victor Tadakusu had been arrested by Police at Bungana Island off the coast of Tulagi. They had traveled in a motorized speedboat stolen from Tambea Resort and were planning to raid the police station at Tulagi for guns, when they were accosted by the Police following a tip off. A shoot out eventuated, resulting in the death of one of the five persons. Three of the group absconded bail and were never arrested. They eventually regrouped and were the key players in the lawlessness and violence that shortly was to follow. Had the warning of the court been heeded and aggressive efforts made to re-arrest those three accused, the lawlessness could very well have been thwarted. When passing sentence[19] the Court made it abundantly clear that the approach being taken to pursue their claims and grievances through unlawful means was wrong.

The EG's ability to govern was compromised; it reached the stage where it could not govern effectively in accordance with the rule of law. For a start it could no longer guarantee the safety, security and life of its citizens, people were simply told to flee as lawlessness spread inwards.

The coup d'état that occurred on 5th June 2000 did not come as a surprise. Earlier that year[20] Auki Police Station on Malaita Island had been raided and firearms stolen by a group calling itself the Malaita Eagles Force, MEF for short. Instead of having to contend with only one armed group of militants, the EG was now faced with two illegal militant groups. The coup d'état simply complicated matters further.

18 HCSI-CRC 239 of 1999 8th November 1999 (unreported) at page 1.

19 *Regina v. Victor Tadakusu* HCSI-CRC 239 of 1999 10th November 1999 (unreported).

20 January 2000.

Lawlessness, disorder and confusion were no longer confined to the outskirts, it surfaced in the heart of the city through the formation of the MEF.

Four days after the coup d'état on 9th June 2000, the Court made the following observations in Regina v. Michael Talu:[21]

> Solomon Islands is at a cross-road. It has to address the deteriorating state of the Rule of Law and its processes, and the administration of justice in the country now, before it slides out of control. It is a sad chapter in the history of the administration of justice in this country, that today, the Accused, Michael Talu, duly prosecuted under the laws of this sovereign democratic nation, before this Honourable Court, could not be present to receive his judgment, because of the lack of an effective Prison Service and Police Force to guarantee his safety and security before this Court. He has therefore out of necessity, requested that his judgment be read out in open court in the presence of his Counsel, but in his absence. I have with hesitation obliged.
>
> Already because of the deteriorating law and order problem in town, in the past weeks, the learned Director of Public Prosecutions could not appear in Court to present his closing submissions. He has to flee town for his safety. This is a very sad, but serious and unfortunate state of affairs, which must be arrested forthwith.

It was a fruitless call by the Court for what it was worth because there was no effective police force in the country who could have done anything about it. Perhaps it was a desperate cry for outside intervention at that point of time.

The role of the Commissioner of Police ('Commissioner') in the conflict was crucial. He is appointed by the Governor-General on the advice of the Prime Minister after consulting the Police and Prison Service Commission under section 43(2) of the Constitution. Under section 43(3) the Commissioner is the Commander of the Police Force. Under section 43(4) the Prime Minister or a Minister authorized by him may give to the Commissioner general directions of policy regarding maintenance of public safety and public order as he may consider necessary. By section 43(5) the Commissioner is exclusively responsible for the use and control of the operations of the Force without being subject to the direction or control of any person or authority apart from the organization, maintenance and administration of the Police Force which can be assigned to a Minister as a ministerial portfolio under section 37 of the Constitution.

The Governor-General by convention is Commander of Chief of the Police Force though that is not stipulated in the Constitution. He has power under section 16 of the Constitution to declare by proclamation that a state of public emergency exists. No such declaration was ever made during the period of the ethnic con-

21 HCSI-CRC 21 of 2000 9th June 2000 (unreported) at page 1; see also *Saxson Sai and Others v. Andrew Nori and the Attorney-General* HCSI-CRC 180 of 2000 13th June 2000 (unreported) and *Regina v. John Robu and Others* HCSI-CRC 28 of 1998 14th June 2000 (unreported).

flict in 1998, 1999 and 2000. Perhaps it was thought unnecessary by the then ruling Government. So the ordinary criminal laws of the land continued to apply.

The activities of the Police Force in the Solomon Islands are governed by the *Police Act* (Cap. 110). This sets out in black and white the constitution of the Force, its functions, duties etc.

Section 5 for instance sets out the functions of the Police Force in very clear terms:

> The Force shall be employed in and throughout Solomon Islands for the maintenance and enforcement of law and order, the preservation of the peace, the protection of life and property, the prevention and detection of crime and the apprehension of offenders, and shall be entitled for the performance of all such duties to carry arms:
>
> Provided that no firearms shall be carried except with the authority of the Commissioner given under and in accordance with the general or special directions of the Prime Minister acting in his discretion.

Where the situation warrants, the Police are entitled to carry arms. What happened at the height of the ethnic conflict was a classic example of a situation where Police Officers should have been authorized to carry arms not only for their own safety but to protect the life, limb and property of others. I do not know if any general or special directions were ever given by the then Prime Minister to the then Commissioner of Police. I cannot say whether any such request was ever made by the then Commissioner to the Prime Minister.

Section 6 of the *Police Act* also gives the Prime Minister emergency powers[22] if the country is at war or it appears that a grave threat to the defence or internal security of the nation has arisen to direct that the Police Force or any part thereof may be employed as a military force or to comply with the orders of any military authority that he may specify. This provision could have been invoked at that time. Again I do not know if any such advice was ever given to the Prime Minister. It was obviously thought unnecessary because that provision was never invoked. Had it been thought necessary, perhaps a contingent of Military Personnel (Army Generals or Commanders) could have been brought in to direct the activities and operations of the Police Force at that time?

Section 21 further provides for the general powers and duties of Police Officers[23] to:

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22 Section 6(1): 'If her Majesty is at war or it appears to the Prime Minister that a grave threat to the defence or internal security of Solomon Islands has arisen, the Prime Minister in his discretion may direct that the Force or any part thereof – (a) shall be employed as a military force; (b) shall comply with the orders of any military authority that he may specify.'

23 See also sections 49-52 of the *Criminal Procedure Code*.

> exercise such powers and perform such duties as are by law conferred or imposed upon a police officer,
>
> obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superiors in the Force or from any other police officer in the same rank as himself but senior in service and
>
> promptly obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.

These are common and general powers given to all police officers the world over and yet specific enough to enable them to act decisively in any situation confronting them.

As the Commander of the Police Force, the Commissioner of Police was responsible for its operations from beginning to end. That the Police Force failed to carry out its functions and duties from the beginning, during and throughout the period of the ethnic conflict, is of fundamental concern. The criminal law was not used during that time or at any time thereafter. Why members of the GRA/IFM were not arrested and why the situation could not be controlled at the beginning of the conflict, when they were committing individual crimes and when it was possible to isolate and identify the culprits raises grave questions. The situation at the beginning could not be described as overwhelming. Were the Police ill equipped, ill prepared to handle an insurgency of such nature? It cannot be said that they did not have the necessary firepower at their disposal to confront the lawlessness. They had sufficient high-powered guns to control any acts of insurgency or rebellion within the country. Was there political interference? There was a government in place and a parliament. Were the Police divided along ethnic lines and thereby ineffective to deal with the acts of insurgency? What had happened to all the training that many members of the Police had undergone to deal with such things? The Police had a unit called the Police Field Force to deal with such incidents; were they incapable of handling the job? Were orders actually given to deal with the situation or were they being told to hold back, if so, why and for what reason? Was the whole episode under estimated, or was there ineptness and indecisiveness throughout? These vital questions can only be properly addressed if a commission of enquiry is set up.

The Police did not collapse during the coup d'état of 5th June 2000; it had failed long before that to perform its constitutional and legal obligations.

Conclusion

That Solomon Islands became a failed state was foregone. That a coup would take place was also foregone, you did not have to be an expert in security matters to foresee this. That resistance groups from amongst the displaced victims of Malaita Island would arise was foregone.

When a vacuum is created by the failure of the law enforcement agency (the legitimate arm of the people) to protect life, limb and property, that vacuum must be filled somehow. For purposes of determining the timing of an intervention, that would have been an opportune time. The ideal timing would have been when the legitimate Government was still in power before it was overthrown in the coup. Before the Government machinery totally collapsed, an intervention should have been made similar to the intervention carried out by the Regional Assistance Mission to Solomon Islands ('RAMSI') spearheaded by Australian Armed Forces and the Australian Federal Police.

The displaced Malaitans and their relatives waited for the Police Force to act, when they failed, they turned their anger and frustrations against the EG of Prime Minister, Ulufa'alu. On 5th June 2000 with sympathisers from within the Police Force, they raided the Rove Armoury took out all the high powered rifles with ammunition, held Prime Minister Ulufa'alu hostage and forced him and his Ministers to resign. That was equally wrong. Two wrongs will never make a right. They do not cancel each other out either. They simply complicate matters further. That was exactly what happened in Solomon Islands during that period.

Despite the 'best attempts' of everyone, the EG, the Police, Provincial and custom leaders, church groups, women's groups, civil society etc., the ethnic conflict could not be controlled. Whilst most Government Departments, including the Courts could function, their effectiveness was greatly curtailed. They could only watch helplessly as the lawlessness tore the country apart.

Whatever the motives and reasons that drove the Guadalcanal Militants, they cannot justify the unlawful measures taken to achieve their goals, irrespective of how attractive and justifiable they sounded. Solomon Islands had crossed the divide of paganism and savagery where revenge and retribution were common occurrences, to embrace the dawn of Western civilisation, culture, Christianity and democratic government and the rule of law. On 7th July 1998, the country celebrated its twentieth year of independence and some one hundred years after the first intervention by an outside force.

The heart of the ethnic unrest on Guadalcanal was premised on the claim or belief whether justifiable or not, that the people of Guadalcanal's rights, freedoms, properties and cultures, as protected by the Constitution, were not respected or upheld. It was ironic that those same rights were pursued to the greater detriment, hurt, damage and loss of the rights of others, equally protected by the very same Constitution invoked. As recently as Friday 20th February 2004[24] the Premier of Guadalcanal Province was quoted by the Solomon Star as reiterating those same sentiments that had propelled Guadalcanal Militants to lawlessness:

> The Premier of Guadalcanal Province Waeta Ben Tabusasi has called on Honiara residents to respect the rights, freedoms and properties of Guadalcanal people. Mr Tabusasi said the Guadalcanal Provincial Government is gravely concerned that

24 Solomon Star Issue No. 2541 Friday 20th February 2004 at page 5.

> despite repeated calls by leaders and landowners from Guadalcanal for people to respect Guadalcanal people, problems are still occurring.

Whatever were the causes, reasons, motives and grievances of the Guadalcanal militants these cannot justify the lawlessness and criminal activities perpetrated. The way forward for the Guadalcanal people, the Malaita people and the whole country is through and by the rule of the law. It is in the interest of all leaders in the country for the sake of its people to promote the rule of law and good governance.

The coup d'état of 2000 cannot be justified. It was equally wrong and perpetrators in the Police and Prison Service who colluded with the members of the Malaita Eagle Force must be brought to account for their infidelity to the Crown.

At the beginning of this paper I pointed out that the demands of the Guadalcanal Province could be traced back to 1978 and 1988. During that time, they were advised correctly by the then ruling EG , to take up their demands in the proper forums according to law. In 1998, when the demands re-surfaced, the EG of Prime Minister Ulufa'alu correctly advised them to take up the matter through the appropriate Government forums, which were able to deal with them; the Courts, Parliament and all relevant Government Departments were functioning and intact. They were never used.

In 1998 criminals took up arms to back up those demands. The difference in 1998 was that the Police failed completely to enforce the rule of law, to apprehend criminals and offenders and to bring them to justice. Had the full force of the law been applied fearlessly, fairly and decisively, the storm in the teacup would have been contained, lawlessness curtailed and the ethnic conflict prevented.

When the linchpin failed, the Government's ability to govern was compromised, resulting in its treasury being raided and emptied and properties stolen or damaged at the whim of militants and criminals; Solomon Islands became a failed state.

Solomon Islands is now picking up the pieces and struggling to get back on track. That began with the arrival of RAMSI in the country in July 2003, who together with the assistance of loyal officers in the Police Force and Public Service, have been working hard at restoring the effective working of the Government machinery.

The country is now on an uphill climb again. Government Departments are being made to function again according to General Orders, Financial Instructions and other stated rules and practices. The Government Finances are now under very tight control and supervision. Government bills are being paid, even if a little late. Investor confidence is slowly being restored; businesses that have closed will hopefully consider reopening and new and old investors return.

The way forward for Solomon Islands is not through the barrel of the gun but by good governance through the rule of law. The sooner this is accepted and assimilated across the nation, the easier will the task be in rebuilding a shattered economy and nation and moving forward. In any society or nation, there will always be those who wish to take the law into their own hands. An effective, disciplined and professional police force is crucial in such situations to ensure that those who do so face the full force of the law. To this end the great strides made in the last seven months

by RAMSI Participating Police Officers together with members of the local Police Force in arresting rogue police officers and purging the Police Force of criminal elements cannot be bypassed without comment. They have done an excellent job under the leadership of Nick Warner Special Coordinator of RAMSI, the Deputy Commissioner of the Participating Police Force, Ben McDevitt, and the former Army Commander John Frewen and new Commander Quentin Flowers. The country is truly indebted to Australia and New Zealand and all the other participating South Pacific countries that have taken such a bold and gracious step in coming to the assistance of the nation. Without that intervention, Solomon Islands would have sunk deeper into the control of criminals with guns and the economy eventually destroyed. The intervention was timely and God sent.

Collective Identity and the Construction of Political Markets in Africa

Christophe Dongmo

Introduction

In competitive political markets,[1] citizens make political choices that reflect their collective needs; and political actors (parties, state organs, civil society) make choices that maximise their gains in terms of control and influence over the citizens. Political markets could therefore be interpreted to include any situation where exchange of political opportunities between citizens and parties takes place.[2] Applying these economic tools to the ongoing political participation debate in Africa leads to the idea of political behaviour based on identity as a key concept for understanding the anthropology of society and politics. In making political decisions, citizens take account of their sociological affinities with political contenders and in return they expect to obtain from elected officials some kind of socio-economic privileges.

In Africa, a sense of people-hood is instrumental to group formation and political expression. Political life is conducted through a complex web of social forces and inter-identity relationships. It is difficult to understand the state in Africa, and consequently to assess its capacity to formulate and implement policy, without probing its social underpinnings. In other words, if government structures furnish the context for official interactions in the public domain, social groups constitute the fundamental stumbling blocks of political action and interchange.[3]

Most studies of contemporary Africa have emphasized the importance of collective identity in forging the social roots of electoral behaviour and the structure of public institutions. In spite of monopolistic resistance of governments, African peoples have always tried to base their political participation on identity issues such as tribe, ethnicity, race, culture, gender and religion to name but a few. Although African governments have officially succeeded in ignoring the impact of identity on the construction of political behaviour, identity politics has always existed, even

1 I borrow the concept of "political markets" from Célestin Monga, *The Anthropology of Anger Civil Society and Democracy in Africa* (Célestin Monga and Lynda L Fleck trans, Lynn Rienner, London) 2-4.

2 J E Stiglitz, *Economics* (W W Norton & Co, New York, 1993) 13.

3 N Chazan, P Lewis, R A Mortimer, D Rothchild, and S J Stedman (Eds) *Politics and Society in Contemporary Africa* (Lynne Rienner, Boulder, 1999) 75ff.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 67–87.*
 ISBN 90 04 14599 0.

though in a form different to what can be captured by the traditional tools of analysis available in political science. For this reason African states themselves are often very different kinds of organisations to those the conventional study of development politics envisages.

In the political evolution of nations and the emergence of identity, patterns of sub-identity survival occur in such a way as to appear to mitigate the growth of political order and the strengthening of national identity. Social interactions between the population and political institutions lack an effective basis and carry the seeds of political instability. An analysis of the stages of nation building and a wider range of collective identity is needed to understand political order and political conflicts. Political participation and voting behaviour are in constant change and are the product of the continuing pressures of social relationships coexisting in the nation. Hostilities may emerge as a result of competition for power, status, and wealth within the political system.

Indeed, it is arguable whether one can speak of a true African *politics* in the strict sense of the word, for the inconsistencies of state officials in both discourse and action are so heinous that the very existence of their strategy to use identity as a tool for political mobilisation may prove ineffective, irrational and hypothetical. A crossroad of peoples, cultures and civilisations, Africa has a profusion of types of social structures and abounds in identity potentials. Africa represents a mosaic of states whose relations, though complex and diverse, are interconnected. Africa is so original and specific to the construction of development politics that it deserves to be analysed as a whole. Although African countries have undergone separate development experiences, it is the intention of this paper to study African countries holistically. African countries underwent similar colonial experiences and social evolution patterns; these have shaped their political sociology. As a result, most African countries, irrespective of linguistic, religious or cultural heritage, have stunning similarities as far as the market value of collective identity on the political market is concerned.

This paper analyses the role of collective identity from the perspective of political sociology, which is concerned with the structure and dynamics of identity as an imperative source of political behavioural change. It is an attempt to understand a specific aspect of African politics in a theoretically insightful and methodological manner. In doing so, the paper aims to provide a comparative study of the group basis of political decision-making in Africa. It examines these influences by tracking the political patterns of collective identity over time and across African nations.

Proposing an outline of what can be called a sociological construction of internal politics, I will shed some light on the continent's long tradition of collective political participation. By analysing political participation from a group perspective, I will show that the quest for democratic change in Africa is deeply entrenched and that the ongoing socio-politico failures are the result of collective identity on the construction of citizens' political behaviour. The history of identity divisions underlies the internal weakness of African states and leaves them vulnerable to internal fragmentation and external penetration.

This paper begins with an overview of the role of collective identity in political sociology. In particular it describes the evolution of ideas about collective identity in political thought. The paper then attempts to relate issues bearing on identity challenges in the construction of political institutions to the wider environment of African politics. It examines the factors accounting for a resurgent interest in collective identity such as race, tribe, ethnicity, class, religion, and gender. The paper then moves to an examination of the peace-inducing effects of collective identity. In this section, I argue that collective identity is a tool for political – electoral – behaviour and that the prevalence of war and political decay in Africa is the result of identity contrasts. Finally it is the argument of this paper that even though collective identity is present in African politics, the problem is the lack of an effective collective identity – one that unites the population. I argue that in order to build a new and more sustainable participatory democracy complete social upheaval is necessary and that the liberal state system is capable of bringing about such a fundamental change.

The main motivation behind this essay is less to try to arrive at definitive conclusions than to discuss some practical issues and pose some theoretical perspectives that appear amenable to further inquiry. This paper does not attempt to break new ground in the discussion of the social capital effects of political behaviour. Rather, the purpose of the paper is to encourage further exploration of the taxonomies of collective identities and to suggest that such further analysis can contribute to an understanding of nation-building and political order in Africa.

Varieties and Evolution of Collective Identity in Political Thought

As with many other valid concepts in the social sciences that lack meticulously delineated parameters, the concept of collective identity has flexible frontiers rather than rigid boundaries. Given the relative lack of definite precision in the social sciences due to the nature of the phenomena they are supposed to describe, the concept of collective identity may suffer from a degree of inexactness and may be surrounded by controversy. Collective identity can be examined from several angles: as a form of social capital, its meaning in international relations theory, its relationship with ethnicity and as a social force.

Collective Identity as a Form of Social Capital

At the outset, collective identity may be equated with 'social capital.' Although there are distinct traces of the concept in earlier literature, the analysis of social capital at a micro level is usually associated with Robert Putnam.[4] In his seminal work on civil associations in Italy, Putnam defines social capital as those features of social organi-

4 R Putman, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, Princeton, NJ, 1993). Note that Woolcock identifies two authors as the first proponents of the modern concept of social capital. M Woolcock, 'Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework' (1998) 27 *Theory and Society* 151-158, referring to H L Judson, *The Community Center* ((1920) and J Jacobs, *The Life and Death of Great American Cities* (Random House, New York, 1961).

sation, such as networks of individuals or households, and the associated norms and values that create externalities for the community as a whole. Whether at the micro or macro level, social capital exerts its influence on development as a result of the interactions between two distinct types of social capital – structural and cognitive.

Structural social capital is a relatively objective and external construct in the sense that it facilitates information sharing and collective action and decision-making through established roles and social networks supplemented by rules, procedures, and precedents. Cognitive social capital is a more subjective and intangible concept, for it refers to shared norms, values, trust, attitudes, and beliefs.[5] This last-mentioned approach seems more connected to the interpretation that the concept of collective identity is given in political science and related subjects. Social capital has an information sharing function in society. Social capital can lower information uncertainty by spreading knowledge about the state of the nation or by making the behaviour of others more predictable. In addition to acting as forums for information exchange, networks and associations, social capital facilitates collective action and decision-making by increasing the benefits of compliance with expected behaviour or by increasing the costs of non-compliance.[6]

Collective Identity in International Relations Theory

The popular image of international relations (IR) is that it consists of the interactions of nation-states. The role of non-state actors appears complementary, subservient, out of the limelight. In IR theory, constructivist scholars now argue that 'ideas and discourse matters' and that norms, values, and identity heavily influence political life.[7] Fundamental to constructivism is the proposition that human beings are social beings, and would not be human but for their social functions. Constructivism holds that people make society and society makes people.

Collective communities, it is argued, can influence the creation and maintenance of political regimes in a number of ways. State political institutions are embedded in the broader normative structures of their local society and, as a result, states typically are not free to ignore such communities without paying a price. This view of regimes, which can be placed in a broader theoretical approach to IR, is termed social constructivism. As the term implies, the focus is on the social construction of world politics. It is argued that actors in international politics make decisions based upon what the world appears to be and how they conceive their roles in it. These conceptions derive from what could be termed systemic, inter-subjective

5 C Grootaert and T Van Bastelaer, *The Role of Social Capital in Development An Empirical Assessment* (Cambridge University Press, Cambridge, 2002).

6 Ibid 4.

7 Y Lapid and F Kratochwill (Eds), *The Return of Culture and Identity in IR Theory* (Lynne Rienner, Boulder, Colorado, 1996); A Wendt, 'Anarchy is what States Make of It: The Social Construction of Power Politics' (1992) 46 (2) *International Organization* 391-426; E Adler, 'Seizing the Middle Ground: Constructivism in World Politics' (1997) 3 *European Journal of International Relations* 319-363.

'shared understandings, expectations, and social knowledge embedded in international institutions.'[8]

Social constructivists argue that rule-governed cooperation can, over time, lead actors to change their beliefs about who they are and how they relate to the rest of the international system. As cooperation becomes habituated, states and other non-state actors may develop more collective identities. These, in turn, further strengthen the readiness of international actors to cooperate. Constructivists not only highlight the non-coercive, constraining effects of norms but also point to the important role played by non-state actors in the creation and evolution of these norms.[9] By analysing how social collectivities – states and non-state actors – give their meaning to their roles and actions, constructivism has added a new spectrum of study to mainstream readings of IR theory and global politics.

Ethnicity as a Variable of Collective Identity

In practice, the distinction between collective identity and ethnicity is not a clear-cut one. Many groups may combine significant characteristics of both. Collective identity in any one of its facets is built up through a series of identification fragments, among which is the threshold issue of 'ethnicity.' The relationship between ethnicity and collective identity is therefore the key to the range of theories we can term the 'ethnic inequality' approach. Their common concern is the relationship between ethnic conflicts and the identity structure in terms of the distribution of socio-economic power. We cannot understand the way ethnicity influences political behaviour without an improved understanding of the collective identities that are at stake in processes of ethnicisation. We need to look into the social practices and the cultural codes that – in the minds and actions of actors – make ethnicity real.

Ethnicity is probably the most widely used concept to describe an individual's sense of who he or she is. However, in the many works dealing with ethnicity, the usage of the term varies considerably. While it is not the intention of this paper to review the conceptual differences that underpin the differing uses of the term, I will briefly summarise some of the main theories about ethnicity as they relate to identification.

As a starting point it is important to note that ethnicity is viewed as a higher order concept, a general organising referent that has several subsets. The serious study of ethnicity, like so much else, owes much to the insights of Max Weber who defined ethnic groups as mass status groups.[10] Weber sought to combine their subjective and objective aspects, and balance their cultural and political bases. In fact, he

8 A Wendt, 'Collective Identity Formation and the International States' (1994) 88 *American Political Science Review* 389.

9 P R Viotti and M V Kauppi, *International Relations Theory: Realism, Pluralism, Globalism, and Beyond* (Allyn and Bacon, 3rd ed, 1987) 217-18.

10 Max Weber is best known as one of the leading scholar and founders of modern sociology. His major works include *Roman Agrarian History* (1891); *The Protestant Ethic and the Spirit of Capitalism* (1905); *Economy and Society* (1914); *Politics as a Vocation* (1918); *The Methodology of the Social Sciences* (1949).

oscillates between according primacy to political factors and historical memories in the shaping of a sense of common ethnicity versus actual cultural differences.

An ethnic group may be defined as a group of individuals with a sense of people hood based on presumed shared socio-cultural experiences and/or similar physical characteristics. Put differently, an ethnic group is a collectivity within a larger society having real or putative common ancestry, memories of a shared historical past, and a cultural focus on one or more symbolic elements defined as the epitome of their people hood. Examples of such symbolic elements are: kinship patterns, physical contiguity, language or dialect forms, tribal affiliation, or any combination of these.

A necessary accompaniment is some consciousness of kind among members of the group.[11] Human groups entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of civilisation, colonisation or migration.

It is important that we understand the process of ethnicisation as a special case of the process of identicisation that is the chain of events through which objective conditions of economic or political grievances become the basis of political claims justified by reference to collective identity. Identicisation is a process whereby individual actors attempt to solve problems of action, whereas ethnicisation is a particular aspect of that process.[12] The term identicisation refers to the processes through which collective identities are constructed, replaced, transformed and institutionalised.[13]

Collective Identity as a Social Force

The resurgence of collective identity has been observed in political sociology and the sense of common identity has remained to this day a major focus of political identification by individuals. For at least 150 years liberals and socialists confidently expected the demise of ethnic, racial, religious and national ties and the unification of the world through international trade and mass communications. These expectations have not been realised. Instead, we are witnessing the revival of collective identity across the globe. Clearly, collective identity, far from fading away, has now become a central issue in the social and political life of every continent.

Though the term 'collective identity' is recent, the sense of kinship, group solidarity, and common culture to which it refers is as old as the historical record. Central to the debate is the concept of 'elementary identity' as constructed by Emile Durkheim. Durkheim regarded elementary identity as an irreducible element of social organisation. Another aspect to identity is the creation of shared categories of thought in what may be termed less differentiated societies. This relates to the study of crowds. Durkheim's conception of 'collective effervescence,' a state of 'psychic

11 Schemerhorn (1978) 12, quoted by A D Smith, Chap 2, in J Hutchinson and A D Smith (Eds) *Ethnicity* (Oxford University Press, Oxford and New York, 1986) 6.

12 K Eder, B Giesen, O Schmidtke, and D Tambini, *Collective Identities in Action A Sociological Approach to Ethnicity* (Ashgate, Burlington, 2002) 17.

13 Ibid.

exultation' that exists in crowds acting at moments of social discontinuity provides one analytical tool. Durkheim[14] – whose heirs were the collective behaviourists – understood that crowd members are capable of conduct of which they are incapable individually, that emotions echo in crowds, and that the passions that seize crowds can produce action either heroic or barbaric.[15]

There is much to criticize in the collective behaviour literature. It had categorised most mass violence as 'hostile outbursts,'[16] that is the occasional engagement in incoherent action. The literature focused on rather rigid stages that 'had' to be traversed by crowds in a specified order. It also suggested that crowds inevitably act in contradiction to values accepted in the wider society.[17] These views based on Durkheim's work underpin all general 20th century social theory literature. This approach maintains that the stability of any social system and the authority of a government are not based purely in structural constraints and balances, but are premised on social norms which have somehow been taken into the character of a particular society. Durkheim called this a 'collective conscience.' It was this collective conscience that created the organic whole or the functional interdependence of dissimilar individuals.[18] In one of his monumental contribution in the field, the French sociologist observed that:

> The totality of beliefs and sentiments common to average citizens of the same society forms a determinate system that has its own life; one may call it the *collective common conscience* … it is, by definition, diffuse in every reach of society. Nevertheless, it has specific characteristics that make it a distinct reality. It is, in effect, independent of the particular conditions in which individuals are placed; they pass on and it remains … Moreover, it does not change with each generation,

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14 E Durkheim, *The Elementary Forms of Religious Life* (Karen E Fields trans, Free Press, New York, 1995) 228.

15 E A Tiryakian, 'Collective Effervescence, Social Change, and Charisma: Durkheim, Weber and 1989' (1995) 10 (3) *International Sociology* 269-281, 273.

16 Referring to rioting crowds for example, we can argue that they are aroused but not incoherent; they can move into action quickly, and they draw support from social approval. Collective behaviourists were focused on aspects of the riot that unfortunately got lost as their work was eclipsed by a new wave of theory. In their absence, the understanding of crowds has gone by default. See D L Horowitz, *The Deadly Ethnic Riot* (University of California Press, Berkeley, 2001) 35. However, there is a small revival of interest on the crowd; it is evident, for example, in Turner's emphasis on the nullification of customary meanings that makes extraordinary action possible: R H Turner, 'Race, Riots, Past and Present: A Cultural-Collective Behavior Approach' (1994) 17 (3) *Symbolic Interaction* 309-324, 318.

17 See N J Smelser, *Theory of Collective Behaviour* (Free Press, New York, 1962) 13-18, 101-12, 248-53; R H Turner and L M Killian, *Collective Behavior* (Prentice-Hall, Englewood Cliffs, NJ, 3rd ed, 1987) 58; and the critique of S D Reicher, 'The St. Paul's Riot: An Explanation of the Limits of Crowd Action in Terms of a Social Identity Model' (1984) 14 (1) *European Journal of Social Psychology* 1, 17-19.

18 E Durkheim, *The Division of Labour in Society* (George Simpson trans, Free Press, New York, 1964) 79-80.

> but, on the contrary, it connects successive generations with one another. It is, thus, an entirely different thing from particular consciences, although it can be realized only through them.[19]
>
> …
>
> In the first place, whenever we find ourselves in the presence of a governmental system endowed with great authority, we must seek the reason for it, not in the particular situation of the governing, but in the nature of the societies they govern. We must observe the common beliefs, the common sentiments that, by incarnating themselves in a person or in a family, communicate such power to it. As for the personal superiority of the chief, it plays only a secondary role in this process. It explains why the collective force is concentrated in his hands rather than in some others, but does not explain its intensity.[20]

Collective identity has its foundations in combined remembrances of past experiences and in common inspirations, values, norms, and expectations. The validity of these beliefs and remembrances is of less significance to an overarching sense of affinity than is their ability to symbolise a people's closeness to one another. Used in this manner, collective identity refers to a subjective perception of common origins, historical memories, ties, and aspirations; it pertains to organised activities by persons, linked by a consciousness of a special identity, who seek to maximise their political, economic and social interests. The collective group operates socially in a relationship governed, in certain circumstances, by informal and formal rules of interaction that may be both recurrent and predictable.

Collective identity also refers to relationships between groups whose members consider themselves distinctive, and these groups may be ranked hierarchically. It is therefore necessary to distinguish between collective identity and social class. Theories of social class always refer to systems of social ranking and distribution of power. Collective identity, on the contrary, does not necessarily refer to rank and may well be egalitarian in some respects.

'Education' about one's socio-cultural identity is part of the creation of a collective identity. Individuals learn a type of code that provides them with a mechanism to organise information about themselves in a coherent fashion. There are two major sources of a person's identity: the social roles that constitute the shared definitions of appropriate behaviour and individual life history. Both the person and others base their conception of identity on these two sources. For Arnold Dashefsky, 'social identity' refers to how others identify the person in terms of broad social categories or attributes, such as usage, occupation or ethnicity. On the other hand, self-conception is a cognitive phenomenon that consists of the set of attitudes an individual holds about him-or herself.[21] Likewise, 'personal identity' refers to how others define the person in terms of a unique combination of traits that come to be attached to

19 Ibid, emphasis added.

20 Ibid 196.

21 A Dashefsk, *Ethnic Identity in Society* (Rand McNally, Chicago, 1976) 3ff.

him or her.[22] Processes of social, political and economic change have not diminished various elements of collective identity. Rather, they persist and, in multiple ways, interact with other components of social categorisation.

Collective identity is also fundamentally concerned with meaning: the categorisations made by ordinary actors, which are either recognised or rejected by others. These categorisations could hardly be less fundamental to patterns of human cooperation and conflict. Collective identity creates a fundamental sense of union between individuals with the effect that individual calculations of costs and benefits recede into the background. It is in this way that they are basic to collective action and social integration.[23] Those who adopt a collective identity consider it the reference point for evaluating means and strategies as well as the setting of ultimate goals. Collective identity is made from symbolic codes. Like a language transcends all finite acts of designation, collective identity exceeds any finite obligations of solidarity. Just as a language demarcates the symbolic space for possible communication, collective identity sets limits to individual calculations, and defines a frame of reference for acts of social classification as well as for constructions of solidarity and trust.[24]

Cultural categories with social and group referents are also the focus of collective identity inquiry. Where there is a group, there is some sort of boundary, and where there are boundaries, there are mechanisms to maintain them. These boundaries are cultural and social markers of difference. As Manning Nash points out, the differences among groups are index features, which must be easily seen, grasped, understood and reacted to in social situations.[25] The index features implicate or summarise less visible, less socially apparent aspects of the group. These boundary-marking features say who is a member of the group and what minimal cultural and social items are involved in membership.[26]

As the terms collective and social are often considered synonymous, one is inclined to believe that collective identity is social identity. Collective identity is therefore a social force. A social force is an ethnic, religious, territorial, economic and status group. Political life in society involves, in large part, the multiplication and diversification of the social forces. Kinship, racial, cultural and religious affiliations are supplemented by occupational, class, and skill groupings. Clearly, the power and influence of social forces varies considerably.

In a society in which all belong to the same social force, conflicts are limited and are resolved through the structure of the social force. In a society with only a few social forces, one group may dominate the others and effectively convinces them to acquiesce to its rule. But in diverse and complex societies, no single social force can rule, much less create a community, without creating political institutions that have some existence independent of the social forces that gave birth to them. The rela-

22 Ibid.

23 Eder et al, above n 12, 19.

24 Ibid.

25 M Nash, 'The Core Elements of Ethnicity' in Hutchinson, above n 11, 24ff.

26 Ibid, 24ff.

tive power of groups changes, but if the society is to be a community, the power of each group must be exercised through political institutions that temper, moderate, and redirect that power so as to render the dominance of one social class compatible with the community of many.[27]

Collective identity leads immediately to regarding individuals as beings who have different social constructs, whose inevitable gradual development links them to past and future generations. It is the continuing repetition of an individual's various social ties that becomes the elementary cause of the formation and extension of the living political organism.

Collective identity is an enduring social and political force, constructed and reconstructed as circumstances and contexts change. Rather than simply determining the nature of political organisation, as 'tribal affiliation' was thought to determine politics in some societies, collective identity is formulated in relation to diverse political and social forces. Processes of social, political and economic change have not diminished these various elements of collective identity; collective identity persists and, in multiple ways, interacts with other components of political life. Many circumstances, relating both to the internal structure of societies and the functioning of their political system, combine to give a new significance to the field of collective identity. As is the case in Africa, the belief in group affinity, regardless of whether it has any objective foundation, can have important consequences for the formation of a political community and the maintenance of political order.

Collective Identification as a Tool for Political Behaviour in Africa

The resurgence of regionalism and social conflict has fuelled pessimism about the future of democracy and political order in Africa. Similar to the ways in which social groups and other forms of collective affiliations have become subject to explicit ideological contention, collective identity is present and carries various political meanings. In each country different elements act as the primary point of political mobilisation. Tribe, race, class, religion, and ideology are all favored rallying cries used to gather individuals together. They are common tools enabling them to aggregate political demands on the state. Collective identity can serve as an instrument of politics because it may be seen as the 'natural' source of political and social cohesion, thereby 'deepening' the language and imagination of grassroots politics.

There is a well-worn saying that people act politically as they are socially. Political sociology research has stressed social group attachments as having an important influence on voting behaviour.[28] The relationship between collective identity and elections is one of interaction and interdependence; political phenomena may have psychological consequences and vice versa. In explaining the foundations of political behaviour, we need not always assume – as does much of the current survey research literature – that collective identity influences political actions. Rather, we may recog-

27 S P Huntington, *Political Order in Changing Societies* (Yale University Press, New Haven and London, 1968) 9.

28 G Sartori, 'Political Development and Political Engineering' (1968) 17 *Public Policy* 261.

nise with Leon Festinger and other social psychologists of the 'cognitive dissonance' school that there are reciprocal influences between collective beliefs and political actions.[29] In Africa as elsewhere, the electoral system is by far the most powerful tool of constitutional engineering able to affect the possibilities for accommodation and harmony.

The abuse of identity in politics has been an obstacle to Africa's political and economic development. Identities have historically been significant in the African political process, under colonial rule as well as in post-colonial dispensation. Group identity became a source of conflict during the colonisation period and the debate over the character of precolonial identities is directly linked to the question of ethnic creationism by colonial states.[30] Thus, the differential impact of colonialism set the context of the regional educational, economic and political imbalances which later became significant in the mobilisation and manipulation of identity consciousness in order to effectively divide and rule. It affected the politics of decolonisation as well as the arena of competitive politics during the colonial era.[31]

John Lonsdale argues that this process of state intervention was manifested in colonial state leaders' conscious efforts to utilise identity imagery in order to temper Africans' mobility and to 'tribalise' them by consigning them to particular regional or specific identities. This process was intensified both before and after independence through the manipulative politics of instrumentalist political leaders; the resultant zero-sum competition generated confrontational 'political tribalism.'[32]

Duke University scholar Donald Horowitz relies on a situational analysis to explain how colonial-era ethnic and social stratification led to uni-ethnic regional political activity after independence. He explains further that in 'unranked ethnic systems,' in which ethnic groups were treated unequally, the worst treated groups constituted 'incipient whole societies' that eventually aimed for autonomy or secession from the state.[33] Here the emergence of sub-nationalism reflects a historical situation in which states imposed unranked ethnic systems, and excluded groups who lay outside the mainstream of state power then aspired to full-scale autonomy or secession in the postcolonial period.

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29 Cognitive dissonance is concerned with the relationship among cognitions. Cognition for the purpose of this theory may be thought of as a 'piece of knowledge.' Festinger's Theory of Cognitive dissonance postulates that individuals, when presented with evidence contrary to their worldview or situations in which they must behave contrary to their worldview, experience 'cognitive dissonance.' L Festinger, '*A Theory of Cognitive Dissonance* (Stanford University Press, Stanford, 1962).

30 J B Forrest, *Subnationalism in Africa Ethnicity, Alliances and Politics*, (Lynne Rienner, Boulder and London, 2004) 27.

31 M Jega, 'Identity Transformation and the Politics of Identity Under Crisis and Adjustment' in A Jega (Ed) *Identity Transformation and Identity Politics Under Structural Adjustment in Nigeria* (Nordiska Afrikainsittet, 2000) 15-16.

32 J Lonsdale, 'Moral Ethnicity and Political Tribalism' in P Kaarsholm and J Hultin (Eds) *Inventions and Boundaries: Historical and Anthropological Approaches to the Study of Ethnicity and Nationalism* (Roskilde University Press, Roskilde, Denmark, 1994) 137-138.

33 D L Horowitz, *Ethnic Groups in Conflicts* (University of California Press, Berkeley, 1985) 31.

Donald Rothchild has explored efforts to manage ethnic conflict in Africa in an unusually sophisticated analysis that takes into account a situtionally changing complex of colonial historical experiences and unequal resource allocation as well as the attitudes of group members, regional leaders and elites.[34] Lonsdale also describes how colonial and postcolonial African states manipulated the African social order, consciously compartmentalising Africans into ever more narrow ethnic and regional containers while giving succour to instrumentalist leaders. In this respect, colonial and postcolonial states and Westernised intellectuals constructed idealised accounts of identity that were embraced by regional political manipulators and state rulers.[35]

Identity became relevant, contradicting the expectations of those who saw in anti-colonial movements the makings of enduring trans-ethnic nationalisms. The transcendent obligation of resistance to the coloniser largely obscured the vitality of identity as a basis of social solidarity. The potency of this factor became clear only in the cold dawn of independence. All over Africa, scholars, highly sympathetic to the aspirations of African nationalism, looked naturally for the factors of cohesion rather than for elements of potential discord. Tribalism, religion, race and ethnicity emerged as retrograde forces carrying heavy political weight. It is from this perspective that Anderson argues that the future of African politics should belong to the 'detribalised.'[36]

Donald Horowitz considers the implementation of democracy to be much more difficult in "divided societies" such as Africa. His basic argument is that democracy is about inclusion and exclusion, about access to power, about the privileges that go with inclusion and the penalties that accompany exclusion. In severely divided societies, ethnic identity provides clear lines to determine who will be included and who will be excluded. Since the lines appear unalterable, being in and being out may quickly come to look permanent.[37]

Applying this analytical approach to African politics, Horowitz gives a schematic analysis of the current less than cheery picture of the political situation:

> Togo and the Congo Republic both have northern regimes (based, respectively, on the Kabrai and the Mbochi) that came to power after military coups reversed the ethnic results of elections. Neither regime has had a special desire to accommodate a democratic process it identified with its southern (Ewe or Lari) opponents. Consequently, both took steps to disrupt the process… Kenya, with its Kalendjin-dominated minority government, finally succumbed to Western pressure and conducted a multiparty election. But the incumbent president, Daniel Arap Moi, was

34 D Rothchild, *Managing Ethnic Conflict in Africa: Pressures and Incentives for Cooperation* (Brookings Institution, Washington DC, 1997) 31, 36-38, 63-65.

35 J Lonsdale, 'The Moral Economy of Mau Mau: Wealth, Poverty, and Civic Virtue in Kikuyu Political Thought' in B Berman and J Lonsdale (Eds) *Unhappy Valley: Conflict in Kenya and Africa* (James Currey, London, 1992) 329-331, 460, 463.

36 C W Anderson, *Issues of Political Development* (Prentice-Hall, Englewood Cliffs, NJ, 2nd ed, 1974) 29, quoting D F McCall, 'Dynamics of Urbanization in Africa' (1955) *Annals* 298 March 151-60, 158.

37 D L Horowitz, 'Democracy in Divided Societies' (1993) 4 (4) *Journal of Democracy* 18-38.

> able to use a combination of intimidation, violence and ethnic divisions among the opposition to win both the presidency and the parliamentary majority on a plurality of votes, mainly from his own group and several other small ethnic groups. The result is a regime that continues to exclude the two largest groups, Kikuyu and Luo. Likewise, Cameroon's President Paul Biya, presiding over a government supported mainly by Beti and Bulu and opposed by all the rest, benefited from an opposition divide along ethnic lines and an election boycott by the major party… In a dubiously conducted election in Ghana, the military ruler, Jerry Rawlings, won the presidency, supported by 93 percent of the vote in his own Ewe-dominated area, but polling less than one-third in Ashanti, thus reviving an earlier polarization.[38]

One of the important patterns that emerged recently in African politics is the existence of ethnic voting blocks, and the widespread monolithic regional support for a given candidate. Africans indeed vote in line with their sociological affiliations. Governance is carried out along ethnic lines as well – which, according to Horowitz, means the inclusion of the ethnic "winners" of elections and the exclusion of all other groups (the "losers"). As a result, most radical opposition leaders consist of tribal representatives who are bitter about their exclusion from power. A few items of information are enough to uphold this sociological construction of internal politics in most African countries. In Cameroon for example, Ni John Fru Ndi, the charismatic Chairman of the Social Democratic Front (SDF) and leader of the opposition comes from a minority group – English speakers – and is mainly supported by the Bamileke who although the largest population group, have been excluded from Cameroon's political and administrative life for decades.

In Africa, collective identity also provides political representation for class, religious, and other social groups. Political parties generally maintain their institutional and ideological ties to specific identity groups, and most parties depend on the vote or ideological support of their clientele groups to provide a stable base of electoral support. When Macias Nguema Bazogo of Equatorial Guinea began the reign of terror that resulted in the forced displacement of nearly half of the population, the violence, like that of Idi Amin Dada (Uganda), Jean Bedel Bokassa (Central African Republic) and Laurent Gbabgo (Cote D'Ivoire), was directed by a militia drawn from his own ethnic group, and the victims were ethnically identified. Likewise, Somalia's Siad Barre invaded Ethiopia in part to gain the support of ethnic Somalis living near Somalia's border with Ethiopia.

The differing perspectives on collective identity detract from the essence of state building. In much of Africa, there is no real ethnic core to give identity to the state. Such an undertaking is complicated by the presence of ethnic groups fighting for the control of the state or for the right to secede and establish their own state. Building a unitary nation is also hampered by the lack of a common past among dif-

38 Ibid 21-2.

fering groups. Without a common history and culture to build upon, it is difficult to reach a consensus on present and future policies.[39]

Though it rests on shaky foundations, collective identity remains constant in the political life of Africa. The reality of collective identity and its impact on citizens' political behaviour is such that it is impossible to ignore. Collective identity dominates political discourse because it provides a simple and apparently coherent theoretical model for the analysis of seemingly bizarre, or incomprehensible, phenomena. Political scientists use this framework to justify the existence of authoritarianism. Williams notes:

> In Africa, where democracy is 'widely approved but everywhere in doubt,' open public participation in politics has tended to be characterized by divisive struggles among ethnic groups over power and resources. Resulting conflicts have led to a general paralysis of productive political activity, a demobilization of participatory institutions, and the seemingly ineluctable turn toward authoritarian mechanisms of rule.[40]

African societies invest identity with sacred significance and base other interpersonal relationships, including community and political obligations, on its model. Collective identity is a prime influence on political ideologies. It is also an important factor in political and ideological education as well as the transmission of knowledge of political thought from one generation to the next. It serves as a locus for developing a notion of trust, an electoral base and political behaviour. In other words, identity is usually taken as a microcosm of the desired political order. Where parties break along identity lines, elections are divisive. Where armed forces are ethnically fragmented, military coups, ostensibly to quell disorder or to end corruption may be made to secure the power of some groups at the expense of others. Whole systems of economic relations can crystallise on opportunities afforded and disabilities imposed by government policy on particular identity groups.[41]

Most groups have their own cultural brokers within state institutions. Ethnic quotas are exercised in bureaucratic and political appointments and the failure to include leading members of each ethnic group risks provoking social decay and political challenge to the regime from non-represented groups. Generally, the elite class knows that it would have to pay a political price if any group perceived itself to have been left out of these social calculations.[42] Several countries have adopted an official policy of *équilibre regional* – regional equilibrium – the advantages of which

39 S David, 'Why the Third World Still Matters' (1992-93) 17 (3) *International Security* 127-159, 127, 132-33.

40 D C Williams, 'Accommodation in the Midst of Crisis? Assessing Governance in Nigeria' in G Hydenand M Bratton (Eds) *Governance and Politics in Africa* (Lynne Rienner, Boulder, Colorado, 1992) 97–119, 97.

41 R Fegley, 'Minority Oppression in Equatorial Guinea' in G Ashworth, (Ed) *World Minorities* (Quartermaine House, Sunbury, England, 1978) vol 2, 84.

42 A Thomson, *An Introduction to African Politics* (Routledge, London and New York, 2001) 62.

are still unclear. It is open to debate as to whether or not the country maximises utility through a policy of regional equilibrium. In economic terms, competition is driven out of the labour markets, the state ceases to be a profit-maximising agent, the population is worse off in so far as in the provision of labour and investment opportunities and excellence and merit have no room at all.

It is particularly necessary to ask whether collective identity is the cause of current political instability or whether it stems from the long period of post-independence authoritarianism, economic decay and one-party rule. In other words, is collective identity an exogenous and predetermined variable, or is it an endogenous variable, whose value depends upon other factors that are ignored? The author strongly believes that the lack of a unifying collective identity throughout the continent and the subsequent political decay is a combination of both factors. Collective identity seems to have explanatory value in a continent where many societies experience sharp conflict between social groups, and where secessionist movements arise in countries that had been nationally integrated, or so it would seem, for centuries. At the present time, there appears to be a tendency to view identity differences as widely relevant to African political groups and their interrelations.

There is a great deal of accuracy to the observation that collective identities are constructed in part by an 'internal architecture' of rivalries within political collectivities.[43] The process of constructing identities suggests that they are formed by the wider political processes and are inseparable from them. Collective identities are not simply the creators of the political process; the identities so developed serve as agents of African politics. Collective identity can empower peoples, widening the horizons of individuals as participants in a larger enterprise and providing them with a distinct political boundary between themselves and others.

It is this accent upon organised group action in the political arena and upon expressed collective claims to resources, participation and security that makes sociological interaction so appropriate to the study of the many political identities in Africa. People join political organisations not only because they support their ideology or their electoral plans, but also because specific political organisations can advance their collective interests and aid them to safeguard their cultural and anthropological advantages. As more collective identity groups have sprung up in Africa, individuals have tended to attach themselves to a number of organisations simultaneously. Group frameworks are therefore at the core of African political fabric: although some social action may be conducted by classes or identity writ large, the reality of social organisation consists of participation in smaller groupings limited in membership and/or geographical scope. The political manifestations of Africa's backwardness and vulnerability are tremendous. Imported institutions are inadequate to meet the complex nature of internal politics;[44] African countries seem

43 Berman and Lonsdale, above n 35, 330-332.

44 Bertrand Badie 'Je dis Occident: Démocratie et Développement. Réponse à 6 Questions' (1990) *Pouvoirs* no 52; Bertrand Badie, *L'Etat Importe: L'Occidentalisation de L'Ordre Politique* (Fayard, Paris, 1992).

to have adopted an attitude of masochistic complacency toward authoritarianism and patrimonialism.[45] In short, Africa refuses to develop.[46]

Identity Fragmentations as Sources of Social Conflicts and Political Decay

The level of political community a society achieves reflects the relationship between its political institutions and the social forces that comprise it.[47] In most African countries political development confronts tremendous social obstacles. Images from Africa mostly consist of civil war, military insurrection and political anarchy. It has to be acknowledged that rather than facing the difficult task of imposing one group's identity on subordinate groups, many African states confront the far more problematic challenge of creating an identity in the first place.[48] Since independence, Africa has witnessed more than a score of civil wars, and over the past decade between 4 million and 6 million people have died as the result of such wars. In Africa, ideologically driven religious, ethnic and political hatred still persist. There have been no fundamental changes in ideas and attitudes in much of Africa that would make war obsolete. Domestic insecurity in Africa, then, has had an increasingly high propensity to spill over borders. African states have dealt with situations such as the Rwanda genocide of 1994, which resulted in more than 500,000 deaths and more than 3 million refugees fleeing to neighbouring countries, haphazardly and ineffectively. Therefore, public support for war is likely to be greater in Africa than elsewhere else in the world.[49]

In the relatively weaker and ineffectively governed African states, collective identity is a peremptory source of war and conflict, and more particularly internal political struggles. This identity-generated politics defines those included in the community and, by implication, those regarded as 'outsiders,' excluded from the affairs of *The Republic*. In worst-case situations where some social groups are not willing to abide by the common rules of relationship, the result is zero-sum competition and at times a breakdown in the civil order. In many African countries, a sense of common fate and overriding societal concerns has collapsed, resulting in bureaucratic corruption and violent encounters between state and insurgent armies

45 T Callaghy, 'State, Choice, and Context: Comparative Reflections on Reform and Intractability' in D E Apter and C G Rosberg (Eds) *Political Development and the New Realism in Sub-Saharan Africa* (University Press of Virginia, Charlottesville, 1994) 184-219.

46 A Kabou, *Et Si L'Afrique Refusait le Développement?* (L'Harmattan, Paris, 1991).

47 Huntington, above n 27, 8.

48 Unlike Western Europe where state building took place before the view had taken hold that each ethnic group deserved its own state, in Africa, states were created at a time when ethnic nationalism had gained wide grass roots acceptance. In other words, Western European state makers had the luxury of forging their political landscape before the emergence of mass political participation. David, above n 39, 132.

49 Ibid 137.

and widespread violence by the militia.[50] Internal conflicts involving ethnic, religious and regional identities have been persistent and can be expected to remain a significant factor in the future. In large part, this conflictive pattern reflects state power and the intensity of the struggle of identity groups to gain access to state institutions and a better share of public resources. When state-ethnic conflicts involve the allocation of tangible resources, the struggle among identity groups is normally expressed through interest group politics.[51]

The intrinsic characteristics of identity fragmentation are too numerous to detail. In some cases, colonisation divided a single ethnic group among many states. This is the case of Ogaden Somalis spread around Somalia, Ethiopia, Kenya and Djibouti; it is also the case of Fangs in Gabon, Cameroon and Equatorial Guinea. Since many individuals in each ethnic group feel a higher allegiance to their group than to the state, the outcome is often continued disruption of the social fabric in the countries in which they live thus exacerbating the likelihood of war and conflict.[52] The denial of statehood to certain ethnic groups – Hausa in Cote D'Ivoire, Tutsi in Rwanda and Burundi, Biafra in Nigeria, Bayamurengue in the Democratic Republic of Congo (DRC) and Blacks in Namibia, South Africa and Zimbabwe – has also created instability throughout Africa as these groups seek to rule themselves, while existing states act to suppress their moves towards self-determination.

Even in apparently stable states with legitimate regimes, identity conflicts have exploded out of a volatile political atmosphere, threatening the established order to its roots. More significantly these conflicts often occur in the process or aftermath of democratisation, as was the case during the 1990s democratic upheavals that led to National Sovereign Conferences throughout most of Francophone Africa. The mass killings in Burundi by both ethnic groups – Tutsi and Hutus – in late 1993, after the army's assassination of the democratically elected president, and the genocide practiced by groups associated with the government in Rwanda in April 1994, after the authoritarian ruler's plane was shot down, are the most fearsome examples. Similar if lower-scale violence in the DRC also followed the elections. Political riots in Cote D'Ivoire (September 2002), Senegal and Mauritania (1989-1991) were not directly related to the democratisation process per se but were coincident with it. In Algeria (1990-91) and Nigeria (1993), the transition to democracy was accompanied by such disorder that it caused a military coup, followed by further civil disorder accompanied by social and political unrest. These events do not constitute state collapse, but they are steps toward it and major instances of state and personal insecurity.

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50 D Rothchild, 'Conclusion: Responding to Africa's Post-Cold War Conflicts' in E J Keller and D Rothchild (Eds) *Africa in the New International Order: Rethinking State Sovereignty and Regional Security* (Lynne Rienner, London, 1996) 227, 228.

51 D Rothchild, 'Conclusion', above n 50, 229.

52 On the relevance of ethnicity in conflict in the horn of Africa, see I M Lewis, *A Modern History of Somalia* (Longman, Longman, 1980) 221-22; C Clapham, *Transformation and Continuity in Revolutionary Ethiopia* (Cambridge University Press, Cambridge, 1987); B H Selassie, *Conflict and Intervention in the Horn of Africa* (Monthly Review Press, New York, 1980).

Even the sociological picture of Muslim Africa is far from settled. In most African countries, rapid urbanisation contributed to the rise of religious activism.[53] Because of the impact of collective identity, Islam, the family, and the role of women in it, is invested with diverse ideological and political meanings. North African Muslims, as their counterparts elsewhere in the world, possess an intensified awareness of Islamic ideas and practices; they are more assertive in their judgments of what constitute adequate Islamic conduct, which in turn impacts on political participation and the establishment of a viable community network. In Muslim Africa, the apolitical Islamic educational and lobbying movements begun long before independence, gradually acquired political overtones.

With the liberalisation of laws governing associations and political parties in the 1990s, fundamentalists have found sympathetic audiences in these bleak milieus. Groups such as the Sufi or the Algerian Islamic Salvation Front (FIS) are no longer apolitical. In some West African societies, Sufi orders have increasingly played an active political role. These orders – and opposition to them – contribute to the fragmentation of political authority.[54] In the late nineteenth and early twentieth century, Sufi orders throughout Equatorial Africa were seen as potential templates for transregional political action threatening colonial rule. France was concerned that the orders could be used by the Ottoman Empire and rival colonial powers to weaken French rule. More than a century later they continue to affect the social fabric and challenge the state's self ascribed use of Islam in social life and internal politics.

Political regimes, established religious authorities, and counter-regime Islamists all claim to be the defender of family integrity, the sanctity of the Holy Koran and of the secondary roles and rights of women in an Islamic democratic society. Although women have had considerable political influence, sometimes as leaders,[55] a key dimension of Muslim politics is the contest over the meanings attached to the symbolic notion of 'womanhood'. For some reformists, women should not be

53 In Algeria, rapid urbanisation also contributed to the rise of religious activism. Although the Algerian state and the National Liberation Front (FLN) controlled the countryside, the shift in state investment away from agriculture toward heavy industry in the 1960s and 1970s contributed to massive emigration from the countryside to the urban zones. By 1988, nearly 44 percent of Algeria's population was living in the cities, with most of the newly arrived generation living in poor conditions. Most people were further impoverished as a result of the economic liberalization implemented beginning in 1988 by Chadli Benjedid (born 1929, ruled 1979-1992). The consequence of such rapid economic dislocation was discontent among a vulnerable group of the population whose aspirations for a more prosperous and secure life were largely compromised.

54 R Launey, *Beyond the Stream: Islam and Society in a West African Town* (University of California Press, Berkeley and Los Angeles, 1992) 86-88; D Cruise O'Brien, 'Charisma Comes to Town: Mouride Urbanization, 1945-1986' in D Cruise O'Brien and C Coulon (Ed), *Charisma and Brotherhood in African Islam* (Clarendon Press, Oxford, 1988) 135-55. A Abduvakhitov, 'Islamic Revivalism in Uzbekistan' in D F Eickelman (Ed) *Muslim Politics and Societies: Russian, Central, Asian, and Western Perspectives* (Indiana University Press, Bloomington, 1993) 80-81.

55 F Mernissi, *Sultanes Oubliées: Femmes Chef D'Etat en Islam* (Albin Michel, Paris, 1990).

confined to subordinate roles. Indeed, Elmandjra argued 'no hope is possible for Muslim societies without the positive participation of women, whose full rights have been assured by religion.'[56] As Eickelman and Piscatori observe, notwithstanding the positive contributions made by reformists, a more prevalent view, echoed throughout the centuries of Islamic history, argues that the just Islamic society exits in a delicate balance or complementary of genders.[57] The underlying belief, common to all ideological formations, is that women must remain 'in their place' for political harmony to prevail. If women do not adhere to this moral order, society runs the risk of degenerating into temptation, rebellion, social dissension and disorder.

In addition to North Africa, this conception of the social order also prevailed – though with a lesser degree – in Muslim minorities of Central and West Africa. This was particularly the case in the Sokoto caliphate, which prevailed in West Africa from 1817 to 1837 and represented – in Ibraheem Sumaiman's words – the standard Islamic state.[58] Even today because of the strong linkage between religion and politics, women are generally excluded from social amenities such as basic education and electoral processes. They cannot work, vote or stand for public office without the consent or formal authorisation of their husband.

Referring to these problems and hindrances, it can be argued that the inability to form strong and cohesive multiethnic states has led to internal warfare throughout Africa. The overthrowing of governments, revolutions, insurgencies and civil conflicts dominate African political landscape. Recent or continuing internal conflicts have taken place in Liberia, Sierra Leone, Somalia, Ethiopia, Angola, Sudan, DRC, Rwanda, Burundi, Algeria, Cote D'Ivoire, and The Central African Republic and there is no indication that this prevalence of internal warfare will abate in the near future. African states are still young and fragile; they confront problems in forging cohesive states and face the challenges of inculcating a state identity among disparate groups and establishing inter-state borders.

Concluding Remarks

The prototypical African state can be seen to possess certain basic characteristics. African states face numerous problems in their efforts to consolidate state authority: lack of democratic governance, weak administrative structures and lack of qualified manpower. African states are poor and have populations that are splintered along identity lines. Certainly the literature of dependency provides an important, even if controversial, body of theory regarding the international roots of Africa's prob-

56 M Elmandjra, *Première Guerre Civilisationelle* (Casablanca, Les editions Toubkal, 1992) 172-73.

57 D F Eickelman and J Piscatori *Muslim Politics* (Princeton University Press, Princeton, NJ, 1996).

58 I Sulaiman, *The Islamic State and the Challenge of History: Ideals, Policies, and Operation of the Sokoto Caliphate* (Mansell Publishing, London, 1987) 130.

lems.[59] But these external factors of Africa's crises can be exaggerated, and may preclude an objective appraisal of the domestic dimensions of the African predicament. A preoccupation with external problems sidesteps something long understood in human affairs: social development has always been premised on a people's ability to effectively manipulate their political and economic affairs to their advantage over a period of time in spite of odds imposed by the prevailing political environment.

Thrown off balance by a political, economic and social crisis without clear beginning or end, African peoples have witnessed – and have been powerless to stop – the collapse of the value systems that govern their daily political life. There has been a demise of the traditional democratic culture, which now appears obsolete. African states exhibit different degrees of vulnerabilities, weaknesses and insecurities. However in many states internal conflicts, coupled with poor governance and bad policy choices had, over the first four decades of independence, created circumstances that had become unbearable to many citizens. Putting together these intrinsic and extrinsic characteristics of underdevelopment provides a composite, grand characterisation of the African states as weak, vulnerable and insecure. It is clear that scattered and mobile people are neither likely to generate the resources on which permanent government institutions rest, nor the social structures and values needed to uphold them. Governing Africa has always been a struggle, and those who have sought to maintain some form of authority within the continent have had to make use of every possible resource in order to do so.[60]

Throughout Africa, we need to build states with a relatively well-educated population who seek patriotic involvement in the management of state affairs.[61] In much of Africa, there is no collective identity core to give identity to the state. This is complicated by the presence of groups fighting for the control of the state or for the right to secede and establish their own state. Building a unitary state is also hampered by the lack of a common past among differing groups. Without a common history and culture to build upon, it is difficult to reach a consensus on present and future policies.[62]

Collective identity should play a functional part in the maintenance and existence of any societal system. Operating in the right political environment, collec-

59 The dependency theory, a set of explanations of the main predicaments of Third World countries, originated in Latin America and swept the intellectual horizons of many states, culminating in demands for a New International Economic Order in the 1970s and 1980s. Relying on the dependency theory, no Western analyst attempted to configure a theory of international society that would incorporate the perspectives and actions of peripheral states, particularly those of what came to be known as the Third World. K J Holsti, 'International Relations Theory and Domestic War in The Third World: The Limits of Relevance' in S G Neumann (Ed*) International Relations Theory and The Third World* (St Martin's Press, New York, 1998) 103, 107.

60 J F Bayart, *The State in Africa: The Politics of the Belly* (Longman, London, 1993) 20ff.

61 S Rokkan, 'Dimensions of State Formation and Nation-Building: A Possible Paradigm for Research on Variations Within Europe' in C Tilly, (Ed) *The Formation of National States in Western Europe* (Princeton University Press, Princeton, NJ, 1975) 598; David, above n 39, 134.

62 David, above n 39, 132–33.

tive identity could be a progressive force as a form of social organisation. Collective identity could foster national growth through interaction and social communication, increasing social stability and development as part of an individual and group commitment to an unencumbered national identity.[63] In order for Africa to successfully meet the demands of the new order, it will first have to resolve its emerging social and political instability issues.

63 J S Himes, 'The Functions of Racial Conflict' (1966) 45 *Social Forces* 1-10.

Rethinking Nationality in International Humanitarian Law

Kim Rubenstein

> The accused was a citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of Bosnia and Herzegovina at the time of the alleged crimes[1]

In this description of Dusko Tadic, the War Crimes Tribunal for the Former Yugoslavia identified three forms of identity or membership of the accused. Tadic was a citizen of the former Yugoslavia therefore his formal nationality was Yugoslavian. Yet that was not his sole identity; his ethnicity was Serbian. Moreover, where he lived was relevant; his residential 'identity' was the Republic of Bosnia and Herzegovina.

What does this description, and indeed the way humanitarian law values a person's nationality, tell us about the significance of membership in humanitarian law?[2] Why didn't they identify his family status as a son or father, brother, husband? What is his religion? His gender is self-explanatory through language pronouns – is this relevant? Through the evidence we discover that Tadic was also a café owner, karate instructor and part-time traffic cop – different communities of people were relevant to his life experience.[3]

Nationality has been central to law's understanding of membership. Moreover, the formal legal relationship between the individual and the state is that of citizenship – or nationality.[4] However, as this paper argues, various forces in the international

1 Opinion and Judgment of Trial Chamber, Prosecutor v Tadic, Case No IT-94-1-T, 7 May 1997 at para 1.

2 This paper is part of a project reviewing the way law determines membership in an international framework, examining the continuing relevance of 'nationality' in international law. The author was a Visiting Fulbright Senior Scholar at Georgetown University Law School in 2002-2003 where she laid the groundwork for this paper.

3 See description in Michael P Scharf, 'Case Note, Prosecutor v Tadic, May 7, 1997' (1997) 91 *American Journal of International Law* 718.

4 Citizenship and nationality can be distinguished in a technical legal sense. While essentially the same concept, they reflect two different legal frameworks. Both terms identify the legal status of an individual in light of his or her state membership. But the term citizenship is confined mostly to domestic legal forums, and the term nationality to the international law forum. As Weis states '[c]onceptually and linguistically, the

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 89-104.*
 ISBN 90 04 14599 0.

context, including globalisation and the contrasting phenomena of fragmentation, express tensions besetting traditional notions of state membership in an international framework.[5]

This paper begins by looking at some of the issues underpinning the larger question of the role of nationality in humanitarian law. It then explores those questions in the context of the former Yugoslavia and in particular through the judgment of the War Crimes Tribunal for the Former Yugoslavia in the case of *Tadic*.[6] It argues that nationality should not necessarily be determinative when applying humanitarian law.

The Impact of Globalisation

Globalisation is a contested term. In globalisation I am essentially referring to the continued effect of the internationalisation of the world framework. I am not discussing a world without states, rather states fundamentally altered by the growth and interconnection of relationships between states and individuals around the world. This is not to say that the state is obsolete or that globalisation is an entirely new phenomenon. What is new is the rapidity of the assault upon the state by the quickening turns of globalisation. Sovereignty has necessarily been altered without being abolished. States hold their place as key planks in the world system though they are no longer the only important actors.[7] Globalisation has transformed and will continue to revise the extent to which the ship of state is sovereign.

Many international law scholars have discussed the impact of globalisation on international law. Edith Brown Weiss, for instance, looks at the growth of actors in the international legal system in discussing globalisation's impact on governance in international law.[8] In another context Anne Marie Slaughter discusses globalisation

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terms…emphasize two different aspects of the same notion….'Nationality' stresses the international, 'citizenship' the national, municipal aspect'. Paul Weis, *Nationality and Statelessness in International Law* (1956 Sijthoff & Noordhoff) at 5.

5 This contrast between globalization and fragmentation is often highlighted in literature about the impact of globalization. See for instance, Edith Brown Weiss, 'The Rise or the Fall of International Law?' (2000) 69 *Fordham Law Review* 345 at 345. However, as she argues, the newness is that both are happening at the same time, requiring rethinking of the distribution of authority in international relations and law.

6 Above n 1 and later decisions on appeal as cited further below.

7 In fact Paul Kennedy argues that even if the autonomy and functions of the state have been eroded by transnational trends, no adequate substitute has emerged to replace it as the key unit in responding to global change. See Paul Kennedy, *Preparing For The 21st Century* (1994 Vintage) 134 and Paul Hirst and Grahame Thompson 'Globalization and the future of the nation state' (1995) 24 *Economy And Society* 408.

8 Weiss above n 5. Weiss highlights also the growth of international organizations at noting the number of intergovernmental organizations in 1998-1999. The 2001-2002 edition of the Yearbook of International Organizations records 6743 intergovernmental organizations and 47098 nongovernmental organizations for a total of well over 50,000 international organizations. Weiss above n 5 at 350.

and the growth of international networks and their impact on international law.[9] Neither of those analyses however consider the consequences for the legal status of nationality.

Globalisation does alter the centrality and significance of national membership. Indeed, Scholte in discussing globalisation recognises that:

> Supraterritorial networks have given many people loyalties (for example, along lines of class, gender and transborder ethnicity) that supplement and in some cases override state-centered nationalism. In addition, many people in the contemporary globalizing world have become increasingly ready to give 'supraterritorial values' related to, say, human rights and ecological integrity a higher priority than state sovereignty and the associated norm of national self-determination over a territorial homeland.[10]

If globalisation changes the absolute sovereignty of states it then must have an impact on traditional statist views that impact upon humanitarian law. Whether one places it into the framework of globalisation or not, the entire development of human rights law and its emphasis on the individual has been a powerful force in moving the attention away from the state and towards the individual in the international legal framework.

The human rights framework is part of David Held's construction of a model of cosmopolitan sovereignty. Cosmopolitanism is the other end of the spectrum to statism. This too is a contested term,[11] varying from the universal citizen to citizens who have a 'wide variety of affiliations' ranging from the local to the global.[12] David Held develops a view of cosmopolitanism in international law arguing:

> [p]eople would in principle come to enjoy multiple citizenships - political membership, that is, in the diverse political communities that significantly affect them. In a world of overlapping communities of fate, individuals would be citizens of their immediate political communities, and of the wider regional and global networks that impact upon their lives. This overlapping cosmopolitan polity would be one that in form and substance reflects and embraces the diverse forms of power and authority that operate within and across borders.[13]

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9 Anne-Marie Slaughter, 'Governing the Global Economy through Government Networks' in Byers (ed.) *The Role of Law in International Politics: Essays in International Relations and International Law* (2000 Oxford University Press).

10 Jan Aart Scholte, 'Civil Society and Democracy in Global Governance'. (2002) 8 *Global Governance* 281 at 288.

11 See Kimberley Hutchings and Roland Rather (eds) *Cosmopolitan Citizenship* (1999 St Martins).

12 See also Paul Berman, 'The Globalization of Jurisdiction' (2002) 151 *University of Pennsylvania Law Review* 311.

13 David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1 at 33.

However one looks at the way membership plays out in the current international framework, nationality is not the only relevant membership. This is not to deny the continued relevance of nationality in certain contexts. Rather, it should not be the central or sole legal status relevant to law, particularly humanitarian law. Nationality should be just one of many different memberships relevant to issues requiring legal resolution in conflict scenarios.

The Political Framework and Context of the Former Yugoslavia

The former Yugoslavia and the turmoil within that geographic region is an example of fragmentation. Some may argue it reflects the opposite forces to globalisation. If globalisation represents the lessening value of borders and the nation-state, fragmentation is about the creation of new states within states, and the breaking down of former states.

Maivan Clech Lam seeks to explain this situation:

> At first glance, the ongoing compulsion of some ethnic groups to mutate into new nation-states at a time when globalisation is rendering the institution of the state itself increasingly impotent appears incomprehensible. On closer inspection, however, a certain logic emerges that suggests that globalization is driving the engine of nationalism. To begin with, since transnational institutions increasingly make the economic decisions that affect national, as well as local communities, the latter understandably seek direct access to such institutions so as to influence it. To date, there is but one way of accessing the WTO, the IMF and the World Bank – and that is to become a state.[14]

The political situation that gave rise to the turmoil in the former Yugoslavia and the crimes that occurred raise significant political issues about membership and the relevance and role of nationality in determining legal issues. Feminist scholarship on the political situation in the former Yugoslavia enhances this critique of nationality. Christine Chinkin and Kate Paradine[15] examine the gendered meanings of the concepts of democracy, citizenship and human rights in the context of the General Framework Agreement (GFA) for Peace in Bosnia and Herzegovina negotiated in 1995. In their section looking at Human Rights and the GFA they write:

> Women in Bosnia and Herzegovina are trapped in a concept of citizenship that is defined along nationalist lines, demarcated by legally drawn borders and enforced by the international community in a way that leaves little room for negotiation. The

14 Maivan Clech Lam, 'Between Nationalism and Feminism: Indigenous Women, Community and State' in Richard, S, Martha, M and Rose Markus, H (eds), *Engaging Cultural Differences in Liberal Democracies* (2002 Russell Sage Foundation) 271.

15 Kate Paradine and Christine Chinkin, 'Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords' (2001) 26 *The Yale Journal of International law* 103.

> collusion of nationalism with religious affiliation that was furthered by war means that women's experience of citizenship is also constrained by religious stipulations. The West simply failed to investigate the reality of nationalism as inevitably sexist and antithetical to women's experience of choice. The internal borders are legally constructed as porous, in that freedom of movement of persons, goods and capital is guaranteed throughout Bosnia and Herzegovina. The GFA also recognizes the possibility of ethnic association across external borders but it does not explicitly mention other forms of external association. However, the free movement of persons across the Entities is an illusion when other identities – family, gender, neighbors – have been destroyed by the violence perceived primarily in ethnic terms.[16]

The inherent nationalism in 'nationality' as a legal concept does not always sit well with individual experiences of identity or membership. Moreover, the extract highlights the varying memberships relevant to an individual's experience in any given situation.

The difficulty that law has in dealing with different memberships has been highlighted by other scholars, and in a range of contexts. As David Wippmann writes in the introduction to his edited collected on international law and ethnic conflict:

> ethnic conflict is not ... an ordinary or natural category for legal analysis. In keeping with its Westphalian underpinnings, international law tends to compartmentalize issues pertaining to armed conflict along state lines. As a result, armed conflicts are typically characterized and analyzed as international, internal, or mixed, with important consequences turning on those distinctions. In legal theory, the ethnic character of such conflicts is generally of little importance.[17]

It is the argument of this paper that nationality should not be the only form of membership relevant to law in its understanding of legal issues evolving from the pressures of fragmentation and globalisation.

Humanitarian Law and Nationality

A person's nationality has been fundamental to the characterisation of rules applying to war-like situations and the personal criminal accountability of aggressors towards victims.[18] First, nationality is intrinsically linked to national sovereignty and sovereignty is relevant to humanitarian law. As Meron has argued 'the sovereignty of states and their insistence on maintaining maximum discretion in dealing with those who threaten their 'sovereign authority' have combined to limit the reach of

16 Ibid.

17 David Wippman (ed.) *International Law and Ethnic Conflict* (1998 Cornell University Press).

18 See further Renee Provost, *International Human Rights Law and Humanitarian Law (*2002 Cambridge University Press) at 37-42.

international humanitarian law applicable to non-international armed conflicts.'[19] In looking at the place of civilians in war, much attention is directed to the limitation on humanitarian law in its characterisation of conflict.[20] Second, the interpretation of non-international armed conflicts is crucial to the breadth of application of humanitarian law. The nationality of the victim and the aggressor can be determinative of whether humanitarian law operates in a given situation.

Humanitarian law regarding armed conflict[21] is broken down into different types of conflict scenarios. There are rules that apply to international or inter-state armed conflicts, rules for non-international armed conflicts (as defined under the 1977 Additional Protocol II of the Geneva Conventions) and internal armed conflicts as defined under common Article 3 of the 1949 Geneva Conventions[22] and rules that apply to national liberation armed conflicts.[23] These are all distinct from laws regarding genocide and crimes against humanity that are *not* limited to the existence of an armed conflict. Indeed, humanitarian law in its larger sense, through the laws of crimes against humanity and genocide, has indirectly addressed the notions of harms to individuals rather than being strictly caught up with a person's nationality. So the laws against genocide allow for broader identifications of race, religion, and ethnicity and are not fixed solely on questions of nationality. The same is true for crimes against humanity.[24]

Yet the centrality of nationality to other parts of the humanitarian law framework has been simmering in various jurisdictions. For example, in 1968 the Privy Council decision *Public Prosecutor v Koi*[25] examined the Geneva Conventions as implemented through the Malaysian Geneva Conventions Act 1962.[26]

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19 Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554. In writing the article though in 1995, before the Tribunal had made some of its early determinations, Meron was of the view that the Security Council's Criminal Statutes for the former Yugoslavia and Rwanda have contributed significantly to the development of international humanitarian law and its extension to non-international armed conflicts, citing James C O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia'. (1993) 87 *American Journal of International Law* 639.

20 See Simon Chesterman (ed.) *Civilians in War* (Lynne Rienner 2001).

21 This is separate to the concept of 'war' which in international law has been even more restrictive. See Renee Provost, above n 18 at 248.

22 The 1949 Geneva Conventions are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention (III) relative to the Treatment of Prisoners of War, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

23 Article 1(4) Additional Protocol I, 1977. See also above n 21 at 247-248.

24 I thank the anonymous referee for this chapter for suggesting I emphasise this distinction.

25 [1968] 1 All ER 419.

26 I am grateful to Professor Peter Rowe for his suggestion I look at this decision.

The case involved accused who were 'so called Chinese Malays either born or settled in Malaysia but in no case was it shown whether or not they were of Malaysian nationality.'[27] They were charged with offences under the *Internal Security Act* 1960 of the Federation of Malaysia and sentenced to death. They had acted as paratroopers, dropped in Johore under the command of Indonesian Air Force officers, at a time when Malaysia and Indonesia were in armed conflict.

The question arose whether the accused were protected by the Geneva Conventions relative to the treatment of prisoners of war, as implemented in Malaysia by the Geneva Conventions Act 1962. Lord Hudson's judgment discusses the issue of nationality and the provisions[28] leading to:

> an assumption that a 'prisoner of war' is not a 'national of the detaining power'. Moreover the reference in the provisions to a 'duty of allegiance' might fairly 'suggest the further inference that a person who owes this duty to a detaining power is not entitled to prisoner of war treatment.[29]

In this majority judgment the notion of allegiance to the detaining power was central to the fact that the accused could not rely on the Geneva Convention, although it did not develop in detail how one would determine that allegiance.[30] The accused had unsuccessfully sought to argue that nationality was irrelevant, and that they were protected by the Convention.

A more current and poignant example of the problem of nationality and the disjuncture between humanitarian law and the reality of a dispute can be illustrated through the jurisdictional questions challenging the Judges in the War Crimes Tribunal for the Former Yugoslavia.

Humanitarian Law and Its Application in the Former Yugoslavia

The rules incorporated and made applicable to the crimes committed in the former Yugoslavia are set out the Statute of the UN International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY). The Statute also establishes the jurisdiction of the Tribunal.[31]

The ICTY has jurisdiction over natural persons[32] who allegedly committed grave breaches of the Geneva Conventions of 1949,[33] violations of the laws or

27 [1968] 1 All ER 419 at 421

28 Such as articles 87 and 100.

29 [1968] 1 All ER 419 at 425.

30 The judgment refers in obiter to two important cases on allegiance: *Joyce v Director of Public Prosecutions* [1946] 1 All ER 186; [1946] AC 347 and *R v Neumann Transport* [1946] SALR (TPD) 1238.

31 The Statute is available at <http://www.un.org/icty/legaldoc/index.htm>.

32 Article 6 of the Statute.

33 Article 2 of the Statute.

customs of war,[34] genocide[35] and crimes against humanity[36] on the territory of the former Socialist Federal Republic of Yugoslavia since 1 January 1991.

The only explicit reference in the Statute to a distinction between international or internal war is found in Article 5 dealing with crimes against humanity:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, *whether international or internal in character*, and directed against any civilian population' (emphasis added)

In contrast, Article 2 of the ICTY Statute refers to the Grave Breaches provisions of the Geneva Conventions of 1949 but says nothing on its face about international or internal armed conflict. The breaches as specifically set out in the Statute include:

(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.

These grave breaches provisions are from the four Geneva Conventions of 1949.[37] As Oren Gross argues, 'it is no mere coincidence that the list of articles relating to the subject-matter competence of the Tribunal opens with an article which deals with grave breaches' as they 'constitute serious violations of the very core of international humanitarian law'.[38]

However, in order to satisfy the Geneva Convention requirements set out in Article 2 of the ICTY, there needs to be an international armed conflict. Unlike common Article 3 to the Four Geneva Conventions that applies to cases 'of armed conflict not of an international character', and the Protocols additional to the Geneva

34 Article 3 of the Statute.

35 Article 4 of the Statute.

36 Article 5 of the Statute.

37 The Conventions from which the Grave Breaches are drawn are Article 50, of the 1949 Geneva Convention 1 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Articles 130 of the 1949 Geneva Convention III Relative to the Treatment of Prisoners and of War and Article 147 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

38 Oren Gross, 'The Grave Breaches System and the Armed Conflict in the Former Yugoslavia' (1995) 16 *Michigan Journal of International Law* 783 at 785.

Conventions of 12 August 1949 which set out further provisions for 'cases of armed conflict not of an international character,'[39] the Grave Breaches provisions from the Four Geneva Conventions apply *only* in international armed conflicts.

Moreover they only cover 'protected persons'. 'Protected persons' are defined, in each of the Four Conventions.[40] In Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying power *of which they are not nationals*. (emphasis added)[41]

In addition, Article 4 of Geneva Convention IV continues to concentrate upon nationality:

> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.[42]

This is where nationality rears its head directly. It is also indirectly within the characterisation of the word international as 'inter' 'national' involves the concept of between nations and between individuals of opposing nationalities. Article 2 grave breaches crimes are different to the crimes against humanity[43] and genocide.[44] These are also within the jurisdiction of the ICTY and were specifically developed to include crimes committed against a State's own nationals, that is within nations.[45] The article 2 provisions are therefore the most traditional and narrow of the humanitarian law provisions.[46]

In commentary analyzing the creation of the ICTY before any cases were heard, there seemed to be overwhelming support for the notion that articles 2 and

39 These provisions of the Geneva Conventions that are not grave breaches may still be within the ICTY jurisdiction through Article 3 that provides jurisdiction over violations of the 'laws or customs of war'. See O'Brien above n 19.

40 Articles 13, 13, 4, and 4 of the respective Four Geneva Conventions.

41 Article 4 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

42 Ibid.

43 Article 5 of the Statute.

44 Article 4 of the Statute.

45 Although Meron argued that it was a shame that it was still linked to armed conflict. See Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *American Journal of International Law* 78 at 87.

46 I thank the anonymous referee of this chapter for suggesting I emphasise this distinction.

3 of the tribunal's jurisdiction would provide the basis of most of the Tribunal's work.[47] Moreover, there was much academic attention to whether the distinction between international and internal armed conflict would affect the working of the Tribunal.[48]

Theodor Meron was firmly of the view that because 'of the involvement of foreign actors, most internal conflicts are in fact mixed internal-international conflicts.'[49] Yet, he predicted that the accused in *Tadic* might argue that at the time of the alleged war crimes, there was no armed conflict or that the conflict was of internal rather than international character.[50] This argument had the potential to undermine the applicability of the rules to individual situations because, apart from article 5, the conflict would need to be characterized as international in order to operate.

In addition to the characterisation of armed conflict, the other requirement with the potential to limit the breadth of Article 2 was that the victim be a 'protected person'. Indeed, O'Brien foreshadowed the way in which nationality would become an issue when he argued, 'it should not matter that some combatants are citizens of the same nation-state.'[51] These questions became significant in the *Tadic* case.

Tadic

As one of the first trials and decisions of the ICTY significant jurisdictional questions were covered. This case involved several judgments touching upon the jurisdictional points.

The first decision of 10 August 1995 was a Trial Chamber determination on the Defence motion challenging the jurisdiction of the Tribunal. The decision contained significant statements on the characterisation of the conflict and the definition of 'protected person'. The case then went to the Appeals Chamber, which delivered its judgment on 2 October 1995.[52] The case was returned to the Trial chamber which delivered its opinion and judgment on 7 May 1997. Following that decision there was an appeal and cross-appeal resulting in a decision of the Appeals Chamber of 15 July 1999.[53]

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47 See O'Brien above n 19.

48 Ibid. See also Meron above n 45 at 80 where he states, 'Whether the conflicts in Yugoslavia characterized as internal or international is critically important.'

49 Meron above n 45 at 81. Moreover, he argues that the establishment of the Tribunal 'constitutes a determinations that the conflicts in Yugoslavia are international in character' at 82. In another article Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 *American Journal of International Law* 236, he refers to the other academics who supported this approach as well as the views of the UN Commission of Experts at 238 who supported this view.

50 Meron above n 19 at 80.

51 O'Brien above n 19 at p 647.

52 Its statements on the questions of jurisdiction have also been important.

53 Two later judgments regarding allegations of contempt against prior counsel were also heard in 2000 with the judgment being handed down on 30 July 2002.

As explained in the introduction, Dusko Tadic was described by the Trial Court as a 'citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of Bosnia and Herzegovina at the time of the alleged crimes'[54] This highlights three types of membership; his nationality as a 'citizen of the former Yugoslavia', his ethnicity as a 'Serb' and his residence in the Republic of Bosnia and Herzegovina. This reminds us that these three categories of membership are relevant and, perhaps the ordering shows a preference or priority to nationality over ethnicity and of ethnicity over residence? Yet, as set up in the introduction to this chapter, it also leaves out other forms of membership that may be relevant to Tadic's identity. His family status, his religion and his gender might be relevant. The evidence also indicates Tadic was a café owner, karate instructor and part-time traffic cop. Like any individual, different communities of people were relevant to his life experience,[55] yet some aspects of a person's identity are not necessarily given any legal value. Indeed, the critical legal membership in humanitarian law, regarding Tadic's criminal accountability for the grave breaches provisions, involved his citizenship/nationality. Each membership status was relevant to the characterisation of the conflict as either international or internal and to the legal status of his victims.

In its decision of 10 August 1995 the Trial Chamber held that it did not need to determine which type of conflict existed in the region where the alleged crimes were said to have occurred. It viewed the references to the crimes in Articles 2 to 5 of the statute as being independently part of customary international law, and therefore the element of internationality was not a criterion of jurisdiction for the Tribunal. However, the Trial Chamber did accept that the definition of 'protected person' involved the Tribunal going to the Convention definition although, in this particular instance there had been no case made denying that status –ultimately it would be a matter of evidence.[56]

The Appeals Chamber determined the question of the classification of the conflict differently to the Trial Chamber. It held that the Security Council had purposely left the categorisation of the conflict to the Tribunal[57] and supported its conclusion by what it termed a *reductio ad absurdum* argument.[58] The centrality of nationality to this argument is best set out in this extract:

> If the Security Council had categorized the conflict as exclusively international, and in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities in Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that

54 Opinion and Judgment of Trial Chamber, Prosecutor v Tadic, Case No IT-94-1-T, 7 May 1997 at para 1.

55 See description in Scharf above n 3.

56 See Prosecutor v Tadic, 10 August 1995 at paras 49 and 53.

57 See Prosecutor v Tadic, 2 October 1995, Case No IT-94-1-AR72 at para 76.

58 Ibid.

> the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian-Serbian civilians in their power would not be regarded as 'grave breaches', because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as 'protected persons' under Article 4, para 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as 'grave breaches' because such civilians would be 'protected persons under the Convention, in that Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument.[59]

Commentators have found the distinction based on nationality of aggressor and victim unconvincing[60] and potentially dangerous.[61] Moreover, Greenwood argues:

> It should not be presumed, especially for a purpose such as the application of humanitarian law, that when a State breaks up into a number of new States as a result of a secession of parts of its territory and the secession is opposed by force of arms so that an armed conflict occurs between the old State and a seceding entity or being the various successor States to the old State, all residents of one of the seceding territories automatically take the nationality of the State created by that secession, irrespective of their wishes (perhaps violently expressed) to remain part of the old State or to become part of one of the other successors.
>
> In the case of Bosnia Herzegovina, before it became an independent State all members of the Bosnian population were citizens of Yugoslavia. It is far from clear that on independence, members of the Serb community who opposed that independence should be regarded as having become the nationals of Bosnia -Herzegovina, rather than retaining some form of Yugoslav (or perhaps Serbian) citizenship. Such a possibility was in fact, expressly mooted by the Arbitration Commission of the International Conference for the Former Yugoslavia as early as January 1992. - See Opinion No 2, 92 ILR 167.[62]

This analysis is poignant for different reasons. First it raises the question of the power to determine nationality. Ultimately a state determines its own nationality

59 Ibid.

60 George Aldrich, 'Jurisdiction on the International Criminal Tribunal for the Former Yugoslavia,' (1996) 90 *American Journal of International Law* 64.

61 Christopher Greenwood, 'International Humanitarian Law and the Tadic Case,' (1996) 7 *European Journal of International Law* 265 at 273.

62 Ibid.

and arguably the Tribunal would need to examine the citizenship statutes of the states to determine this issue. This would be reaffirming the sovereignty of the state in determining its own members. Secondly, there is the more profound question of the relevance of nationality in this type of conflict. Does this definitional requirement of nationality reflect the object and purpose of humanitarian law? Is nationality of relevance in this scenario? Why is nationality still privileged in this way?

When the Trial Chamber came to hear the evidence it had to apply the Appeals Chamber approach to the facts before it – to determine whether in fact the crimes fell within Article 2 – whether the conflict was international at the time of the crimes and whether the victims were protected persons – i.e. not nationals of the aggressor. In its 7 May 1997 judgment, a majority of the Tribunal found that 11 counts charging Grave Breaches of the Geneva Convention of 1949 were inapplicable. It held that Article 2 only applied to citizens of the Republic of Bosnia and Herzegovina who actually found themselves in the hands of the Yugoslavia People's Army before 19 May 1992 or the Army of the Federal Republic of Yugoslavia and Federal Republic of Yugoslavia after 19 May 1992.

Such a legalistic approach preferences the formal legal status of nationality and does not question the relevance or significance of other forms of membership relevant to the conflict. The prosecution appealed this aspect of the judgment,[63] and the Appeals Chamber reviewed the specific question of the formal approach to nationality in the definition of 'protected person' in the Geneva Convention.[64]

The Appeal Chamber took a different approach on the question of 'nationality'. First, it highlighted that the preparatory work[65] to the Geneva Convention intended to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they found themselves, were refugees and thus no longer owed allegiance to the state and no longer enjoyed its diplomatic protection. One example identified relevant to that earlier period was that of German Jews fleeing Europe.

But more importantly it stated:

> This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern

63 The case involved both Defence Appeals and Prosecution Cross Appeals.

64 As the Appeals Chamber noted, it was the first time that the Appeals Chamber decided an appeal from a final judgment of a Trial Chamber. *Prosecutor v Tadic*, 15 July 1999, para 1.

65 Footnote 204 of the Appeal Chamber judgment states: 'The preparatory works of the Convention suggest an intent on the part of the drafters to extend its application, *inter alia*, to persons having the nationality of a Party to the conflict who have been expelled by that Party or who have fled abroad, acquiring the status of refugees. If these persons subsequently happen to find themselves on the territory of the other Party to the conflict occupied by their national State, they nevertheless do not lose the status of 'protected persons' (*see Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II, pp. 561-562, 793-796, 813-814).

> inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[66]

In this approach we see the shift from nationality to ethnicity as the crucial membership in legal terms.

The Trial Chamber in another ICTY decision, Celibici, may have influenced this approach.[67] In that judgment significant attention was directed to the question of nationality in international law. It drew on the *Nottebohm* judgment as well as other commentary[68] and questioned the effective link between an individual and a state. The Trial chamber was of the view that 'provisions of domestic legislation on citizenship in a situation of violent state succession cannot be determinative of the protected Status of persons caught up in conflicts which ensue from such events.'[69] This is a significant move away from both the sovereignty of the nation-state in general terms, but more specifically the sovereignty of the state in determining its own nationals and finally a move away from the relevance of nationality in humanitarian law.

It is interesting, though, how the judgment in *Tadic* identifies notions of allegiance as useful in determining membership. This approach is also part of a mindset that better understands singular forms of membership or identity over multiple memberships. This is perhaps understandable in a wartime framework where allegiance can be more central than in other periods. Yet allegiance is a complicated notion and singular allegiance is being challenged in a variety of different contexts in law and practice.[70]

Conclusion

As the cases in the ICTY show, nationality should not be the only identity relevant to the determination of the grave breaches provisions. Indeed, a layered and

66 *Prosecutor v Tadic, 15* July 1999, para 166.

67 *Prosecutor v Delalic et al* 16 November 1998.

68 Ibid at paras 245-266.

69 In coming to this view the Tribunal quotes often from Bartram Brown, 'Nationality and Internationality in International Humanitarian Law'. (1998) 34 *Stanford Journal of International Law* 351.

70 It is in this context that globalisation and its impact upon nationality returns to focus, because part of the complication inherent in notions of allegiance is determining what allegiance means when people have connections to more than one place or people or sense of community.

fluid approach to questions of membership and identity should be applied to other aspects of international law in practice. No doubt, the fact that international law has been directed traditionally to states has been fundamental to the current significance of nationality. Moreover, in determining the link between the individual and the state, nationality or citizenship has been the crucial factor. However, humanitarian law is an example of international law applying directly to the individual. It imposes criminal responsibility on individuals as well 'often in addition to the state's international responsibility'.[71]

In light of developments in the international legal framework, it is time to shift membership from questions of nationality and include other membership identities depending upon the context of dispute. In the context of the former Yugoslavia, ethnic differences were of paramount concern in the conflict that evolved. The approach of the appeal chamber in *Tadic* reflects a move away from formal notions of nationality, which should now be reflected in the Geneva Conventions themselves.[72]

More broadly, it is time to consider and re-evaluate other areas of international law that use nationality to determine legal principles. Here I have attempted to draw out the conflicting issues and forces shaping the shifting notions of membership. The forces of globalisation and regionalism, integration and disintegration are always in flux and are difficult to capture even in snapshot. Perhaps then, what we are after is a set of tools to help us better examine and determine core values of membership. Nationality has its uses but only takes us so far and, beyond that point, it is an inflexible instrument that leads to unjust outcomes.

We are at a point when we need to think of using other tools to help us better define appropriate meanings of membership. And in concluding with method and approach rather than anything definitive, let me shift with the wont of my slippery subject to the political practice or dialogue that feminists have sought to promote known as 'transversalism'. Transversalism is an intellectual tool that encourages flexibility when examining membership. It holds that a person is 'rooted in [their] own identity, but mov[es] to appreciate another's position' and that this 'process of dialogue across differences' can '[lead] to a different kind of coalition politics' where participants 'respect rather than bury differences'[73] Hilary Charlesworth and

71 Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554 at 562.

72 The Geneva Conventions are under review, although this specific issue in not central. See <http://www.crimesofwar.org/expert/genevaConventions/gc-intro.html> and the Harvard Program on Humanitarian Policy and Conflict Research (HPCR) at <http://www.hsph.harvard.edu/hpcr/ihl_research_meeting.htm>.

73 Robin Teske, quoting Mary K. Meyer, 'Gender Politics in the Northern Ireland Peace Process: A Case Study of the Transversalist Politics of Northern Ireland Women's Coalition in Partial Truths and the Politics of Community' in Robin Teske (ed.) *Partial Truths and the Politics of Community* (2003 University of South Carolina Press) and Robin Teske, 'Thinking about Feminism, International law and International Relations' in *The Measure of International law: Effectiveness, Fairness and Validity,* Proceedings of the Annual Conference of the Canadian Council on International Law Series' (2003 Kluwer Law International).

Christine Chinkin recognise the value of the shifting concept in international law 'in its emphasis on the multiplicity of women's stories and the range of their cultural, national, religious, economic and social concerns and interests'.[74] Transversalism should be a guiding principle when grappling with shifting and multiple memberships evolving rapidly in a world well past nationality as a sole determinant of connection or belonging.

74 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Juris Publishing 2000) at 51. Note they refer to N Yuval Davis 'Women Ethnicity and empowerment' in A Oakley and J Mitchell (eds) *Whose Afraid of Feminism? Seeing through the backlash* (1997 Hamish Hamilton) at 13 where Yuval Davis distinguishes 'transversalim from universalism because universalism assumes a homogenous point of departure ending up being exclusive rather than inclusive.'

The Role of International Courts and Tribunals in Relation to Armed Conflict

Caroline Foster[1]

> A great judge once observed that the laws are not silent amidst the clash of arms. In our age we need also to assert that the laws are not powerless to prevent the clash of arms.[2]

Introduction

International courts and tribunals have an important role to play in relation to the prevention of armed conflict. A close examination of the matters brought before international adjudicative bodies reveals four types of activity through which these institutions are able to make increasing and significant judicial contributions to international order.

Firstly, following armed conflict or episodes involving the use of force international adjudication offers an authoritative public process for assessing the legality of the use of force or the manner in which a conflict has been conducted. Through this process the law on use of force and armed conflict is reinforced and developed.

Secondly, where courts and tribunals settle disputes over the location of boundaries they may remove a source of friction between disputants that otherwise could have prolonged or resulted in armed conflict. This process involves a quasi-legislative

1 My thanks to Professor Bruce Harris and Treasa Dunworth of the University of Auckland, Dr. Barbara Von Tigerstrom at the University of Canterbury and Professor Vaughan Lowe, Chichele Professor of International Law at the University of Oxford, for comments on drafts of the article, as well as to the reviewer consulted by the editors, whose comments led to inclusion in the article of a more closely focused analysis on the subject of the preservation of human life through provisional measures orders. Responsibility for the views and analyses conveyed in the paper remains my own. The article reflects the law as at February 2004.

2 Weeramantry J, Dissenting Opinion, *Legality of the Use of Force (Serbia and Montenegro v. Belgium)* 199 in the context of the Court's decision declining to order provisional measures, below, note 28. The Judge is here reiterating the identical comment he had made in his Dissenting Opinion in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America)*, where the Court also declined to order provisional measures, below, note 96.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 105-144.*
 ISBN 90 04 14599 0.

activity, with courts and tribunals establishing a territorial framework for the parties' more peaceful future interaction.

Thirdly, in some cases, international courts and tribunals may indicate provisional measures with a view to restraining armed hostilities. Difficult and engaging questions about the role of international courts and tribunals arise in relation to the indication of provisional measures in such circumstances, contributing to debate about the complementarity of such judicial activity with the exercise by the Security Council of its powers under Chapter VII of the United Nations (UN) Charter. At present, the strongest legal foundation on which international adjudicatory bodies may indicate provisional measures expressly for the purpose of preventing further loss of life consists of the close interconnection between individuals' interests in the preservation of life and the rights of States at issue in disputes involving armed conflict.

Fourthly, from time to time the International Court of Justice is requested to give an Advisory Opinion on questions connected with actual and potential armed conflict. The appropriateness of such requests is a heavily contested issue.

The shortcomings and failures of the UN multilateral security system are often considered in contemporary discussion, and events since the turn of the millennium have provoked further controversy on this issue. This paper does not seek to contribute to that debate. That international law cannot guarantee a peaceful world is clear. This paper focuses instead on an area of activity in international law through which a contribution can be made to the prevention and reduction of international armed conflict: States' submission of their legal disputes to international courts and tribunals.[3] The discussion in the following pages demonstrates that international adjudicatory bodies are increasingly playing a significant role in relation to armed conflict.[4]

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3 As in the case of the system of collective security operated under the UN Charter, the characteristics of the present work of international courts and tribunals are the result of an evolutionary process. Towards the end of the 1800s there came to be an increasing reliance upon judicialised arbitration to resolve disputes and an emergence of legal imperatives to seek the judicial settlement of international disputes before contemplating war. Collier, John and Lowe, Vaughan, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press, 1999) 32. The gradual development of this change in attitude has led to the widespread use of international adjudicatory mechanisms by States to resolve some of their more difficult disputes today. Commentary on international adjudication has entered a new era and numerous texts, articles and festschrifts offer insightful perspectives on the various issues of substance and procedure that call for attention as applicable international law and practice develop.

4 Legal issues arising under the laws of war are certainly taking a higher profile than ever before on the dockets of international courts and tribunals. For another contemporary discussion on this subject, see Gray, Christine, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after *Nicaragua*' (2003) 14 *European Journal of International Law* 867-905, published as this paper was being finalized. Gray notes at 885f that a majority of the cases before the International Court in recent years have concerned armed conflict and that there are very few reservations to the Court's optional jurisdiction clause in relation to disputes involving the use of force. Also key to the analysis later in this paper is an article titled 'Interim Measures for the Protection

As noted above, the paper identifies and considers four forms of activity through which international courts and tribunals now play an identifiable role in relation to armed conflict: the ascertainment of legal responsibility for breaches of international law, the settlement of disputes over the location of boundaries, the indication of provisional measures, and, in the case of the International Court of Justice (the International Court), the granting of Advisory Opinions on questions connected with actual and potential armed conflict. Although many of the cases considered in the paper have been decided by the International Court, reference is also made to decisions by international arbitral tribunals. The focus of the paper is on State-to-State disputes; it does not address either the role of international criminal tribunals, including the International Criminal Court, in determining individual responsibility for non-compliance with the laws of armed conflict, or the contribution of post-conflict claims commissions.[5]

Particularly challenging questions arise in connection with international judicial bodies' powers to order provisional measures, and the paper seeks to make a contribution to the hard question of whether or not international courts and tribunals have the legal authority to make interim orders for the express purpose of protecting lives. International judicial dicta and the special characteristics of the right to life provide the basis for an argument that would justify international courts and tribunals awarding provisional measures to safeguard human life. Such an argument entails breaking down the conceptual divide between the relevant rights of States and the right to life of individuals within States. Acceptance of this point of view would inject a new element into the debate about the respective roles of the International Court of Justice and the United Nations Security Council in relation to both the indication of provisional measures and the giving of Advisory Opinions. The envisaged result would be a greater appreciation for the role that may be played by international courts and tribunals in relation to armed conflict, and, perhaps, over time, better protection for individuals caught up in the disaster of such conflict.

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of Human Rights' by Rosalyn Higgins in Charney, Jonathan I., Anton, Donald K. and O'Connell, Mary Ellen (ed), 'Politics, Values and Functions: International Law in the 21st Century: Essays in Honour of Professor Louis Henkin' (Martinus Nijhoff, 1997) 87. See also Iwamoto, Yoshiyuki, (Lee), 'The Protection of Human Life through Provisional Measures Indicated by the International Court of Justice' (2002) 15 *Leiden Journal of International Law* 345.

5 A study of the role played by international criminal tribunals in relation to armed conflict could be expected to endorse the conclusion of this paper that the determinations of responsibility for breaches of international law carried out by international courts and tribunals may help reinforce the norms of international law even though these determinations may be carried out only after armed conflict has ended, as discussed in section (ii) of this paper.

Ascertainment of Legal Responsibility for Breach of the Law on Use of Force and the Law of Armed Conflict

Most frequently the role of international judicial bodies in relation to armed conflict will be to offer retrospective assessments of States' compliance with their legal obligations after a conflict has taken place. The provision of an authoritative process for determining the legal responsibility of international actors after an event causing international discord is an essential feature of the role of international courts and tribunals in relation to armed conflict. Furthermore, in cases involving armed conflict this task has been carried out by international adjudicatory bodies in such a way as to underline the significance of the law at issue. The following paragraphs discuss a number of cases addressing compliance respectively with the law on use of force (the *ius ad bellum*) and the law of armed conflict (the *ius in bello*).

In considering the role of international courts and tribunals in reinforcing the law on use of force the judgment of the International Court in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* of 6 November 2003 merits a close examination.[6] This was the Court's first substantive judgment dealing with the law on use of force since its 1986 judgment in the *Case Concerning Paramilitary Activities in and against Nicaragua*.[7] The timeliness of the *Oil Platforms* judgment was undeniable,[8] and the Court's approach to the subject matter of the case intriguing: the International Court foregrounded in its reasoning as well as in its dispositif the Court's rejection of United States' claims that its attacks on certain Iranian oil platforms during the Iran-Iraq war were justified under the law on self-defence. The *Oil Platforms* case and the *Nicaragua* case together comprise the Court's fullest work on the application of the law on the use of force, with both cases focusing inter alia on the extent of States' rights of self-defence.[9] Although the *Nicaragua* decision did not enhance the Court's popularity in the United States, it demonstrated the role of international courts and tribunals in setting out and applying international law on the use of force by States, whilst the *Oil Platforms* judgment drew attention anew to this role.

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6 *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment of 6 November 2003, ICJ Reports 2003.

7 *Case Concerning Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986 p. 14.

8 This point was made in the Separate Opinion of Judge Simma.

9 It will be recalled that in the *Nicaragua* case Nicaragua successfully complained to the Court about US support for the *contras* in Nicaragua. Nicaragua alleged US involvement in certain attacks on Nicaragua and in secret mine-laying. The Court found that it had jurisdiction based on the 1946 US Declaration under Article 36(2) of the Statute of the Court, and under a 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the US. The Court rejected the arguments of the US that its acts could be justified as collective self-defence. The Court held *inter alia* that the US had breached customary international legal obligations not to intervene in the affairs of another State, not to violate the sovereignty of another State and not to use force against another State. Above, note 7.

The two United States attacks in question took place in 1987 and 1988 respectively. On 19 October 1987 the United States attacked Iran's Reshadat and Resalat oil production complexes, claiming to be acting in self-defence after a missile attack three days earlier on the Sea Isle City, a Kuwaiti tanker that had been reflagged to the United States in an effort to protect it from assault. On 18 April 1988 the United States almost completely destroyed Iran's Nasr complex, again claiming to be acting in self-defence after the USS Samuel B. Roberts, a United States warship, struck a mine in international waters near Bahrain.[10] From the beginning there was some doubt regarding the United States' assertions that it was acting in self-defence. It was not always clear who was responsible for each of the many attacks in the Persian Gulf on commercial and military vessels during the war, the majority of which took place during the Tanker-War from 1984-1988.[11] Iran denied allegations that it was responsible for certain incidents and attributed them to Iraq.

The International Court of Justice had only limited jurisdiction in the *Oil Platforms* case. Neither Iran nor the United States presently accepts compulsory jurisdiction under Article 36(2) of the Court's Statute. In the event the Court found that jurisdiction might be founded on a compromissory clause in the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (the Treaty).[12] Iran requested the Court to find that the United States had breached its obligations to Iran inter alia under Articles I and X (1) of the Treaty and international law, and was under an obligation to make reparations to Iran. Article I of the Treaty of Amity provided that there should be enduring peace and friendship between the two parties, but in its 1996 decision on preliminary objections the Court rejected the idea that this provision offered a basis on which the Court might exercise jurisdiction.[13] However the Court found there to be jurisdiction in relation to the subject matter of Article X (1) of the Treaty, which provided that there was

10 On the occasion of each of these attacks the US notified the United Nations Security Council of its actions, consistent with its obligations under Article 51 of the Charter of the United Nations.

11 Lloyds listed 546 incidents, of which it attributed more than 200 to the Iranian military. Counter-Memorial of the United States, Exhibit 9, referred to in the Separate Opinion of Judge Kooijmans, para 11.

12 Article XXI (2) of the 1955 Treaty of Amity provided that: 'Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.' *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment of 12 December 1996 ICJ Reports 1996 p.803.

13 Article I of the Treaty of Amity provided that: 'There shall be firm and enduring peace and sincere friendship between the United States of America and Iran.' The Court held that although in principle a friendship treaty might be violated by the use of force (ibid, para 21) that was not the case here in light of the limited character of the Treaty of Amity as an economic and consular treaty. The Treaty's Article I provision could not be interpreted as a requirement that the parties abstain from the use of force against one another (ibid, paras 27-28). Accordingly the Court reached the view that Article I, taken in isolation, could not be a basis for the jurisdiction of the Court (ibid, para 31).

to be freedom of commerce and navigation between the territories of the two parties.[14] The United States denied that it had breached its obligations to Iran under this provision and at the same time asserted that its actions fell within Article XX (1)(d) of the Treaty of Amity, a security clause, which provided that the Treaty did not preclude a party's application of measures necessary to protect its essential security interests, or to fulfil its obligations for the maintenance or restoration of international peace and security.[15]

This security clause was the central element of the Court's 2003 judgment on the merits of the case. In examining the application of the security clause the Court decided to focus on an examination of whether the United States' recourse to force had been consistent with international law on the use of force in self-defence. The Court's logic was that a finding that the United States had used force inconsistently with relevant international law would dispose of the United States' claim that it was protected by the security clause, as Article XX (1)(d) could not have been intended to sanction the illegal use of force. As the Court observed, the issues of self-defence arising in the parties' dispute raised matters 'of the highest importance to all members of the international community'.[16] Furthermore, the Court decided, controversially, to begin by considering whether the United States' destruction of Iranian oil platforms fell within the security clause in Article XX (1)(d), and only after that to look at whether there had been a breach of the provision on freedom of commerce and navigation in Article X (1).

In the event, the Court considered insufficient evidence had been produced by the US to prove that the attacks on the Sea Isle City[17] and the Samuel B Roberts involved armed attacks on the United States by Iran.[18] Further, the attacks were not carried out consistently with the requirements of necessity and proportionality central to the legal use of force in self-defence, and could not therefore be considered to fall within the scope of the security clause in Article XX (1)(d) of the Treaty of Amity. In its finding that the attacks could not be regarded as having been necessary responses to the attacks on the two ships, the Court considered that United States assertions as to the military purposes for which the Iranian platforms were allegedly

14 Article X (I) of the Treaty of Amity provided that: 'Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.'

15 Article XX (1)(d) of the Treaty of Amity provided that: 'The present Treaty shall not preclude the application of measures: … *(d)* necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.' In an unsuccessful counter-claim the US also sought reparations, alleging, 'that in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-1988 that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty'. This claim was expanded during final submissions to refer also to danger and detriment to navigation.

16 Above, note 6, paras 37-38.

17 Ibid, para 61.

18 Ibid, para 72. It was possible that Iraq, rather than Iran, had launched the missile that struck the *Sea Isle City*. The evidence was inconclusive as to whether it was Iran that had laid the mine encountered by the *Samuel B. Roberts*.

used, including the assertion that the Reshadat platform had been used to monitor the movement of the Sea Isle City, were not backed by sufficient evidence.[19] Given these findings the Court concluded that the attacks on the Reshadat and Resalat complexes were neither necessary nor proportionate. Indeed, the Court noted that the United States admitted its attacks on the complexes were 'target(s) of opportunity'. The attack on the Salman and Nasr platforms also did not meet the criterion of proportionality. There had been no loss of life when the Samuel B. Roberts struck its mine, and even though the vessel had been severely damaged it had not been sunk.[20]

The Court then turned to the alleged breach by the United States of the provision on freedom of commerce and navigation in Article X (1) of the Treaty of Amity. It found that Iran had not established that the United States had breached this provision through its attacks on the oil platforms. The Reshadat and Resalat platforms were not producing oil at the time they were attacked, as they had been put out of commission by earlier Iraqi attacks.[21] The attack on the Salman and Nasr platforms did not interfere with freedom of commerce in oil, as the United States had already stopped all direct oil imports from Iran under an embargo imposed by Executive Order.[22]

A certain level of controversy was associated with the Court's decision to focus on assessing whether or not the United States' actions were consistent with the right to self-defence, rather than to deal first with the issue of whether there was an interference with freedom of commerce and navigation. In Separate Opinions a number of Judges emphasised strongly their view that the Court's finding in this case that United States actions were not consistent with international law on the use of force was not logically essential to its judgment, and that the crux of the Court's decision to dismiss Iran's claim was embodied in the finding that the United States had not breached the provision on freedom of commerce and navigation in X (1) of the Treaty of Amity.[23] Judge Higgins, Judge Buergenthal, Judge Parra-Aranguren and Judge Kooijmans considered the Court's finding on Article XX (1)(d) was inconsistent with or reversed its earlier decision on the jurisdiction of the Court.[24] On the

19 Ibid, para 76.

20 Ibid, para 77.

21 Ibid, para 92ff.

22 Ibid, para 94ff. In the Court's opinion, Article X (1) applied only to protect freedom of commerce and navigation between the territories of the two parties, and it was not relevant that the US attack might have affected any indirect commerce in oil between Iran and the US through the territories of third countries.

23 Those judges adopting this view considered that the finding on Article XX (1)(d) did not merit the place it was given in the Court's *dispositif*. They considered that the legal dispute arising between the parties was whether there had been an interference with commerce or navigation between their territories. Separate Opinion of Judge Higgins, paras 22 and 49; Separate Opinion of Judge Buergenthal, para 30; Separate Opinion of Judge Owada, para 12.

24 Separate Opinion of Judge Higgins, para 54; Separate Opinion of Judge Buergenthal, para 3ff; Separate Opinion of Judge Parra-Aranguren, para 14; Separate Opinion of

other hand, some members of the Court considered the Court should have gone further. They would have liked to see the judgment take a stronger position on the incompatibility of the US actions with international law on the use of force.[25]

The Court's attention in the *Oil Platforms* case to the limits in the law on use of force in self-defence is directly pertinent to the assertion that the involvement of international courts and tribunals in disputes concerning armed conflict is increasing, particularly if the view is taken that the Court was not required as a matter of legal logic to address that subject.[26] At a general level, a parallel may be drawn with the Court's 1986 *Nicaragua* decision.[27] In each case it might be said that the Court elected an approach that permitted it to make findings on the question of US compliance with the law on the use of force.

In considering the role played by international judicial bodies in assessing State responsibility for breaches of the law of armed conflict, reference should be made to the proceedings pending before the International Court of Justice in relation to events in the former Yugoslavia in the 1990s. Both the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*[28] involve

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Judge Kooijmans, para 52.

25 See the Declaration of Judge Ranjeva, Vice-President of the Court, the Dissenting Opinion of Judge Elaraby, the Separate Opinion of Judge Simma, and the Separate Opinion of Judge Rigaux, Judge *ad hoc* appointed by Iran. See also the Declaration of Judge Koroma, who supported the Court's approach.

26 At the same time, the Court's decision in the *Oil Platforms* case to focus its interpretation and application of the security clause in the Treaty of Amity on the question of the United States' compliance with the law on self-defence reduced its scope for authoritative comment on the relationship between national security interests and the free flow of international trade in oil. Judge Higgins notes 'the Court reduces to nil the legal interest in what was happening to oil commerce generally during the "Tanker War".' Separate Opinion of Judge Higgins para 51. It might be added that the merits of the US counter-claim on the physical interference to navigation in the Gulf engendered by the Iran-Iraq war were perhaps under-discussed in the Court's rather economically developed judgment. They received particular attention in the Separate Opinion of Judge Simma, who voted alone against the Court's findings on the US counter-claim, at paras 35ff. The Court held that US counter-claim under Article X failed for similar reasons as the Iranian claim, when the Court found that none of the affected vessels was engaged in commerce or navigation between the territories of the two parties.

27 Although in the 1986 *Nicaragua* case the US reservation to its Optional Clause Declaration precluded judicial assessment without US consent of US compliance with obligations under multilateral agreements, including applicable obligations under the UN Charter, the Court nevertheless found itself in a position to comment on the subject of US compliance with international law on the use of force. Delivering a judgment based on customary international law instead of the UN Charter, the Court ensured that its decisions in the *Nicaragua* case dealt broadly with US actions in terms of general law on the use of force, rather than in terms solely of the bilateral obligations of friendship owed by the US to Nicaragua under the 1956 Treaty.

28 Below, notes 80, 81, 82, and 83. As to developments in the definition of genocide that may be relevant in the Court's impending consideration of aspects of these two cases,

claims of genocide. The former proceedings also involve claims of the illegal use of force and breaches of the law of armed conflict. These cases are discussed further below in the section dealing with provisional measures. Although the legal arguments thus far have concentrated on jurisdictional issues the proceedings are of significance. Likewise the proceedings instituted by Yugoslavia against NATO States in relation to their actions in Yugoslavia in 1999 in the *Legality of the Use of Force* cases are of importance; these proceedings also involve claims of violations both of the law on the use of force and the law of armed conflict.[29] Yugoslavia alleges that NATO States engaged in the illegal use of force and committed breaches of the law of armed conflict. It also asserts that these States engaged in acts of genocide in the form of 'the deliberate infliction of conditions of life calculated to cause the physical destruction of a national group'. Yugoslavia has complained to the Court about the civilian deaths and injury resulting from the NATO campaign, as well as the damage caused to roads, railways, bridges, water supply, hospitals, industry, commerce, agriculture, schools, communications and cultural sites. The Court was not in a position to grant provisional measures when they were requested in 1999, because the Court did not consider *prima facie* that it had jurisdiction over the Legality of the Use of Force disputes.[30] Two of the cases lodged were removed from the Court's list for want of jurisdiction: those against Spain and the US.[31] Hearings on jurisdiction are still pending in Yugoslavia's cases against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the UK. While it may yet be found that there are jurisdictional barriers to the Court's consideration of these cases, the

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and in the *Legality of the Use of Force* cases, see below, note 100, reference should be made to the Judgment of 19 April 2004 in the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Radislav. Kristc* Case No: IT-98-33-A.

29 *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Provisional Measures, Order of 2 June 1999, ICJ Reports 1999 p.124. See also the Court's Orders of the same date in *Legality of Use of Force (Serbia and Montenegro v. Canada)*; *Legality of Use of Force (Serbia and Montenegro v. France)*; *Legality of Use of Force (Serbia and Montenegro v. Germany)*; *Legality of Use of Force (Serbia and Montenegro v. Italy)*; *Legality of Use of Force (Serbia and Montenegro v. Netherlands)*; *Legality of Use of Force (Serbia and Montenegro v. Portugal)*; *Legality of Use of Force (Yugoslavia v. Spain)*; *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*; *Legality of Use of Force (Yugoslavia v. United States of America)* ICJ Reports 1999.

30 Two main factors precluded a finding of *prima facie* jurisdiction in these cases. Firstly, Yugoslavia's Declaration accepting the jurisdiction of the International Court of Justice under Article 36(2) of the Court's Statute had not been lodged until a month after the beginning of the NATO bombing campaign, and this was found to preclude a finding of *prima facie* jurisdiction with respect to several of the respondents. Secondly, the Court was not prepared to find that the acts complained of by Yugoslavia came within the scope of the Convention on the Prevention and Punishment of the Crime of Genocide, under Article IX of which Yugoslavia also sought to invoke the Court's jurisdiction, and this was also found to preclude a finding of *prima facie* jurisdiction in all of the remaining cases.

31 Both Spain and the US have reservations to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, under which Yugoslavia sought to bring its case against them.

institution of proceedings has called attention to the significance of the legal obligations at issue.[32]

Judicial and quasi-judicial contributions to the reinforcement of the law of armed conflict have included two partial awards adopted in The Hague on 1 July 2003 by the Eritrea-Ethiopia Claims Commission, which addressed the treatment of prisoners of war (POWs) by these two States during their recent border conflict.[33] The decision dealt with the question of State responsibility for violations of the Geneva Conventions.[34]

Possibly the most intriguing aspect of the case before the Commission was the fact that, at the time the conflict commenced in May 1998, Eritrea had not become a party to the Geneva Conventions; it did so in August 2000. The Commission decided to operate on the basis that the provisions of the Geneva Convention relative to the Treatment of Prisoners of War (the Third Geneva Convention) were a reflection of customary international law, but indicated that it would hear argument on the point if one of the parties asserted this was not the case.[35] As with the findings of the Court in the *Nicaragua* case, the Commission's views on customary international law send a signal to international legal actors that obligations arise under customary international law even when a treaty is not in force between the parties. The Commission held that customary international law prohibited absolutely the

32 For a fuller picture of the situation it might be noted that the Committee established by the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia recommended against the institution by the Office of further investigation of alleged breaches by NATO of the law of armed conflict. The Committee noted that the numbers of civilian deaths and injuries reported in a compilation prepared by the Yugoslav Ministry of Foreign Affairs and relied upon by Human Rights Watch did not provide a basis for charges of genocide or crimes against humanity. The Committee did not consider in-depth investigation would be justified. 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the FRY' available at <www.un.org/icty/pressreal/nato061300.htm>.

33 *Partial Award – Prisoners of War Eritrea's Claim 17* Eritrea-Ethiopia Claims Commission 1 July 2003 (Eritrea's Claim); *Partial Award – Prisoners of War Ethiopia's Claim 4* Eritrea-Ethiopia Claims Commission 1 July 2003 (Ethiopia's Claim) 41 ILM 1057 (2002). The Commission was established under the Agreement signed in Algiers on 12 December 2000 between the government of the State of Eritrea and the government of the Federal Democratic Republic of Ethiopia. The Commission's task was to decide through arbitration claims for loss, damage and injury arising out of the parties' conflict, including those resulting from violations of international humanitarian law and international law more generally. The Commission was required by the Agreement to endeavour to complete its work within three years after the closing date for the filing of applications.

34 In this respect, the awards are in the same category as, for example, the proceedings that were instituted by Pakistan against India in the *Trial of Pakistani Prisoners of War (Pakistan v. India)* in 1973. Pakistan accused India of the genocide of 195 Pakistani prisoners of war and/or civilian internees in Indian custody. The proceedings were subsequently withdrawn. ICJ Pleadings, *Trial of Pakistani Prisoners of War*.

35 *Eritrea's Claim*, para 41; *Ethiopia's Claim*, para 32. For a fuller discussion of the Commission's reasoning, see the note by this author in (2004) *New Zealand Yearbook of International Law* titled 'The Partial Awards of the Eritrea-Ethiopia Claims Commission on the Treatment of Prisoners of War'.

killing of POWs, and required them to be evacuated from the battlefield promptly and humanely. The live wounded and sick were required to be cared for, and the dead to be collected.[36] There was also an obligation under customary international law to allow the International Committee of the Red Cross to have access to POWs.[37]

Certain findings were made against both Ethiopia and Eritrea respectively. The Commission found inter alia that Ethiopia had not taken effective measures to prevent POWs being beaten upon capture, deprived of footwear during marches following capture, or subjected to forced indoctrination, and had held them in conditions that could seriously affect their health, and had delayed their repatriation.[38] Eritrea had failed inter alia to prevent beatings during interrogation following capture and had allowed pervasive and continuous physical and mental abuse of detainees, had subjected detainees to unlawful labour conditions, had failed to provide adequate sanitation, food and drinking water, and had punished those who attempted to complain.[39]

The above discussion illustrates the significance of the availability of international adjudication as a forum in which requirements for States to conduct themselves in accordance with international law on use of force and armed conflict may be authoritatively reinforced. The significance of this function in an international community striving to live peaceably and according to the rule of law cannot be underestimated, but at the same time this facet of the international adjudicatory function is inherently limited to the retrospective assessment of States' actions. International judicial bodies do play more proactive roles in relation to armed conflict, as discussed in the following three sections of this paper. Among them is the role played by international courts and tribunals in establishing the location of international borders and boundaries in circumstances involving military action between neighbouring States.

Establishing the Law in Territorial Disputes

The involvement of international courts and tribunals in boundary cases may provide an opportunity for the authoritative determination of a legally identified territorial or maritime boundary on which the parties can rely as established for the purposes of their future relationship.[40] Consistent with this, the delivery of judgments and awards determining boundaries has frequently been linked with bringing an end

36 *Eritrea's Claim*, para 58; *Ethiopia's Claim*, para 64.

37 *Ethiopia's Claim*, paras 60-62.

38 *Eritrea's Claim*, section V. D 'Findings of Liability for Violation of International Law'.

39 *Ethiopia's Claim*, section V. D 'Findings of Liability for Violation of International Law'.

40 Mechanisms other than adjudication are also often employed in boundary disputes, whether or not a dispute has been characterized by armed conflict. The war between Eritrea and Ethiopia referred to above provides an example. When the conflict was brought to an end in 2000, a Boundary Commission was established to delimit and demarcate the border between the two countries based on colonial treaties and applicable international law. The Boundary Commission was established under the same agreement as the Eritrea-Ethiopia Claims Commission. The Boundary Commission

to hostilities or preventing future hostilities. The *Territorial Dispute (Libyan Arab Jamahiriya/Chad) and the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, discussed in this section of the paper, and the *Frontier Dispute (Burkina Faso/Mali)*, discussed in the following section, number among the more acute instances where this has been so.[41]

The mobilization of troops and maintenance of a military presence in disputed boundary areas is not infrequent, as demonstrated in the case of *Maritime and Territorial Questions between Bahrain (Qatar v. Bahrain)*,[42] decided by the International Court in 2001, and the Case concerning Sovereignty over *Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*[43] decided by the International Court in 2002. As these cases show, military movement or activity may be a feature not only of land boundary disputes but also of maritime boundary disputes. Another example is the dispute presently before the International Court of Justice in the *Maritime Delimitation Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*.[44] Honduras claims that its maritime Caribbean boundary with Nicaragua has been determined. Nicaragua disagrees. As a result there have

delivered its *Decision on Delimitation of the Border between Eritrea and Ethiopia* on 13 April 2002 at the Permanent Court of Arbitration in The Hague.

41 Below, notes 53 and 62. Although three of these four cases involved adjudication by the International Court of Justice, the work of international arbitral tribunals in boundary disputes must also be considered, as in the *Eritrea v. Yemen* case discussed below, 40 ILM 900, 983 (2001).

42 In this case Qatar objected *inter alia* to Bahraini occupation of the island of Hawar which Qatar considered was part of its territory, including Bahrain's construction there of military as well as civilian installations, and the presence of military weapons and the conduct of military activities, and of activities associated with tourism. Memorial Submitted by the State of Qatar (Merits) Vol.1, 30 September 1996 paras 1.20-1.22. Qatar asked the Court to decide which State had sovereignty over each of the Hawar islands and specified shoals, as well as to decide where the parties' single maritime boundary lay, tasks that were duly completed by the Court in its Judgment of 16 March 2001. *Maritime and Territorial Questions between Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001, ICJ Reports 2001.

43 Indonesia objected to a maritime and aerial Malaysian military presence in the disputed territories that Indonesia considered excessive, as well as to the expansion of Malaysian tourist installations on Sipadan, and of Malaysian fishermen's huts on Ligitan. Memorial of the Republic of Indonesia Vol.1, 2 November 1999 paras 8.70–8.79, see also Counter-Memorial of Malaysia Vol.1, 2 August 2000, para 4.47. Indonesia carried out regular naval and aircraft patrols around the waters of the islands and both civilian and military authorities paid occasional visits to the islands. Memorial of the Republic of Indonesia Vol.1, 2 November 1999 para 8.91. The Court found that sovereignty over the islands lay with Malaysia. *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Merits, Judgment of 17 December 2002, ICJ Reports 2002.

44 The parties' land boundary was determined in 1906 in an arbitral award rendered by the King of Spain, the validity of which was upheld by the International Court of Justice. *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906*, Judgment of 18 November 1960, ICJ Reports 1960 p.192.

been repeated confrontations and each party has captured vessels allegedly trespassing in its maritime zones.[45]

The occurrence of a serious episode involving armed conflict or military activity may be the catalyst that propels disputing parties into taking a boundary dispute before an international court or tribunal.[46] This was the situation in the *Eritrea/Yemen* case, which came before the Permanent Court of Arbitration (PCA) in 1996. In this dispute, a conflict between the parties had taken place in 1995. During 1996 the parties agreed to renounce the use of force against one another in relation to their territorial sovereignty and maritime boundary dispute[47] and to establish an arbitral tribunal to rule on the scope of their dispute on these issues. They agreed to refrain from military activity and movement against one another. To avoid tension they entrusted the government of France with monitoring any such military activity or movement,[48] with France reporting its observations to the UN Secretary General. The parties also issued a joint statement recording their desire to resolve their dispute by peaceful means[49] and accordingly submitted the case to the Permanent Court of Arbitration.[50] The proceedings in the *Frontier Dispute (Benin/Niger)*, instituted by Special Agreement in June 2001 might also be considered.[51] Although the parties emphasized their commitment to the peaceful resolution of their boundary dispute, there was a crisis in relation to the border in 1963 and there were serious incidents again in 2000 and 2001.[52] The parties have asked the Court to determine the course of sections of their boundary, and to resolve the question of which State has title to

45 Nicaragua has granted petroleum concessions for parts of the continental shelf it claims as its own. It also claims a 200-mile fishing zone. Application Instituting Proceedings of 8 December 1999 para 4. Similar problems over maritime territory led to the institution of proceedings by Nicaragua in 2000 in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, with claims by Nicaragua that the Colombian navy has been intercepting and arresting Nicaraguan vessels in the disputed area of the Caribbean.

46 See the *Rann of Kutch* arbitration of 1965 which dealt with the dispute between India and Pakistan over their boundary line in the marsh of Kutch *(Indo-Pakistan Western Boundary (Rann of Kutch) Case (India v. Pakistan)*, 7 ILM 633 (1968), 667. After India posted border guards along a line running through the centre of the Rann in 1965 Pakistan fired on the Indian outposts and battles involving several thousand troops ensued. Following negotiations under British auspices, the parties reached an agreement in June of that year on a ceasefire and the submission of their dispute to arbitration. The Arbitral Tribunal awarded the greater part of the Rann to India, while considering Pakistan should be awarded certain specified areas of the Rann.

47 Agreement on Principles of 21 May 1996, Article 1.

48 Ibid, Articles 4 and 5.

49 Joint Statement of 21 May 1996.

50 An Arbitration Agreement was signed on 3 October 1996. The *Eritrea/Yemen* Arbitral Tribunal issued two awards, the first on 9 October 1998 and the second on 17 December 1999. The first award dealt with the scope of the dispute and addressed the parties' claims to sovereignty over the islands that lay between them. Above, note 41.

51 Application of 11 April 2002.

52 Verbatim Record, Public sitting of the Chamber, Thursday 20 November 2003, p12.

certain islands in the River Niger. The formation of a Chamber was requested and hearings began in November 2003.

Boundary disputes and associated armed conflict may however have continued for many years before being finally determined through adjudication. This was so, for example, in relation to the decision of the International Court of Justice in 1994 in the case of the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*.[53] Chad argued that Libya had occupied an important part of the territory of Chad in the period following 1971, the year Libyan troops entered, with Libya's military presence building up between 1973 and 1987. Libya claimed a large area of Chad in the proceedings before the International Court, reaching south to the latitude of 15°N. Chad had unsuccessfully sought the assistance of the UN Security Council in the course of the 1980s[54] and complained of a number of large-scale attacks launched by Libya against it. Pursuant to a 1989 Framework Agreement relating to their territorial dispute, the parties' Heads of State decided during a summit meeting in 1990 to seize the Court immediately with their case.[55] In their Special Agreement[56] the parties asked the Court to decide upon the limits of their respective territories in accordance with applicable rules of international law.[57]

A particularly long-standing dispute involving armed conflict was the subject of the decision of the International Court in 1992 in *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening)*.[58] The parties had been in dispute in relation to their land boundaries since 1861. Dispute over their maritime boundary dated from the 1880s. Various processes of negotiation, arbitration and enquiry had been employed in relation to aspects of the disputes. Tensions erupted in 1969. A series of border incidents led to the suspension of diplomatic and consular relations and a situation of armed conflict established itself. Although the Organisation of American States negotiated a ceasefire and the withdrawal of troops the parties remained formally at war for some ten years.[59] In 1972 agreement was reached on the major part of the land boundary, but six areas were still subject to dispute. In 1980 the parties concluded a General Treaty of Peace establishing a joint

53 *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Merits, Judgment of 13 February 1994, ICJ Reports 1994 p.6.

54 Ibid, para 71.

55 Ibid, para 5.

56 The Special Agreement was notified to the Court on 31 August 1990 and 3 September 1990.

57 In its Judgment of 13 February 1994 the Court identified the parties' boundary, finding it to be defined in the co-ordinates of the 1955 Treaty of Friendship and Good Neighbourliness between the French Republic and the United Kingdom of Libya, to which Chad was a party as successor to France. It was unnecessary to consider a range of other matters, including the application of the principle of *uti possidetis iuris* and the detailed pleadings of the parties relating to its application, and the effectiveness of past occupation of relevant areas.

58 *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening)*, Merits, Judgment of 11 September 1992, ICJ Reports 1992 p.351.

59 Ibid, para 35.

frontier commission. Despite holding 43 meetings between 1980 and 1985 the commission failed to resolve the outstanding aspects of the dispute. In accordance with the General Treaty of Peace, El Salvador and Honduras then brought their dispute before the International Court.[60]

As revealed in these and other cases, in authoritatively identifying a stable and objective basis on which States may conduct their future activities, courts and tribunals dealing with boundary cases often make a significant contribution to ending or reducing tensions and conflict between neighbouring States. In many cases the task of the court or tribunal may be confined from the beginning to dealing with technical and legal issues concerning the identification of a disputed boundary; the court or tribunal may not be asked to address directly the legality of any military activity by the parties in connection with their boundary dispute. Even in these limited circumstances, however, the decision of the court or tribunal may have enduring and far-reaching effects in relation to the parties' future security. Indeed the adjudication of boundary disputes has been described as a 'legislative' activity,[61] establishing a clear legal framework for the future interaction of the parties.

On occasion, questions of State responsibility may arise in the context of a boundary dispute. This was the case in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea Intervening)*.[62] The Court's disinclination to attribute legal responsibility in relation to armed occupation in the context of this boundary dispute is of particular interest. In 1994 the International Court was asked to determine an inflamed boundary dispute between Cameroon and Nigeria, eventually giving its judgment on the merits in 2002. This case involved armed hostilities between the two parties. As stated by Cameron, hos-

60 The parties submitted their dispute to a chamber of the International Court to be constituted with their express consent and to include an *ad hoc* judge nominated by each of the parties. The Chamber was requested to delimit that section of the parties' land boundary remaining to be determined since 1980 and to determine the legal situation of certain islands and maritime spaces also forming the subject of their dispute. On 11 September 1992 the Chamber issued its judgment on the merits of the case. The judgment decided the location of the disputed sectors of the parties' land boundaries, and identified which of the named islands were subjects of the parties' dispute and which party had sovereignty over each of these islands. The Chamber then found that the waters of the Gulf were held in joint sovereignty by El Salvador, Honduras and Nicaragua. All three States were successors to the Federal Republic of Central America, which had been established when the region became independent from Spain in 1821 and lasted until 1839. It is to be hoped that this dispute has finally been laid to rest with the Court's rejection in December 2003 of El Salvador's application for revision of its 1992 judgment. *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)* Judgment of 18 December 2003, ICJ Reports 2003.

61 Munkman, AW 'Adjudication and Adjustment – International Judicial Decision and the Settlement of Territorial and Boundary Disputes' (1972-73) 46 *British Yearbook of International Law* 1.

62 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea Intervening)*, Merits, Judgment of 10 October 2002, ICJ Reports 2002.

tilities had been taking place since the mid 1980s, with a full-scale Nigerian invasion in 1987 in the Lake Chad area and another in 1993 in the Bakassi Peninsula. Cameroon also alleged that there had been repeated incursions by Nigeria into Cameroonian territory along the boundary between the two States.

Cameroon's Application to the International Court sought the delimitation of its boundary with Nigeria, and also requested the International Court to declare that Nigeria was violating its obligations under international law in using force against Cameroon. Cameroon considered that Nigeria was attempting unilaterally to modify its boundary with Cameroon, in violation of the principle of *uti possidetis iuris* and its legal obligations concerning land and maritime delimitation. The Court was asked to declare that Nigeria was obliged to withdraw its administrative and military presence in Cameroon, and in particular to evacuate its troops from the area around Lake Chad and the Bakassi Peninsula. For its part, Nigeria disputed Cameroonian sovereignty over relevant areas of land and sought delimitation of the States' land and maritime boundaries in accordance with Nigeria's view of where the correct boundaries lay. Nigeria considered Cameroon's claims that Nigeria was in violation of its international legal obligations were unfounded and argued that Cameroon was in violation of its own obligations.[63]

Provisional measures were granted to Cameroon in this case. The prominent feature of the case for the purposes of the present discussion on international courts' and tribunals' establishment of the law in territorial disputes is that the Court disposed of the merits of the case entirely through a determination of the correct boundary between the parties. The Court opted not to determine the questions of State responsibility arising in Cameroon's claim in relation to Nigeria's military activity, or those raised in Nigeria's counter-claim.[64] In place of such an analysis the Court observed that the prevailing situation, involving the military, administrative and police presence of each party in areas determined by the Court to fall within

63 Nigeria unsuccessfully challenged the jurisdiction of the Court (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea Intervening)*, Preliminary Objections, Judgment of 11 June 1998, ICJ Reports 1998 p.275), and Nigeria's request for interpretation of the Court's Judgment on jurisdiction was declared inadmissible the following year *(Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon)*, Judgment of 25 March 1999, ICJ Reports 1999 p.31). In its judgment on the merits, the Court defined the parties' boundary line in the Lake Chad area and the boundary line from Lake Chad to the Bakassi Peninsula with reference to colonial legal instruments and agreements. The Court then found that sovereignty over the Peninsula lay with Cameroon, and finally determined the location of the parties' maritime boundary.

64 Above, note 63. As discussed above, Cameroon requested the International Court to declare that Nigeria was violating its obligations under international law in using force against Cameroon, referring to Nigeria's military occupation of certain territory, including the Bakassi Peninsula, and to alleged repeated incursions by Nigeria into Cameroonian territory along the boundary between the two States. For Nigeria's counter-claims that Cameroon had incurred international responsibility, see Memorial of the Federal Republic of Nigeria, May 1999, Vol III ch 25, where specific incidents are listed.

the territory of the other party, was reversible and that there was an obligation on each party to withdraw such presence expeditiously and without condition.[65] The Court noted that in implementing its judgment the parties would be afforded an opportunity to cooperate in the interests of their respective populations, including to enable the populations' continued access to health and educational services, and that this cooperation should help maintain security during the Nigerian withdrawal.[66] Underlining its expectation that the parties would build their future relationship on the basis of their land and maritime boundaries as defined by the Court, the Court also declined to uphold Cameroonian submissions seeking guarantees that Nigeria would refrain from repeating past violations.[67]

The Court appears to have considered that its primary role in this case was to determine the physical boundaries between the disputants' territories. With this task completed, Nigerian evacuation of Cameroonian territory was thought sufficient to address Cameroon's injury in the circumstances of the case. Once the legal framework establishing the parties' boundary was put in place, the expectation was that the parties' military arrangements would be adjusted accordingly. This case in particular demonstrates the contribution the Court may be able to make to international peace and security through establishing the law in a territorial dispute and that this can outweigh the significance of questions of responsibility for breach of international law that may be put before the Court in conjunction with disputants' territorial claims.

The Indication of Provisional Measures

The preceding sections of this paper have examined two forms of activity through which international courts and tribunals may make identifiable contributions to the prevention and reduction of armed conflict: firstly through reinforcing the law on the use of force and armed conflict in the course of determining responsibility for breaches of these bodies of law, and secondly through establishing the course of boundaries between neighbouring States, thereby providing an objective framework for the future interaction of the parties. This section of the paper examines perhaps the most challenging role that international courts and tribunals are called upon to perform in relation to armed conflict: the consideration of requests for the indication of provisional measures. Particular attention is paid to the exercise by the

65 As in the case of the *Temple of Preah Vihear (Cambodia v. Thailand)*, where the Court not only declared that the Temple fell within Cambodian territory, but declared also that Thailand was obliged to remove military and police forces stationed at the Temple and on nearby territory. *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, ICJ Reports 1962 p.6.

66 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea Intervening)*, Provisional Measures, Order of 15 March 1996, ICJ Reports 1996 p.13. The question of whether alleged armed incursions along the length of the parties' boundaries had taken place was set aside by the Court for want of evidence.

67 Idem.

International Court of Justice of its power under Article 41 of the Court's Statute to indicate provisional measures to preserve litigants' rights pending a decision on the merits of a case. Controversy has attached to the question whether the provisional measures orders of the International Court are binding upon disputants, although the Court's decision to this effect in the Lagrand case has for now resolved the issue.[68] The power of other tribunals to make orders for provisional measures, in particular the International Tribunal for the Law of the Sea (ITLOS), might be borne in mind in evaluating arguments presently being put forward in the context of decisions by the International Court in favour of extending the basis on which provisional measures may be granted in situations of armed conflict, as discussed below.[69]

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68 *Lagrand Case (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999 p.9; Merits, Judgment of 27 June 2001, ICJ Reports 2001. Article 41(1) provides that: 'The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.' While the word 'indicate' might have been regarded as neutral in both the English text and the original French text of Article 41, rather than referring to measures which 'ought to be taken', the French text referred to measures which '*doivent être prises*', which was open to alternative translation as 'must be taken'. The Court reconciled the English and French texts based on the character of the judicial function. Ibid, paras 100-109. See also the discussion on this question in a context of armed conflict in the Separate Opinions of Judges Ajibola and Weeramantry on the occasion of Bosnia and Herzegovina's second request for provisional measures in the case of *Bosnia and Herzegovina v Yugoslavia*, below, note 82. For a commentary see Kammerhofer, Jörg, 'The Binding Nature of Provisional Measures of the International Court of Justice: the 'Settlement' of the Issue in the *LaGrand* Case' (2003) 16 *Leiden Journal of International Law* 67.

69 See the provisions of Article 290 United Nations Convention on the Law of the Sea as to the circumstances in which provisional measures may be ordered in the Convention's dispute resolution system. Provisional measures were granted by the International Tribunal for the Law of the Sea in the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Order of the Tribunal of 27 August 1999 (38 ILM 1624 (1999)); and in the *Mox Plant Case (Ireland v. United Kingdom)*, Order of the Tribunal of 3 December 2001, (41 ILM 405 (2002)) where the Tribunal's provisional measures were subsequently affirmed by the *Arbitral Tribunal constituted pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea*, Order of the Tribunal of 24 June 2003; and in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Order of the Tribunal of 8 October 2003. After the finalisation of this paper provisional measures were requested by Guyana from an Annex VII Tribunal under Article 290, pending resolution of its land and maritime boundary disputes with Suriname, exacerbated in 2000 when an oil platform licensed by Guyana was evicted by the Suriname navy from its petroleum-rich offshore area. Guyana asked the Tribunal to order Suriname to refrain from the threat and use of armed force in the maritime zone, refrain from reprisals against Guyanese citizens, particularly fishermen, refrain from activities hindering the resumption of oil exploration in disputed areas, and stop conduct that could hinder the exploitation of oil deposits. Donovan, Thomas W. 'Guyana invokes Annex VII of United Nations Convention on Law of the Sea against Suriname for Disputed Maritime Area' ASIL Insights Vol 1: Number 49 April 2004.

There have been a number of occasions when the International Court has ordered provisional measures with a view to containing armed conflict. The five cases referred to below have arisen within the last twenty years, three of them in approximately the last decade. A number of the cases involved territorial disputes, although the best known of them did not: the *Case Concerning Paramilitary Activities in and against Nicaragua*.[70] In the *Nicaragua* case the Court indicated that the United States should immediately cease blockading Nicaraguan ports, and refrain from any mine laying activity. Further, the Court ordered that Nicaragua's sovereignty and independence should be fully respected, and not put in jeopardy through any military or paramilitary activities prohibited by principles of international law, such as the principle that States should refrain from the threat or use of force against one another and refrain from intervening in one another's affairs.

In the *Cameroon v. Nigeria* case, discussed in the previous section of this paper, the International Court was moved to accede to Cameroon's request for provisional measures. In February of 1996 military altercations caused fatalities among and injury to both military and civilian personnel on the Bakassi Peninsula, as well as major material damage.[71] On 15 March 1996 the Court ordered that both parties should ensure that no action of any kind, including by their armed forces, was taken that might prejudice the rights of the other; they should observe the agreement they had reached that February for the cessation of hostilities on the Peninsula; and they should not allow the presence of armed forces on the Peninsula beyond their positions of that February.[72]

The International Court in the context of armed conflict had also ordered provisional measures some ten years before over another boundary dispute, in the case of *Burkina Faso/Mali*.[73] In the dispute between Burkina Faso and Mali certain serious incidents occurred between the armed forces of the two States in the disputed frontier area in December 1985. These incidents were described by Burkina Faso as

70 *Case Concerning Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Provisional Measures, Order of 10 May 1984, ICJ Reports 1984 p.392. The Court did not accede to a second request from Nicaragua for provisional measures, filed on 25 June 1984, in which Nicaragua asked the Court to secure compliance with the Order of 10 May 1984. The Court's response here may be contrasted with its readiness to make a second order for provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)* (below, note 82); *Case Concerning Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (above, note 7 para 287).

71 *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Provisional Measures, Order of 15 March 1996, ICJ Reports 1996 p.13, para 38.

72 Ibid, para 49. The Court also ordered the parties to take all necessary steps to conserve evidence relevant to the case within the disputed area. In his Separate Opinion Judge Ajibola observed that the Court had seldom awarded provisional measures for this purpose. See also the concerns about evidence that also partially motivated the Court in its decision to grant provisional measures in *(Burkina Faso/Mali)*, below, note 73.

73 *Frontier Dispute (Burkina Faso/Mali)*, Provisional Measures, Order of 10 January 1986, ICJ Reports 1986, p.3.

an attack.[74] Mali asserted that Burkinabe troops had been beleaguering border villages and had occupied a number of villages and raised their flag there. Mali said it had been forced to repulse these troops by force.[75] Although a ceasefire was agreed at the end of that December, a Chamber of the International Court acceded to Burkina Faso's request for the grant of provisional measures in January 1986. The Chamber took the view that the occurrence of incidents involving a use of force that was irreconcilable with the principle of peaceful of dispute settlement imposed a duty on the Court to indicate provisional measures to ensure the due administration of justice.[76] This duty was not superceded by the conclusion of a ceasefire agreement by the parties.[77] Accordingly the Chamber ordered the parties to continue to observe their ceasefire, to withdraw their forces behind agreed lines, and to ensure no action was taken that might aggravate or extend the dispute that had been submitted to the Chamber.[78]

An order of provisional measures will not always produce results. In the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, noted earlier in this paper and presently before the International Court, Bosnia and Herzegovina alleges inter alia violation of the Genocide Convention by Yugoslavia through its acts against the Bosnian people in the 1990s, including its 'ethnic cleansing' practices.[79] Bosnia and Herzegovina sought and gained provisional measures in this case from the Court in April 1993: the Court ordered Yugoslavia to take all measures in its power to prevent the crime of genocide, and in particular to ensure that military units controlled by Yugoslavia did not commit genocidal acts.[80] The Court reaf-

74 Ibid, paras 1 and 4.

75 Ibid, para 6, citing communications from the Government of Mali.

76 Ibid, para 19. As in the *Cameroon v. Nigeria* case, the Chamber was also concerned that such incidents could lead to destruction of material evidence.

77 Ibid, para 25.

78 The Chamber issued its judgment on the merits of the case on 22 December 1986, founding its determination of the parties' boundary on the principle of *uti possidetis iuris*. ICJ Reports (1986) 554. The Chamber based the detail of its findings on the colonial boundaries that had existed between the former French colonies of Upper Volta and French Sudan before they became the independent States of Burkina Faso and Mali respectively and on topographical work. The events of December 1985 were not the first instance of conflict in relation to this border. Less than ten years previously Burkina Faso and Mali had been at war over the boundary. Merrills, J.G. *International Dispute Settlement* (Cambridge University Press, 3rd ed, 1998) 129.

79 Attention must also be drawn to the proceedings pending in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*, lodged in 1999. Croatia attributes to Yugoslavia widespread injury and damage and an estimated 20 000 deaths between 1991 and 1995, and asserts that Yugoslavia's actions constituted genocide. A hearing on preliminary objections is pending.

80 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Provisional Measures, Order of 16 April 1993, ICJ Reports 1993 p.3.

firmed these provisional measures when in July that year Bosnia and Herzegovina sought further provisional measures, requiring Yugoslavia inter alia immediately to desist from providing military support to groups in Bosnia and Herzegovina and from planning to partition or annex the territory of Bosnia and Herzegovina.[81] In July 1996 the Court rejected Yugoslavia's preliminary objections on the question of jurisdiction,[82] and in February 2003 the Court rejected Yugoslavia's application for revision of that decision.[83] Proceedings on the merits are pending. The events surrounding the case of *Bosnia and Herzegovina v. Yugoslavia* and the repeated attempts made by Bosnia and Herzegovina to bring an end to Yugoslavia's actions in Bosnia and Herzegovina provide a salutary reminder that it should not be expected that the orders of international courts and tribunals will always constitute an effective constraint on military activity and armed violence.[84]

In some cases, simultaneous efforts to resolve conflicts through other processes may lead to the temporary suspension of litigation. The case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* concerned the presence of Ugandan forces in the Democratic Republic of the Congo (formerly Zaire), and the massacres and other atrocities that were occurring, with a large number of civilian deaths and injuries taking place.[85] In July 2000 the Court ordered provisional measures underlining the parties' obligations under international law, although proceedings have since been postponed by agreement of the parties to allow diplomatic negotiations to proceed in a calmer atmosphere.[86] Parallel proceedings against Rwanda and Burundi, in which the basis on which the Court's jurisdiction might be founded was less strong, were discontinued, but in 2002 the Democratic Republic of the Congo lodged a new application against Rwanda alleging acts of armed aggression involving serious and flagrant violations of human

81 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993 p.325.

82 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Preliminary Objections, Judgment of 11 July 1996, ICJ Reports 1996 p.595.

83 *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections*, Judgment of 3 February 2003.

84 On the relevance of the military and political contexts in which international awards and judgments are rendered, see *Arbitration for the Brcko Area (Republika Srpska v. Federation of Bosnia and Herzegovina)* in Copeland, Carla S., 'The Use of Arbitration to Settle Territorial Disputes' (1999) 67 *Fordham Law Review* 3073 at 3089.

85 The Democratic Republic of the Congo alleged that Uganda, Rwanda and Burundi had attempted to seize Kinshasa and assassinate President Kabila, with the intention to establish a Tutsi controlled regime in the Republic. The Republic argued that these countries had supported Congolese rebels and had committed aggression against the Democratic Republic of the Congo. Application of Uganda of 23 June 1999, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000, ICJ Reports 2000.

86 Hearings in the case against Uganda had been due to open on 10 November 2003.

rights law and of international humanitarian law. A hearing on jurisdiction and admissibility is pending in that case.[87]

The five cases discussed above, in each of which the ICJ saw fit to order provisional measures, reveal that in appropriate circumstances the Court will act upon a request to make such an order in relation to a situation of armed conflict. In acceding to requests to order provisional measures, the International Court has relied upon traditional criteria for granting such measures, including the need to preserve the rights of the parties, as well as the need to preserve evidence for trial on the merits.[88] At the same time it is clear that in making its decisions on such requests the Court is mindful of the contribution it may make in a given case to the prevention or minimization of violent conflict. A direction to the parties to refrain from action that might prejudice the rights of the parties or aggravate their dispute is now commonly included in provisional measures orders,[89] and is of particular pertinence when provisional measures are indicated in relation to a situation of armed conflict. Further, as discussed below, a range of arguments are being formulated concerning the extent to which international courts and tribunals' powers to indicate provisional measures may give them the capacity to direct that hostilities be suspended in order to prevent ongoing loss of life.

Attention needs to be given first, however, to the related question of the appropriate respective roles of the International Court and the United Nations Security Council in relation to situations of armed conflict.[90] If the Court's direct interven-

87 *Armed Activities of the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*. In considering cases that have focused on transborder incursion, mention might also be made of the *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras) (Jurisdiction and Admissibility)* which focused on the alleged activities of armed bands coming across the border from Honduras into Nicaraguan territory. The International Court found that it had jurisdiction in this case (Judgment of 20 December 1988, ICJ Reports 1988 p.69), but proceedings were subsequently discontinued, along with parallel proceedings by Nicaragua against Costa Rica. These proceedings followed the finding in the *Case Concerning Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* that certain cross-border military attacks on Honduras and Costa Rica were attributable to Nicaragua (although there was insufficient evidence that these actions constituted an 'armed attack' by Nicaragua warranting the exercise of the right of collective self-defence).

88 Above, notes 72 and 76.

89 Collier and Lowe, above, note 3, 172-3.

90 As discussed by Gray, above, note 4, 888. The 1976 decision of the International Court in the *Aegean Sea Continental Shelf Case (Greece v. Turkey)* provides an early illustration of a case where this question arises. Greece objected to Turkish activities that might prejudice Greece's ability to exploit the resources of the areas of the continental shelf it was claiming. Turkey's explorations for petroleum were ongoing and its seismic research vessel had military protection. *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Interim Protection, Order of 11 September 1976, ICJ Reports 1976 p.3, para 16. The Court rejected Greece's request for interim measures in this case, noting *inter alia* that there was no reason to assume that either party to the dispute would disregard its obligations under the UN Charter or would fail to comply with Security Council resolutions calling upon them to do everything in their power to reduce tensions and resume negotiations in relation to the dispute (paras 38-41). The Court subsequently dismissed the Greek case

tion in situations of armed conflict is to be contemplated, the already existing overlap between the Court's capacity to indicate provisional measures and the Council's role under Chapter VII of the UN Charter may be amplified. Presently it is understood that the Court's jurisdiction in a particular matter is not restricted by the fact that the Council is seised with the same situation.[91] In practice the Court's approach blends the exercise of judicial independence with demonstrations of comity with the Council, a fellow principal organ of the United Nations. For example, when the Court granted provisional measures in *Cameroon v. Nigeria* in 1996, as discussed earlier in this section, the Court referred to the calls of the Security Council for parties to observe the ceasefire they had agreed in Togo in February of that year,[92] and ordered them to cooperate with the UN mission being dispatched to the Bakassi Peninsula.[93] In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*,[94] the Court's decision to indicate provisional measures in 2000 was couched in broad terms, as noted above, requiring the parties to observe their obligations under international law but not requiring the immediate withdrawal of Ugandan forces. This approach allowed for the Court's provisional measures order to be implemented consistently with the terms of the parties' arrangements under the Lusaka Agreement, endorsed by the Security Council, for a graduated withdrawal of troops.[95]

The Court has also demonstrated its continuing respect for the role of the Security Council in comments made during the Court's consideration of other requests for provisional measures. In the *Legality of the Use of Force* cases, discussed above, where Yugoslavia's request for provisional measures was rejected due to the absence of *prima facie* jurisdiction, the International Court made reference to the special responsibility of the Security Council.[96] In *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, where the Court again refused to grant provisional measures for want of *prima facie* jurisdiction, the Court noted the number of Security Council resolutions dealing with the situation in the Democratic Republic of the Congo.

The case of *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya*

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for want of jurisdiction.*Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Preliminary Objections, Judgment of 19 December 1978 ICJ Reports 1978 p.3.

91 The Court's approach has developed since 1976. The Court made a clear statement in the *Nicaragua* case, repeated since on a number of occasions, that although the Security Council has primary responsibility for the maintenance of international peace and security under Article 24 of the UN Charter this is not an exclusive responsibility, and the roles of the Security Council and the International Court are complementary to one another. Above, note 70, para 95.

92 Above, note 70, para 45.

93 Ibid, paras 46, 49.

94 Above, note 85.

95 See discussion in Gray, above, note 4, 902.

96 See *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, above, note 29, para 50.

v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America) should also be referred to here. Libya sought relief against the steps being taken by the United Kingdom to have the Lockerbie suspects extradited from Libya, based on the argument that the United Kingdom was obliged to permit Libya to prosecute the suspects under the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Libya's request for provisional measures was refused following the Council's adoption of a resolution dealing with the situation in 1992.[97] The Court noted that it was not called upon to determine definitively in the context of a request for provisional measures the legal effect of the Security Council resolution deciding that the Libyan Government was required to comply without any further delay with the British requests.[98] The decision should not necessarily be viewed as a display of deference by the Court towards the Security Council. In reaching its decision the Court observed that the obligations of the Parties to comply with Resolution 748 under Article 103 of the Charter prevailed over their obligations under any other international agreement, including the Montreal Convention, and that an indication of the measures requested by Libya would be likely to impair the rights which appeared *prima facie* to be enjoyed by the United Kingdom by virtue of the Security Council resolution.

The Court declined again to engage in reviewing the validity of Security Council resolutions when it ordered provisional measures in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* in 1993.[99] The Court did not order provisional measures in respect of Yugoslavia's genocidal actions, concluding that it did not have the authority to consider Bosnia and Herzegovina's arguments that the Court take steps to address the effect of the arms embargo under Security Council Resolution 713 of 1991 on Bosnia and Herzegovina's ability to defend itself against such actions. This aspect of the Court's decision should not necessarily be considered evidence that the International Court maintains an attitude of deference towards the Security Council. The Court reasoned that its powers did not extend far enough to encompass Bosnia and Herzegovina's request with respect to the Resolution. In

97 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992 p.3; *(Libyan Arab Jamahiriya v. United States of America)*, ICJ Reports 1992 p.114. In this case, the Council adopted a resolution of direct relevance in the proceedings before the Court three days after the Court's hearings had closed, acting under Chapter VII of the Charter of the United Nations (Security Council Resolution 748). Observing that after the adoption of this resolution by the Security Council the rights claimed by Libya under the Montreal Convention could not be regarded as appropriate for protection by the indication of provisional measures, the Court found that the circumstances of the case were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* Order of 14 April 1992, para 40.

98 Ibid, para 43.

99 Above, notes 80 and 81.

requesting the Court to order provisional measures in respect of the arms embargo, the Applicant was asking not only for measures that the Court might require to be taken by one or both parties to the case but for measures that 'would clarify the legal situation for the entire international community', in particular the Members of the United Nations Security Council. This task fell outside the scope of the Court's powers to indicate provisional measures as set out in Article 41 of its Statute.[100]

The above discussion makes clear that the International Court must operate in tandem with the Security Council, while retaining its own sphere of activity, and that there is considerable scope for these two principal UN organs to play complementary roles in relation to situations of armed conflict. The essential character of provisional measures orders must next be considered in light of their status as incidental to proceedings on the merits of legal disputes between States.[101] The power of international courts and tribunals to order provisional measures is considered to be derived from the need to ensure that disputants do not take actions that may prejudice the rights of either party. This reasoning underpinned the Court's refusal of Libya's request for provisional measures in the *Lockerbie* case as well as the reasons it gave for declining to consider the validity of Security Council Resolution 713 in *Bosnia and Herzegovina v. Yugoslavia*, discussed above. Although the idea that international courts and tribunals should be recognized as having a capacity to indicate provisional measures in order to safeguard human life in the context of armed conflict may be attractive, it is necessary to enquire carefully as to the legal foundation for recognizing such capacity. If provisional measures proceedings are only incidental to the adjudication of the merits of disputes over States' rights, how then do individuals' interests in the preservation of life become relevant?[102] This article suggests that a legal foundation for indicating provisional measures to protect life in a situation of armed conflict can be identified by examining more closely the rights of States that are at issue in the particular situation, and assessing whether prejudice to those rights would be created through loss of life.

Lighting the pathway to be explored in this paper, Judge Weeramantry took the view in his Dissenting Opinions in the *Legality of the Use of Force* cases that it was consistent with international courts' and tribunals' role as institutions for the peaceful settlement of disputes for them to indicate provisional measures that will restrain conflict, observing:

100 Order of the Court of 13 September 1993, above, note 81, para 41.

101 For example, it might be emphasized in this connection that the requirement for *prima facie* jurisdiction at the provisional measures stage, as adopted in the *Fisheries Jurisdiction* case, serves to safeguard the integrity of the adjudicatory function and its importance should not be minimized. *Fisheries Jurisdiction* case, Provisional Measures, Order of 17 August 1972, 1972 ICJ Reports 12.

102 The issue can be expected to continue to arise in future cases. In *Cameroon v. Nigeria* Judge Ranjeeva observed that: 'A new "given" in international judicial relations is thus confirmed, that is, incidental proceedings consisting of a request for provisional measures owing to the occurrence of an armed conflict, grafted on to a legal dispute.' Above, note 71, Declaration of Judge Ranjeeva.

> [o]ne of the most ancient and hallowed attributes of the judicial process – the power and obligation of a court to do what lies within its power to promote the peaceful settlement of disputes by such interim measures as may be necessary …[103]

Judge Higgins observed extracurially in 1997 that the law on provisional measures has been subject to developments in relation to the right to life and human security as to 'the extent to which such interim measures may be suggested in order to protect human rights that go beyond the strict scope of the inter-State dispute before the Court.'[104] She drew attention in particular to the line taken by the Court when ordering provisional measures in the cases of *Burkina Faso/Mali* and *Cameroon v Nigeria*. In contrast with the obligations between States forming the basis of provisional measures orders in the cases of *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*[105] and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*,[106] the obligations between States that were at issue in *Burkina Faso/Mali* and *Cameroon v. Nigeria* did not directly concern the protection of individuals.[107] Rather, both cases concerned disputes over territory in circumstances giving rise to the use of force. Judge Higgins suggested that 'the evolving jurisprudence on provisional measures shows a growing tendency to recognise the human realities behind disputes of States'.[108]

The author considers that there is some authority on which legal arguments for further progress in this direction might be developed and draws attention to two distinct legal rationales for such development.[109] On one approach the International Court has certain responsibilities in relation to the maintenance of international

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103 Ibid, 181. See also pp.191, 192, 197, 199, 200, 203 of the Dissenting Opinion. The Judge observes that a domestic court would not hesitate to issue an order restraining violence between litigating parties. See also the finding of the Chamber in *Burkina Faso/Mali* above; Higgins observes that this finding struck new ground. Above, note 4, 97.

104 Above, note 4, 87.

105 *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, Provisional Measures, Order of 15 December 1979, 1979 ICJ Reports 7.

106 Above, notes 80 and 81.

107 Higgins, above, note 3 at 95, 101. Higgins draws attention to the fact that, although the case of the *United States Diplomatic and Consular Staff in Tehran* did not strictly involve the Court in applying human rights law, it did involve rights relating to individuals' safety and protection, including under the applicable Conventions. The Court referred expressly to the privation, hardship, anguish and danger to life and health experienced by the individuals as a consideration in its decision to grant provisional measures. Above, note 106, para 42. See also Higgins' discussion of the interim measures ordered by the Permanent Court of International Justice on 8 January 1927 in *Denunciation of the Treaty of 2 November 1865 Between China and Belgium* 1927 PCIJ Ser A/B No 8. Ibid, 89-91.

108 Ibid, 103.

109 In his Dissenting Opinions in the *Legality of the Use of Force* cases Judge Weeramantry makes a range of comments that could be used to bolster both these arguments. Below,

peace and security as a principal organ of the United Nations.[110] In the *Legality of the Use of Force* cases the Court referred to such responsibilities, although not suggesting that they inferred the Court had any special power to issue orders intended to avert armed conflict or the use of force.[111] The Dissenting Opinions of Judges Shi and Vereshchetin in those cases afford some support for the view that as principal judicial organ of the United Nations the Court has an independent responsibility in respect of the maintenance of international peace and security. Judge Shi considered that it is 'within the implied powers of the Court' to issue a general statement of appeal to the parties to act consistently with applicable rules of international law.' Similarly Judge Vereshchetin noted that 'the Court is inherently empowered, at the very least, immediately to call upon the Parties' … to refrain from aggravating or extending their conflict. There is scope to build on these dicta, drawing also on the approach taken in *Burkina Faso/Mali*, where the Chamber considered that provisional measures were required to be ordered to ensure the due administration of justice.[112]

A somewhat stronger alternative or complementary line of argument may be developed based on various judicial comments relating to the preservation of life under provisional measures orders. This approach is premised on the view that the right to life of individuals, or the need to protect individuals' interests in life, is

notes 112 and 113. The Judge also addressed the question of the complementarity of the respective roles of the Security Council and the Court, at pp.201, 202.

110 The comments of Judge Ranjeeva in *Cameroon v. Nigeria*, above, note 102, are consistent with this view: 'Such decisions represent, on the one hand, measures required by the circumstances of the case which are evaluated by the Court in the exercise of its discretionary power and, on the other hand, a contribution by the Court to ensuring the observance of one of the principal obligations of the United Nations and of all its organs in relation to the maintenance of international peace and security.' Declaration of Judge Ranjeeva.

111 Above, note 29, para 18. It might be noted that in the specific context of armed conflict involving genocide, Bosnia-Herzegovina submitted in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* that the International Court should identify a special role for itself in relation to the prevention of genocide under the Genocide Convention. Bosnia-Herzegovina invoked Article VIII of the Convention, under which a Contracting Party may call upon the competent organs of the United Nations to take such action as they consider appropriate to prevent or suppress genocide and related crimes. The Court rejected the idea that this provision conferred on the Court any functions additional to those possessed by the Court by virtue of its Statute. Above, note 81, para 47. In his Separate Opinion Judge Ajibola noted that his support for the Court's decision to reaffirm its order of provisional measures was predicated on the aspirations of UN Members as reflected in the UN Charter. He noted that the Security Council had passed many resolutions dealing with the situation before the Court, observing that '[b]oth the Court and the Security Council have taken steps … to stop the ongoing acts of genocide in Bosnia.'

112 See also the Dissenting Opinion of Judge Weeramantry in the *Legality of the Use of Force* cases, above, note 29 at 195, 196, 204.

explicitly recognized and is inseparable from applicable rights of States.[113] As noted by Judge Higgins, in granting provisional measures in the *Burkina Faso/Mali* case the Chamber referred to the exposure not only of the interests of the States concerned but also of the persons and property in the area to serious risk of irreparable damage.[114] Ten years later a stronger approach was taken in *Cameroon v. Nigeria*. The Court commented that although the rights at issue in the proceedings before it were sovereign rights over territory these rights also concerned persons and by reason of the killing of persons and the ongoing serious risk of harm to them the rights of the parties had undergone irreparable damage and were at risk of further such damage.[115] A similar though slightly different approach was taken in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. The Congo's request for provisional measures was cast partly in terms of helping ensure the Congolese the benefit of their fundamental human rights, as well as of helping ensure respect for the sovereignty of the Congo,[116] but the Court's order was cast more in terms of the rights of the Congo to respect for the rules of international humanitarian law and human rights instruments as well as to sover-

113 Judge *Ad Hoc* Kreca suggested in his Dissenting Opinions in the *Legality of the Use of Force* cases, above, note 29, that humanitarian concern has assumed primary importance in the Court's practice in relation to indicating provisional measures and that humanitarian considerations have gained 'autonomous legal significance' in this context. Dissenting Opinions of *Ad Hoc* Judge Kreca, paras 5 and 6. See also the Dissenting Opinion of Judge Weeramantry the same cases. 189, 190.

114 Above, note 73, para 21.

115 Above, note 71, paras 39, 42. The tenor of these comments can be contrasted with the Court's provisional measures order in the *Nicaragua* case, where there was no reference to the need to support 'the rights of Nicaraguan citizens to life, liberty and security' as advanced by Nicaragua. *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. US)* Order of 10 May 1984. 1984 ICJ Reports 169, 180, 182, 186. Discussed by Higgins above, note 4, 96. Nicaragua's phraseology echoed that more successfully adopted by the United States in the case of *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, above, note 105, para 19. In his Separate Opinion in *Cameroon v. Nigeria* Judge *Ad Hoc* Ajibola commented that indications of provisional measures, whether to preserve the parties' rights or to avoid aggravation of their dispute and the commission of acts that might cause irreparable harm or prejudice to the parties, have always included an element pertaining to protecting and preserving human life or property. Separate Opinion of Judge Ajibola, ibid. The Judge, citing comments by the Court in the *Nicaragua* case and the *Genocide* case, reached the conclusion that: '[T]he purpose and content of Article 41 of the Statute is not and cannot be restricted only to the preservation of the prospective rights of the parties in a matter like the one before the Court.'
Cf Declaration of Judge Oda, observing that the 'irreparable damage' the Court referred to in its provisional measures order, i.e. the potential for further loss of life on the Bakassi Peninsula, might not concern damage to the rights to be adjudicated at the merits stage of the case. Declaration of Judge Oda, para 2.

116 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000, para 13: request for provisional measures, para 6, though see also para 4.

eignty, territorial integrity, the integrity of its assets and natural resources.[117] The Court stated that persons, assets and resources on Congolese territory, particularly in the area of conflict, remained extremely vulnerable and there was a serious risk that the Congo's rights might suffer irreparable prejudice.[118]

The contrast between the articulation of the Court's approach in *Cameroon v. Nigeria* and in *Armed Activities on the Territory of the Congo* suggests that the line of reasoning being advanced in this paper calls for further elucidation. Key to the argument is the assertion that irreparability of loss of human life founds a solid, if not irrefutable, basis on which to found a judgment that there is sufficient likelihood of irreparable harm to a State's rights to justify the indication of provisional measures. Thus the intrinsic importance of life itself is to be a fundamental consideration in a decision to order provisional measures in a dispute between States. The notion of irreparability highlights more starkly than is usual in international law the closeness of the relationship between individuals' interests and States' rights. Such a relationship was given some recognition in the *Burkina Faso/Mali* case.[119] Acknowledgement of the relationship can be seen clearly in the case of *Cameroon v Nigeria*, and it can also be seen in the case of *Armed Activities on the Territory of the Congo*, even though it was articulated in different terms in that case. Additionally, the point has come up in the death penalty cases handled by the Court, where provisional measures have been granted on the basis that the execution of those convicted without observation of the requirements in the Vienna Convention on Consular Relations would constitute irreparable harm to States' rights under the Convention.[120]

The point may be made more fully as follows. It is generally understood that in a case governed by international law an international court or tribunal may order provisional measures where a right of a State is at issue in the proceedings before the court. The particular right at issue might be a State's right to be free from the use of force or from intervention by other States, for example, as in the *Nicaragua* case. A State's title to territory might be at issue, as in the case of *Burkina Faso/Mali* or the case of *Cameroon v. Nigeria*. A State's rights under international humanitarian law or international human rights law may be at issue, as in the case of *Bosnia and Herzegovina v. Yugoslavia*. In certain circumstances a State's rights under the

117 Ibid, paras 40, 43, and 47 (1) and (2), though see also para 47(3). Iwamoto, above, note 4, 360.

118 Ibid para 43.

119 Above, note 72.

120 The contrast in this respect between the death penalty cases and the *Hostages* case, above, note 104, should be noted. *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, 1998 ICJ Reports 248; *LaGrand (Germany v. United States of America*, Provisional Measures, Order of 3 March 1999; *Avena and other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003. New ground was broken at the merits stage in *LaGrand* when the Court concluded that reference to 'his rights' in Article 36, paragraph 1, of the Vienna Convention on Consular Relations created individual rights which might be invoked by a detained person's national State, though declining to find it was a human right. Above, note 68, para 77. Cf Separate Opinion of Judge Shi. Iwamoto, above, note 3, 345, 358.

Vienna Conventions on Diplomatic or Consular Relations might be at issue, as in the case of *United States Diplomatic and Consumer Staff in Tehran (US v. Iran)*. The logic that provisional measures may be ordered only in respect of the subject the merits of which are under dispute has been described as 'the need for co-terminosity between the relief sought and the principle claim advanced'.[121] The conclusion that, by reason of the irreparability of loss of life, co-terminosity will automatically be present in many disputes where lives are on the line is compelling. It can be strongly argued that in no circumstances can rights of States connected with protection of individuals be expected to remain unprejudiced in the face of illegal actions directed to bringing about their deaths.

Potential for the recognition of such a link between individuals' interests and public international legal rights went unrealized earlier in the twentieth century, in the response of the Permanent Court of international Justice to a Norwegian application for interim measures in the 1930s case of the *Legal Status of the South-Eastern Territory of Greenland*. In this case, which concerned a territorial dispute, Norway considered there was serious reason to fear that the Danish would carry out acts of violence against Norwegian nationals living in the disputed area. It was argued that the Court's competence under Article 41 of its Statute extended to the indication of interim measures of protection 'for the sole purpose of preventing regrettable events and unfortunate incidents.'[122] The Permanent Court rejected Norway's request for provisional measures requiring Denmark to abstain from coercive measures against Norwegian nationals on the basis that the occurrence of such incidents would not affect the 'existence or value' of Norway's claims to sovereign rights over the territory in question.[123] In the eyes of the Permanent Court there was no co-terminosity between the interim measure sought and the rights upon which the Court was to adjudicate at the stage of the merits. Operating on this basis it would seemingly be necessary to draw a distinction between those cases involving armed conflict where the merits of a dispute are to be addressed solely in terms of territorial sovereignty and those where the merits are alternatively or additionally to be addressed in terms of human rights. Only in the latter category of cases, such as that of *Bosnia and Herzegovina v. Yugoslavia*, would there be the co-terminosity required for the indication of provisional measures directed to safeguarding human life.[124] This article

121 Higgins, above, note 4, 88, 91. This is implicit also in the comments of Vice-President Weeramantry in his Dissenting Opinions in the *Legality of the Use of Force* cases: 'The Court, in an appropriate case, where possible conflict threatens *rights that are being litigated before it*, is not powerless to issue provisional measures conserving those rights by restraining an escalation of the dispute and the possible resort to force.' Emphasis added. Dissenting Opinion of Judge Weeramantry, above, note 30 at 200, citing his own comments in his Dissenting Opinion in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America)*, above, note 97.

122 *Legal Status of the South Eastern Territory of Greenland (Norway v. Denmark)* Judgment of 2 August 1932 PCIJ Ser A/B No 48 284.

123 Ibid, 285.

124 Iwamoto, above, note 4, 362-364.

calls into question such a distinction, and queries the narrowness with which the rights claimed in a dispute are to be interpreted when applying a co-terminosity test.

Setting aside the obvious differences between the situations at issue in the *Eastern Greenland* case and the case of *Bosnia and Herzegovina v. Yugoslavia*, this paper suggests that the Permanent Court's approach was perhaps focused too closely on the concept of sovereign title to territory, lacking sufficient acknowledgement of the fact that title to territory brings with it rights to freedom from interference and armed incursion into that territory. Once States' obligations to refrain from the use of force against one another's territorial integrity and political independence are taken into account, queries surface in relation to the significance placed by the Permanent Court in the *Eastern Greenland* case on its belief that Danish coercion of Norwegian nationals did not affect the value of Norwegian territorial claims. Although the value of the claims might not have been affected, the value of valid title to territory would have been. Norway's problem was just that it had failed to challenge Denmark in these terms. In light of the *Eastern Greenland* case it is interesting to observe that, although no doubt for a variety of reasons, allegations of breaches of law on the use of force were included in the terms of the dispute brought before the ICJ in *Cameroon v. Nigeria* alongside claims relating to their territorial dispute. As it turned out, this move was unnecessary as a remedy to the problem encountered by Norway. Although it was open to the Court to rely in its indication of provisional measures on Cameroon's allegations of Nigerian breaches of international law in order to ensure co-terminosity, the Court did not do so. Instead the Court expressly took the view that the killing of persons could bring about irreparable harm to States' interests in territorial disputes. Furthermore, as noted above, at the merits stage of the case the Court declined to consider questions of responsibility for breach of international legal obligations. Although the Court's reasons for that decision may have been unconnected with the Court's approach to provisional measures, taken together they do appear to give a certain signal to counsel in future cases that it should not be necessary to allege breaches of international law in boundary disputes simply in order to obtain provisional measures directed to preventing loss of life.

Higgins considers that the approach in *Eastern Greenland* has been superceded by that in *Burkina Faso/Mali* and *Cameroon v. Nigeria*:

> Taken together, they would seem effectively to overrule the determination by the Permanent Court of International Justice in the Eastern Greenland case that no measures will be indicated to afford protection to persons if that goes beyond the subject matter of the dispute.[125]

The key and outstanding question concerns the terms on which this overruling has taken place. This paper suggests that the best basis on which to build an understanding of this evolution in the law is to consider the requirement of irreparable

125 Higgins, above note 3, 102.

prejudice to States' rights automatically to be satisfied in the case of likely loss of lives intended to be protected in certain measure by such rights. The terms of the most recent relevant decision of the Court, in *Democratic Republic of the Congo v. Uganda*, crafted perhaps with Judge Higgins' comments in mind, can most readily be explained on the basis of such an approach. The approach is also consonant with the reality, invoked by Judge Higgins herself, that States comprise individuals and States rights are built on individuals' needs and interests.

Questions may remain about the rule that the International Court must establish that it has *prima facie* jurisdiction over the merits of a case where it intends to order provisional measures.[126] Will the Court have jurisdiction to order provisional measures directed to the preservation of life in the face of objections to jurisdiction in relation to the subject matter of the dispute, but prior to the hearing of preliminary objections? Such objections might be based, for example, on a reservation in a declaration accepting the Court's compulsory jurisdiction under Article 36(2) of the Court's Statute, as in the *Nicaragua* case. There may be some likelihood that the Court will increasingly take a more precise approach to the question of *prima facie* jurisdiction in such cases, for example by taking the view, where the texts conferring jurisdiction so permit or suggest, that it cannot be accepted *a priori* that a particular claim falls completely outside the scope of the Court's jurisdiction, as in the *Nuclear Tests* cases.[127] That might particularly be the case in relation to a reservation to an Optional Clause Declaration, where, by entering a Declaration, a State has manifested a general intention to subscribe to peaceful settlement of its disputes through the International Court. The approach taken by the Court in the *Nicaragua* case might be recalled, where the Court took the view that the parties' Declarations 'appear[ed] to afford a basis' on which jurisdiction might be founded.[128] At the same time, States may take comfort from the Court's strict approach to jurisdiction in the context of Bosnia and Herzegovina's requests for provisional measures in *Bosnia and Herzegovina v. Yugoslavia*. As it was clear that the Court had jurisdiction only under the Genocide Convention there was no basis on which to order provisional measures requiring the observance of human rights more generally, including under international humanitarian law.[129] The problem of jurisdiction remains a difficult one. If it were subsequently found that the Court lacked jurisdiction over the merits

126 Iwamoto, above note 4, 365.

127 Nuclear Tests (Australia v France), Order of 22 June 1973, 1973 ICJ Reports 99; Nuclear Tests (New Zealand v France), Order of 22 June 1973, 1973 ICJ Reports 135. Higgins above note 3, 94. Note might be made of the Court's finding in *Bosnia and Herzegovina v. Yugoslavia* that problems of temporality raised by Yugoslavia in relation to Bosnia and Herzegovina's succession to the Genocide Convention did not necessarily constitute a bar to the Court's exercise of its powers to order provisional measures. Above, note 81, 16. Higgins above, note 4, 100.

128 Above, note 70, 180.

129 Above, note 80, 19. Higgins, above, note 4, 100.

of a case, would provisional measures become null and void *ab initio*?[130] If so, by what authority would compliance with those measures have been mandated?

The corollary of the conclusions reached in this section of the paper as to the recognized extent of international courts' and tribunals' powers to indicate provisional measures in relation to situations involving armed conflict is that, within the UN system, the task of intervention in international disputes for the express purpose of preventing further loss of life becomes a task that is to be shared between the United Nations Security Council and the International Court of Justice. It should be taken into account that the Court is capable of operating with expedition where the right to life is at issue.[131]

The injection of the question of the Court's power to order life-saving provisional measures into debate over the respective roles of the two bodies need not be expected to pose major problems. There may be limited effect on decisions whether or not to order provisional measures. Based on experience to date, the Court may simply find itself making additional provisional measures orders in circumstances where it would have done so in any event, such as in the *Nicaragua* and *Bosnia and Herzegovina v. Yugoslavia* cases. However, building the right to life into the structure of provisional measures orders should strengthen perceptions of the need to comply with these orders. The Court's new role can thus be expected to complement that of the Security Council, and may also be of particular significance in less intractable bilateral disputes posing a relatively negligible threat to international peace and security and with which the Security Council is therefore not seized. It will remain the job of the Security Council to determine, with reference to whether a given conflict constitutes a threat to international peace and security, the circumstances in which violent conflict can be considered sufficiently serious to require an international response. Also, for the foreseeable future the possibility of militarily enforc-

130 Consider the rejection of that view in the *Award on Jurisdiction and Admissibility (Southern Bluefin Tuna Case)*, of 4 August 2000, which expressly revoked the provisional measures that had been ordered by the ITLOS, above, note 69.

131 Indeed, with respect to individuals' loss of life, in his Dissenting Opinion in the *Legality of the Use of Force* cases Judge Weeramantry observes that in cases concerning the death penalty the Court has issued provisional measures within a day (*LaGrand (Germany v. United States of America)*, above, note 69, or a week (*Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, above, note 120. *Legality of the Use of Force (Serbia and Montenegro v. Belgium)* Order of the Court of 2 June 1999, Dissenting Opinion of Vice-President Weeramantry. In *Avena and other Mexican Nationals (Mexico v. United States of America)*, above, note 119, the Court issued its provisional measures order within approximately a one-month timeframe from the date Mexico lodged its request. In considering how quickly the Court may be able to respond to a request for provisional measures in relation to a situation involving armed conflict, it might be noted as a starting point that in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)* the Court issued its first Order for provisional measures twenty days after Bosnia and Herzegovina lodged its request. Above, note 80. The Court's response to the urgency attaching to the request for an Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (General List No 131) may also be referred to.

ing judgments issued in respect of such situations will remain subject to Security Council mandate under Chapter VII of the UN Charter. With the binding status of provisional measures orders now recognized,[132] a significant new question likely to arise at some point will be whether that power of enforcement might be brought into operation in relation to provisional measures orders. There seems little reason why that should not be permissible.

One further point needs to be made. As reflected in Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights, the inherent right to life has a strong claim as the preeminent human right.[133] However, it will have become apparent that this paper does not propose that international courts and tribunals ordering provisional measures to safeguard human life should found their orders on the right to life as a right held by individuals. Indeed, the Court's focus in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* on the rights of the Congo rather than on a right to life held by the Congolese could be interpreted as a signal that the Court finds that approach too troublesome to move forward at any speed in this direction, even if the Court's decisions in *Burkina Faso/Mali* and *Cameroon v. Nigeria* are considered to have indicated such an approach. Accordingly, the focus of this paper is on preserving individuals' interests in life through orders based on those rights of States on which individuals rely for protection of their essential interests, such as States' rights to territorial integrity.

At the same time it should be emphasized that this paper does not exclude the possibility that, perhaps in the not too distant future, jurisprudential analyses will emerge to support orders of international courts and tribunals based directly on the right to life as a right held by individuals. The subject is one well worthy of further study. There may be scope for work based on an analogy with the jurisdiction of courts and tribunals under Article 290(1) of the United Nations Convention on the Law of the Sea to prescribe provisional measures not only to preserve the rights of the respective parties to a dispute but alternatively "to prevent serious harm to the marine environment".[134] Alternatively or additionally an appeal to natural law may be necessary.

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132 *LaGrand* case. Above, note 67.

133 See also Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 4 of the American Convention of Human Rights. For a broad-ranging discussion on the right to life in international law see Ramcharan, B.G. (Editor) *The Right to Life in International Law*, Martinus Nijhoff Publishers, 1985.

134 Consider the decision of the International Tribunal for the Law of the Sea in the Southern Bluefin Tuna Cases, in which the Tribunal considered that "measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the Southern Bluefin Tuna stock." *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999, 38 ILM 1624 para 80. In the *MOX Plant* case the Tribunal ordered Ireland and the United Kingdom to co-operate, to enter into consultations on the commissioning and operation of the plant, and to devise measures to prevent any pollution, as appropriate. *The MOX Plant Case Request for Provisional Measures (Ireland v. United Kingdom)* Order of 3 December 2001, 41 ILM

There is also the possibility that, although it has not been the practice so far, States involved in situations of armed conflict might insert into the causes of action they are pursuing on the merits of a case claims based on the obligations owed by States to one another under international human rights law to protect the right to life. Such claims could be separate from and additional to the legal claims being put forward in relation to the dispute that has given rise to armed conflict between the parties. It will be recalled that arguments were put forward on the right to life in the context of the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*. The International Court observed in its Advisory Opinion that compliance with international humanitarian law would provide a gauge of whether deprivation of life was arbitrary and contrary to the International Covenant on Civil and Political Rights (ICCPR) in given circumstances.[135] If the right to life were to be plead in contentious proceedings, the question might arise whether the terms in which the individual's right to life may be crafted in the ICCPR are indeed determinative of the scope of the interests in life that are protected under the inherent right to life. For States that maintain the death penalty it could be difficult to assert otherwise, unless perhaps a distinction can be drawn between the ending of an individual life and the ending of many individuals' lives en masse.

The Court's comments in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* are of less relevance in the context of assertion of the argument put forward in this paper for directing provisional measures orders to the preservation of life through reference to the rationale that provisional measures are intended to prevent prejudice to the rights of disputing States. Even though the circumstances at hand involve armed conflict, those rights may not in all cases be rights under international humanitarian law. To take an example, the rights of States at issue in a case could be connected with freedom of navigation, in contexts such as the maritime disputes discussed earlier in this article. In the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* the International Court has, therefore, seemingly moved beyond the point it reached in addressing the question of alleged potential breach of the ICCPR in the *Advisory*

405 para 89. These provisional measures were affirmed by the Annex VII *The Mox Plant Case (Ireland v. United Kingdom) Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea*, Order No 3, 24 June 2003. In the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, the Tribunal included among its provisional measures a direction to Singapore not to conduct its land reclamation in a way that might cause irreparable prejudice to the rights of Malaysia or in a way that might cause serious harm to the marine environment. Order of the Tribunal of 8 October 2003.

135 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996. 1996 ICJ Reports paras 24-25. cf Separate Opinion of Judge Weeramantry, emphasizing the core character of the right to life, at section 10f. The right to life is referred to also in his Declaration by President Bedjaoui. Para 22. See also the Human Rights Committee's General Comment No. 14: Nuclear weapons and the right to life (Art. 6) of 9 November 1984.

Opinion on the Legality of the Threat or Use of Nuclear Weapons. This leads to a significant point in relation to the argument asserted in this paper: where international courts and tribunals order provisional measures to safeguard human life based on the rights of States, such as those connected with freedom of navigation or territorial integrity, the protection accorded to life may be broader than in circumstances where a court or tribunal bases such an order on the right to life itself. On the argument presented in this paper, loss of life in armed conflict, whether conducted in accordance with international humanitarian law or not, becomes deplorable in legal terms, just as it is in human terms. An opportunity is created within the international legal system to try and prevent such loss of life, and all the social and historical consequences that flow from deaths in armed conflict.

As a final comment it must be conceded that, on whichever legal foundation it is based, the protection of individuals' lives through provisional measures orders can be expected to remain difficult in practice. It is uncertain that States will welcome the development of an international judicial role comprehending what may effectively constitute a broadened power to order ceasefires. An ongoing increase in the number of reservations relating to security and participation in armed conflict inserted in optional clause declarations accepting the compulsory jurisdiction of the International Court of Justice may be expected.[136] At the same time there can be little question that the need to protect human life will necessarily continue to influence international courts and tribunals in their assessment of requests for provisional measures.

Advisory Opinions on Compliance with the Law on the Use of Force and the Law of Armed Conflict

The capacity of the International Court to provide Advisory Opinions is the final significant aspect of the role of international courts and tribunals in relation to armed conflict that will be discussed in this paper. The International Court's advisory jurisdiction permits an assessment of the legality of actions in advance of a potential use of force or during a conflict. In this respect, the character of Advisory Opinions contrasts with the post facto character of judgments on State responsibility for breach of the laws of war following the conclusion of armed conflicts, discussed at the beginning of this paper. Contrasting also with provisional measures orders, Advisory Opinions essentially comprise a declaration of the law rather than a direction to disputants on actions they are obliged to take. Advisory Opinions remain a controversial judicial instrument in certain respects: as with provisional measures, questions about the scope of the judicial role will arise where the Court is requested to give an Advisory Opinion on a subject with which the Security Council is already seised, as noted below in relation to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. It might be noted that, as in the case of provisional measures orders, a new, though not necessarily problematic, element would be injected into debate about these questions if understandings concerning

136 Gray, above, note 3, 885.

the right to life were developed along the lines discussed in the preceding section of this chapter and, for example, requests for Advisory Opinions came to be recognized as invitations to the Court to identify steps that should be taken to safeguard life.

The International Court's advisory jurisdiction was invoked by the General Assembly of the United Nations on 8 December 2003[137] in its request to the Court to render an advisory opinion urgently on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in and around East Jerusalem by Israel.[138] Australia, Israel and the United States actively opposed this course of action. The International Court responded to the General Assembly's qualification of this request as urgent by setting timeframes for the prompt submission of further information and the opening of proceedings.[139] Hearings opened on 23 February 2004 and concluded on 25 February. Although at the time of writing Israel has indicated it may change the route of the Wall, Israel's Wall or Barrier is presently planned to extend along a 720-kilometre line. Approximately 975 square kilometres of land lies between the Barrier and the Green Line and is occupied by an estimated 17,000 Palestinians in the West Bank and 220,000 in Jerusalem. The Barrier will also mean that discrete areas where another 160,000 Palestinians now live will become enclaves. The Barrier consists of a fence equipped with electronic sensors, a ditch up to 4 metres deep, a two-lane asphalt patrol road, a trace road parallel to the fence (a strip of smooth sand to detect footprints) and coiled barbed wire.[140] The Secretary-General views the construction of the Barrier as a deeply counterproductive act at a time when the Israelis and the Palestinians need to be building their confidence in each other. The General Assembly has already demanded 'that Israel stop and reverse the construction of the wall'.[141]

Israel has asserted that the Barrier is a security measure, not representing a political or other border, intended to stop the entry into Israel of Palestinian terrorists from the West Bank.[142] Israel maintains that its construction of the Barrier is consistent with its inherent right to self-defence and with Article 51 of the UN Charter.[143] The Palestine Liberation Organisation (PLO) does not directly dispute this point, but argues that Israel's activity is inconsistent with international humanitarian law because the measures taken are not consistent with the principles of necessity and proportionality, and are inconsistent with international human rights law.[144] The PLO refers to the effects of constructing the Barrier on settlers' access to

137 Resolution A/Res/ES-10/14.

138 General List No 131.

139 Order of the Court of 19 December 2003.

140 Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 A/ES-10/248, paras 8-9.

141 Resolution ES-10/13 21 October 2003, para 1.

142 Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 A/ES-10/248, paras 2 and 4-6.

143 Ibid, Annex I para 6.

144 Ibid, Annex II.

their places of work, to food and water supplies and to schools and hospitals.[145] The PLO maintains that Israel is attempting to annex the territory in question contrary to international law.

As in the case of the Request for an Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[146] the events and issues which the Court must consider here are not just highly politicized but are also central to security analyses of future regional and global military stability. The strategic implications flowing from the subjects on which Advisory Opinions have been requested in the two cases do differ strongly from one another, however. The request in the *Nuclear Weapons* case related to a global issue that, as it transpired, involved a degree of abstraction putting a determinative response beyond the reach of the Court.[147] The request in *Legal Consequences of the Construction of a Wall* relates to a specified activity that is presently taking place in an identified physical location.

States have expressed differing views on the appropriateness of the request in *Legal Consequences*. Australia has argued that the Court should decline to issue an Advisory Opinion in this case because it is being asked to determine a dispute involving Israel in the absence of Israeli consent, because the rendering of an opinion would be devoid of any object or purpose given that the General Assembly is already dealing with the situation, and because issuing an Advisory Opinion would be likely to have a detrimental effect on the peace process, with which Australia notes that the Security Council remains seized.[148]

These concerns echo in certain respects those raised earlier in connection with the Court's power to order provisional measures, although the legal conditions for the exercise of the Court's advisory jurisdiction are distinct from those governing the indication of provisional measures. Further discussion of the Court's advisory jurisdiction lies beyond the scope of this paper, but for present purposes it may be observed that intervention in an armed conflict by an international judicial body, whether through an Advisory Opinion, a provisional measures order or a judgment on the merits of a case, is possible only within the scope of the applicable law and the adjudicatory function being exercised.

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145 Idem. See also Secretary General's Report Section D – Humanitarian and Social Impact.

146 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996 p.66.

147 It will be recalled that the Court found by seven votes to seven, by the President's casting vote, that although the threat or use of nuclear weapons would generally be contrary to the rule of international law applicable in armed conflict, the Court could not conclude definitively whether or not the threat or use of such weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. Ibid, para 105E.

148 Written Statement of Australia of 19 December 2003. Available together with the written statements of other participants on the website of the International Court of Justice.

Conclusion

Judicial settlement of international disputes evolved in an era when the pacific settlement of disputes was coming to be regarded as a measure of human civilization. Despite and even because of the two world wars in the first half of the twentieth century, and numerous more localized later conflicts, there has been sustained support for mechanisms permitting the binding peaceful settlement of international disputes according to law. Events in Afghanistan and Iraq in the first few years of this new millennium have prompted continued enquiry about the existence or otherwise of an international legal order, and about the broader contributions of international institutions to this order, among them international judicial institutions.

Based on the study in this paper, there is ample ground to conclude that international courts and tribunals play a number of roles in relation to armed conflict that go beyond the provision of fora and procedures for peaceful dispute resolution. Most often, the contribution of international courts and tribunals is made through defining, emphasizing, reiterating and explaining the content of applicable international law in relation to the use of force and armed conflict and takes the form of a judgment after the fact on compliance with the law. Among the cases discussed in this paper involving determinations of State responsibility, two in particular merit special mention. Each appears to evidence a conscious participation by the International Court of Justice in efforts to build a more peaceful world.[149] Attention may be drawn to the Court's decision in *Oil Platforms* actively to focus its judgment on legal issues associated with the use of force in self-defence, emphasizing the significance of the international legal prohibition on the unilateral use of force at a time when this issue was particularly significant in the international political arena. In counter-point, the case of *Cameroon v. Nigeria* is notable because, although it was willing to indicate provisional measures, the Court decided not to address directly the questions of State responsibility raised by the parties. The Court's primary aims seem to have been to protect human life while encouraging a focus on the resolution of the parties' boundary dispute.

Taking up the tone of that judicial decision, this paper has also examined three processes through which international adjudication may be used to help reduce the likelihood of disputants continuing violent hostilities or resorting to armed conflict in future. This may be the case not only where an international court or tribunal

149 In relation to these and other cases discussed in this paper it is of interest to recall the view of Lon Fuller that the role of courts in a society is to work out what is required for realizing the society's shared aims and to employ the strategies available to them to craft decisions that will facilitate progress towards these ends. Here, the society in question is international society. It may be noted that Fuller intended his thinking on adjudication to apply equally to both national and international courts and tribunals. See Fuller, L.L. 'The Forms and Limits of Adjudication' in Winston, K. I. E. *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Hart Publishing, 2001) 101, as well as other writings by Fuller, particularly *Anatomy of the Law* (Praeger) 1968. Though published only posthumously 'Forms and Limits' was written in the 1950s and circulated by Fuller in the 1950s, '60s and '70s.

determines where neighbouring States' disputed boundaries lie, but also where provisional measures are ordered, and possibly where an Advisory Opinion is sought from the International Court of Justice. In relation to these last two processes, debate on the proper role of the Court may only just be beginning. As discussed in the relevant section of the paper, a legal rationale can be advanced for greater recognition of international judicial authority to indicate provisional measures for the express purpose of safeguarding the individual right to life or individuals' interests in life. At some point it is inevitable that the divide between the State and the individual that marks public international law so strongly be broached more openly. The question of the right to life provides an obvious starting point.

Challenges within international law such as those identified here in relation to the indication of provisional measures may be addressed in the course of time. Further movement towards recognition of grounds on which the mechanisms of international adjudication can be used for the direct protection of individuals is likely. At this point it may be observed that international adjudication has become established as a core institution in the dynamics of States' collective and generally peaceful international self-regulation. Were there no international courts and tribunals it is hard to imagine that an international law among sovereign equals could be regarded as a workable strategy to bring even an incomplete degree of order to international relations.[150]

150 See Sir Hersch Lauterpacht's perspectives on the international judicial function, in particular in *The Function of Law in the International Community* (Oxford University Press, 1933), and *The Development of International Law by the International Court* (Stevens & Sons Limited, 1958). See further Koskenniemi M. 'Lauterpacht: the Victorian Tradition in International Law' in *The Gentle Civilizer of Nations* (Cambridge University Press, 2002) 353, including at 391.

Human Rights Commissions and Religious Conflict in the Asia-Pacific Region

Carolyn Evans [1]

> A concern for human rights has to be born from within before it can be enforced from without.[2]

Religious conflict is an intractable and serious problem in many parts of the Asia-Pacific region. Many religious or ethno-religious conflicts do not lend themselves to simple or short-term solutions. A wide range of approaches is needed to resolve such conflict satisfactorily. One such approach that is becoming more popular in the Asia-Pacific region is the development of National Human Rights Institutions (particularly Human Rights Commissions) in numerous States.[3] Obviously, such

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1 This article is part of a broader project on National Human Rights Institutions in the Asia Pacific region being carried out with my colleague Amanda Whiting from the Asian Law Centre. My thanks to Amanda and to Dinah Shelton, Charles Norchi, Stephanie Kleine-Ahlbrandt, Karin Lucke and Elena Baylis for their comments on an earlier draft and to Beth Midgley for her assistance with editing. This chapter is a modified version of an article originally published in the International and Comparative Law Quarterly. It is reprinted with the permission of the British Institute for International and Comparative Law and Oxford University Press.

2 Li-Ann Thio, 'Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go before I Sleep' (1999) 2 *Yale Human Rights and Development Law Journal* 1, 78.

3 National Human Rights Commissions are discussed in Kamel Hossain et al (Eds), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (2001); Sonia Cardenas, 'National Human Rights Commissions in Asia' (2002) 4(1) *Human Rights Review* 30; Brian Burdekin and Anne Gallagher, 'The United Nations and National Human Rights Institutions' in Gudmundur Alfredsson et al (Eds), *International Human Rights Monitoring Mechanisms* (2001) 815; Anne Gallagher, 'Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners' in Philip Alston and James Crawford (Eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 201; and Thio, above n 2, 61–80. For more detailed discussions of the role of particular National Human Rights Commissions in the Asia-Pacific region see Amanda Whiting, 'Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission' (2002) 39 *Stanford Journal of International Law* 1; Vijayashri Sripati, 'India's Human Rights Commission: A Shackled Commission?' (2000) 18 *Boston University International Law Journal* 1; Mario Gomez, 'Sri Lanka's New Human Rights Commission' (1998) 20 *Human Rights Quarterly* 281; Abul Hasnat Monjurul Kabir, 'Establishing National Human Rights Commissions in South Asia: A

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 145–161.*
 ISBN 90 04 14599 0.

Commissions have a much broader mandate than resolving ethno-religious conflict, but the approaches taken by Commissions to such conflicts are revealing when considering the role of Commissions more generally.

National Human Rights Commissions ('NHRC') established in compliance with United Nations standards have been established in Australia, Fiji, India, Indonesia, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Republic of Korea, Sri Lanka and Thailand.[4] In many of these States, however, human rights abuses are still wide-spread and serious. The establishment of NHRC, which generally do not have the power to make enforceable decisions, could easily be derided as an attempt by governments to create a façade of respect for human rights while failing to take the enforcement of those rights seriously.[5] While this criticism has a degree of validity, NHRC have played a constructive, if limited role, in the promotion and protection of human rights in the Asia-Pacific region.

The first part of this article introduces the internationally recognised standards to which NHRC should adhere and looks at the ways in which those standards have been adopted by NHRC in the Asia-Pacific region. The second part looks at the way in which two Asian NHRC have dealt with the complex human rights problems that arise from ethno-religious conflict. Conflict fuelled by religious violence has been a significant cause of human rights abuses in the region. Religious freedom and the rights of religious minorities can be a sensitive and politically charged issue in many Asia-Pacific States and the variety of responses that NHRC have used to deal with ethno-religious disputes demonstrate both the potential and limitations of NHRC in dealing with such difficult matters. The final part assesses the place of NHRC in strengthening human rights protection in the Asia-Pacific region.

Principles Regarding the Establishment and Operation Of NHRC

The international community has recognised the importance of NHRC in ensuring effective protection of human rights for over a decade.[6] The *Vienna Declaration and Programme of Action*, adopted by the General Assembly in 1993, reaffirmed the 'important and constructive role' played by national human rights institutions gener-

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Critical Analysis of the Processes and Prospects' (2001) 2 *Asia-Pacific Journal of Human Rights and Law* 1; Charles Norchi, 'The National Human Rights Commission of India as a Value-Creating Institution' in John Montgomery (Ed), *Human Rights: Positive Policies in Asia and the Pacific Rim* (1998).

4 These NHRC are all members of the Asia Pacific Forum of National Human Rights Institutions, discussed below.

5 Indeed a number of NHRC in the region were arguably established in order to deflect international criticism or pressure for regional rights institutions. See Norchi above n 2 114–16; Cardenas, above n 3, 33.

6 UN Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995) 4–6 ('*UN Handbook*'); Linda C Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1, 3–5; Kabir, above n 3, 11–15.

ally and encouraged the 'establishment and strengthening' of such institutions.[7] The United Nations has continued to recognise the importance of NHRC by supporting their work through the United Nations National Human Rights Institutions Forum[8] and encouraging States to develop NHRC.[9] There has also been recognition of the importance of NHRC in the Asia Pacific region through the establishment of the Asia-Pacific Forum of National Human Rights Institutions ('Asia Pacific Forum') in 1996 as a body for co-ordinating information and technical development between many NHRC in the region.[10]

The United Nations has set out, and the Asia-Pacific Forum has accepted, a series of principles to which all national human rights institutions (general comprising Commissions and/or Ombudsmen) should adhere.[11] These principles are officially called the *Principles Relating to the Status of National Institutions*, but commonly known as the *Paris Principles*.[12] In order to achieve membership of the Asia Pacific Forum, NHRC have to show that they adhere to these *Principles* and the importance of the *Principles* is re-iterated in the public statements of the Forum.[13] The *Paris Principles* cover three primary areas: the competence and responsibility of NHRC; guarantees of independence and pluralism for NHRC; and methods of operation to be employed by NHRC. There are also 'additional principles' for those NHRC that have 'quasi-jurisdictional competence'. Exploring the manner in which NHRC in the Asia-Pacific region have implemented these principles assists in developing an understanding of the strengths and weaknesses of NHRC.

Competence and Responsibilities

The basic responsibility of NHRC, as set out in the *Paris Principles*, is to protect and promote human rights. They should advise the 'Government, Parliament and any other competent body' as to their 'opinions, recommendations, proposals and reports

7 *Vienna Declaration and Programme of Action* (adopted by the World Conference on Human Rights, Vienna, Austria, 25 June 1993) UN Doc A/CONF.157/23 (1993) Art 36.

8 See the National Human Rights Institutions website, which gives an overview of the functions of the forum as well as resources for NHRC: <www.NHRI.net/other.htm> at 22 April 2004.

9 See generally Burdekin and Gallagher, above n 3, 821–4.

10 For information on the history and operation of the forum see <www.apf.hreoc.gov.au> at 22 April 2004. The forum operates to provide 'mutual support, co-operation and joint activity' through such activities as information exchanges, training, joint projects, and regional seminars: 'Larakia Declaration: Conclusions, Recommendations and Decisions' (Asia Pacific Forum First Regional Workshop, Darwin, Australia, 8–10 July 1996).

11 The Asia Pacific Forum has stated that to 'ensure effectiveness and credibility the status and responsibilities of national institutions' those institutions should comply with the *Paris Principles*. Ibid.

12 GA Res 134, UN GAOR, 48th sess, 85th mtg, UN Doc A/RES/48/134 (1993) (*Paris Principles*).

13 See, eg, 'Concluding Statement' (Seventh Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, New Delhi, India, 11–13 November 2002) [5].

on any matters concerning the promotion and protection of human rights.' This broad mandate includes scrutiny of existing or proposed legislative and administrative provisions for compliance with human rights norms; preparing reports on any 'situation of violation of human rights which it decides to take up' or on the general state of human rights in the country; drawing government attention to particular situations that are giving rise to abuses of rights; encouraging ratification of human rights treaties; contributing to State reports to UN bodies; cooperating with UN and regional human rights bodies; engaging in research and education in the area of human rights; and publicising human rights and efforts to combat their violation.

Each of the NHRC in the Asia-Pacific region has its jurisdiction defined with reference to protecting human rights. The precise definition of human rights differs, but most of the constitutive documents of these NHRC define rights by reference to other instruments, including constitutions, local laws and international obligations. The *Protection of Human Rights Act 1993* (India), for example, defines human rights as 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.'[14] Similar definitions can be found in the legislation of Thailand,[15] Nepal,[16] South Korea,[17] and Mongolia.[18] Thus, international standards (or at least standards from human rights treaties that have been ratified) are deliberately transformed into domestically applicable standards. This acknowledgement of the relevance of international standards to domestic conceptions of rights is an important, if generally overlooked, aspect of the contribution of NHRC to the development of rights adherence in the region. If they do nothings else, NHRC have demonstrated that some reference to international human rights law can be compatible with Asian legal systems, thus making a valuable contribution to the 'Asian values' or 'values in Asia' debate.[19]

The similarity of the definition of human rights in NHRC constitutive instruments, however, can mask considerable differences in mandate. While the Indian Act refers explicitly to international covenants, it limits the Commission's mandate to rights 'enforceable by courts in India'. As international treaties are not directly enforceable by the Indian courts, the scope of the Indian Human Rights Commission could be more restricted than it may seem at first. In practice, however, the Commission has followed the Indian Supreme Court's example and reports that it is 'daily relying on [human rights] treaties and other international instruments.'[20]

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14 *Protection of Human Rights Act 1993* (India) § 2(1)(d).

15 *Human Rights Commission Act 1999* (Thailand) § 3.

16 *Human Rights Commission Act 1997* (Nepal) § 2(f).

17 *National Human Rights Commission Act of the Republic of Korea 2001* (Korea) Art 2(1). This Act also includes reference to international customary law.

18 *Law of the National Human Rights Commission of Mongolia 2000* (Mongolia) art 3.1.

19 For a good, recent overview of this debate see Randy Peerenboom, 'Beyond Universalism and Relativism: The Evolving Debate about "Values in Asia"' (Research Paper No 02–232, UCLA School of Law, 2002).

20 National Human Rights Commission of India, *Annual Report 1998–99* (1999) 21.

Similarly, although many NHRC constitutive documents refer to international treaties ratified by the State, each State has ratified different human rights treaties and thus in some cases the reference to treaties only leads to the incorporation of limited human rights obligations.[21] In a commentary on best practice for NHRC, the Commonwealth Secretariat argued that human rights should be defined 'not only by reference to domestic law, but also by reference to all international human rights instruments, whether or not acceded to by the State.'[22] Most States in the region have not been prepared to go this far, but many Commissions have interpreted their mandate very broadly to include many more rights than their constitutive documents appear to cover.[23] Thus, in practice, NHRC have adopted a wide mandate in regard to a range of human rights issues.

Composition and Guarantees of Independence and Pluralism

In order to help ensure the effectiveness of NHRC, the *Paris Principles* require that NHRC be pluralistic and independent. No particular method of selection for members of NHRC is required by the *Principles*, but the method should ensure the 'pluralist representation of social forces (of civilian society)' and members are required either to directly represent, or engage in consultation with, representatives from a range of social groups, such as trade unions, non-government organisations, academics, and parliamentarians. NHRC independence is to be ensured by adequate funding and protected tenure for members. In its study of best practice for NHRC, the Commonwealth Secretariat suggested that the independence and continuing effectiveness of NHRC is best guaranteed by ensuring that they are established by constitutional provisions, or at very least by legislation. Establishment by executive

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21 For example, Malaysia has ratified only two major human rights treaties: the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); and the *Convention on the Rights of the Child*, opened for signature 29 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). It has not ratified such important conventions as the *International Covenant on Civil and Political Rights*, opened for signature 26 December 1966, 999 UNTS 171 (entered into force 23 March 1976); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); or the *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). See Office of the United Nations High Commission for Human Rights, *Status of Ratifications of the Principal Human Rights Treaties* (2002).

22 Commonwealth Secretariat, *National Human Rights Institutions: Best Practice* (2001) 18.

23 The National Human Rights Commission of Malaysia, for example, has referred regularly to economic and social rights, even though its establishing law does not refer to them and Malaysia has not ratified the *International Covenant on Economic, Social and Cultural Rights*. See Whiting, above n 3, 24–6.

decree was not considered a sufficient guarantee of the 'continued existence or independence of an NHRC.'[24]

Different Asia-Pacific States have attempted to protect the independence of their NHRC in a variety of ways. The Indian Human Rights Commission, for example, requires the five members of the Commission to be recommended by a Committee consisting of government and opposition representatives, and to be confirmed by the President of the Commission.[25] While the structure of the Committee gives the government a high degree of control over appointments, the power of the government to politicise the appointment process is strictly constrained by the requirement that the President of the Commission be a former Chief Justice of the Supreme Court and two other members be current or former judges of the Supreme Court and the High Court.[26] The fact that three of the five members are, or have been, holders of high judicial office has helped to secure the independence and prestige of the Commission. The Nepalese Human Rights Commission also requires that one member be a retired judge,[27] while the Korean Human Rights Commission allows the Chief Justice of the Supreme Court to nominate three of the eleven members of the Commission.[28] The widespread use of retired judges as Commissioners is generally a positive step in the ensuring the independence of NHRC, but it should be kept in mind that judicial independence cannot be assumed in all States in the region.

Other States, however, have not given such explicit protection to the independence of their Commissions. The Australian Human Rights and Equal Opportunity Commission, for example, is appointed by the government and no particular qualifications are set out for Commission members in the legislation.[29] Similar concerns about independence arise with the Indonesian,[30] Malaysian,[31] and Philippines

24 Commonwealth Secretariat, above n 22, 10–11. See also UN Centre for Human Rights, above n 6, 11.

25 *Protection of Human Rights Act 1993* (India) § 4.

26 Ibid § 3.

27 *Human Rights Commission Act 1997* (Nepal) § 1.

28 *National Human Rights Commission Act of the Republic of Korea 2001* (Korea) Art 5. Although four members are nominated by the President, and the other three are nominated by the National Assembly.

29 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) § 8. The Commissioners are appointed by the Governor-General (who acts on the advice of the Prime Minister). The Commission has expressed concerns over the extent to which planned government changes to the Human Rights and Equal Opportunity Commission will further undermine its independence. See Human Rights and Equal Opportunity Commission, *Submission to Senate Legal and Constitutional Legislation Committee on the Australian Human Rights Commission Legislation Bill 2003* (2003) <www.hreoc.gov.au/ahrc/submission.html> at 22 April 2004.

30 In Indonesia, the Commission was created (and can be destroyed) by presidential decree. See *Decree of the President of the Republic of Indonesia No 50/1993*. Despite this, Thio and Gallagher argue that it operates with reasonable independence: Thio, above n 2, 63–4; Gallagher, above n 3, 305–6.

31 The Malaysian Commission itself has called for greater independence in the selection and removal of its Commissioners. See National Human Rights Commission of

Commissions, which consist of members nominated by the President or Prime Minister (with the fragile protection in the Philippines Constitution that a majority of members have to be members of the Bar).[32] Despite the lack of guaranteed independence, most Commissions in the region do act independently in practice and sometimes do so to a degree that disconcerts governments that thought that they were creating a façade of human rights compliance. As Professor Thio points out in the context of the Indonesian Commission, the motives of those establishing Commissions might be public relations, but human rights institutions 'have a way of assuming a life of their own quite apart from the intention of their creators.'[33]

The extent to which Commissioners of NHRC in the Asia-Pacific region are truly independent is a complex and controversial one that is fluid overtime. Some people working the in field, for example, believe that the Indonesian Commission was punished for its independence by the government, particularly after it made unfavourable comments on the military's action in Aceh. In private interviews, certain non-governmental activists working in Indonesia claim that the Commission is now far less independent, although it still does manage to raise the ire of the government from time to time. In other countries it is clear that there is a real problem of independence, with the Commission far more often siding with the violator than the victims of rights abuses.[34] Yet it is also clear that in some parts of the region, Commissions are acting with true independence and pressure is maintained by non-government groups on those Commissions which seem to be acting at the behest of the government.[35]

While it is clear that most Commissions have been composed with some consideration given to independence, the issue of plurality (the importance of which is emphasised in the Paris Principles) is not dealt with in most NHRC constitutive documents.[36] Indeed some of the measures that help to ensure independence (such as insisting that members are judges or barristers) are inimical to plurality. While some of these problems can be dealt with by undertaking consultation with a variety of social groups, some Commissions complain that lack of funding means that they

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Malaysia, *Annual Report 2002* (2002), which summarises its more detailed review of the *Human Rights Commission of Malaysia Act 1999* (Malaysia).

32 *Executive Order 163 of 1987* (Philippines) § 2 (a).

33 Thio, above n 2, 71.

34 See, for example, Asian Human Rights Commission, Statement, *Sri Lanka: Former inquiry officer of the Human Rights Commission speaks out* (25 October 2004).

35 The Asian Human Rights Commission (which is a non-government organization) often circulates criticisms of Asian NHRC. See ibid.

36 Although it is possible that the Asia Pacific Forum will place some pressure on NHRC in regard to plurality. When Malaysia applied for membership of the Forum, the Fiji Human Rights Commission asked for further information on the Malaysian Commission's composition. The additional information provided satisfied the Fijians, but demonstrates that the Forum can play a limited supervisory role in regard to plurality. See 'Report of the Seventh Annual Meeting' (Seventh Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, New Delhi, India, 11–13 November 2002) 10.

are not able to provide appropriate assistance to some vulnerable groups, particularly those living in remote regions or who do not speak the dominant language(s). When Commissions are unable to set up regional offices or ensure that their materials are translated into a variety of languages, their plurality is undermined.[37]

There is no requirement in the Paris Principles or any other international work dealing with Commissioners that the Commissioners have any particular expertise in human rights. Some Commissions (for example in the Philippines) have tended to be staffed by people with a strong background in and knowledge of human rights. Others (for example Malaysia) tend to be more the province of former government officials. In countries where most Commissioners are required to be judges such judges need not have any particular background in the rights field and their domination of the Commission may exclude others who do have such experience. Ideally, at least some Commissioners should have a strong background in human rights and all Commissioners should be obliged to be trained in human rights law and appropriate ways to deal with human rights issues. It may, however, have an unfortunate effect on plurality if only human rights experts were appointed to Commissions. People such as former government officials, judges, unionists, or representatives of minority groups might bring useful skills, background and networks to the Commission that would complement the particular talents of those whose background is primarily in the area of human rights.

Methods of Operation

A variety of methods are set out in the *Paris Principles* for achieving the protection and promotion of human rights.[38] These include consideration of questions within the NHRC's mandate, holding hearings, making press statements, meeting and setting up working groups, and consulting with others. There are also 'additional principles' set out for NHRC with 'quasi-jurisdictional competence.' NHRC, according to these additional principles 'may be authorized to hear and consider complaints and petitions concerning individual situations'. The use of the permissive 'may' and the fact that these principles are 'additional' demonstrates that at the time the *Paris Principles* were being drafted such investigative functions were considered peripheral to NHRC functions.[39] The *Paris Principles* emphasise the role of NHRC in assisting the conciliation process or making recommendations to the competent authorities, but only very briefly mention making binding decisions 'within the limits prescribed by law.'[40]

37 Even the reasonably well funded Indian Human Rights Commission has struggled to ensure that people in all States are getting adequate access to the Commission: National Human Rights Commission of India, *Annual Report 1998–99* (1999) 8. See also Sripati, above n 3.

38 See generally UN Centre for Human Rights, above n 4, ch III–V.

39 National Human Rights Commission of Malaysia, *Annual Report 2002* (2002) ch 9.

40 Compare with the very detailed treatment given to the investigation of individual complaints by the Commonwealth Secretariat: Commonwealth Secretariat, above n 22, 20–1.

Despite the fact that the ability to make *binding* decisions is not a feature of NHRC in the Asia-Pacific region, the *investigation* of both general and individual allegations of violations of rights has been an important part of the role of NHRC.[41] In its best practice study, the Commonwealth Secretariat placed 'investigation of alleged violations of rights' as the first in a list of the most important contributions that NHRC could make to the development of 'pluralistic and healthy democracies.'[42] While it may be argued that NHRC need enforcement powers to make them effective,[43] there are important values of transparency and government accountability that can still be served by the open investigation of human rights.[44] Linda Reif argues that it is possible for NHRC without enforcement mechanisms to contribute to the development of good governance and a culture of human rights in a number of ways such as increasing transparency and accountability.[45]

Thus, whether or not enforcement of Commission rulings follow, a valuable end can be served by bringing to light and publicising human rights abuses that had been covered up in the past. It has been argued, for example, that the Indonesian Human Rights Commission, during the transition from the Suharto regime, was able to gain the trust of victims of police and military brutality and thus to reveal abuses that the government preferred to cover up. This was important in creating a more democratic and rights conscious culture in post-Suharto Indonesia.[46]

The determination of a NHRC that there has been a breach of human rights and suggestions for reform or redress can also put political pressure on governments to comply. Even in the absence of enforcement mechanisms, some Commissions have been successful in encouraging governments to follow Commission determinations. The Indian Human Rights Commission, for example, has noted that 175 of its 176 recommendations for compensation to be paid to victims of rights abuse have been given effect to, although sometimes only after extensive discussions with the responsible government department.[47]

While NHRC may suffer in comparison to Courts in regard to the enforceability of their decisions, they have the advantage of being able to respond more flexibly and over a longer time period to a range of challenges thrown up by human rights problems.[48] Unlike courts, Commissions do not need to wait to react after the event

41 The *UN Handbook* describes the power to investigate individual complaints as one of the 'most common functions' of NHRC: UN Centre for Human Rights, above n 6, 7.

42 Ibid 3.

43 Sripati, above n 3, 30–2. Giving the power to make binding determinations to NHRC may lead to inappropriate conflicts of jurisdiction with courts: UN Centre for Human Rights, above n 6, 12–13.

44 Reif, above n 6, 28–30.

45 Ibid 17–18.

46 Thio, above n 2, 66–9.

47 National Human Rights Commission of India, *Annual Report 1998–99* (1999) 7.

48 Brian Burdekin, 'Human Rights Commissions' in Kamel Hossain et al (Eds), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (2001) 801.

to an alleged rights abuse, but can proactively seek to prevent abuses occurring.[49] Educational programmes in human rights have played an important role in NHRC in the Asia-Pacific region and have involved training for groups such as police officers, the military, government officials, judges, school-children and other community groups.[50] The benefits of such education are likely to be long-term and play a role in contributing to cultural change that is less dramatic, but may ultimately be more effective, than court cases that punish particular individuals.

Another strength of NHRC is that they can and do take an active part in lobbying government over legislation, policy, or participation in international human rights treaties. The Australian Human Rights and Equal Opportunity Commission, for example, has been prepared to criticise the use of mandatory detention of asylum seekers in Australia;[51] the Indian Human Rights Commission successfully lobbied for the repeal of the *Terrorist and Disruptive Activities (Prevention) Act 1987* (India);[52] the Indonesian Human Rights Commission was critical of the government's decision to ban a popular publication (Tempo);[53] and the Malaysian Human Rights Commission mounted a strong attack on the *Internal Security Act 1960* (Malaysia), arguing that it needed to be repealed and replaced by anti-terrorism laws that better balance human rights with national security.[54] The fact that each of these examples relates to issues that are politically sensitive in the respective States also indicates a willingness of some NHRC to engage with controversial issues in an independent manner.

NHRC can also engage in more creative solutions to problems than the legal remedies to which the Courts are restricted. The Indian Human Rights Commission, for example, has issued a directive that all autopsies of people who die while in police custody be video-taped.[55] This was its response to the wide-spread allegations that autopsies of those who had been killed by the police were being under-

49 This is particularly important where vulnerable groups might be fearful of approaching a government institution to complain of rights violations. See Gallagher, above n 3, 313.

50 For example, the Malaysian Commission ran human rights education programmes for 'police, civil servants, teachers, parents and educators', as well as a special human rights 'road show' for people in rural areas in 2002: National Human Rights Commission of Malaysia, *Annual Report 2002* (2002) ch 1.

51 Sev Ozdowski, *Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner* (2001) <www.hreoc.gov.au/human_rights/idc/index.html> at 22 April 2004.

52 National Human Rights Commission of India, *Annual Report 1998–99* (1999) 7. The Commission lobbied for its repeal on the basis that its implementation had lead to serious abuses that were damaging to rights. The Commission undertook 'extensive hearings and analysis' before coming to this conclusion in a climate in which there was a real threat from terrorism. Sripati describes the Indian Commission as the 'decisive force' behind the repeal of the Act and says that it was the Commission's 'earliest and most tangible achievement': Sripati, above n 3, 25.

53 Thio gives some background to these and other cases to which the Commission has taken a proactive stance: Thio, above n 2, 64.

54 National Human Rights Commission of Malaysian, *Annual Report 2000* (2000) ch 3.

55 Sripati, above n 3, 23–4.

taken improperly or under police intimidation. More than 20 States have followed the directive.[56] Unlike courts, NHRC are not bound by the strictures of resolving a particular claim, but can look to the causes of the dispute and the need for long-term solutions. NHRC may, for example, be able to act as a forum for communities that are in dispute with one another to work through the multiple causes of grievances between them as part of an ongoing confidence building exercise. They can also work with non-governmental organisations or other government agencies to develop a range of methods for curbing abuses.[57] This power is particularly important where abuses are deep-rooted and widespread, or rooted in long-standing inter-communal antagonism. An example of such problems are those facing indigenous people in the Malaysian province of Sarawak, where the Malaysian Commission has worked with government officials, non-governmental organizations and indigenous people to help to ensure better recognition of the rights of indigenous people in decisions made in the province.[58] Complex strategies are required to assist in resolving such disputes and ensuring respect for human rights in the future. NHRC have the capacity (though not always the resources or willingness) to engage in developing these strategies because of the wide range of methodologies that they are permitted to employ.

Some further strengths and weaknesses of NHRC in the protection and promotion of human rights can be illustrated by looking at the way in which different NHRC in the Asia-Pacific region have dealt with rights abuses that arise from ethno-religious conflict. For the purposes of this case study, two focus States – India and Malaysia – have been chosen. These two Commissions have taken quite different approaches to the challenges posed by issues of religious freedom and religious intolerance. Because of the sensitivity of the issue and its importance in many parts of the world, the studies provide a useful example of the problems faced by many NHRC in dealing with international norms that some people argue are alien to local culture.[59]

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56 National Human Rights Commission of India, *Annual Report 1998–99* (1999) 14–15. The Commission also developed a Model Autopsy Form and brought together a panel of forensic experts to assist in developing instructions for post-mortem examinations.

57 While most NHRC work well with NGOs, the relationship is not always smooth. In 2002, for example, Malaysian NGOs boycotted working with the Malaysian Commission for 100 days to protest the lack of government follow up to the Commission's recommendations: National Human Rights Commission of Malaysia, *Annual Report 2002* (2002) ch 1.

58 Ibid ch 5.

59 The complex nature of and controversies over the appropriate scope of religious freedom has caused difficulties even in Western States that arguably have cultures that are more compatible with principles of religious freedom. See Carolyn Evans, *Religious Freedom under the European Convention on Human Rights* (2001).

NHRC and Rights Abuses Arising from Religious Conflict

Malaysia

Malaysia has a society that is divided along ethno-religious lines, with a dominant Muslim Malaya population and an economically strong, but politically weaker, Chinese minority.[60] Religion and ethnicity are closely intertwined. Article 153 of the *Malaysian Constitution* defines a Malay as someone who habitually speaks Malay, practices Malay customs *and is a Muslim*.[61] Article 3(1) of the *Constitution* states that 'Islam is the religion of the Federation; but other religions may be practiced in peace and harmony'. While some States have incorporated Syariah courts to adjudicate in some areas of law, Art 3 has been interpreted as making Islam the religion of the Federation, but not a State religion as such.[62] In response to the growing political appeal of PAS, an opposition party with Islamic ties, Prime Minister Mahathir on 29 September 2001 stated at the Gerakan Party's annual general assembly that Malaysia was already an Islamic State.[63] This comment and the political influence of conservative Muslims is a source of concern for many non-Muslim Malaysians, as well as for groups such as Sisters in Islam and other more progressive Muslim associations and individuals.[64]

While the establishment of the Malaysian Human Rights Commission (also known by its Malaysian acronym SUHAKAM) was originally greeted with considerable scepticism by the human rights community in Malaysia, the courageous and public stand that it has taken on a number of human rights issues has increased its

60 For an overview of the way in which race and religion have influenced political discourse see Syed Ahmad Hussein, 'Muslim Politics and the Discourse on Democracy' in Francis Loh Kok Wah and Khoo Boo Teik (Eds), *Democracy in Malaysia: Discourses and Practices* (2002); and Meredith L Weiss, 'Overcoming Race-Based Politics in Malaysia: Establishing Norms for Deeper Multiethnic Co-operation' in Ho Khai Leong and James Chin (Eds), *Mathathir's Administration: Performance and Crisis in Government* (2001) 62.

61 For an interesting discussion of the extent to which colonial ideas still inform the debate over being a 'true Malay' see A B Shamsul, 'A History of Identity, An Identity of a History: The Idea and Practice of "Malayness" in Malaysia Reconsidered' (2001) 32 *Journal of Southeast Asian Studies* 355.

62 See *Che Omar bin Che Soh v PP* [1988] 2 MLJ 55, where the Federal Court held that the role of Islam in the secular federation of Malaysia as guaranteed by Art 3 (1) was ceremonial or ritual in nature and the provision did not make Islam the state religion such that all laws and mode of government must conform to Syariah. This is being chipped away by more recent decisions but is still good law: Farid Sufian Shuaib, Tajul Aris Ahmad Bustami and Mohamad Hisham Mohamad Kamal (Eds), *Administration of Islamic Law in Malaysia: Texts and Material* (2001) 3–19.

63 Prime Minister Mahathir later followed this up by saying that there was no need for debate as people were comfortable with this state of affairs: *The Sun* (6 October 2001) 1.

64 Patricia Martinez, 'The Islamic State or the State of Islam in Malaysia' (2001) 23 *Contemporary Southeast Asia* 474, 491. Martinez also notes that younger Malaysians often feel alienated by religious laws.

credibility considerably.[65] It has, however, taken a very cautious approach to religious issues, in part because repressive Malaysian laws make it difficult to speak about problems between the religious and ethnic groups in Malaysia.[66] Debate on 'sensitive issues', including relations between Malays and non-Malays and the role of Islam, is banned even in Parliament.[67]

The Malaysian Commission has held several closed-door 'dialogue sessions' on the issue of 'inter-faith dialogue'. The only public product of the first session was a press release that claimed that the aim of the conference was to 'facilitate understanding of the concept of human rights within the context of Malaysia's multi-religious society' and to 'promote better understanding and respect among the different religious groups in Malaysia.'[68] In the press release the Commission offered to provide a platform for ongoing dialogue between members of different faiths so that 'issues that could lead to conflict and tension in multi-religious Malaysia could be dealt with in a respectful and responsible manner.' A follow-up conference was held later in 2002 and after these discussions, the Commission wrote to the Chief Secretary of the Government to ask him to consider establishing an inter-faith council and for clarification of the 'murtad' (apostasy) laws and the declaration that Malaysia was an Islamic State.[69] These topics were chosen because of their importance to participants in the dialogue sessions and reflect growing courage by the Commission in this area, particularly as the declaration of Malaysia as an Islamic State has been a highly sensitive issue. Several more conferences on these matters were planned for 2003[70] and they are a small step forward in a country where even discussion of religious issues is highly circumscribed. There has not been any public element to these discussions yet and it is not clear whether they have affected government policy in the area of religious freedom. One disadvantage of such a 'closed door' approach to issues is that it is difficult to evaluate its effectiveness, but outsiders need to be sensitive to the environment in which the Commission is operating when it comes to religious issues.

The experience of the Malaysian Commission in dealing with religious differences demonstrates the extent to which Commissions are influenced by the legal and political environment in which they operate. The fact that the Commission is dealing with religious issues largely behind closed doors at one level suggests weaknesses

65 See generally Whiting, above n 3.

66 A similar caution has been evident in its examination of racial and cultural issues: ibid 32–40.

67 *Constitution of Malaysia* art 10(4) prohibits parliament from questioning the privileges given to Malays and the Malay language. The government has also used the notorious *Sedition Act 1948* (Malaysia) and the *Internal Security Act 1960* (Malaysia) against critics of government practices or policies. For an overview of the human rights aspects of the *Internal Security Act 1960* (Malaysia), see National Human Rights Commission of Malaysia, *Annual Report 2002* (2002) ch 3.

68 Human Rights Commission of Malaysia, *Press Statement* (9 April 2002).

69 National Human Rights Commission of Malaysia, *Annual Report 2002* (2002) ch 1. The Chief Secretary has promised to respond to these issues.

70 See the National Human Rights Commission of Malaysia schedule of activities: <www.suhakam.org.my/activities.htm> at 22 April 2004.

and ineffectiveness. It may, however, be better described as the result of a realistic assessment of the extent to which local conditions require an incremental and low-key approach to issues that are socially divisive. The willingness of the Commission to raise the issue of whether or not Malaysia is an Islamic State suggests that it is prepared to tackle controversial issues to some degree and the fact that the government has expressed a willingness to respond to those inquiries (when international human rights groups which have raised the issue have been attacked for interfering in Malaysian politics) may indicate some level of success with this approach.

India

The *Constitution of India* provides for a secular State in which all religions are respected and religious freedom is guaranteed.[71] While India has a large Hindu majority, it still has significant Muslim, Christian and other religious communities. From the time of partition there have been significant problems with violence between the various religious communities[72] and inter-communal violence continues to play a significant role in Indian political life.

Of the two Commissions discussed in this paper, the Indian Human Rights Commission has been the most forthright and proactive in seeking to protect religious minorities even in times of unrest and inter-communal violence.[73] Indeed, unlike the other two Commissions, it has moved quickly and publicly to deal with high-profile situations such as the violence in Gujurat or the killing of Christians in Orissa in 1999.[74] In these cases the Commission has acted suo-motu and begun investigations in the circumstances surrounding the violence almost immediately, while warning of the potential for further human rights abuse.[75] In the case of Gujurat it has repeatedly stressed that the violence is part of an ongoing pattern, encouraged by some political leaders and media outlets, and should not be dealt

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71 The preamble of the *Constitution* begins, 'We, the people of India, having solemnly resolved to constitute India into a sovereign socialist *secular* democratic republic' and to secure 'liberty of thought, expression, belief, faith and worship' (emphasis added). Articles 25–8 of the *Constitution of India* set out the details of the right to religious freedom. For a discussion of religious freedom under the *Constitution* see H M Seervai, *Constitutional Law of India* (3rd ed, 1983).

72 For an overview of the role played by religious conflict and compromise in the drafting of the *Constitution of India* and the development of Indian democracy see Granville Austin, *Working a Democratic Constitution: The Indian Experience* (1999).

73 For a general assessment of the Commission, see Sripati, above n 2; V S Malimath, 'Report of the National Human Rights Commission of India' in Kamel Hossain (Ed), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (2001) 211.

74 National Human Rights Commission of India, *Case No 422/18/98-99* (1998–99); see also National Human Rights Commission of India, *Annual Report 1998-99* (1999) 59–61.

75 National Human Rights Commission of India, *Case No 1150/6/2001-2002 (Notice of Proceedings)* (1 March 2002).

with as a series of isolated events.[76] The Indian Commission has been deeply critical of the way in which local government and officials have handled the conflict in Gujurat. The Commission took the unusual step of publishing its report before getting a response from the Gujurat government on the grounds that the government had delayed its response unacceptably and the issue was sufficiently urgent to require publication without a response.[77] The Commission held that, given the history of communal violence in Gurjat and the widespread and serious nature of the human rights abuses, the government was to be considered liable in the absence of any defence.[78] The Commission made clear that the State has a 'primary and inescapable responsibility to protect the rights to life, liberty, equality and dignity' of all its people from abuses by agents of the States and also from abuses by 'non-State players within its jurisdiction.'[79] Given the numbers who died and were injured in the ongoing attacks in Gujurat and the absence of any justification by the State for its failure to protect these lives, the Commission applied the principle of *res ipsa loquitur* to hold that there was a 'comprehensive failure of the State to protect the Constitutional rights of the people of Gujurat.'[80]

The Indian Commission is also very specific in the orders that it makes. While it has generally condemned religious violence, called on all parties to respect religious freedom, and quoted Ghandi on the importance of tolerance and human dignity,[81] it has also made a series of orders with the aim of improving the human rights situation. These include everything from ensuring that camps of those made homeless by the violence have adequate shelter and food,[82] to ordering that local investigators who were considered to have done a poor job of investigating the violence be replaced by the a special investigation unit in certain crucial cases[83] and to suggesting that a special court to be set up to prosecute the most serious offenders.[84]

The Indian Commission has demonstrated the extent to which NHRC can use the full range of their powers even in very politically sensitive areas and at times of serious conflict. Its stand has been principled and courageous, and its recommenda-

76 National Human Rights Commission of India, *Case No 1150/6/2001-2002 (Preliminary Comments)* (1 April 2002) [20(g)].

77 National Human Rights Commission of India, *Case No 1150/6/2001-2002 (Proceedings)* (31 May 2002) [4]–[6].

78 National Human Rights Commission of India, Case No 1150/6/2001-2002 *(Comments of the Commission)* (31 May 2002) [9]–[10].

79 Ibid.

80 Ibid [10].

81 National Human Rights Commission of India, *Case No 1150/6/2001-2002 (Concluding Observations)* (31 May 2002) [68].

82 National Human Rights Commission of India, *Case No 1150/6/2001-2002 (Recommendations)* (1 April 2002) [21].

83 National Human Rights Commission of India, *Case No 1150/6/2001-2002 (Further Set of Recommendations of the Commission)* (31 May 2002) [27]. The State government refused to allow the CBI special investigators take over the cases, although it did promise to look more carefully at the cases.

84 Ibid [29].

tions concrete and practical. The difficulty that the Commission has experienced in making a real contribution to bringing the perpetrators to account for their actions in Gujurat is the hostility of the government of Gujurat to its investigations and recommendations, exemplified by the government's original refusal to respond to the Commission's private report and its ongoing refusal to take serious action against Hindus implicated in the violence.[85] When faced with contempt for its authority, an NHRC without enforcement power can do little to force the hand of government beyond continuing to put political pressure on the government by reporting abuses in an objective and credible manner.[86] That does not mean, however, that the Commission has been entirely powerless. For example, it was part of the successful efforts to have the charges from one of the notorious incidents in the riots (the 'Best Bakery incident') reopened by the national investigators and courts after criticism of the way in which it was handled by local courts.[87] Thus, even though it was not able to force the government of Gujarat to respect all of its recommendations, it has still been able to find ways of influencing the outcome in particular cases or on particular issues to try to improve the human rights responses to the massacres.

Conclusions: Problems and Possibilities

> National Human Rights Institutions can be a double-edged sword. In the best of circumstances, they strengthen democratic institutions by widening and enhancing a nation's democratic space, but they can also be mere straw men, part of a government's administrative machinery to scuttle international machinery.[88]

The limitations of NHRC's as protectors and promoters of human rights are linked to their limited powers of enforcement[89] and, sometimes, to the perception that they are too dependent on the government to tackle important but controversial issues.[90] In extreme cases, where their independence has been insufficiently guaranteed, they have even been accused with complicity with governments against the interests of

85 See also Human Rights Watch, *Compounding Injustice: The Government's Failure to Redress Massacres in Gujurat* (2003).

86 The Indian Commission has continued to put pressure on the government to punish those responsible for the atrocities and to ensure fair trials for those charged. See, eg, National Human Rights Commission of India, *Case No 1150/6/2001–2002 (Proceedings)* (16 June 2003).

87 National Human Rights Commission of India, Press Release, *NHRC decides to move the Supreme Court in Best Bakery case. Transfer application also moved in respect of 4 other serious cases* (July 2003).

88 Kabir, above n 3, 4.

89 Philippines NGOs have attacked the Philippines Human Rights Commission as a 'tiger with no tooth': Philippine Alliance of Human Rights Advocates, *An Initial Assessment of the Performance of the Philippines Commission on Human Rights* (1999).

90 National NGO Coalition for the Establishment of an Independent NHRC, 'Not for the People! The Controversy over the National Human Rights Commission in South Korea' (1999) 18 *Asia Pacific News* <www.hurights.or.jp/asia-pacific/no_18/no18_korea.htm> at 22 April 2004.

victims.[91] When they are the only official human rights body in a State, NHRC's can appear to be facades that create the appearance of rights observation without the reality.[92] Even NHRC have argued that governments are too slow to respond to their recommendations where there is no power of enforcement to compel them to do so.[93] They can also be prone to the same prosaic problems of inefficiency, wastefulness or internal politics that can beset any government institution.[94]

There are, however, real strengths in the multi-faceted, less-legalistic approach that NHRC can bring to resolving conflicts that arise out of human rights problems. Issues such as religious freedom and intolerance cannot be dealt with in an adequate or comprehensive manner simply by enforcing religious rights through judicial mechanisms. As the inter-communal violence in Gujurat demonstrates, the causes of religious conflict are complex and multiple, and such conflicts can lead to a wide range of rights abuses. NHRC are able to utilize a greater range of strategies over a longer period of time than courts in order to contribute to more lasting solutions to these problems. Such strategies may involve education in schools, training of police and military officers, undertaking research projects, encouraging negotiations between parties and even closed door sessions, such as those in Malaysia, that allow dialogue to begin in areas of deep controversy. Such diverse strategies work best, however, if they are reinforced by other mechanisms (either courts with the power to enforce legal rights or NHRC powers of enforcement) that can be used to deal with parties that refuse to be involved in more conciliatory processes or who are responsible for serious abuses of human rights.[95]

While even vigorous and independent NHRC alone are insufficient to ensure the protection and promotion of human rights in States, they can play a significant role in assisting the long-term development of a culture of rights and peaceful resolution of inter-communal conflicts.[96] Through education, government lobbying, investigation of particular cases, and a long term commitment to increasing the realisation of human rights NHRC are likely to play an increasingly important role in the region.

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91 The Sri Lankan Commission, for example, is accused by NGOs of assisting in covering up serious violations, such as torture, by encouraging victims to settle claims for very small amounts of money. In return for compensation, the victim agrees to drop all criminal and civil proceedings: 'The Sri Lankan Commission has Used Its Power to Bite the Victims and Not the Perpetrators' (Statement delivered at the Asian Civil Society Forum, Bangkok, Thailand, 10 December 2002). See more generally the criticisms of many African NHRC in Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001) <www.hrw.org/reports/2001/africa> at 22 April 2004.

92 Kabir, above n 2; Philippine Alliance of Human Rights Advocates, above n 89.

93 National Human Rights Commission of Malaysia, *Annual Report 2002* (2002).

94 Center for Public Resource Management, *Evaluation of the Philippines Commission on Human Rights: Final Report* (2002) ch 5.

95 The Commonwealth Secretariat concludes that, while NHRC should not have power to make enforceable decisions, a 'mechanism for the enforcement of NHRC decisions by courts should be provided' and it is critical that there are sanctions for failure to cooperate with NHRC: Commonwealth Secretariat, above n 22, 30.

96 Cardenas, above n 3, 42–8.

Part II

Conflict Resolution and Peace-Building

The Role of the United Nations in Conflict Resolution and Peace-building in Timor-Leste

His Excellency Sukehiro Hasegawa

Introduction

In this paper I would like to take this opportunity to share my views on the contribution made by the United Nations Mission of Support in East Timor (UNMISET) towards conflict resolution and peace-building in Timor-Leste as East Timor is now officially called.

Since the end of the Cold War, both the concept and practice of United Nations (UN) peacekeeping operations have changed substantially. During the Cold War, UN peacekeeping forces were deployed as a manifestation of the will of the international community to undertake impartial and non-forcible intervention to resolve conflicts between conflicting sovereign parties. Since then, UN peacekeeping missions have evolved and focused on not only alleviating enormous humanitarian sufferings but also preventing the deterioration of internal conflicts and the collapse of statehood. For this purpose, peacekeeping missions increasingly play the role and function of peace-building to lay the basic foundation of self-sustaining peace. More recently, the international community has accepted the pragmatic and realistic approach of carrying out all phases of peace activities simultaneously to achieve enduring conflict resolution.

UN peacekeeping is a form of conflict resolution as its activities are based on third-party intervention. It is important to distinguish between the traditional understanding of 'restoring peace' among nation-states and 'building peace' in war-torn societies. The former is defined as the cessation of acts of war undertaken by national armed forces and the latter as the process of establishing the institutions of democratic governance and fostering a culture of respect for human rights and freedoms. Peacekeeping is a tool of conflict management that contains violence, while peace-building is a means of establishing a viable and inclusive democratic governance structure in a post-conflict society. The latter includes the rule of law, free and fair elections, a viable national legislature, an independent judiciary, transparency and accountability in public administration, access to political and economic opportunities and equitable sharing of wealth.

In Timor-Leste, the UN Security Council decided to maintain the UN security and civilian presence in May 2002 by establishing UNMISET with the adoption of resolution 1410 of 17 May 2002 in order to ensure that the gains made over the previous two and a half years by the United Nations Transitional Administration in East

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 165–191.*
 ISBN 90 04 14599 0.

Timor (UNTAET) were consolidated and the viability of the new state maintained. In this context, the primary role of UNMISET in providing external and internal security was a deliberate effort to carry out 'actions to identify and support structures which [would] tend to strengthen and solidify peace in order to avoid a relapse into conflict.' (The UN Secretary-General defined this as a peace-building activity in his *Agenda for Peace* in 1992.) UNMISET is one of the UN peace operations that undertake peacekeeping and peace-building activities in an integrated and comprehensive manner. This integrated approach taken by the UN Security Council is line with key recommendations of the Panel on United Nations Peace Operations headed by Lakhdar Brahimi which reported in 2000.

Providing Security as a Bedrock for Peace-Building

Peacekeeping operations constitute the foundation for peace-building efforts and enduring conflict resolution. Without security maintained by international peacekeeping forces or national security forces, it would be impossible to undertake such peace-building activities as the protection of human rights, the formation of democratic government through free and fair elections, the establishment of a justice system with proper legal frameworks, the delivery of public and social services, infrastructure reconstruction and economic rehabilitation. The imperative of maintaining security, as a prerequisite for peace-building, has applied in Timor-Leste since the arrival of Australian troops as part of the multinational peacekeeping forces in September 1999.

Maintenance of External Security and Territorial Integrity

Since the UN established its transitional governing authority for the then East Timor with resolution 1272 on 25 October 1999 the Peace Keeping Forces (PKF), as the integrated military component of both UNTAET and UNMISET, have contributed decisively to the overall stability and secure environment within Timor-Leste particularly in the border areas. During the year following the establishment of UNMISET in May 2002, the military component continued to provide support for the external security and territorial integrity of Timor-Leste, while ensuring timely transfer of security responsibilities to the national defence force, Falintil-FDTL (F-FDTL).

Major security threats did emerge in late 2002 and early 2003 when riots and grave civil disturbances erupted in the capital Dili on 4 December 2002. A further serious security incident took place on 4 January 2003 when a group of about 20 to 30 men armed with automatic weapons attacked villages in Atsabe of Ermera district and killed five people. Then, on 24 February 2003, a small group of men armed with semi-automatic weapons attacked a shuttle bus travelling from Maliana in the border district of Bobonaro. Two people were killed and five people injured. UNMISET military and police forces as well as Timorese police forces were deployed to the area immediately. On 27 February 2003, a UN Fijian military patrol sighted and exchanged fire with a group of armed men in the area, killing one and

apprehending another. It appeared that former militias and armed groups were infiltrating Timor-Leste with the purpose of undermining the stability of the country. As PKF intensified their security measures, external security concerns diminished. The situation has remained largely calm since March 2003. Due to the diplomatic efforts of both Timor-Leste and Indonesia, the relationship between the two countries has improved significantly since the international recognition of the independence of Timor-Leste.

After the security incidents mentioned above, the downsizing plan for the military component was adjusted by maintaining a greater PKF personnel strength through December 2003 than was originally planned. The current military strength is about 1,750 personnel, including 78 military observers. This compares to 3,760 military personnel and 106 military observers in June 2003. The PKF is currently responsible for security in the western districts and the entire tactical coordination line (TCL), the de facto borderline between Timor-Leste and Indonesia. It has the capability to respond to security threats throughout its areas of operation. This includes visiting patrols into the border districts of Suai and Oecussi, where the military no longer maintains a large-scale presence.

The Border Patrol Unit (BPU) of the national police force or Policia Nacional de Timor-Leste (PNTL) has now assumed full responsibility for day-to-day management of all junction points or border crossings along the tactical coordination line. The BPU's ability to maintain security in the border area depends largely on close cooperation with Indonesian counterparts. UNMISET continues to support close collaboration among Timorese security agencies, including the PNTL and the defence force or the F-FDTL. The Mission has helped create the joint information centre where international military and police officers work together with Timorese counterparts on day-to-day management and analysis of security-related information.

Through their interaction with UNMISET's military component, F-FDTL officers have improved the functioning of military headquarters and developed relevant skills such as logistic planning, communications and map reading. While the F-FDTL is capable of limited response operations, it will require several more years to develop the logistic capability to respond to external threats if any were to occur.

One of the main challenges in promoting cooperation between the national police and the defence force in maintaining internal and external security is the lack of an overarching national security policy that clearly defines the roles of respective security forces. There have been reports of incidents, sometimes violent, between members of the PNTL and the F-FDTL. This is possibly a manifestation of low morale and lack of discipline. The healthy development of the Timorese police and armed forces will depend on political decisions that need to be made in order to define their roles and functions.

Currently, the PKF military component of UNMISET is supporting the maintenance of security in the border area by patrolling in those areas along the tactical coordination line that are not patrolled by the BPU of the PNTL. The United Nations Military Observers (UNMOs) continue to assist on border management through permanent border liaison teams operating close to key junction points and

through regular visits to other junction points using mobile patrol teams. As an interim measure pending the establishment of an agreed border, UNMISET will continue to assist the Government in developing a TCL management framework for the PNTL on one side and the Indonesian police and armed forces on the other.

In spite of the overall stable relationship that exists between Timor-Leste and Indonesia, there are still reports of sightings of armed gangs and criminal elements in the border districts. With these developments, the leaders of Timor-Leste are anxious for the UN to maintain its security presence in the country even after the mandate of UNMISET expires in May 2004. Reflecting this concern, Prime Minister Mari Alkatiri wrote to the Secretary-General on 2 February officially requesting the retention of one military battalion. The Secretary-General took note of the wide spread public concern over the security of the country and at the same time the limited capacity of Timorese security agencies in spite of the fact that the overall security situation has remained calm over the past year. The Secretary-General then decided to recommend to the Security Council a provision of some 42 military liaison officers or UN Military Observers (UNMOs) to monitor security-related developments and to facilitate contacts between the two sides of the TCL. In addition, the Secretary-General suggested that the Security Council consider the continued presence of an infantry company with aviation support which would leave 310 military personnel to promote continued calm and to prevent the destabilizing impact of abrupt termination of the international presence.[1]

Internal Security and Law Enforcement

The maintenance of law and order and internal security is most crucial in laying a pre-requisite for peace-building in a conflict affected society. Support provided by the international community through UNMISET has resulted in some tangible achievements as well as shortfalls in the maintenance of internal security.

As noted above, on 4 December 2002 the country suffered a major civil disturbance in Dili when mobs attacked and burned government buildings, business premises and other buildings including the residence of the Prime Minister. Two civilians were shot and killed. The incident shook the confidence of the Timorese leadership and the international community. Since then, however, the relative calmness and the low crime rate that has prevailed since 2003 have gradually increased the sense of security and stability among Timorese citizens and foreign residents. There continue to be occasional reports of threats by armed groups and criminal elements in the rural areas. In addition there have been reports of smuggling, extortion

1 Editors' note: The Security Council adopted Resolution 1543 on 14 may 2004 that extended the mandate of UNMISET for 6 months with a 'view to subsequently extending the mandate for a further and final period of 6 months, until 20 May 2005.' S/RES/1543 (2004) at para 1. Subsequently on 16 November 2004 the Security Council adopted resolution 1573 extending the mandate for 'a final period of 6 months until 20 May 2005.' S/RES/1573 (2004) para 1.

and robberies in many parts of the country as well as sporadic violence among martial arts groups and youth gangs in certain areas.

The UNMISET police component (UNPOL) has to date completed its transfer of routine policing authority to the PNTL in all 13 districts of the country with the last transfer of patrolling responsibilities in Dili district on 10 December 2003. This is in line with the downsizing plan of UNPOL with the reduction from a total strength of 1,250 at the time of independence and about 680 UNPOL police officers last year to the current number of about 325 (comprising some 200 international police advisors and a 125-member formed unit). UNPOL continues to transfer functions to Timorese national counterparts at police headquarters while the remaining 200 UNPOL technical advisers continue to assist with specialised tasks and to mentor Timorese police in all districts. In addition, the 125-officer Malaysian formed police unit remains available to respond to possible civil disorder.

Building a Self-Sustainable Peace

The concept of self-sustainable peace envisages the attainment and preservation of peaceful conditions that are sustainable internally and externally without the assistance of international peacekeeping forces. Internally, self-sustainable peace requires the existence of democratic governance. Externally, self-sustainable peace is possible only when neighbouring nations maintain bilateral relations of mutual respect, trust and confidence.

Democratic Policing

Security and stability is the foundation for sustainable peace-building. Rebuilding and reforming police forces and developing internal security practices that comply with democratic norms and international human rights standards are central to peace-building efforts. A durable peace requires the creation of accountable and effective police forces that can provide a secure and safe environment for political, economic and social development.

In forming the national police force in less than two years, UNMISET has trained 3,024 national police officers, of which over 20 percent are women, representing a relatively high proportion in comparison with figures worldwide. UNPOL has revised the training course for police cadets from a three-month course to a four and six-month curriculum while interested bilateral development partners, the UN System agencies and the UNMISET Human Rights Unit have provided in-service training for PNTL officers after their initial training. To complement police development efforts by UNMISET, bilateral partners have supported specialized training on surveillance and intelligence as well as on supervision and management. UNMISET has incorporated human rights training in all police training efforts.

Meanwhile, the Government has established three special police units within the PNTL:

- Shortly after the 4-December incident, UNMISET and the Government of the Democratic Republic of Timor-Leste (G-RDTL) agreed to establish a special police unit called a Rapid Intervention Unit (RIU) in order to increase the PNTL's capacity to respond to civil disorder in a professional manner, particularly in urban areas. The training of the RIU has continued with intensive retraining that commenced on 13 October 2003. This course is expected to increase the RIU's effectiveness and professional responsiveness by the end of UNMISET's mandate.
- Secondly, the G-RDTL decided to establish a unit, the BPU, within the PNTL to patrol and manage the border. UNMISET has trained the BPU with a deployment of 219 national police officers. So far, the skills transfer from the peacekeeping forces (PKF) and UNPOL to BPU officers has helped improve the BPU's efficiency. While the BPU is generally functioning well in border control and patrolling, logistical difficulties present a continuing challenge.
- The development of another special police unit, the Rapid Deployment Service (RDS), initially envisaged by the Government to be the force in countering possible incursions and threats posed by militias and heavily armed groups in the rural and border areas, has been challenging – politically, institutionally and financially. With delays in the recruiting, equipping and training of the RDS members, considerable problems are now encountered in creating an effective rapid deployment capability within the PNTL before the PKF's withdrawal in late May 2004.

To address key institutional shortcomings, UNMISET continues to support the Government's efforts in establishing the PNTL Institution Strengthening Committee under the leadership of the Minister of Interior and relevant senior officials to lay the basic legal, administrative and policy framework necessary for the creation of a viable, professional and independent police service. The Government has identified key priorities for the next three months before the end of UNMISET's mandate. These include the establishment of a PNTL disciplinary committee and advancement of the comprehensive review and approval of police procedures (SoPs) and general guidelines while ensuring their accessibility and applicability for all PNTL officers. Achievements in this area include increased awareness on the part of the Government and the PNTL of the need to address key institutional issues. This has led to tangible results in establishing an administrative and planning unit in the Ministry of Interior, assigning PNTL liaison officers to work in the defence force and the Office of the Prosecutor-General, integrating human rights in all police training, revising the police curriculum, undertaking the comprehensive review of about 20 police policies and procedures and adopting specific guidelines and plans for community policing. Despite this progress, there is a need for intensified efforts to put in place key institutional, legal and policy frameworks, according to internationally accepted standards, in addressing the issue of police discipline, oversight mechanisms, police relations with other security organs such as the defence force in the broad national security framework and police relations with the public.

As reflected in the latest report of the Secretary-General to the Security Council, the contribution of international civilian police remains crucial in the development of the PNTL as a non-political and professional police service. It is envisaged that continued international support, after May 2004, for the development of the PNTL should include 157 police advisers, including civilians, who will assist the PNTL through further monitoring and mentoring activities.

Challenges in the Maintenance of Internal and External Security

To date, despite the many achievements in the development of the PNTL, there have been reports of police misconduct, including excessive use of force, assaults, negligent use of firearms, criminal activities and corrupt practices. These incidents demonstrate the necessity of strengthening the PNTL's disciplinary procedures. If misconduct increases, public confidence in the PNTL will erode.

While considerable achievements have been made during the past two years, there remain threats to peace and stability in Timor-Leste. Let me identify these threats. The first is largely apolitical, with a history pre-dating 1999 and characteristic of many developing nations. This category of threat includes violence associated with large numbers of unemployed youth, martial arts group rivalries, marketplace turf battles and criminality, mostly centred in Dili and Baucau. Only long-term economic and educational developments will address the root causes. In the meantime, a reasonably effective, professional, impartial and accountable law enforcement apparatus should be able to deal with these situations.

The second category of threats to peace and stability is more specific to the Timorese political context and relates to perceived inequalities in the distribution of marginal benefits. Many who were involved in the independence struggle, such as former clandestine groups, ex-combatants and veterans, hold deeply felt and genuine grievances. Prominent among these is the CPD-RDTL (Popular Defence Council of the Democratic Republic of Timor-Leste), a group rejecting the entire transition process. Of course, the two types of conflict interact with one another, e.g., the lack of productive employment opportunities drives veterans to lobby for Government jobs, while idle youth are prime recruits for groups with political grievances.

The relationship between police and military, both in the early stages of their development, presents potential security issues. While the UN has not been responsible for training the new defence force, UNMISET has nevertheless devoted considerable attention to the issue of civil-military and police-military relations.

Despite the progress in the development of a national police force, it is clear that ensuring the effectiveness, impartiality and accountability of such a force, at both the institutional and operational levels, is a long-term challenge. Following UNMISET's departure, the specialized units will play a crucial role in Timor-Leste's security structure, particularly in the management of the border area, as described below. They, however, continue to lack essential equipment and financial resources and will require additional assistance even after May 2004. Furthermore, the PNTL still lacks technical skills in a number of other specialized areas, including investiga-

tion, forensics, intelligence-gathering and special police operations to counter major crime, such as terrorism, abduction and hijacking.

The PNTL's ability to win public confidence will depend upon further efforts to strengthen discipline and ensure compliance with internationally accepted standards of policing. Continued mentoring and monitoring of the PNTL and its special units will be necessary to promote oversight, accountability and compliance with international human rights standards. Further efforts will be required to develop appropriate institutional and legal frameworks to ensure that police recruitment is based on merit and to encourage an open and democratic policing culture.

With regard to the external security situation, the relationship between Timor-Leste and Indonesia remains a critical factor affecting Timor-Leste. The two countries have made progress toward establishing the kind of diplomatic framework necessary to maintain mutually beneficial relations and increase cooperation. This includes Prime Minister Mari Alkatiri's successful visit to Jakarta in June 2003 and the establishment of the Joint Ministerial Commission to address issues of bilateral concern between Timor-Lest and Indonesia.

Another challenge is to meet the target dates for delineation of the land border. It is now hoped that the agreement on a provisional line constituting the border can be achieved by May 2004, while recognizing that a more refined line and a formal treaty will take much longer. Although the role of border delineation in the maintenance of peace should not be overestimated, the continuing lack of a defined line will provide fertile grounds for misunderstandings and incidents.

While reported sightings of armed groups moving around Timor-Leste's border districts continue, it is significant to note that since early 2003 there have been few significant security incidents resulting from cross-border incursions. This reduced activity has occurred notwithstanding that significant numbers of 'ex-militia' remain in West Timor near the border. Despite the continuation of long running discussions and proposals, there seems to be little prospect for relocating out of West Timor significant numbers of ex-refugees including the 'ex-militia' and other East Timorese people associated with the TNI (Troop National Indonesia). Repeated initiatives to encourage the remaining former refugees to return to Timor Leste, including the tireless efforts of President Gusmão, have as yet made no headway.

The area of the TCL or tactical coordination line remains porous while illegal hunting, trade and crossings continue. Close cooperation with Indonesia will remain crucial to address these and other longer-term security challenges in the area, including the problems posed by the continued presence of a significant population of former refugees. Approximately 26,000 former refugees from Timor-Leste still remain in West Timor near the border areas. In addition to security implications, this situation has considerable human costs, including those in cases where parents and their children are located on separate sides of the tactical coordination line. There is a need for durable solution to these problems.

The enclave of Oecussi in particular gives rise to the potential for cross border incidents. Effective implementation of the land corridor already agreed upon with Indonesia is essential. The possible withdrawal of PKF or decreased presence of

UNMOs and resulting decline in communication links will increase the enclave's sense of isolation and vulnerability.

The development of the Timorese armed forces will continue to depend upon bilateral support through the provision of equipment, training and facilities. The interaction of the Timorese armed forces with counterparts in UNMISET's military component, however, has offered some opportunities for skills and knowledge transfer.

The reduction and withdrawal of UNMISET's military component requires a smooth transfer of responsibility to the relevant Timorese security agencies and institutions, including the BPU of the PNTL. Officers of the BPU are currently deployed in all three districts along the TCL and have assumed responsibility for the nine main crossing points with West Timor. The PKF has invested considerable effort in promoting close cooperation between the PNTL and the TNI. This has enabled the resolution of border incidents in a timely and efficient manner. Recent experience at the junction points has demonstrated the potential for the PNTL and the TNI to work together in a professional manner.

Timor-Leste represents a tempting and relatively unprotected target for elements such as human traffickers, paedophiles and criminal gangs. They constitute another external threat capable of suborning, undermining and compromising the lawful order and perhaps of exploiting internal restless elements. There is an urgent need for the capacity building of Timor-Leste security organs to forestall these potential threats.

Assessment of external threats to Timor-Leste is inextricably tied to the country's internal stability. External meddling in Timor-Leste during the last 30 years has most often been linked to internal vulnerabilities and upheavals. The most effective way to minimize external threats is to develop the country's economy, especially in the border areas and Oecussi, and to build up effective accountable Government and security institutions while minimizing disgruntled elements who feel they have been neglected or are outside the system. Failure to manage internal issues will increase the country's vulnerability to external threats.

Fully aware of this causal relationship, the Prime Minister called for international assistance in support of a form of 'preventive development' during the Meeting of Development Partners on 3 December 2003. He believes that targeted socio-economic development in the border regions can pre-empt possible security threats.

Establishment of Viable Public Administration

A major achievement of the political leadership and the people of Timor-Leste is the establishment of basic governance structures in a peaceful and participatory process, respecting fully democratic principles and human rights. The UN and development partners have contributed much to this process. The transition is remarkable given that Timor-Leste had undergone four centuries of Portuguese colonial rule and twenty-four years of Indonesian occupation. The building of basic governance structures included the election of the Constituent Assembly members on 30 August 2001. The Constituent Assembly, after writing the Constitution, trans-

formed itself into a legislative assembly and became the first National Parliament. On 14 April 2002, the first Presidential Election was held. The Constitution of the Democratic Republic of Timor-Leste came into force on 20 May 2002 marking the birth of an independent country. The Constitution provides for a unitary democratic state, based on the rule of law and the principle of separation of powers. It provides for an elected President of the Republic, the Government, the National Parliament and an independent judiciary.

Achievements

Prior to the restoration of independence in May 2002, few Timorese had been trained in senior and middle level management and administration of public institutions. As a result, the vast majority of incumbent civil servants in managerial positions were not adequately trained or experienced for the critical tasks they were to perform.

To address the problem of a skills shortage, the National Development and Planning Agency and the United Nations Development Programme (UNDP) carried out a study called the 'Capacity Development for Governance and Public Sector Management' in August 2001 and identified the need for a progressive capacity building approach, which extends over a period of 15 years in four phases:

- In the first phase, from July 2001 to January 2002, the focus was on capacity development in terms of essential capacities needed to support service delivery;
- In the second phase, 2002 to 2004, the focus has been on the maintenance of skills initially developed, their consolidation and the consolidation of those institutions created to support the Government's general functions;
- In the third phase, during the next eight to 10 years, the focus will be on the expansion of service delivery by the public administration through improvement in its programming, its expertise and capacity; and
- In the fourth phase, during the next 10 to 15 years, the Government's efforts will focus on improving its service delivery and productivity.

According to the UNDP study on governance and public sector management, support to public administration during the first two phases required varying degrees of dependence on international human resources. The study provided a framework for transition to a national administration and suggested 75 areas of human resource and institutional development. Some 32 components were identified as critical, requiring support in 2002 and 29 components were identified for support by 2004, with the remaining 14 components for long-term capacity building by 2012.

Taking into account the findings of this study, the Security Council has entrusted UNMISET with the responsibility for providing advisory support through the provision of international advisers called the Civilian Support Group (CSG) to ensure stability and democratic functioning of Timor-Leste state institutions in the immediate post independence period. The CSG advisers were to provide assistance to core administrative structures critical to the viability and political stability of Timor-Leste. The CSG core members filled '100 stability' positions created to sustain the

administration of financial, infrastructure and legal systems in the following four areas:

Financial and Central Services	42 advisors
Internal Systems in various ministries	27 advisors
Essential Services (water and sanitation, Power, roads, housing, ports and health)	17 advisors
Legal / Justice systems	14 advisors

Initially UNMISET's endeavour to support the governance and public administration institutions of Timor-Leste addressed the lack of capacity of Timorese civil servants and aimed to develop necessary skills. Its immediate goals were:

- to ensure the viability and sustainability of the institutions and capacity building process initiated by UNTAET and minimize the risks of government failure and consequent political instability,
- to provide active support for the promulgation of a legal framework, including the formalization of rules and regulations as well as the standardization of operating procedures, without infringing upon Timor-Leste's sovereignty; and
- to address the acute lack of basic essential knowledge and skills of Timor-Leste public servants and to move towards the path of self-reliance.

UNMISET has so far made significant achievements in enabling the viability and political stability of Timor-Leste's state institutions. More specifically, the civilian advisors have played a pivotal role in assisting the Government to prepare legal frameworks, formalise related rules and regulations and institute operational procedures. As a result, by the end of November 2003, UNIMISET was able to phase out 30 of the 100 'stability' CSG posts. Despite this reduction, the work of the CSG continues to be supplemented by the 'development advisers' particularly through the UNDP programme of 200 development posts, funded by bilateral as well as multilateral development partners.

Challenges

Despite these accomplishments, the requirement for human and institutional capacity building has turned out to be far more demanding than originally envisaged, requiring the Government and other state institutions to demand the continuity of institutional support and capacity building process beyond May 2004. There remains the substantial challenge of developing, on a sustainable basis, the capacity of Timorese civil servants without the international civilian advisors. In all, the progress in establishing viable public administration remains fragile and the following challenges remain.

- While there is tangible progress in instituting rules, regulations and operating procedures, Timor-Leste's state institutions are still in need of major support in establishing legal frameworks. The lack of a general law governing the Civil Service and organic laws covering key institutions poses a major challenge to the sustainability of the accomplishments to date.

- The lack of basic essential knowledge and skills of Timor-Leste public servants is the second major challenge. This lacuna continues to impair the effective and efficient discharge of official responsibilities.
- As noted in the Secretary-General's report to the Security Council (S/2004/117of 13 February 2004, paragraph 21), the transition from the 'stability' to the 'development advisers' faced serious problems in view of the lack of timeliness and predictability of bilateral or multilateral funding for recruiting the 'development advisers.' It took more than one and a half years to fill half of the 209 'development adviser posts.'

Pending further progress in the establishment of legislative and regulatory frameworks and the availability of voluntary funds for civilian advisers, it has become clear that there is a need to make a change in the CSG implementation plan. It assumed that no further support would be provided beyond May 2004. The exit strategy was based on the assumption that the responsibility for skills transfer and capacity building support would be shifted to 'responsible hands', i.e. bilateral and multilateral development partners, for carrying forward the mission of self-reliance and sustainability.

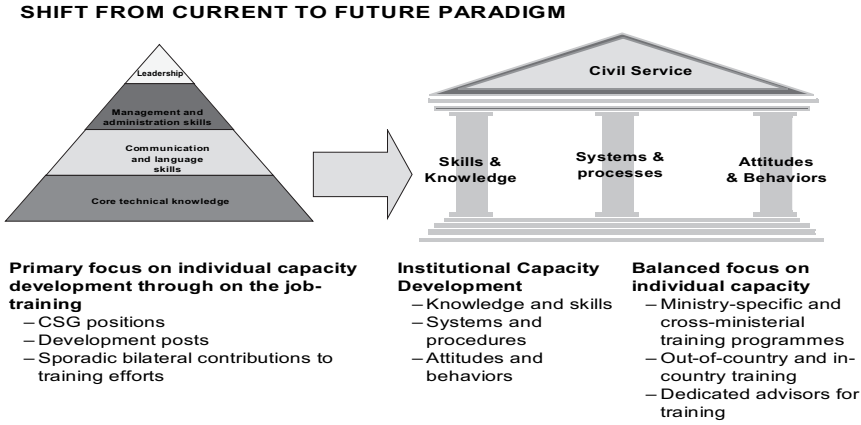
The assessment of the critical needs likely to exist after May 2004 by a taskforce composed of the Capacity Development and Coordination Unit (CDCU) of the Government of Timor-Leste, UNDP and UNMISET revealed that the time required for human capacity building in some of the 100 core functions would be greater than the original timeframe set for the CSG advisors. Based on the review by the Government of Timor-Leste and UNMISET as well as the analysis by UNDP and the UN Secretariat, 58 advisers will be needed in UNMISET until May 2005. The Taskforce suggested that 19 posts be in the areas of finance administration, 16 posts in key ministries, 8 posts in other state organs such as the Offices of the President and the Prime Minister, the National Parliament and the Council of Ministers and 15 posts in the justice sector.

The Government and UNMISET have recognized that there is a need to institute a more integrated strategy for strengthening Timor-Leste civil service and to adopt a holistic approach for long-term institutional capacity development and coherent and well-coordinated assistance by all key stakeholders.

New Integrated Approach to Institutional Capacity Building

Recognizing that Timor-Leste had to advance to the next institutional capacity development phase, I proposed to the Meeting of the Development Partners in December 2003 that there was a need for a paradigm shift in capacity development to enable state institutions to go beyond the short-term objective of securing stability and to look to the long-term objective of developing administrative capacities that would support sustainable growth and poverty reduction. The traditional approach to capacity building focuses simply on increasing necessary skills and knowledge required for the civil service in four main areas: (1) core technical skills and knowledge; (2) communication and language skills; (3) management and administration skills; and (4) leadership skills. The proposal entailed moving to a

focus on institutional capacity development that has three equally important pillars. These are: (1) skills and knowledge, (2) systems and procedures and (3) behaviours and attitudes.



It is very difficult to enhance the technical knowledge of a counterpart if they do not have the appropriate academic training – no matter how well qualified and well-intended the international advisor. The areas of law, medicine and finance are clear examples of fields where such academic training is indispensable. In these cases, medium-term (two to four years) intensive academic training, possibly out-of-country, is essential.

In addition, civil service employees require training in language and communication skills to communicate more effectively in the work place. They require proper language training in Portuguese, one of two official languages in Timor-Leste, and training in English, which is an important working language. For this purpose, UNDP had started to offer Portuguese and English language courses for the national counterparts of both CSG and 'development posts advisors.'

As for general management and administration skills such as planning, decision-making and report writing, short-term training courses may be sufficient. The current approach focuses on enhancing the skills of individual national counterparts, almost exclusively through an on-the-job training by an international advisor. Until recently the advisor performed line functions and had little time to provide such training. To ensure long term sustainability a new approach had to be developed. An alternative being explored at present is to assign a group of international advisers, not tasked with any line functions, to act as trainers in providing the in-country training of counterparts. These trainers are part of the new comprehensive institutional capacity development programme for each ministry with cross-ministerial programmes for common functions. It is expected that international support in providing the trainers in this programme, to be administered by UNDP, will come from development partners. The Government with the support of UNMISET and UNDP convened the first workshop on this issue on 16 February 2004 in order for

each Government ministry to present an exit strategy plan for international advisers and an institutional capacity development plan.

Justice and Serious Crimes

It would hardly be possible to bring self-sustaining peace and democracy to a post-conflict society without securing justice and reconciliation. Putting in place an appropriate system of justice is part of the long-term peace-building effort. In the following paragraphs some tangible successes in achieving justice and reconciliation in Timor-Leste are highlighted as are some of the outstanding challenges.

Pursuant to the Security Council Resolution 1272, UNTAET inherited in October 1999, a feeble justice system that had totally broken down following the outbreak of violence. Judges, prosecutors and defence lawyers, the majority of whom were Indonesians, left Timor-Leste as did many of the support personnel with the departure of the Indonesian civilian administration in September 1999. The physical infrastructure that had sustained the justice system was extensively damaged as were other private and public buildings. The militia, assisted by the Indonesian military, destroyed and burned the court buildings, police stations, prisons and other institutions associated with the maintenance of law and order.

Starting from scratch, the UN administration proceeded to put in place a transitional legal system that retained the application of Indonesian law to the extent that it was consistent with international human rights standards. UNTAET created judicial institutions including the courts, the prosecution service, the public defenders' office and the prisons. It provided funding and technical support for these institutions. The establishment of a functioning judicial system for the transitional period laid the foundation for the criminal justice system of Timor-Leste.

The current criminal justice system in Timor-Leste is composed of two legal frameworks – one for ordinary crimes and one for serious crimes. The serious crimes process aims at bringing into justice those responsible for crimes against humanity and other serious crimes committed in the then territory of East Timor in 1999. The ordinary crimes process refers to the prosecution of criminal offences other than those that lie within the jurisdiction of the serious crimes framework.

Establishment of the Timorese Justice System: Achievements and Challenges

The judicial system in Timor-Leste is still in its embryonic stages. In August 1999 there was not a single judge in Timor-Leste and only some 70 persons with rudimentary legal training. By 2000, the UN administration appointed, on a probationary basis, 25 judges, 13 public prosecutors, 10 public defenders and 12 registrars and clerks, after they received some crash course training. Today, there are 17 trial judges, six investigating judges, nine public prosecutors and nine public defenders operating in four district courts in Dili, Oecussi, Baucau and very recently Suai. All of them are still serving in an initial probationary period. Apart from these state employees, there is still a general dearth of jurists in the country – a shortage that is likely to continue for some time.

Timor-Leste has a legacy of an extremely week judicial system. Under the Portuguese regime there was only one judge, who was Portuguese, in Timor-Leste while the Court of Appeal was in Mozambique. Similarly, during the Indonesian regime, the Court of Appeal was situated outside Timor-Leste while Timorese occupied mostly clerk positions.

The judicial system is comprised of the Judiciary; the Office of the Prosecutor-General, the public defenders, and other related institutions, as well as the administrative services provided by the Ministry of Justice. Thus far, certain judicial bodies defined by the Constitution have not been established. These include the Supreme Court of Justice, the High Administrative, Tax and Audit Court, Administrative Courts of first instance, Military Courts, Maritime Courts, and Arbitration Courts.

The district courts have barely functioned due to inadequate numbers of court staff and other judicial personnel. The three courts outside of Dili are almost non-functional for a long period of time as judicial officers refused to remain in these locations due to poor working and difficult living conditions. There have been long delays in issuing indictments and listing matters for trial. In December 2003, there were approximately 354 detainees in three prisons located in Becora, Gleno and Baucau. Many pre-trial detainees, including juvenile detainees, are held for a long period of time before they come to trail. Of the 242 detainees in Dili's Becora Prison, only 77 have been sentenced and 70 of the 165 pre-trial detainees are currently held on expired detention orders.

There have been considerable delays in the enactment of necessary laws in Timor-Leste which has required the continued use of UNTAET and other legal instruments. The UNTAET Regulation 1999/1 provided that the applicable law should be that law which was in force on 25 October 1999 when UNTAET was established, except insofar as it was in conflict with international human rights standards, or where it is superseded by subsequent UNTAET Regulations. The Penal Code presently in use is the Indonesian code, with the exceptions as provided for in the UNTAET regulations. The applicable criminal procedure is provided for in UNTAET Regulation 2000/30. The civil code and civil procedures in use at present are Indonesian laws. (Regulation 2000/11 pertains to the organization of Courts; and Regulation 2000/15 refers to the establishment of Special Panels).

The issue of the applicable law became critical when the Court of Appeal decided in July 2003 that the law applicable prior to 25 October 1999 was Portuguese law and not Indonesian law as earlier understood. The Court also decided that prosecution of serious crimes under UNTAET Regulation No. 2000/15 contravened Article 24 of the Constitution, which prohibits the retroactive application of laws. Dissatisfied with the ruling of the Court of Appeal, the National Parliament passed a bill in October 2003 that stipulated that in the absence of Timorese laws or UNTAET regulations on any particular facet of law, Indonesian law should apply rather than Portuguese law.

The national institution responsible for overseeing the running of the courts and the competency of the judges is the Superior Council of the Judiciary. It has management and disciplinary control of the judiciary, as well as the mandate to oversee judicial inspections and propose to the National Parliament legislative ini-

tiatives concerning the judicial system. The Superior Council is comprised of one representative elected by the National Parliament, one elected by the judges, one appointed by the President of the Republic and one by the Government. This body was formed with the swearing in of the President of the Court of Appeal in May 2003 but has not been able to implement its oversight mandate.

The criminal justice system has seen little improvement since its inception. The state of the justice system is currently of such a nature that it might in the long run hamper democracy and stability, if there are not measures to improve the situation. Some of the challenges in the justice sector are as follows:

- Low levels of judicial capacity;
- Lack of communication within and among key institutions in the judicial system;
- Confusion concerning institutional and individual roles and responsibilities;
- Lack of management, planning and coordination skills;
- Lack of mechanisms guaranteeing judicial independence;
- Lack of safeguards against corruption;
- Lack of a clear policy for the sector concerning languages and lack of proper interpretation and translation facilities; and
- Lack of uniformity in following procedures (within and among institutions).

Despite assistance provided by UNDP, UNMISET, USAID and others to increase the capacity of the ordinary crimes system through training and mentoring projects including the fielding of judge mentors, public defender mentors and prosecutor mentors, the lack of leadership in the sector remains a major challenge. Recognizing this, UNDP, in close cooperation with the national judicial organs, including the Prosecutor General, the President of the Court of Appeal and the Ministry of Justice as well as UNMISET and other partners in the sector, has implemented a new programme to strengthen the justice sector. One of the achievements is the establishment of the Council of Coordination, comprising the Prosecutor General, President of the Court of Appeal and the Minister of Justice. This has helped improve channels of communications among key institutions in the sector. The lack of judicial capacity has led to an exponentially increasing case backlog. Coupled with lack of appropriate professional conduct and oversight in the sector, this results in a public perception of the judiciary that is not accessible and leaves few incentives for people to approach the formal system with their complaints.

There clearly remain a number of significant tasks which the sovereign authorities need to undertake which will require continued specific technical assistance from the international community. Failure to do so will have a deleterious effect on the long-term stability of Timor-Leste's justice sector and the country. For these reasons, there is a need for the international community's support in ensuring that the justice sector is stable and viable in Timor-Leste.

It is highly recommended that capacity building of the judicial organ be a priority for future or continued support to Timor-Leste. Out of some 58 CSG positions identified as 'most critical posts' recommended for the follow-on mission, 12 posts should be in the justice sector, which would require continued budgetary support

from the UN Security Council. These 'most critical functions' in the justice system are as follows:

3 Court of Appeal judges' posts;
4 District Court judges' posts;
2 Court Clerks' posts;
1 Public Defender's post;
1 Advisor to the Prosecutor-General's post; and
1 Prosecutor.

It is believed that the only way to enhance access to justice and to guarantee the minimum standards of justice and rule of law for Timor-Leste's citizens is to improve the foundations on which the national justice system is built.

Prosecutions and Trials of Serious Crimes

I now wish to share with you the Timor-Leste experience of bringing to justice those who committed crimes against humanity and other serious crimes during the conflict. We all remember that the Timorese people suffered the most severe forms of human rights violations. To provide a credible process of accountability for serious offences committed against the people of Timor-Leste, the international support to post-conflict Timor-Leste enabled the creation of the serious crimes process as previously mentioned.

The UN Security Council, speaking on behalf of the international community, emphasised the importance of establishing such a process. The Special Panels for Serious Crimes in Timor-Leste, similar to the Special Court in Kosovo, is unique in the world. The international community has regarded the Special Panels as a type of 'internationalised' national court. Though operating within a domestic legal system, the Special Panels are working with the standards, requirements and expectations of an international tribunal, like the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the Special Court for Sierra Leone, since those too are exercising jurisdiction for crimes against international law.

The major achievement of the serious crimes process is that justice is being served with respect to the serious crimes committed in Timor-Leste. Although all the crimes committed are not yet prosecuted, many of the perpetrators have been brought to justice.

Since the work of Serious Crimes Unit (SCU) began, 81 indictments have been filed with the Special Panels for Serious Crimes at Dili District Court. In the indictments, there are charges filed against 369 persons. The accused in the 81 indictments include 37 Indonesian TNI military commanders and officers, 4 Indonesian Chiefs of Police, 65 East Timorese TNI Officers and soldiers, the former Governor of Timor-Leste and 5 former District Administrators. At present, 281 of those 369 persons indicted by the SCU remain at large in Indonesia. The 81 indictments issued include the so-called '10 priority case' indictments, in which a total of 183 accused persons are charged with 'crimes against humanity,' with 168 of those 183 accused still at large in Indonesia. Indictments were issued charging the former Indonesian

Minister of Defence and Commander of the Armed Forces, 6 high-ranking Indonesian Military Commanders and the former Governor of Timor-Leste with crimes against humanity for murder, deportation and persecution during 1999. To date, 55 of the 81 indictments issued charge 339 persons indicted with crimes against humanity.

The Serious Crimes Unit decided in late 2001 to prioritize its investigations and to concentrate on 10 cases for the purpose of completing them expeditiously as stipulated in the reports of the Secretary General to the Security Council on the situation in East Timor (S/2001/717-para and S/2001/983 para 34 of 24 July 2001 and 15 October 2001, respectively). The factors that influenced the selection of these ten cases were: the number of victims, the type of crime such as murder and rape, the seniority of the perpetrators and the socio-political implication of the crime such as the location of the crime, for example a crime committed in a church. These cases were selected on the basis of the then available factual evidence. Subsequent investigations revealed massacres that were of much larger scale and importance than the original 10 priority cases. An example is the Laktos massacre which was not classified as a priority case in spite of the fact that 14 men were killed in one incident in a village and all the houses set on fire, while the Lolotoi case was included as one of the priority cases although the number of people killed was four.

The Special Panels for the trial of serious crimes started the hearing of cases at the beginning of January 2001. Since its inception, in spite of the handicap of insufficient resources, the Special Panels were able to issue 44 final decisions (against 33 indictments). The final decisions include 36 judgments in which 17 concerned crimes against humanity. In the 44 cases that have been decided, the panels have handed down 43 convictions and 1 acquittal. Also, the Public Prosecutor withdrew seven indictments and dismissed two on procedural or jurisdictional grounds. There has been some satisfaction by the hundreds of victims in seeing their cases tried and decided. Most of the accused have not disputed the majority of the allegations against them. Typical charges relate to the murder of independence supporters, of East Timorese staff who worked for the UN during 1999 and of civilians. All the accused who have been tried so far have been East Timorese nationals, most of whom were low-level militia, often illiterate farmers, who admit their involvement in the events described but who generally claim that they were either forced or ordered to join the militia and participate in the crimes. Very often the person on trial was not the main perpetrator. Those with greater levels of responsibility are still at large and presumed to be in Indonesia. Only one accused was a former member of the guerrilla resistance force. The trial of the second one is ongoing.

Out of the 81 indictments submitted by the office of the Deputy General Prosecutor for Serious Crimes, so far 48 cases are still pending, out of which 18 cases involve accused presently in Timor-Leste and 30 cases in which the accused are still at large and supposed to be in Indonesia.

These achievements can be considered as a success, especially when compared with the often cited slow progress made by the ICTR and the ICTY, taking into account that the Special Panels had to surmount various constraints related mainly to the implementation of warrants of arrest, lack of transcribed records, lack of

interpreters and translators and an insufficient number of judges. Although multiple panels were envisaged in UNTAET Regulations No.11/2000 and No.15/2000, it has only been in the last six months that there have been a sufficient number of judges to constitute two complete panels. Each panel comprises two international judges and one East Timorese judge.

There are now six international judges and two national judges in the unit. The international judges are on renewable contracts of six months. The judges have come from countries such as Italy, Burundi, Brazil, Cape Verde, Germany, Portugal and the United States. With six international judges and two Timorese judges available and one more additional national judge, it will be possible to have three panels sitting concurrently. The aim is to finish the trials of the pending 18 cases and any other incoming cases from the prosecution office by May 2004.[2]

The serious crime process, however, continues to face these four major challenges: (a) many accused persons are still at large; (b) insufficient resources; (c) limited time available for investigations and trials; and (d) the competing relationship between the serious crimes process and the reconciliation programme.

Impossibility of trials without the presence of the accused

The inability of the prosecution office to bring before the court the main planners and perpetrators of the serious crimes committed in Timor-Leste constitutes probably the most significant challenge to the effectiveness of the serious crimes process.

In 30 cases out of the 48 that are still pending before the Special Panels, the accused are absent from Timor-Leste and are, presumably, in Indonesia. The Court is not able to hold hearings with respect to those 30 cases as, pursuant to the applicable rules, 'no trial of a person shall be held in absentia.' There have been arrest warrants issued against some of those accused who are presumed to be in Indonesia. In spite of the memorandum of understanding between Indonesia and UNTAET regarding cooperation in legal, judicial and human rights related matters (Sections 1.2.d, 2.c and 5), Indonesian authorities do not execute those warrants. The memorandum gives both parties the right to interrogate witnesses within each other's jurisdiction and the right to 'transfer to each other all persons whom the competent authorities of the requesting Party are prosecuting for a criminal offence or whom these parties want for the purposes of serving a sentence.'

The implementation of the memorandum expects all persons indicted for serious crimes to appear before the Special Panels to face trial, except where their cases had previously been tried in Indonesia. The parties' refusal to turn over evidence, witnesses, or suspects has impeded the serious crimes process. Indonesia maintains that the memorandum is not a formal extradition treaty, which is technically correct but may be against the spirit of the memorandum. Meanwhile, Timor-Leste's Constitution prohibits the extradition of any Timorese nationals. It is therefore possible to conclude that no senior Indonesian government or military figures will be extradited in order to come and attend trial in Timor-Leste.

2 Editors' note: This has not been achieved. Security Council Resolution 1573 envisages that the trials will now be competed by May 2005.

Insufficient resources for serious crimes process

The Special Panels are working with the standards, requirements and expectations of an international tribunal, like the ICTR, the ICTY or the Special Court for Sierra Leone, since those too are exercising jurisdiction for crimes against international law. The ICTY, which was established in 1993, has the capacity to run six trial panels simultaneously. The two-year budget of the ICTY during 2002-2003 was as much as US$ 223 million. The ICTY to date has completed trials against 48 individuals and an additional 15 have pleaded guilty, giving a total of 63 adjudications, from which many are still pending on appeal. The ICTR's two-year budget covering 2002-2003 was US$ 178 million. It was established in 1994 and has completed to date cases against 15 individuals.

To date, in Timor-Leste, 48 individuals have had their cases adjudicated, 46 were convicted of at least some charges, one was acquitted of all charges, and one case was dismissed by the judges on the basis that the facts pleaded in the indictment did not meet the standards for jurisdiction. The budget for the Special Panels was US nine million dollars.

The budget disparity is exacerbated when one considers that the other tribunals have been operating much longer and are anticipated to go on much longer. The current request from the Security Council is to finish all trials at the ICTY in 2008 and all appeals in 2010 with the understanding that this goal will only be achievable if national war crimes courts (to be funded largely by the international community) are set up in Bosnia, Croatia, Serbia and Montenegro. The UN has already funded a 'national' court partly staffed by internationals in Kosovo.

Limited time available for investigations and trials

The Timor-Leste Constitution provides that the serious crimes process will be allowed to continue until investigations that were ongoing in 2002 are completed, although their temporal jurisdiction is limited to 1999. The serious crimes process has UN funding assured until mid 2004. The Secretary-General has recommended, for the consideration of the Security Council, the continued international support to the serious crime process for one more year during the consolidation phase of UNMISET.[3]

While there is a necessity to bring to trial all the perpetrators of the serious crimes committed in Timor-Leste, the serious crimes process cannot last indefinitely. It is not possible to finish within two years the investigation, the prosecution and the trial of all the crimes committed. Therefore the solution will be to prioritise and target certain cases that would be prosecuted and decided upon before the expiration of the serious crimes mandate. For example, and as suggested by the prosecutor, it is important to give priority to the 40 cases of crimes against humanity of murder, rape and severe torture. The remaining 'lesser' cases can be left to the Timor-Leste courts to handle with the assistance of other bilateral partners. The presumption here is that the Timorese judges, prosecutors and defence lawyers who had no

3 Editors' note: The recommendation has been accepted by the Security Council; see S/RES/1573 (2004)

judicial experience prior to their appointment in 2000, will have gained enough experience to allow them to deal with such a process, with the assistance of bilateral and/or multilateral partners.

The 'lesser' cases could also be left to the other alternative justice and reconciliation mechanisms like the informal Timorese traditional justice, or the Commission for Reception, Truth and Reconciliation. Also, certain high-ranking Timorese leaders have suggested the possibility of granting amnesties in the future for some 'lesser' serious crimes.

Promotion of Human Rights

Conflicts pose a serious threat to international peace and security. Civilians caught in conflicts face a tremendous amount of suffering. Assaults on the fundamental right to life and the right to be free from torture are common as are the adoption of policies that lead to starvation, forcible relocations and mass expulsions. Women and girls are raped and children are abducted to serve as soldiers. Homes, schools and hospitals are deliberately destroyed and aid workers are attacked preventing provision of humanitarian assistance to the suffering population. The challenges of intervening and ending conflicts are numerous. The major challenge is in fashioning a response that respects international law while taking appropriate action and, when necessary, coercive action for protecting people at risk. External intervention remains controversial with questions raised regarding legality and processes.

The most difficult question is regarding the sovereignty of states that provides the basis for the international order. The UN Secretary General Kofi Annan posed the central question in this debate as, 'if humanitarian intervention is, indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?'

Sovereignty remains the basis for international order and the state is ultimately responsible for guaranteeing human rights of its citizens. To a certain extent, the international human rights regime defines states' legal obligations to their citizens and makes them internationally accountable to how they treat their subjects. Sovereignty therefore includes the responsibility of nation states to protect their people and discharge their functions properly within their territories. The failure of a state to discharge its functions in the absence of a functioning government poses serious problems while causing humanitarian crises and conflicts. In underlining the importance of the sovereignty of the peoples and that of the states, the UN Secretary-General Kofi Annan pointed out,

> State sovereignty in its most basic sense, is being redefined – not least by the forces of globalization and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights.

> When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.

According to the study entitled 'The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty' initiated by the Government of Canada, state sovereignty implies responsibility including the responsibility to protect its people. It has been argued that when the population is suffering serious harm while the authorities are unwilling or unable to provide remedies, the principle of non-intervention yields to an international responsibility to protect the population.

In addition, this study indicates that military intervention should be seen as an exceptional and extraordinary measure. Human rights do provide a tool for defining such threshold limits but, more importantly, tools for preventive action. Human rights provide common standards for establishing accountability of states and early warning of impending conflicts. For example, situations facing ethnic minorities, especially the existence of systematic discrimination can be a critical indicator of an armed conflict. The Security Council, recognizing the value of human rights reports, adopted Resolution 1366 in 2001 inviting the Secretary General to inform the Council on potential armed conflicts resulting from human rights violations.

There are increasing efforts to prevent or end conflicts with programmes on long-term protection of human rights. To this end, peacekeeping and peace–building includes special programmes for strengthening democratic institutions, establishment of a credible judicial system and creation of conditions for the functioning of independent media and civil society. Establishing a framework for human rights is essential for creating an atmosphere of trust in a post–conflict situation. An important element of a human rights approach to peace–building is addressing past abuses, especially against civilians so that perpetrators of such crimes are brought to justice thus breaking the cycle of impunity. A major development in the area of international law is the establishment of ad hoc war crimes tribunals for the former Yugoslavia in 1993 and Rwanda in 1994. These tribunals and the establishment of the International Criminal Court demonstrate that the international community no longer tolerates violations of human rights without assigning responsibility. In many respects, the International Criminal Court could become an effective instrument for prevention through deterrence.

The country in which I have been based for the last two years, Timor-Leste, presents an excellent case study on the role of human rights in provoking and shaping the UN's action and the intensified attention to human rights by international actors in recent years. As a colony of Portugal, Timor-Leste had been listed as a non-self-governing territory as early as 1960. The UN brought pressure to bear on Portugal to decolonise its territory, and following Indonesia's invasion of Timor-Leste in December 1975, was quick to condemn the act of aggression. Relevant Security Council resolutions were passed calling for respect for the Timorese right to self-determination and until 1982, a majority of the General Assembly also passed condemnatory resolutions. From the early 1980s to the mid 1990s, the issue of Timor somewhat languished, to be resurrected only within specialized bodies such as the

Commission on Human Rights. In 1995, at the initiative of the Secretary General, the All Inclusive intra-East Timorese dialogue (AETID), a discussion forum for Timorese representing both sides of the independence issue, began. The UN supervised what was known as the 'Popular Consultation' on 30 August 1999 in which 78.5 percent of Timorese voted for independence.

When hundreds of thousands of Timorese were displaced, many were killed and raped and cities and villages were burned, the response of the UN machinery was relatively rapid. A military force was authorized to use 'all necessary measures' to restore peace in mid-September. The Security Council subsequently moved to establish a transitional administration to provide for interim governance and prepare Timor-Leste for independence. The specialist human rights bodies were equally active. A special session of the Commission on Human Rights (only the fourth such special session to be held) was convened. A Commission of Inquiry was established which reported back to the High Commissioner for Human Rights and the Secretary General. Within months of the atrocities occurring, there were on-site visits and reports by the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, Special Rapporteur on Torture and the Special Rapporteur on Violence Against Women.

Within its initial mandate authorised in Security Council Resolution 1272, UNTAET was to 'take steps' to address past human rights violations. Thus a priority for UNTAET was the establishment of the serious crimes process, a novel model of international and national judges working within a domestic process to provide for the prosecution of those accused of international crimes such as war crimes, genocide, crimes against humanity and domestic crimes such as murder and rape. The Commission for Reception, Truth and Reconciliation was established and continues to operate. In addition, UNTAET was tasked with working towards the establishment of a national human rights institution, in cooperation and collaboration with the Timorese.

With the imminent creation of the Provedor de Direitus Humanos e Justica, Timor-Leste will soon have such an independent body. These human rights institution-building tasks were seen as central to the creation of long-term peace and security. Other institution building programmes were equally important for the protection of human rights. These include the re-establishment of a functioning legal system, the facilitation of structures even prior to the holding of elections to provide for rights of political participation and the delivery of humanitarian assistance and government essential services to provide for the realization of social and economic rights.

With UNMISET, such important work has continued and the protection of human rights continues to be an important barometer of peace, security and well being of Timor-Leste. In reporting to the Security Council on the fulfilment of its mandate, UNMISET routinely reports about progress in relation to the promotion and protection of human rights.

Within this broader field of human rights, one of the main challenges has been to give real meaning to the 'right to development' proclaimed by the General Assembly in 1996. In Timor-Leste, UNDP, the UN system organs and development

partners have been committed to supporting the Government's efforts in ensuring that development policies are formulated and implemented in such a way as to respect the human rights of all persons including the vulnerable and the disadvantaged. However a myriad of challenges remain in developing full participatory processes for political, economic and social development in post-conflict societies.

Economic and Social Dimension

Timor-Leste is making every effort to move towards rebuilding its economy. Having gone through the rehabilitation phase with over-reliance on external assistance, the Government is eager to attain greater self-reliance and normal economic development. Despite tremendous challenges, Timor-Leste has achieved some tangible progress in its economic rehabilitation for the past two years.

The implementation of Timor-Leste's first national development plan, with the two main goals of (1) reducing poverty and (2) promoting equitable and sustainable economic growth, has seen considerable progress with continued efforts by the Government and support by the international community to realize the annual action plans according to priorities identified in areas such as development planning, public sector development, health, education, agriculture, job creation, oversight mechanisms and the rehabilitation of infrastructure, such as water, power and sanitation systems and of the Port of Dili.

Recent positive developments in the economic sphere include the establishment of the third commercial bank, the issuance of Timorese coins, the inflation decline of 7.6 percent by the end of last year compared to 10.3 percent six months earlier thanks to the improvement of food supply and the increase of employment by 50 percent in the public sector. Other initiatives by the Government, in cooperation with development partners, include measures to refine expenditures according to priority programs while taking into account the Millennium Development Goals (MDGs).

Still, Timor-Leste remains the poorest Least Developed Country (LDC) in the region with the majority of the poor, which accounts for 46 percent of the population, living mostly in the rural areas. Meanwhile, according to the Government's data, only one-third of total expenditures and one-fifth of the goods and services go to the rural areas.

The economic concerns, as noted by the Government, include the trend of declining economic growth with the estimated two percent decrease of Gross Domestic Product (GDP) in Fiscal Year 2003-2004 due to a decline in international assistance and an unexpected shortfall of domestic revenues that will adversely affect social and economic development.

The underlying weaknesses in Timor-Leste's economy include these elements: the projected shortfall in the oil and gas revenues (by some US$66 million in the next four years); the decline in capital spending by 15 percent of the GDP; and the decrease in public investment (estimated at about US$40-45 million a year for the next four years). These have serious implications for the level of private economic activities and employment including the decrease in demand for goods (there has

been a significant decline in the import of goods from US$218 million in 2000 to US$186 million in 2002) and the increase of poverty. The Timor-Leste leadership has been pragmatic in addressing key developmental and economic challenges with realistic policy options and strategies particularly in fiscal policy and public sector development.

In bridging the resource gaps, the Government, in a transparent and efficient manner, presented, in the meeting of the Development Partners last December, policy options including measures such as extending the Transition Support Programme (TSP) administered by the Bretton Woods Institutions beyond 2004-2005, redirecting funds for priority programmes, raising revenues and taking concessionary loans. The Government continues to hold consultations with development partners to select the best combination of these options to bridge the fiscal gaps.

Recognizing that promoting an open and inclusive society is the key to establishing a conducive environment for economic development, the Government has taken efforts to promote good governance and people's participation in the economic and political life of the country. The 'Open Governance' initiative, in which the Prime Minister as well as cabinet members visit various areas of Timor-Leste and hold discussions with local communities and representatives, aims to strengthen grassroots participation. In addition, the Government has expressed commitment to promote transparency and accountability with the organization of the international conference on Transparency and Accountability in Public Administration in Dili last year. Also, the Government continues to hold high-level workshops as another mechanism to promote participation of all stakeholders in the implementation of the national development plan.

In my view, the economic rehabilitation of Timor-Leste requires continued international support to the Government's efforts in addressing these challenges: (1) the need to find appropriate policy options to address the fiscal gaps, of about US$126 million over the next three years, resulting from the shortfalls in oil/gas revenues; (2) the need to balance the expenditures in the security sector and development expenditures; (3) the need to redirect bilateral and multilateral international assistance for poverty alleviation and employment generation, particularly in the rural areas; (4) the need to safeguard the human security of individuals particularly the vulnerable and to promote human capacity development, in an economic sense, particularly with respect to a more efficient public sector and the development of a skilled labour force for productivity in the private sector; (5) the need to promote efficiency, professionalism, transparency and accountability in the civil service; and (6) the need to maintain joint partnership among the Government, UN development agencies, development partners and the civil society in achieving specific goals on reducing poverty, promoting gender equality, improving maternal health and reducing child mortality and promoting good governance.

The Government has rightly and eloquently identified the three 'difficult systemic issues' that Timor-Leste is facing, namely, (1) the high dependence of the economy on external support and the need to broaden and deepen the domestic production and service base for employment and enhancing self-reliance and sustainability, (2) the need to improve efficiency of public expenditures and finding

the country's niche or competitiveness in the region and, if I may add, in the global market and (3) the need to consolidate the assistance as well as advice provided by international advisors to be more in tune with the capacity of the country. To ensure smooth transition of Timor-Leste from post-conflict peace building to long-term development, international support for the economic rehabilitation of Timor-Leste remains most crucial in the areas of poverty reduction, income generation and economic growth.

Concluding Observations

Since the attainment of international support and recognition of its independence, Timor-Leste has made considerable achievements in spite of formidable challenges faced by the leaders and the people of this newly born country. The United Nations, through successive peacekeeping and peace-building missions, has helped significantly to maintain the security of the country and the stability of the society. The international community, as represented not only by the UN but also bilateral and multilateral development partners as well as non-government organisations, has contributed substantially to the rehabilitation of public infrastructure facilities, the restoration of social and communal structure and the establishment of democratic governance and administrative structures.

The concept of self-sustainable peace envisages the attainment and preservation of peaceful conditions that are sustainable both internally and externally without the assistance of international peacekeeping forces. Internally, self-sustainable peace requires the existence and functioning of democratic governance structures and vibrant civil society. Externally, self-sustainable peace is possible only if Timor-Leste maintains a relationship of mutual respect and confidence with its neighbouring countries particularly Indonesia. The Timorese leadership represented by President Xanana Gusmão, Prime Minister Mari Alkatiri and Foreign Minister Ramos-Horta have excelled in forging the cordial relationship with President Megawati Soekarno Putri and other leaders of Indonesia.

It is my view that comparatively modest additional support from the international community can make a decisive contribution to the sustainability of achievements that have already been made and to enabling the Timorese to reach a threshold of self-sufficiency. More specifically, I consider it highly desirable for the Security Council to extend for one year the mandate of UNMISET or authorize a follow-up mission with a small PKF component and a strong civilian component to carry out tasks that have direct implications for the security and stability of Timor-Leste, and where bilateral assistance is not available or not appropriate to meet certain requirements. Civilian advisers and staff members can indeed play a critically important role in capacity building in areas such as public administration, justice, human rights, law enforcement, parliament and the Presidency as well as in the investigation, prosecution and trials of perpetrators of crimes against humanity and other serious crimes committed in 1999.

In conclusion, the United Nations has almost completed one of its most comprehensive and successful peacekeeping and peace-building missions in Timor-

Leste. It has nearly fulfilled its mandated objectives: (1) to maintain external and internal security of the country, (2) to help establish a law enforcement agency, the PNTL, and (3) to maintain stability through democratic governance and respect for justice and human rights. The follow-up mission will be able to consolidate the gains made by the two previous missions, UNTAET and UNMISET, and enable Timor-Leste to embark upon its self-sustaining national building efforts.

Lessons Learned Investigating the Well-being of Children Affected by Armed Conflict

Colin MacMullin

Introduction

The singular reality of armed conflict is that it profoundly transforms and permanently affects people's lives – combatants and non-combatants alike. The victims of modern armed conflict are mostly civilians, and the majority of these are children. Klot[1] reports that an estimated 2 million children have been killed as a direct result of fighting in the last ten years, with three times as many seriously injured or permanently disabled, and an even greater number dying of malnutrition or disease caused by armed conflict. Add to this the impact of forced migration. Mawson, Dodd and Hilary[2] report that in 2000, an estimated 13 million children were displaced within warring countries. The cessation of conflict does not, of itself, mean the end of suffering. However, in order to build a sustainable peace, the physical, psychological and social needs of the victims of war, and these include former combatants, must be met. To this end, the United Nations, governments, and in particular, non-government organizations undertake massive relief and re-construction programs aimed at re-building communities and restoring the well-being of those affected by conflict. The provision of what has become known as "psychosocial assistance" to people affected by armed conflict is an increasingly prominent part of humanitarian post-war intervention. Despite this, the field of psychosocial assistance remains relatively unsystematised and lacks a coherent research base to guide the evaluation and development of programs.

This paper will briefly focus on three contemporary conflicts – Gaza, Uganda and Afghanistan – in order to examine the psycho-social programs that are being delivered in these regions to enhance the well-being of children affected by conflict. It will also explore the efforts being undertaken to build a research base for evaluating this work. Finally, the paper will highlight three lessons learned: the need for multi-disciplinary approaches to research, the need for both quantitative and qualitative methods of research, and the need to understand local perspectives of well-being.

1 J Klot, 'The Graca Machel/UN Study on the Impact of Armed Conflict on Children' (1998) 4 *Peace and conflict: Journal of Peace Psychology* 319.

2 A Mawson, R Dodd and J Hilary, *War Brought Us Here: Protecting Children Displaced Within their Own Countries by Conflict* (2002).

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 193–207.*
 ISBN *90 04 14599 0.*

The research questions under consideration are: (1) what do children worry about in the Gaza Strip; (2) what is the best way of helping formerly abducted child soldiers in Northern Uganda reintegrate into their communities; and (3) what has been the impact of psychosocial programs on the well-being of children in Northern Afghanistan.

What Do Children Worry About in the Gaza Strip?

In 1998, donor funds were made available to train some 250 school-counsellors who were then to be given the task of providing counselling services to troubled children in primary and secondary schools throughout the Palestinian Territories. In order to design a curriculum for training these future counsellors, MacMullin and Loughry[3] sought to find out what children in the Gaza Strip worried about. The literature at the time[4] suggested that a significant proportion of Palestinian children were traumatised by the on-going conflict with the Israelis and likely to be experiencing symptoms such as bed-wetting, stuttering, nightmares, interpersonal violence, self-harm and the destruction of property. Would these be the issues that children would want to talk to counsellors about, or were there other matters of concern to them?

The research involved three parts. Firstly, 194 children (103 boys and 91 girls, aged 8 to 14) attending a school in Beach Camp were asked to list, on blank paper, the things that they worried about. This generated in excess of 800 items which were then pooled, sorted and reduced down to a list of the 37 most frequently suggested worries, taking gender and age into consideration. In the second part of the research, conducted on the following day, the same children were provided with a questionnaire listing these 37 items and asked to rate the extent to which they worried about each item on the list. Analysis of this data produced a rank ordering of the items from the most to the least worrisome: for all of the children, for boys as opposed to girls and for differing age groups among the children. These results were then discussed with small groups of children (8 to 10 members) during the third part of the study. At group meetings, children were asked to help the researchers understand the results. The researchers asked the children to elaborate on items, to offer explanations as to why certain items were more worrisome than others, and in particular, to outline what strategies they employed to manage their worries. An especially helpful question asked children to outline the kind of advice that they would give their younger brothers or sisters about dealing with the worries that the exercise had highlighted.

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3 C MacMullin and J Odeh, 'What is Worrying Children in the Gaza Strip?' (1999) 30 *Child Psychiatry and Human Development* 55; C MacMullin and M Loughry, 'A Child-Centred Approach to Investigating Refugee Children's Concerns' in F L Ahern (Ed) *Psychosocial Wellness of Refugees: Issues in Qualitative and Quantitative Research* (2000) 194.

4 See eg R Punamaki, 'Factors Affecting Mental Health of Palestinian Children Exposed to Political Violence' (1989) 18 *International Journal of Mental Health* 63; S Qouta, R Punamaki and E El Sarraj, 'The Relations Between Traumatic Experiences, Activity and Cognitive and Emotional Responses Among Palestinian Children' (1995) 30 *International Journal of Psychology* 289.

The results (see Table 1) were interesting for two reasons. Firstly, they did not support the notion that the children were, in the main, traumatised by the conflict. The only association with trauma that was mentioned was nightmares, and this item ranked 11th on the list. Rather than producing manifestations of trauma, the exercise generated a list of worries concerned with school, family, relationships, economic matters, community and political issues. One might be tempted to refer to the results as a list of what might be termed ordinary, everyday concerns, an unexpected result for a group of children experiencing severe poverty and political and military occupation with its associated violence. It certainly did not look like a list of the concerns of a traumatised group. Under the circumstances, these were the concerns of normal children. As such, the study calls into question the popularly held view that Palestinian children need psychological counselling to help them cope with the violence that is all around them.

Table 1
Rank Order of the Worries of Children at Beach Camp, Gaza Strip (Study 1: March, 1998)

1	Dirty streets	20	Being kidnapped
2	Israeli occupation	21	Siblings getting sick
3	War	22	Quarrelling with siblings
4	Unemployment in Gaza	23	Homework
5	Mother getting sick	24	Going out on my own
6	Women not wearing the veil	25	Not money no books
7	Not enough medicines	26	Father unemployed
8	Drugs and alcohol	27	Me getting sick
9	People swearing	28	No new clothes for the Eid
10	Night and the dark	29	Being late for school
11	Night mares	30	Parents quarrelling
12	Friends won't play with me	31	Brother beating me
13	Car accidents in the street	32	No pocket money
14	Quarrelling with peers	33	The sea
15	Earthquakes	34	Teacher/Principal beating me
16	Playing in the streets	35	Father beating me
17	Dying or being killed	36	Failing my exams
18	Being left alone at home	37	Parents getting divorced
19	Arab countries not united		

N=194 (102 boys and 91 girls, aged 8-14)

The second point of interest with these results concerns, not the items themselves, but the rank order of the items. Leaving aside the obvious concern with the Israeli occupation and the threat of war, the results suggest that the children are more worried about societal and community issues such as dirty streets, the lack of medicines at the hospital and unemployment in general, than personal issues such as father

being unemployed, not having new clothes for the Eid celebrations, not having enough pocket money, or being beaten by brothers, fathers or school principals. Indeed, being beaten was the most frequently nominated concern, but when ranked, one of the least worrisome.

At that time, these results did not make sense as the international literature[5] consistently reported that children, world-wide, were most worried about events in their immediate personal lives and least worried about issues of concern to the wider community. Generally, concerns about pocket money, school assignments and peer relations rank higher than concerns about the local community, the environment or world peace. It was thought that perhaps the researchers had inadvertently influenced the children to express concern for community issues ahead of personal issues. So, the study was repeated, some six months later, at different schools in the same camp, and with an older age group (287 children from 11 to 16 years of age).

This time, the Australian researchers were not present when the children were surveyed and the Palestinian research assistants spoke only from a prepared script that endeavoured not to suggest the kind of worries that were expected or highly valued. Despite all of the changes in method, the second study produced essentially the same results (see Table 2). Again community issues dominated the list of most worrisome concerns; issues such as the perceived corruption of the Palestinian Authority, the death of Iraqi children due to the sanctions that were then in place, the deterioration of health services in Gaza, and again, the dirty streets of the camp. At the bottom of the list of worries were concerns like homework, night-time and the dark, and being beaten by brothers and fathers.

Table 2
Rank Order of the Worries of Children at Beach Camp, Gaza Strip (Study 2: Sept., 1998)

1	Corruption	21	Me or family member kidnapped*
2	Dirty streets*	22	War*
3	My future	23	Father / mother getting angry at me
4	Death of Iraqi children	24	Israeli-Turkish alliance
5	Car accidents children playing in street*	25	Crowded homes
6	Lack of places for entertainment	26	Early marriage / Forced marriage
7	Deterioration of health services*	27	Internal political situation
8	Failing exams*	28	Feeling lonely*
9	Bad manners of young children	29	Being sad helpless and weak
10	Israeli occupation*	30	Dying*
11	Poverty and economic situation	31	No privacy
12	Gaza having too many children	32	My appearance (too short, too thin)

5 See W K Silverman, A M LaGreca and S Wasserstein, 'What do Children Worry About: Worries and their Relation to Anxiety' (1995) 66 *Child Development* 671.

13	How society looks at girls	33	Teacher or principal beating me*
14	Lack of school facilities	34	Relationships with opposite sex
15	Spread of bad morals*	35	Discrimination against girls / family
16	Smoking	36	Not being able to sleep*
17	Noise / Noisy streets	37	Parents / older brother beating me*
18	Woman to bedeck herself	38	Parents quarrelling
19	Violence and bad relationships	39	Night-time and the dark*
20	Me or family member getting sick*	40	Homework*

N=287 (144 boys and 146 girls, aged 8-16)

* Identified in study 1

It was not until the second study was completed that the researchers realised that the method, per se, was not flawed; rather the theoretical perspective taken to interpret the data was flawed. In fact, the results are what might be expected from children in a collectivistic society, where the needs of the community are always seen ahead of the needs of the individual.[6] The problem stems from the single-discipline training of the researchers, both of whom are psychologists. Anthropologists, on the other hand, are completely familiar with the notion of individualism and collectivism and would have seen nothing wrong with the results.

This example makes the point that the study of people's lives, their well-being and the impact of events on those lives cannot best be undertaken from the perspective of a single discipline; a multi-disciplinary approach is needed.

What Is the Best Way of Helping Formerly Abducted Child Soldiers in Northern Uganda Reintegrate into Their Communities?

Over the last decade, the issue of child soldiers has come to the attention of the international community, particularly since the publication of Graça Machel's landmark study on the impact of armed conflict on children.[7] In the year 2000, it was estimated that approximately 300,000 child soldiers in the world were serving in militaries or armed opposition groups.[8] About half of these were in Africa.[9]

While there is little argument about the needs of these children and their communities for support after release - or in the case of Uganda, escape - there is considerable debate about how to best provide that support.[10] Interventions in Uganda,

6 H C Triandis, 'Culture and Social Behaviour' in W Lonner and R S Malpass (Eds) *Psychology and Culture* (1994) 169.

7 United Nations, *Impact of Armed Conflict on Children* (1997).

8 Graca Machel, *The Impact of Armed Conflict on Children: A Critical Review of Progress Made and Obstacles encountered in Increasing Protection of War-Affected Children* (2000).

9 Save the Children UK, *Learning from Experience: Children and Violence* (1999).

10 UNICEF, *Cape Town Annotated Principles and Best Practice on the Prevention of Recruitment of Children into Armed Forces and Demobilization and Social Integration of Child Soldiers in*

for instance, include: family tracing; trauma counselling; skills and vocational training; group psychotherapy; community education; cleansing ceremonies; community capacity building; and the provision of material support such as food oils, grains and seeds, blankets and tools. The approaches taken by the different aid agencies vary in terms of: the emphasis placed on individual and group counselling; the degree to which parents and other care-givers are involved in programs and prepared for the children's return; the extent to which local practices or rituals are incorporated into programs; and the length of stay in rehabilitation centres. There is no lack of ideas about what to include in a rehabilitation or integration program. What is lacking, however, are systematic evaluations of these programs. Even when agencies do seek to evaluate their programs they face difficulties finding appropriate methods and tools to measure outcomes

The present study[11] involves measuring the impact of programs designed to help formerly abducted child soldiers adjust to post-conflict life back in their communities, following their escape from the rebel group known as the Lord's Resistance Army (LRA). In the past 15 years the LRA has abducted approximately 20000 children and forced them to fight or to become unwilling wives of the rebel commanders.[12] Some of the children were as young as seven or eight at the time of their capture. Their abductions were typically brutal and often involved children witnessing the killing of family members and the destruction of their homes. They experienced harsh living conditions with the LRA. Children caught trying to escape are killed, with other abductees forced to do the killing. Nonetheless, it is estimated that 5000 children have escaped, been released by the LRA, or rescued by the Ugandan army. The vast majority gain their freedom by escaping during raids back into the districts from which they were originally abducted.

When they do escape, the children either return directly home, or seek refuge at one of three rehabilitation or reception centres. Each of these centres has a different approach to rehabilitation. The present study was commissioned in order to study two of these centres and to determine the extent to which each was effective in assisting former abductees adjust to civilian life in their communities. The World Vision program houses children for periods of three to four months, providing extensive counselling and vocational skills training before facilitating the children's return home. The Kitgum Concerned Women's Association (KICWA) program provides short-term accommodation of approximately three to ten days during which time children are assessed, families traced and both prepared for reunion. The return home usually involves traditional cleansing rituals.

In order to make judgments about the success of these programs, an instrument had to be constructed that was capable of measuring the children's adjust-

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Africa (1997); I McConnan and S Uppard, *Children Not Soldiers* (2001).

11 C MacMullin and M Loughry, *An Investigation into the Psychosocial Adjustment of Formerly Abducted Child Soldiers in Northern Uganda* (2002).

12 Associated Press, 'World Court's First Case in Uganda', *The Weekend Australian* (Sydney), 31 January 2004, 13.

ment to post-conflict life. A procedure developed in Sierra Leone[13] was adapted for this purpose. In the first instance, the procedure was explained to a group of potential research assistants (local Acholi people who could speak English) who were then provided with a list of descriptors of adjustment or maladjustment. These descriptors included statements such as: "s/he worries about many things", "s/he gets angry easily", or "s/he helps the younger ones". The respondents were asked to sort the items as either "useful" or "poor" indicators of adjustment, and as such, suitable or unsuitable for inclusion in a questionnaire to measure adjustment of former child soldiers in the local context. Items from the original Sierra Leonean list that were retained included: "s/he is jumpy" and "s/he always fights". Whereas, the item stating: "he/she is afraid that something bad will happen to him/her" was rejected because it was argued that *all* children in Northern Uganda fear something bad will happen to them and so this would not discriminate between well- and poorly-adjusted children.

This exercise provided an initial pool of potential items and, importantly, examples of the kinds of items that might be used in such a questionnaire. The respondents were then asked to generate their own ideas to add to the list, based on their knowledge of local children. This list was translated into the local language, Luo, and then taken by the research assistants to a number of different focus groups where the procedure was repeated. These groups included village elders, educated adults, former child soldiers, and children who had not been abducted. This process produced a final questionnaire of 57 items that included 18 locally generated indicators of adjustment. Among these were: "s/he enjoys collecting firewood" and "s/he enjoys telling stories with family and friends in the evening". All of the items were expressed in local idiom, such as: "he/she has trouble in his/her heart".

The study involved this questionnaire being individually administered to 567 children from the Gulu, Kitgum and Pader districts of Northern Uganda (412 male and 155 female, aged from 10 to 18 years). Using quota sampling, the children were randomly selected to represent four groups: 155 (27%) of the children went straight home after escaping from the LRA; 132 (23%) attended the World Vision rehabilitation program in Gulu; 130 (23%) went through the KICWA program in Kitgum; and the remainder, 150 (27%) were children who had not been abducted and were from the same districts and were representative of the same age and gender profiles.

The results indicated that, firstly, the questionnaire turned out to be both a valid and reliable measure of adjustment, and, secondly, significant differences were apparent in the adjustment of the four different groups of children. The procedure generated, for each child, an overall adjustment score, as well as sub-scale scores for anxiety/depression, pro-social behaviour, hostility, and confidence. Table 3 lists examples of the items that constituted each of the four sub-scales.

13 C MacMullin and M Loughry, *Assessing the Psychosocial Adjustment of Former Child Soldiers in Sierra Leone* (2001).

Table 3
*Examples of items that constitute the sub-scales of the 53-item Northern Uganda Child Psychosocial Adjustment Scale (NUCPAS)**

Sub-scale 1 – Anxiety and Depression
Do you have trouble in your heart?
Do you think a lot about bad things from the past?
Do you feel lonely?
Do you find life difficult even if you are home or elsewhere?
Do you cry easily?
Do you feel it is not good for you to keep living?

Sub-scale 2 – Pro-social Behaviour
Do other children like to associate freely with you?
Do you enjoy collecting firewood (other community activities?
Do you go with other children for swimming (or other fun activities)?
Do you help younger ones?
Do you share your feelings or ideas with others?
Do you like to sit around the fire at night?

Sub-scale 3 – Hostility
Do you destroy things that belong to others?
Do you curse or use abusive language?
Do you threaten to hurt others?
Do you destroy your own things?
Are you quarrelsome?
Do you disobey your parents/guardians or teachers?

Sub-scale 4 – Confidence
Do you have confidence to be responsible for others?
Do you have confidence about your future?
Do you think you can do things like others?
Are you confident of doing things on your own?
Are you satisfied with yourself?
Do you feel safe when you are on your own?

* The items in the NUCPAS were locally adapted from the Sierra Leonean Child and Adolescent Adjustment Scales (MacMullin & Loughry, 2001)

The first of the group comparisons in the study was not surprising. All of the children who had been abducted were found to be more anxious and depressed, more hostile, less pro-socially active and less confident than their peers who had never been abducted (see Table 4).

Table 4
(Standard Regression Coefficients for Groups and Factor Scores with Non Abducted Children as a Reference Group)

	Anxious	Pro-social	Hostile	Confident
Straight home (N=155)	**More 31**	**Less -17**	**More 25**	**Less -20**
KICWA (N=130	**More 22**	**Less -22**	**More 15**	**Less -11**
World Vision (N=132)	**More 28**	**Less -18**	**More 19**	No difference -8

Bold = *significant at .05*
KICWA is the Kitgum Concerned Women's Association

The next set of analyses compared the three groups of former child soldiers, or abductees. Here it was found that both groups of children who had participated in the reception/rehabilitation programs were better adjusted than those who went straight home (see Table 5). The KICWA children were found to be less hostile and less anxious than those who had returned straight home, and the World Vision children were found to be more confident than both those who went straight home and those who went through the KICWA program.

Table 5
(Standard Regression Coefficients for Groups and Factor Scores with Straight Home Children as a Reference Group)

	Anxious	Pro-social	Hostile	Confident
KICWA (N=130)	**Less -10**	No difference -5	**Less -15**	No difference 5
World Vision (N=132)	No difference -3	No difference -1	No difference -8	**More 11**

Bold = *significant at .05*
KICWA is the Kitgum Concerned Women's Association

This study was planned as a longitudinal investigation because adjustment is a process over time. There are two more collections of data scheduled for the first and second anniversaries of the initial interviews. While the preliminary results suggest a promising study, they, nonetheless account for only a part of the variance in adjustment among the children. Although, as a group, the World Vision and KICWA children were found to be better adjusted than those who went straight home, there was considerable variation in adjustment among the children who received these interventions. There is still a great deal that we do not know about these children, their families and communities and the contributors to their adjustment. We do not know what part families and communities play in the adjustment process. We do not know which particular features of the KICWA and World Vision programs are

responsible for their successes. Clearly, we only have a part of the picture. What is needed now are rich descriptions of: the lives of some of the children; descriptions of what happens in the family; how the family have dealt with difficulties; how communities have adjusted; what has happened in schools; and what teachers have done. Qualitative research has to be undertaken and case studies developed both of children who are well adjusted and descriptions too of children who are still struggling. We need to have in depth discussions with the children, and those who know them well, in order to hear their theories about what makes the difference, and as the purpose of this research is to inform the practice of the NGOs, to hear their answers to questions such as: "What could the NGOs be doing differently (or, more of) in order to better help children and their communities adjust to the children's return?"

With respect to the Palestinian study the conclusion was that research into the impact of interventions on children's well-being should be multi-disciplinary. The work in Uganda points to the need for research to be multi-modal that is employing both qualitative and quantitative methods. These perspectives have been brought together in a study to assess the outcomes for children of a psychosocial intervention in Northern Afghanistan

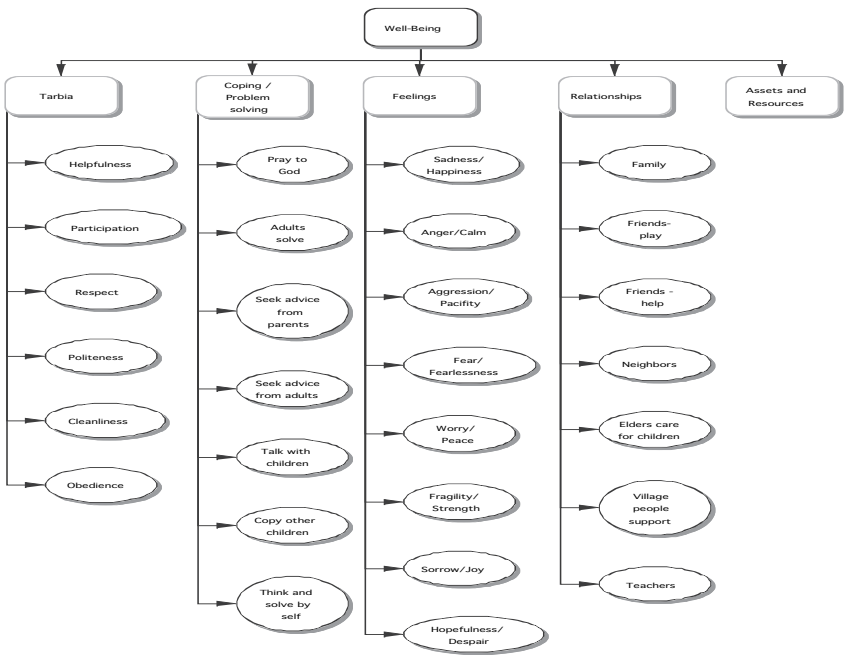
What Has Been the Impact of Psychosocial Programs on the Well-Being of Children in Northern Afghanistan?

In late 2001, the US led invasion brought to an end the Taliban government of Afghanistan and established the Afghanistan Transitional Authority. This has led to major repatriation, with some 2.3 million refugees and internally displaced persons returning to their villages and often destroyed homes.[14] The present research is being conducted in Kunduz and Taloqan provinces, the final stronghold of the Taliban and the site of much conflict and destruction. The villages being investigated had been abandoned when attacked, and subsequently were destroyed by the Taliban. In 2002, a consortium of international NGOs began working in the Northern provinces in order to help villagers re-construct their communities putting in place shelter, water and sanitation, as well as psychosocial services. The aim of the psychosocial programs was to improve the well-being and development opportunities of Afghan children and to help them, and their families and communities, cope better with the effects of prolonged conflict. To achieve this, the lead agency, Child Fund Afghanistan (CFA), working with UNICEF, established Child Well-being Committees and Child-Centred Spaces in a number of villages. These programs helped communities identify threats to children's well-being and actions to reduce them; provided parenting and material supports to families with highly vulnerable children; increased children's access to and participation in structured non-formal education activities; trained teachers; and engaged youth in community development projects and income-generating activities.

14 UNHCR, *Statistics* (2003) UNHCR <http://www.unhcr.ch/cgi bin/texis/vtx/print?page =home&tbl=NEWS&id=3f3ce07f8> at 22 October 2003.

The goal of the research (which is ongoing) was to develop and field-test measures of child well-being that: integrated qualitative and quantitative approaches; were locally grounded; and reflected the importance of social ecologies in children's well-being. The first task was to review earlier research, undertaken by anthropologist Jo De Berry,[15] that investigated local perceptions of children's well being,[16] then conduct focus group meetings with local CFA staff, teachers and other child specialists in Taloqan and from that build a well-being questionnaire that could be administered to both children and adults. The De Berry report proposed three domains of children's well-being: good relationships; positive feelings; and positive coping. Positive coping was described by De Berry as the development of faith, *tarbia* (children's manners and participation in the community), courage and responsibility.[17] To this, the research team added a western psychological construct of coping, namely that of cognitive problem solving. The resulting model of children's well-being (see Figure 1) was used as the basis of discussions with local CFA staff and other local child experts in order to identify items for the well-being questionnaire.

Figure 1
Model of Children's Well-being



15 J De Berry, *The Children of Kabul: Research on their Psychosocial Well-Being* (Save the Children, U.S.A. 2002).

16 Ibid.

17 Ibid.

The final questionnaire for the children had 23 items: 9 feeling items; 6 relationship items; and 8 coping items. The adult form of the questionnaire asked the same questions, but it also included 6 questions about children's *tarbia*. The questionnaire was designed to be read to the respondents who were asked to indicate their answers by marking different sized symbols. This was to overcome problems with literacy.

The questionnaire was administered to 267 children and 145 adults in seven villages. The villages were randomly selected as representatives of three different conditions: (1) villages where the humanitarian intervention involved water and sanitation (two villages); (2) villages where there was a psychosocial intervention (two villages); and (3) villages that were recipients of both interventions. Eventually, all seven villages will receive both programs. The different circumstances prevailing in the villages have provided the researchers with an opportunity to engage in a quasi-experimental study that may be able to separate the outcomes of the psychosocial intervention from outcomes attributable to other variables, such as the water and sanitation program. In light of this opportunity the questionnaire will be administered to the same respondents on two future occasions, seven to eight months apart.

Analyses of the first set of data revealed that three of the four subscales provided reliable measures of well-being. These were the Feelings (as reported by the children) Subscale (see Table 6); the Relationships (as reported by the children) Subscale (see Table 7) and the *Tarbia* Subscale (see Table 8)

Table 6
Afghan Children's Feelings Subscale

Are you afraid something bad will happen to you?
Do you worry about many things?
Do you get angry easily?
Do you fight or argue with other children?
Are you hopeful for the future?
Are you sad?
Do you cry easily?
Do you feel sorrow?

Table 7
Afghan Children's Relationships (Child Report) Subscale

Do you feel happy in your family?
Do your teachers have good relationships with you?
Do your friends help you?
Do your neighbours have good relationships with you?
Do the elders of the village take good care of you?
Do the people of the village support you?
Do you play with your friends?

Table 8
Children's Tarbia (Adult Report) Subscale

Do the children in the village respect elders?
Are the children in the village polite?
Do the children obey their parents?
Are the children in the village clean?
Do the children participate in community activities?
Do the children help their parents and families?

The questionnaire will be used to generate relationship and feelings scores for individual children and average scores for groups of children that will allow comparisons of well-being before and after different interventions, as well as comparisons based on gender, age and other variables of interest. The adult reports of children's *tarbia* can be used in a similar way.

The subscale that did not satisfactorily capture a sense of children's well-being was the coping subscale. Unlike the other subscales, the intention of the coping measure was not to average the individual child or adult responses to the items that made up the subscale, rather it was to present the respondents with items representing seven different levels of sophistication in personal problem-solving. It was proposed that there would be a relationship between levels of well being and degrees of sophistication in children's problem-solving strategies, with the more sophisticated strategies being associated with higher levels of well-being. This proposition can be illustrated by the problem children face in crossing a mine-field. It is argued that children who employ sophisticated strategies in deciding how to cross a mine field are more likely to complete that crossing successfully, and therefore enjoy a higher level of well-being than children whose less-sophisticated strategies may lead them to injury. One child, for instance, when asked about his strategy for crossing a mine-field said: 'I tell myself "I must be brave, I must be brave" and then I run across as fast as I can.'

In order to develop a hierarchy of strategies that children might typically employ when attempting to solve everyday problems, focus group members were asked to firstly suggest strategies (see Table 9) and then to arrange those strategies in rank order of sophistication. Sophistication was defined as 'most likely to lead to a successful solution'.

Table 9
Adult suggestions of strategies which children might employ to solve everyday problems

Ask adults to solve the problem for them
Seek advice from parents on how to solve the problem
Talk with other children about the problem and the solutions they employ
Seek advice from adults, other than parents
Watch other children and copy what they do
Pray to God to solve the problem
Think through the problem and plan a solution on one's own

From a western, psychological perspective, it is assumed that sophisticated problem-solving involves individual cognitive processes such as watching, seeking opinions, talking through problems with others, and then reflecting upon the challenge at hand and making a plan for executing a solution. There is also an implicit assumption that, when solving everyday problems, personal autonomy is more sophisticated than dependence on others. However, the focus group members judged the strategies from quite a different point of view, declaring that 'praying to God was the most sophisticated of the strategies, followed by 'asking adults to solve the problem for them'. The other strategies ranked highly were asking parents for advice, followed by asking advice of other adults. The strategy involving thinking through the problem and devising a solution by one's self was ranked as the least sophisticated.

This provided the researchers with a dilemma; whose judgment should be employed in this case? This is not a unique question, nor one that is confined to the world of research. In fact, the field of humanitarian assistance, as a whole, struggles with a tension between respecting local culture and at the same time operating from a range of external, more global perspectives.[18] This is often starkly illustrated when local cultural practices conflict with notions of universal human rights. Clearly, neither cultural imperialism nor cultural relativism is satisfactory. What is needed is an approach that can consider multiple cultural perspectives.

Ethnographers refer to 'polyphony', a notion from literary theory that concerns itself with multiple voices or the simultaneous representation and analysis of ideas and events, as opposed to what is referred to as "monological authority".[19] Such a polyphonic approach could help researchers and the researched alike develop shared understandings of constructs such as coping. This could then lead to shared judgements about the effectiveness of programs designed to enhance children's capacities to cope with problems in their lives. Such an approach will be explored in the next stage of this research project.

Conclusion

Armed conflict takes its toll on people: combatants and civilians. Meeting the psychological and social needs of those affected, directly and indirectly, by such conflict is essential if sustainable peace is to be built. While psychosocial interventions are now a key part of the humanitarian enterprise, few are ever evaluated, and very little research is undertaken into this important work.

The studies discussed in this paper highlight the need for such research to be multidisciplinary, to employ multiple methods, and to consider circumstances from multiple, cultural perspectives. The author would encourage researchers to familiarise themselves with the concepts and methodological tools of cross-cultural psychology

18 See A. Dawes and E. Cairns, The Machel Study: Dilemmas of Cultural Sensitivity and Universal Rights of Children (1998) 4 *Journal of Peace and Conflict* 335.

19 See G E Marcus, *Ethnography through Thick and Thin* (1998).

(see Berry, Poortinga, Segall and Dasen[20]), and cultural anthropology (see Boyden and de Berry[21]), as well as those of psychological measurement. Qualitative, as well as quantitative methods need to be employed (see Ahearn[22]) and research should also be participatory (see Jo De Berry[23]) in order to represent local perspectives.

High quality research is necessary in order to help agencies: evaluate and improve their work; demonstrate the effectiveness of their programs to donors and hence secure the funds necessary for the continuation of this work; and, importantly, develop new and more effective programs.

20 J.W. Berry, Y.H. Poortinga, M. H. Segall and P.R. Dasen, *Cross-Cultural Psychology: Research and Applications* (2002).

21 J. Boyden and J. de Berry (Eds), Children *and Youth on the Front Line: Ethnography, Armed Conflict and Displacement*. (2004).

22 F.L. Ahearn (Ed), *Psychosocial Wellness of Refugees: Issues in Qualitative and Quantitative Research* (2000).

23 J. de Berry, above n 15.

Civil War in Côte d'Ivoire: Another Perspective on the Economy and the Political Order in Africa

Christophe Dongmo

Introduction

Traditionally considered a haven of peace and political stability, Côte d'Ivoire is the latest country to experience civil war and political violence in Africa. Côte d'Ivoire was once a prosperous country ruled by an eccentric strongman, attracting world businesses to headquarter their operations in Abidjan city. With the death of President Félix Houphouët Boigny in 1993,[1] it became apparent that this stability had shallow and dangerous roots. On September 19, 2002 a group of soldiers executed a well-coordinated attack on three major cities to overthrow state institutions. Having failed to take control of Abidjan city on the first day, they retreated and established their stronghold in Bouaké. Largely due to rapid French intervention, the rebels were contained in the upper-north part of the country, and a ceasefire that French troops were to patrol was signed on October 17, 2002. Within days, the Patriotic Movement of Ivory Coast (MPCI), the Movement for Justice and Peace (MJP), and the Popular Movement for the Great West (MPIGO) claimed the rebellion and came together under the pseudonym of *Forces Nouvelles*.

The Côte d'Ivoire crisis is a complex power struggle, mixing issues of nationality, militarism, land ownership, religious affiliation and its impact on political behaviour, and the nature of independence from the former colonial power, France. The conflict is produced by deeply rooted factors such as the lack of democratic institutions, high unemployment rates, border incursions, and easy accessibility of small arms. This situation is expected to continue in so far as for over 30 years since inde-

1 Félix Houphouët-Boigny (October 18, 1905- December 7, 1993) was the first President of Côte d'Ivoire (1960-1993). He rose to prominence during the colonial period, when he founded the multinational party Rassemblement Democratique Africain (RDA), that advocated independence for European colonies in Africa. Under Houphouët-Boigny's ideologically moderate leadership, Côte d'Ivoire prospered economically because of a combination of sound planning and the country's significant cocoa industry. Despite economic success, however, his government presided over a de facto one-party state for most of his reign. Houphouët-Boigny moved the country's capital to his hometown of Yamoussoukro and built the world's largest church there, the Basilica of Our Lady of Peace of Yamoussoukrou. Houphouët-Boigny won the country's first multiparty presidential elections in October 1990 with 89% of the vote. Upon his death, National Assembly president Henri Konan Bedie took power (December 07, 1993 – December 24, 1999). A list of Presidents of Côte d'Ivoire is available from <http://en.wikipedia.org>.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 209-230.*
 ISBN 90 04 14599 0.

pendence, military coups were practically the major means by which changes of government were achieved in Africa.

Even though war and the possibility of war among peoples of the same country have been the motor of African politics, it is my hypothesis that the conflict should be understood as both an internal and external matter. Referring to recent developments in Côte d'Ivoire, I will argue that as communism and the Soviet Union were torn down in the 1990s, Africa started to undergo its own political metamorphosis. Though not successful, the movements for multiparty politics and democracy gained strength. Although studies of political development and state consolidation in Africa have all but ignored the status and role of regional organisations in conflict resolution and political development at large, I argue that, as a result of continued warfare, regional cooperation should evolve as the greater stimulus to state building.

Initially, this essay analyses regional and international endeavours to prevent further escalations. Thereafter, the essay builds some additional arguments pertaining to the political economy of war and conflict in Africa. I demonstrate that whether democratic or not, African states will continue to dominate their internal politics, but regional stability and the resolution of conflicts will rather depend on the input of regional institutions. While there is little reason to believe that African regional institutions can intervene in states' internal affairs, I conclude that, such regional institutions probably can because recent changes in the development and political structures of the continent should be conducive to mutual cooperation and a new model of inclusive globalisation.

I first analyse the impact of regional (Africa) and international (France, United Nations) diplomatic efforts in preventing further conflict. I then consider the difficulties and shortcomings of the peace process, which have led to the current status quo. Third, I offer a prognostic view of the political economy of war and conflict in Africa. Here, I raise some ideas on Africa's political backwardness, before advocating the expanding role of new regional conflict resolution and development initiatives. In the end, it is the contention of this essay that Côte d'Ivoire should serve as the blueprint to raise voices and concerns about a new dialectic of Africa's regional development and reconstruction and that we should promote the concept of regional integration as part of a methodology for understanding African politics.

ECOWAS and Regional Diplomacy

Meeting in Accra on September 29, 2002, the Economic Community of West African States (ECOWAS)[2] heads of state decided to set up a "Contact Group," pre-

2 ECOWAS was established by the Treaty of Lagos, which was signed in May 1975. This laid the ground for the establishment of a fifteen nation economic community of predominantly English and French-speaking West African states. These states pledged themselves to work towards the free movement of goods and people, with the objective of promoting trade between themselves and increasing their independence, as a group, in relation to the rest of the world. The ECOWAS treaty which was signed at the Organisations's 16th Summit in Benin in 1993 and took formal effect on July 30,

sided over by President Gnassingbé Eyadema of Togo, with the assistance of Ghana, Guinea Bissau, Niger, Nigeria, Togo, and President Thabo Mbeki of South Africa. Intensive regional cooperation towards the peaceful resolution of the crisis intensified on March 11, 2003 with the arrival of Ralph Uwechue, assuming duty as Special Representative of the ECOWAS Executive Secretary. Appointed in December 2002 in Senegal, Uwechue was given the mandate to co-ordinate and monitor all peacekeeping operations.

In March 2003 ECOWAS chairman and Ghanaian head of state, John Kuofor, met with ECOWAS chiefs of defence forces from 15 countries led by Lt-Col Seth Obeng. Benin, Ghana, Niger, Togo and Senegal had already committed troops for the mission. ECOWAS chiefs of defence staff endorsed the proposal for an increase from 1,264 to 3,411 soldiers. John Kuofor also invited all the signatories of the Linas-Marcoussis Peace Agreement to a meeting in Accra. Discussions in the first Accra meeting have resulted in an agreement to form a new national reconciliation government by March 14, 2003. The breakthrough was a positive step but two key portfolios remained unallocated. The rebels have ceded their demand for the defence and internal security departments. A political agreement by all delegations was reached to temporally substitute the defence and internal security departments with an all-party National Security Council (NSC), comprising 15 representatives.

Subsequently, the 27th Session of the Assembly of Heads of State and Government of ECOWAS, held in Accra, on December 19, 2003, appealed to the rebels to return to their seats in the National Reconciliation Government. On December 12, 2003 the head of state Laurent Gbagbo signed the decree delegating major executive powers to the Prime Minister, by virtue of article 53 of the Côte d'Ivoire Constitution, and concurrently authorising him to implement the provisions of the Linas-Marcoussis peace agreement, until the general election scheduled for October 2005. At the cabinet meetings of 18 and 22 December 2003, the new government submitted a Draft Bill on the land tenure system, requirements for citizenship, and the criteria for eligibility for the presidency.

International Peace Efforts

French Intervention: The Colonial Power's Conflict Resolution Privileges

Ever since independence in 1960, Côte d'Ivoire has maintained strong ties with its former colonial power, France. Since the Rwandan genocide of 1994, France has stepped back from active support for any African government. When Côte d'Ivoire was ripped apart by its first-ever military coup that brought General Robert Guei to power (December 25, 1999 – October 25, 2000), France watched nervously as four

1995, provided for the imposition of a community tax, the establishment of a regional Parliament, an Economic and Social Council, and an ECOWAS Court of Justice. ECOWAS's Executive Secretariat is housed in Abuja, Nigeria, while the ECOWAS Bank for Investment and Development (EBID) is located in Lome, Togo. See <http://www.ecowas.int>.

decades of Paris-backed stability laid in ruins. Although the previous Lionel Jospin government ignored dubious elections and recognised the Gbagbo government as legitimate three years ago, Jacques Chirac calculated that a government including the rebels and the opposition leader Allassane Ouattara was the best way for internal stability.[3]

French investors, soldiers and political advisers have traditionally played a key role in sub-Saharan Africa's third largest economy and the world leading cocoa producer.[4] France is particularly concerned because some 20,000 French citizens and about 800 soldiers operate in the country on a permanent basis. We cannot underestimate the strategic importance of Côte d'Ivoire in the entire West African geopolitics. Not only was Côte d'Ivoire a key focus for French investment and a center of economic activity in the region, but also new discoveries of oil and increasing energy and agricultural production in West Africa lend the region the strategic importance in shaping French foreign policy in the West African area. In addition, the high level of labour mobility has made Côte d'Ivoire the economic hub of West Africa, and its ports (Abidjan, San Pedro) are the gateways to any international trade within the region. France has in the area of US$3 billions in investment in Côte d'Ivoire and most of the lucrative sell-offs of public utilities, under the World Bank Structural Adjustment Programme, have ended up in the hands of French companies.

In the Foreign Affairs Department, Paris is not keen to be seen to support Gbagbo but neither can Paris officially endorse an armed insurrection. This is why France would normally like to hand over responsibility for the crisis to a proposed ECOWAS peacekeeping force. Since France is not willing to compromise its interests in its most important dependent economy in West Africa to rebels, the commitment to get everyone around the table at the Linas-Marcoussis summit was a means to impose a more direct rule, which dares not say its name. France has a military co-operation pact with Côte d'Ivoire, dating back to 1962, which allows France to intervene and support the legitimate government. But the French Defence Minister Michelle Alliot-Marie has stressed that the reinforced French presence is unrelated to this agreement, which covers only foreign attacks.

Within days after the outbreak, France has moved towards an open military occupation of the territory. Under the "Operation Licorne" more than 4,000 French

3 Allasane Dramane Ouattara, Former Prime Minister of Côte d'Ivoire, is the leader of the main opposition party the Republican Rally (RDR). The new Constitution adopted in 2002 has created a good deal of resentment within the Ivorian community. Article 35 provides that, in order to be eligible for the presidency of the Republic, any candidate must be of Ivorian origin and born of parents who were themselves Ivorians. On the basis of this new provision, the Constitutional Chamber of the Supreme Court rejected the candidacy of 14 politicians (including that of Alassane Ouattara) who did not meet these new requirements on the occasion of the 2002 presidential elections. The consequence of this decision was to exclude a large part of the Ivorian population from participation in the management of their country's public affairs and from enjoying equal access to public office.

4 With about 1,163000 tonnes per year, Côte d'Ivoire is the world leading producer of cocoa. The country also clocks among the top six of coffee production, with about 328,000 tonnes per year. See *Pocket World in Figures* (The Economist Books, 2002).

troops are currently involved in the settlement of the crisis. Though at first they were present only to defend French civilians, and to enforce the Togo cease-fire, it is increasingly obvious that without their presence the rebel forces would have already swept the entire country. French troops, alongside ECOWAS, have been deployed at most strategic crossroads and have been providing tight security to members of the national reconciliation government.

In relation to development aid, France has considerable leverage over the Côte d'Ivoire government. The resumption of the European Union (E.U.) and International Monetary Fund (I.M.F.) support, which was cut in 1999, will be contingent on the parties reaching a political agreement. By January 07, 2003, the former French Foreign Minister Dominique de Villepin concluded a country visit, following two days of talk with the government and the MPCI. Villepin said that France was mobilising to end what he described as "a dangerous spiral." His visit was yet a further attempt to impose a cease-fire. He called on the government, political parties and the rebels groups to attend a summit meeting in Paris later during the month. De Villepin's visit was in response to public authorities sending in a helicopter raid, manned by Angolan and South African mercenaries. In French military quarters such actions were described as "inadmissible and intolerable."[5] The French diplomat reportedly instructed Gbagbo to expel mercenaries and stop aerial bombings and in a separate meeting with the rebels sought to persuade them not to retaliate.

In France, there was clearly some nervousness in ruling circles about the military involvement. Under the heading "France caught in a trap," *Liberation* – the daily newspaper – drew parallels with the U.S. war in Vietnam and accused French government of imprudence. France called on the Linas-Marcoussis peace conference to discuss ways of restoring political order. The subsequent Paris-Kleber Summit, which finally ratified the deal, brought together the United Nations General Secretary, European Community (E.C.), African Union (A.U.), and representatives of other nations.[6] Under the deal agreed upon at the end of nine days of talks, President Laurent Gbagbo will remain in office but will rule through a government of national unity that includes his opponents. The Peace agreement also stipulated the appointment of a non-partisan Prime Minister with executive powers -chosen by broad political consensus – to bring peace and prepare the ground for the October 2005 general elections. In addition, the deal offers general and unconditional amnesty to soldiers who joined the insurrection and guarantees the formation of a new army – comprising loyalists and rebels – with the help of France.

Aside from offering a blueprint for a shake up of political power, the peace plan addresses ethnic tensions many believe to be one of the roots of the political strife in a country where more than a quarter of the 16 million inhabitants are immigrants. An Annex to the text calls for the country's Nationality Code to be reformed to

5 See John Farmer, 'France goes on the Offensive in Ivory Coast' (2003) available at <http://www.wsws.org>.

6 Among the heads of state and government due to attend were Abdoulaye Wade (Senegal), Blaise Compaore (Burkina Faso), Amadou Toumani Toure (Mali), Thabo Mbeki (South Africa), and Omar Bongo (Gabon).

avoid abusive exclusions based on national origins. The agreement also widens the nationality criteria required for presidential elections so that people born out of any Ivorian parent – whether male or female – should be able to stand for any public office. Paris wanted the agreement to be monitored by the UN, with the possibility of sanctions if its terms are broken and foreign aid made conditional on its full observance. It was against this background that President Gbagbo paid a visit to France, on February 03, 2004. That visit helped reactivate the relations between the two countries and contributed in moving forward the reconciliation process in Côte d'Ivoire.

The United Nations System

General Humanitarian and Relief Efforts

Most humanitarian relief works were coordinated by international development Non Governmental Organisations (NGOs) such as the Friends of the World Food Programme, International Organisation for Migration (IOM), Reporters Without Borders, Amnesty International, and the UN system, namely the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the UN High Commissioner for Refugees (UNHCR).

Early in December 2002, the former UN High Commission for Human Rights, the late Sergio Veira de Mello,[7] warned that human rights violators could still face individual criminal responsibility before the International Criminal Court, even though they could escape the reach of national law. On Friday December 20, 2002, the Security Council expressed its deepest concern about reports of mass killings and serious violations of human rights in Côte d'Ivoire. It called on all parties to ensure full respect for human rights and international humanitarian law, particularly with regard to the civilian population, regardless of its origin, and to bring to justice all those responsible for any violation thereof. The Council welcomed the decision by the Secretary-General to request the High Commissioner for Human Rights to send a fact-finding mission to gather precise information regarding the violations of human rights and international humanitarian law in Côte d'Ivoire. The Mission visited Côte d'Ivoire from 23-29 December, 2002.

On January 29, 2003, a Report covering the mission of the Deputy High Commissioner for Human Rights, François Ramcharan, called on parties to stop human rights violations and bring perpetrators to justice. The Report contains allegations about the existence of mass graves, torture and detentions camps, and acts of sexual violence, including gang rape, perpetrated by both sides.[8]

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7 Sergio Veira de Mello, UN High Commissioner of Human Rights, was later assassinated after a deadly suicide attack that killed 22 people on the UN Headquarters in Iraq during a Press briefing in August 2003. His position was filled by Louise Arbour, former Judge of the Canadian Supreme Court.

8 See *Letter dated 24 January 2004 from the Secretary-General addressed to the President of the Security Council*, UN Doc S/2003/90 (2003).

Following Security Council Resolution on January 28, 2003, a UN Multi-Disciplinary Mission arrived in Abidjan on February 24, 2003 to examine various options for a further UN role in restoring peace and stability.[9] The two-week mission assessed the requirements for disarmament and demobilisation of Ivorian armed groups and for sustainable reintegration of ex-combatants and assessed security requirements for the return of Ivorian refugees, internally displaced persons and other refugees. It also evaluated the roles of public and private media, assessed the current humanitarian situation, developed humanitarian access strategies and examined the economic impact of the crisis on Côte d'Ivoire and neighbouring countries. The mission met government, political, civil society and rebel leaders, to discuss what roles the UN could play in efforts to restore peace and security within the framework of the Linas-Marcoussis agreement. It also traveled to key interior towns to get first hand knowledge of the situation.[10]

As sporadic violence and persistent reports of human rights abuses tempered peace prospects in Côte d'Ivoire, the UN Humanitarian Envoy for Côte d'Ivoire, Carolyn McAskie, arrived in Abidjan on April 23, 2003 to launch a new, long-term relief plan. McAskie's visit was a follow-up to a mission she conducted in mid-January 2003 in Côte d'Ivoire and its five neighbours – Burkina Faso, Ghana, Guinea, Liberia and Mali. Since then, the crisis has continued, presenting a mix of positive developments and setbacks. She also played a positive role in the UN Consolidated Inter-Agency Appeal (CAP), which was finally launched on April 29, 2003 consisting of US$ 85.8 millions of emergency aid relief for about 2.8 million war victims.[11] The CAP is an annual call by the United Nations for funding for humanitarian projects around the globe. It is a mechanism put in place by UN humanitarian agencies to develop a common strategy, coordinate activities and ensure resource mobilisation to address humanitarian needs in a coherent and efficient manner. Though it is traditionally launched in the last trimester of each year, the UN decided to launch a "special" CAP for Côte d'Ivoire in the hope of catering to the thousands who have been affected by the conflict and helping to resolve the humanitarian crisis.

The UN Security Council

Acting under Chapter VII of the UN Charter, the UN Security Council described the situation in Côte d'Ivoire as a threat to international peace and security.[12] Deeply concerned by the situation in Côte d'Ivoire and neighboring countries such as Liberia, and recognising the importance of monitoring previous international

9 For the UN Security Council Resolution, see infra n 14. The Mission included representatives of the departments of political affairs and peacekeeping operations, the UNHCR, and the UN Commissioner for Human Rights.

10 See *Report of the Secretary-General on Côte d'Ivoire*, UN Doc S/2003/374 (2003).

11 The new Appeal covers a longer term and is more comprehensive than the Flash Appeal issued in November 2002. Humanitarian agencies received 41.5% of the US$ 22 million in funding required under that Appeal.

12 See SC Res 1464, 4700th mtg, UN Doc S/RES/1464 (2003).

peace efforts,[13] the Security Council on January 28, 2003 decided to re-establish the Panel of Experts appointed pursuant to paragraph 16 of Resolution 1408 (2002) for a further period of three months commencing no later than February 10, 2003.[14] In another major development, the Security Council endorsed the Linas-Marcoussis peace Agreement and called on all political forces to implement it without delay.[15] The Security Council also welcomed the Secretary-General's intention to appoint a Special Representative for Côte d'Ivoire, Professor Albert Tevoedjere, who took office on January 11, 2003.

Relying on the proposals contained in paragraph 14 of the Kleber Conference of Heads of State on Côte d'Ivoire, the Security Council authorised ECOWAS armed forces, in accordance with Chapter VIII, together with French military personnel, to take the necessary steps to guarantee the security and freedom of movement of their personnel and to ensure, without prejudice to the responsibilities of the Government of National Reconciliation, the protection of civilians immediately threatened with physical violence within their zones of operation, using the means available to them, for a period of six months after which the Security Council will assess the situation on the basis of military reports and decide whether to renew the authorisation.

In March 2003, the Security Council set up the United Nations Mission in Côte d'Ivoire (MINUCI), initially for a period of six months to facilitate the implementation of the Paris Peace Agreement and the support of military and diplomatic initiatives.[16] On February 29, 2004, the Security Council adopted resolution 1528, setting up the United Nations Operation in Côte d'Ivoire (UNOCI) for a period of 12 months, with effect from April 4, 2004. That Resolution backstopped the positive developments recorded thus far in the peace process. Pursuant to Resolution 1528, UNOCI replaced the MINUCI on April 05, 2004. The United Nations Force, which currently comprises about 1,300 White Helmets of the ECOWAS Mission in Côte d'Ivoire (MICECI) – now part of UNOCI – was eventually raised to about 6,240 Blue Helmets.[17]

Resolution 1528 also describes ONUCI's mandate. The UN mission has the duty, in coordination with French forces, to monitor strategic aspects such as cease fire, disarmament, demobilisation, reintegration and repatriation, protection of United Nations personnel, institutions and civilians, provision of support to humanitarian operations and the peace process, human rights and civil liberties, dissemination of information, and enforcement of public order. In addition, Resolution 1528 autho-

13 See *inter alia* paragraphs 5 to 7 of SC Res 1343, 4287th mtg, UN Doc S/RES/1343 (2001), as extended by paragraph 5 of SC Res 1408, 4526th mtg, UN Doc S/RES/1408 (2002). See also *Letter dated 24 October 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1343 (2001) concerning Liberia addressed to the President of the Security Council*, UN Doc S/2002/1115 (2002) submitted pursuant to paragraph 16 of SC Res 1408.

14 See SC Res 1458, 4694rd mtg, S/RES/1458 (2003).

15 SC Res 1464, above n 12.

16 SC Res 1479, 4754th mtg, UN Doc S/RES/1479 (2003).

17 SC Res 1528, 4918th mtg, UN Doc S/Res/1528 (2004).

rises UNOCI to use all the necessary means to carry out its mandate, within the limits of its capacity and in the areas of deployment of its units.

In April 2004, Secretary General Kofi Annan introduced Major General Abdoulaye Fall of Senegal as the ONUCI Force Commander. In an exchange of letters, the Council and Mr. Annan agreed on the appointment of General Fall, who was currently leading the ECOWAS force, which folded into UNOCI when it deployed in early April. Bangladesh, Benin, France, Ghana, Morocco, Niger, Pakistan, Senegal, Togo and Ukraine have agreed to provide military personnel to UNOCI.

In spite of UN interventionism, France almost played a solitary role during the peace process, initiating and supporting the vote of resolutions and in-country site visits. Given the necessary gloss that France was acting on behalf of the international community to avert threats to international peace and security, the backing of other nations was vital. UN Security Council Resolutions could not have been adopted without the full backing of the USA. Because no winners will emerge if the country slided into civil war, the US Department of State warned parties that a military option was not the best approach to dealing with the crisis.[18] Côte d'Ivoire received less attention from the international community than other less important conflicts. The battle of powers shifted to the evolution of the Iraq war and the forced departure of Charles Taylor from power in Liberia. The two events attracted more international attention, diplomatic and mediatic coverage than the ongoing war in Côte d'Ivoire. The USA was especially inattentive to the evolution of the peace process and supported any resolution introduced by France in the Security Council, expecting to get the Security Council ticket to legitimate its future intervention in Iraq. The basis of support or ignorance of the necessity for military intervention is still unclear in US – a permanent member of the Security Council – foreign policy. In Clausewitz's terms, it could be argued that war is an instrument of foreign policy in so far as the use of force can consolidate state expansionism.[19] To some extent, Côte d'Ivoire seems to have suffered from this realist construction of international politics.[20] This is because even in the United Nations system states are competitors for power, engaged in a continuous and inescapable struggle for sur-

18 US Department of State, 'Côte d'Ivoire: Meeting in Accra to Form a Government of National Reconciliation' (Press Release, 6 March 2003),

19 Carl von Clausewitz, *On War* (Oxford University Press, Oxford, 1994).

20 In its pure form, realism is based on the proposition that "states seek to enhance their power." States are completely separate from each other, with no affinities or bonds of community interfering in their egoistical pursuit of power. States in the international system aim to maximize their relative power positions over all other states. This is the best way to guarantee survival in an anarchical world. Realists assert the state of war features permanently on the international system's agenda and that this condition is a human condition, that is, a condition that cannot be altered by the appearance of specific forms and types of human societies because it is ultimately rooted in unchanging human nature. But realism does not explain the formation of institutionalised alliances among sovereign states. The most influential challenge to realism has come from several forms of liberal IR theory, namely neoliberal institutionalism. Hans J Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Knopf, New York, 1948).

vival. This makes them all potential if not actual enemies and there can be no "alliance" between them.[21]

Difficulties and Challenges of Conflict Resolution Mechanisms in West African Divided Societies

The Political Impact of Regional Instability and Border Incursions

Côte d'Ivoire and its closest neighbours – Burkina Faso and Liberia – have for many years had strained relations. Burkina Faso perceives arbitrary administrative and immigration policies of Côte d'Ivoire as the oppression of fellow Muslims by the southern neighbour. In Côte d'Ivoire, it is believed that Muslims have sponsored the rebellion from Burkina Faso, thus justifying an "elimination campaign" against the luckless migrants workers in the country. Although no admissible evidence exists to substantiate this claim, most people are of the opinion that weapons used by insurgents could also have come from Burkina Faso. A number of Liberian government soldiers interviewed by the International Crisis Group (ICG) claimed that weapons arrived at the Presidential Executive Palace in July 2002 directly from Burkina Faso.[22] Some Burkina Faso senior state officials said that planes loaded with weapons were leaving Ouagadougou airport on a daily basis. In addition, payments to Burkinabe fighters involved in the Liberian and Sierra Leone conflicts are the subject of a public debate in the Burkina Faso Parliament, as the question of compensation for trucks companies that were hired to bring weapons to Liberia and Sierra Leone and lost their vehicles there.[23]

Liberia is also singled out as instigator of the conflict. Liberia is regarded as a "rogue state", being under UN sanctions for its role in trading so-called "conflict diamonds" and supporting the rebels in neighbouring Sierra Leone. Many observers had previously expressed concern that the two rebel groups operating in the west were receiving support from Liberia.

A Report published on April 30, 2003 by the ICG unravels the complex involvement of many West African leaders in the worsening sub-regional conflicts.[24] The ICG has consistently identified Charles Taylor of Liberia as the key to regional instability, and has warned that West Africa shows many traits of Central Africa, which has been devastated by regional war. While information is sometimes hard to substantiate due to the difficulties encountered by independent observers in the

21 Arnold Wolfers, *Discord and Collaborations: Essays on International Politics* (Johns Hopkins Press, Baltimore, 1962) 83-8.

22 ICG interviews, February-March 2003. See also Global Witness, *The Usual Suspects: Liberia's Weapons and Mercenaries in Côte d'Ivoire and in Sierra Leone: Why it's Still Possible, How it Works and How to Break the Trend* (2003) 10, 22, 26 available at <http://www.globalwitness.org>.

23 See ICG interviews in Ouagadougou and Brussels, November and December 2002.

24 See International Crisis Group, *Tackling Liberia: The Eye of the Regional Storm* (2003) available at <www.icg.org>.

country, it is undisputed that Liberia and Côte d'Ivoire find themselves deeply involved in one another's conflict.

Since the era of President Felix Houphouët-Boigny (1960-1993) and the emergence of Charles Taylor in the 1980s, the two countries have played clandestine roles in each other's domestic affairs. Western Côte d'Ivoire was significant in Liberia's first civil war in so far as it hosted many Liberian refugees, and anti-Taylor forces, mainly ethnic Krahns from Grand Gedeh County. In addition, Côte d'Ivoire remained an important business and arms route for Taylor's wars when Henri Konan Bedié became president of Côte d'Ivoire (December 07, 1993 – December 24, 1999), and the relationship with Robert Guei was rekindled when the General became the head of the military junta that toppled Bedié on December 1999 and an important number of Liberian fighters were apparently installed as part of the Côte d'Ivoire presidential security division.

The extent to which Taylor was involved in the Côte d'Ivoire crisis is still a matter of concern. Closely related is the question of whether Taylor was aware of the planned coup and actively participated, or whether he simply took advantage once the MPCI rebels needed help in the opening of a western front to obtain access to the rich cocoa belt of Daloa and the strategic port of San Pedro. In any event, it is almost clear that Taylor had military and commercial interests that could explain his engagement in the conflict. The first impetus would have to have come from President Gbagbo's recruitment of anti-Taylor fighters, a high percentage of whom belonged to either the Liberians United For Reconciliation and Democracy (LURD)[25] or the Movement for Democracy in Liberia (MODEL),[26] immediately after the attempted coup to bolster his inefficient and unmotivated army and to protect the West of the country from the MPCI. Gbagbo's increased use of LURD elements would have given Taylor reason to involve himself more directly with the MJP and the MPIGO so as to use them against his Liberian enemy.

Commercial interests are also involved. One can assume that Taylor sought to capitalise on MPCI strikes to open a second front, since the MPCI wanted to block Gbagbo's capacity to use cocoa revenue to buy arms, which made the seaport of San Pedro vital.[27] San Pedro has always been the main port for most West African countries timber exports, which remains a key source of income for Taylor's war effort. The need to maintain his access to San Pedro would have been a strong reason for Taylor to support MPIGO and MJP, while those groups could also protect his commercial interests from LURD-MODEL attacks into eastern and southeastern Liberia.

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25 LURD is an armed, political organization dedicated to the building of genuine democracy in the Republic of Liberia through the removal of the repressive Charles Taylor-led government. Liberian refugees in West Africa formed LURD in 2000. Its support comes from internally displaced Liberians and exiles.

26 MODEL surfaced in early May 2003 in the south-eastern region of Liberia. MODEL appears to be the result of the breaking apart of LURD. Its main target seems to be the port of Buchanan in Grand Bassam, from where the government of Liberia exports the country's major produce, timber.

27 International Crisis Group, above n 24, 18-19.

Power-sharing with Rebel Forces: Issues and Concerns

Although the Linas-Marcoussis peace agreement was a power-sharing brokered deal, its implementation has been brought into disrepute by the army and senior state officials. In spite of prior peace efforts, major uncertainties pertaining to the effective implementation of the agreement remained unsettled. The reconciliation process has been tainted by radicalism and lack of compromises between various political forces, each trying to stick to its initial demands. The rebels initially insisted that they have been promised the strategic portfolios of defence and internal security during the Linas-Marcoussis peace agreement. Although rebel groups have demonstrated some degree of flexibility on earlier decided issues, the government has been several times undecided. On several occasions, the hiatus between entrenched constitutional powers and other peace settlements came to be questioned by state senior officials. The head of state vetoed most of the terms of the peace agreement. It seems like the Executive is contracting out from its "obligations" even in situations of national emergency.

In addition, political authorities faced strong resistance from the army and the *Alliance des Jeunes Patriotes pour le Sursaut National* (Young Patriots), a pro-governmental group made up of unemployed and organised young bands, which gained political momentum during the conflict. Within days after the signature of the Linas-Marcoussis Peace Agreement in January 2003, the Young Patriots accused France of "complicity" and directed their daily demonstrations against French interests in the country. On March 08, 2004, the *Young Patriots* attacked magistrates during the ceremony to install the First President of the Court of Appeal and the Acting President of the Abidjan Tribunal. Few days later, they tried to seize by force the Golf Hotel to dislodge opposition leaders members of the cabinet who have been residing there since June 2003.

Supporters of both sides, especially the pro-government demonstrators, have charged France with neocolonialism, and within France itself fears have been raised of being drawn into a Vietnam-type situation. There had been signs that the ruling class and the urban population at large, which had recognised the weakness of France's handling of the crisis prior to receiving ECOWAS and UN backing, was gradually retreating from public outright opposition to the Linas-Marcoussis peace agreement.

To show their opposition to the peace deal, protesters set up barricades paralysing urban traffic across Abidjan, the main city in the south and the country's most successful economic district. On a daily basis, protesters, brandishing knives and huge sticks, set up huge bonfires outside the French embassy and military base and barricaded the main entrance with tree trunks as they hurled burning tires into the compound. In December 2003, former French Foreign Minister, Dominique De Villepin, was held up in Abidjan for an hour by an excited crowd made up of people singing independence and patriotic songs, accusing France and Jacques Chirac of supporting the rebels and calling for military help from the United States of America. In the ruling Ivorian Popular Front (FPI) parliamentary grouping, there

was a general belief that "all Ivorians" have rejected the agreement and that "France should mind its own business."[28]

The divergences that followed between the Head of State and the Opposition coalition heightened tension again. As a protest against the refusal by the Head of State to appoint a PDCI-RDA nominee to the post of the Director of the Autonomous Port of Abidjan, which is under the purview of the Ministry of Economics and Infrastructure, a Department allocated to it, the PDCI-RDA suspended on March 05, 2004, the participation of its seven Ministers in the Government. In a joint statement dated 7 March, six political parties and movements signatory to the Linas-Marcoussis Agreement supported the decision of the PCDI-RDA. The tension was aggravated by a succession of events.

As a protest against the refusal by the Head of State to fully implement the Linas-Marcoussis Peace Agreement the opposition group stepped up War Council meetings and decided to stage a pacific rally. Public authorities took additional security measures in Abidjan and declared a no-go "Red Area." As had been feared, the pacific rally ended in the tragic loss of lives and a large number injured. The number of casualties varied according to the source. The official count was 37 dead, including 2 policemen, while the opposition talked of 350 to 500 dead. UN investigators said at least 120 people died in two days of political violence in the city.[29]

In reaction to the repression suffered by their militants, the concerned four political parties and three former rebel movements suspended their participation in the National Reconciliation Government. After their meeting of March 31, 2004, these political parties and movements demanded inter alia, the recognition of their right to demonstrate, in conformity with Article XI of the Côte d'Ivoire Constitution; the abrogation of the decree prohibiting demonstrations in public places; the effective security guarantees for the people by the State and the neutral Forces; the investigations of the serious events of March 25, 2004, as well as the prosecutions of wrongdoers. Opposition parties withdrew their 26 cabinet members at the end of the March in protest at the Security forces's heavy handed repression of the rally.

After the deadlock, an agreement signed on Friday July 30, 2004 after two days of talks in Accra committed parties to enacting all the political reforms demanded by the French-brokered Linas-Marcoussis peace agreement of January 2003 by the end of August. The key points of the reforms are: a new nationality code to make it easier for West African immigrants to Côte d'Ivoire and their legitimate descendants to acquire Ivorian citizenship, a new law to ease access to title of land and inheritance rights by their children, and finally a constitutional reform to make it easier for foreign born Ivorians to become head of state. Along with the resurrection of the power-sharing government and the enactment of political reforms by the parliament, parties committed themselves to starting a long-delayed process of disarmament, demobilisation and rehabilitation (DDR) "by October 15 at the latest."

28 Mrs Gbagbo, leader of FPI Parliamentary Grouping: see Chris Talbot, 'UN and US back French intervention in Ivory Coast' (2003) available at <http://www.wsws.org>.

29 'Côte d'Ivoire: Peace Summitt sees Disarmament Starting in October' (2004) available at <http://www.irnnews.org>.

The Accra agreement states that the "DDR process will include all paramilitary groups and militias."

In spite of undertakings made by parties, it will be difficult to enforce the DDR. Full disarmament will be difficult to achieve because weapons constitute the only sufficient guarantee to retaliate in case of attacks, and for the rebels, to guarantee the transparency of future electoral consultations of October 2005. On October 14, 2004 Guillaume Soro, the leader of Côte d'Ivoire's rebel movement, flatly refused to start disarming his forces, as demanded by his latest pact with President Laurent Gbagbo, saying political reforms which were supposed have preceded the move have not been enacted. He confirmed that he would wait "for as long as it takes" for the reforms, agreed in a January 2003 peace agreement, to be implemented. But the rebel leader stressed that he would not order his men to surrender their weapons to UN peacekeepers until these reforms were fully in place.[30]

So far the only positive outcome of the so-called "Accra Three" summit has been the resurrection of a broad-based government of national reconciliation. Gbagbo was also due to have launched moves to revise the constitution by the end of September to make it easier for Ivorians of immigrant descent to run for the presidency. But the president said in a televised speech on October 12, 2004 that he would only put the constitutional reform process in motion once the rebels had started to disarm.

Although the parties agreed in Accra to legislate all the political reforms demanded by the French-brokered Linas-Marcoussis peace agreement by the end of September 2004, Seydou Diarra's government was unable to push the measures through parliament as a result of blocking tactics by Gbagbo's FPI. Because of the fact that in the past, the Prime Minister's decisions were often been ruled out by Gbagbo, who enjoys nearly absolute constitutional authority, the Accra Accord also commits President Laurent Gbagbo to issuing a decree to formally delegate executive powers to Prime Minister Seydou Diarra, the independent head of a power-sharing government which collapsed at the end of March 2004. The Accra accord aims to prevent this conflict of authority from recurring, and demands that Gbagbo enshrine in law the delegation of specific powers to the Prime Minister to implement the Linas-Marcoussis peace agreement. These powers were outlined in a letter from the president to the prime minister on December 12, 2003. Gbagbo also agreed to reinstate three opposition ministers whom he fired in May, including the chief whip Guillaume Soro. With the reform process back on track, the rebels and the four main opposition parties represented in parliament agreed to return to the government of national reconciliation.

In order to avoid possible power-sharing problems, ECOWAS, the African Union and the United Nations have set up a joint team to monitor implementation of the Accra agreement closely and issue a joint progress report every two weeks. Ghanaian President John Kuofor warned that ECOWAS might apply sanctions to any party which failed to fulfill its side of the Accra peace deal.

30 Ibid.

Designing Political Order: The Evolution towards an African Regional *Lex Scripta*

Warfare and the Paradigm of Africa's Political Backwardness

While trying to study the chaos caused by post colonialism (state failures, ethnic confrontations, lack of democratic governance, and large-scale human rights abuses), many scholars have generally assumed that developing countries today face even more external challenges than European states did in their formative periods.[31] In the post-Cold War dispensation, Africa is both a casualty and a lost continent. The West is committed to a wholesale rehabilitation of the Eastern Europe and those countries that were part of the socialist orbit. Still, the socioeconomic condition in Africa has been deteriorating from crisis to catastrophe and for most of the Western countries, the region remains a *terra incognito*.[32]

Professor Steven David offers an in depth analysis of the instability syndrome facing Africa. David's ideas shed light on some on the institutional shortcomings in which certain theories of political underdevelopment have been elaborated and tested. His ideas are at the heart of the rhetoric on the political inaptitude that prevents Africa from assimilating the internal peace and stability model. David notes the lack of democracy and the nature of political leadership as the major causes of political instability. He also argues that African leaders, like all leaders, need effective social control to build a strong state.[33]

We find in most scholars the same skepticism toward the ability of African societies to develop sustainable political discourse.[34] Using the same type of argument, Carol Lancaster is equally quick to paint a dark picture of Africa's internal and regional politics.[35] African societies refuse to develop and their leaders appear to have adopted an attitude of masochistic complacency towards authoritarianism and patrimonialism.[36] This original sin originates from colonisation that deliberately weakened social control, thus creating a political fragility that became embed-

31 See eg J LaPalombara 'Penetration: A Crisis of Government Capacity' in Leonard Binder et al (Eds), *Crises and Sequences in Political Development* (Princeton University Press, Princeton, 1971) 222.

32 Felix Moses Edoho 'Overview: Africa in the Age of Globalization and the New World Order' in Felix Moses Edoho (Ed) *Globalization and the World Order Promises, Problems, and Prospects for Africa in the Twenty-First Century* (Praeger, Westport, Connecticut, 1997) 14-15.

33 R S David, 'Why the Third World Still Matters' (1992-93) 17 *International Security* 127, 134.

34 Bertrand Badie 'Je dis Occident: Démocratie et Développement. Réponse à 6 Questions' (1990) *Pouvoirs* no 52, 43-64.

35 C J Lancaster, *United States and Africa: Into the Twenty First Century*, Policy Essay no 7 (Overseas Development Council, Washington DC, 1993) 29.

36 T Callaghy, 'State, Choice, and Context: Comparative Reflections on Reforms and Intractability" in David E Apter and Carl G Rosberg (Eds) *Political Development and the New Realism in Sub-Saharan Africa* (University Press of Virginia, Charlottesville, 1994) 184-9.

ded in many African societies and still persists today.[37] In his well acclaimed *The Anthropology of Anger,* Celestin Monga articulates an alternative to the study of democratisation in Africa. Monga's anger is directed mostly at what he perceives as African injustice, and at outsiders who refuse to acknowledge that Africa's peoples are capable of embracing modernity. He finds the paradigmatic approaches to African politics inadequate and often demeaning to Africans. Monga, who blames some of Africa's most intractable problems on the reluctance of Africans to modernise and enter history, calls African peoples "social misfits" and "marginalised players in the construction of history."[38]

The underlying idea is that while some of African wars and their legacies of humanitarian disasters were sustained by outside powers, their essential etiology resides within the state system. Democracy forges a peaceful environment and inhibits conflict when other democracies are concerned, for democratic states are less likely to go to war with one another.[39] Democracies do not generally assert claims to rule over other democracies; their checks and balances system – separation of powers – coupled with other features – civil, political and socio-economic rights – make perpetual instability less likely. Because most African states lack the democratic foundation of internal peace and political participation, it is clear that the peace-inducing effects of sustainable democracy are largely unavailable.[40]

As the Côte d'Ivoire crisis shows, the persistence of inter-state warfare is especially worrisome. Warfare has been a major cause of the instability that has been all too common throughout the entire African continent. Because of the easy openness of territorial borders, internal disorder generates conflict as neighbouring states act to prevent instability from spreading to them. Inter-state warfare is an ever-present feature of Africa because its causes are firmly rooted in the politics and behavior of many states. In Africa, the benefits of conquests, personal pride and the confiscation of state power have dramatically increased over time. The African political class makes war because they rationally conclude that war is in their interest. African leaders are not restrained from going to war even when public support for war is lacking.

Since most African states are not democratic, the leadership does not depend on the people's support for war. Equally, African leaders do not fear that a loss in war inevitably mean a loss of power. If an African leader judges that going to war will enhance its prospects of power longevity, he/she will choose war. This will be so even if war might not be in the broader national interest. Since it is more likely that war

37 Joel S Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton University Press, Princeton, 1988) 271-3.

38 Célestin Monga, *The Anthropology of Anger Civil Society and Democracy in Africa* (Célestin Monga and Lynda L Fleck trans, Lynn Rienner, London) 90, Ch 3 reviewed by Chisanga Siame in (2000) 3 *African Studies Quarterly* available at www.africa.ufl.edu/asq.

39 D Doyle, 'Kant, Liberal Legacies, and Foreign Affairs Parts I and 2' (1983) 12 *Philosophy and Public Affairs* 205 and 325.

40 R D Castil, *Freedom in the World: Political Rights and Civil Liberties, 1988-1989* (Freedom House, New York, 1989) 70-1.

will serve some narrow group than the society at large, basing the decision to go to war on the interests of a small elite makes that decision more likely.[41]

The absence of constraints on going to war is narrow because a small elite leads most African countries. Political elites tend to be alienated from the population at large and focused on meeting its narrow interests, the most important of which is remaining in power even against the peoples' mandate. Because African cultures differ from those of the West, deterring African states from engaging in war may be more difficult, for successful deterrence requires convincing adversaries not to undertake warfare actions because their costs will be greater than their benefits. Deterrence can only work if one side successfully signals to the other what the cost of its behaviour will be, and if it correctly interpretes those costs to be unacceptable to its adversary.[42]

At the regional level, the search for continental hegemony is not yet a common feature of African politics. Although some African countries dominate the continental landscape, no military power has ever emerged as the driving force to impose its will on other states. Recently Nigeria and South Africa sent peacekeeping troops to Burundi, Lesotho, Sierra Leone, Côte d'Ivoire, and Liberia. Although South Africa and Nigeria could be considered as regional powers, it is the contention of this writer that both countries still face serious internal economic and social problems and their prior actions should not, as such, be interpreted to mean that the search for continental hegemony is the motto of African politics. In international relations discourse, it could be argued that the competitive arms race in Africa is not occasioned primarily by security dilemmas between neighbouring states. Arming in Africa is mainly designed to protect regimes from internal civil disturbances, protect governments that lack constitutional legitimacy, oppress electoral protests and other forms of democratic claims, restrict academic freedom and persecute civil society, human rights Non Governmental Organisations (NGOs) and the powerless population at large.

Most political regimes try to strengthen the internal bases of their political power through intimidation and the confiscation of the state administrative apparatus. In addition, they mobilise the –illiterate – peasantry, influence social elites, and make use of ethnic divisions to forge support among the population. In Africa, a ruthless leader can survive several ruinous decades of stalemate without popular support. Because the political class can pre-arrange electoral results, popular discontent does little to shake their hold on power.

In development politics, two theories – developmental and dependency – discuss socio-economic prerequisites that are necessary for sustainable democracy to take shape. They include reasonably equitable divisions of social wealth and land, high levels of education, legal norms supportive of the democratic rule, the absence of significant identity barriers.[43]

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41 R S David, above n 33, 140.

42 Ibid, 137.

43 On the socio-economic prerequisites of democracy, see R A Dahl, *Polyarchy: Participation and Opposition* (Yale University Press, New Haven, 1971) 48-188; Seymour Martin Lipset,

In the developmental view, African politics is more likely to look like the West over time; that is, they would become increasingly democratic. Three variables are believed to be the prerequisites to democracy: (a) good political leadership, (b) a political culture conducive to democracy, (c) long-term increases in economic well-being. Diamond asserts that democratisation is the result of the "gradual and incremental emergence of democratic culture, initially or predominantly at the elite level, [a] result of the instrumental, strategic choices of a relatively small number of political actors."[44] Higley and Burton supports his views, arguing that only a consensually unified national elite can produce a durable regime.[45]

Dependency analysts argue that democracy is impossible under the conditions of poverty and exploitation which characterises the relationships of the Third World and the West; democracy can be realised only by achieving economic and political autonomy.[46] Real democracy involves substantial measures of power passing from the hands of a small political and/or military elite to the mass of ordinary people. Installation of formal democratic structures and procedures is thus only an introduction to a more complex and interactive process. As Garreton points out, real democracy will emerge only as a consequence of three developments: (a) strong civilian control over the armed forces; (b) enhanced concern for human rights, economic equity, social justice and the rule of law; greatly increased political participation by the poor, minority ethnic groups, women and young people.[47] In fact, the dependency theory view that democracy would not be possible in Africa under conditions of Western exploitation became increasingly more or less tenable, as increasing number of African countries theoretically democratised, but still operated under anarchy and dictatorship. Unfortunately, democracy in Africa did not come close to meeting such basic socio-economic prerequisites.

Without being pessimistic, there is still a long way to go for sustainable democracy in Africa. Whether developmental or dependency, basic democratic conditions are not met in the vast majority of African states and show few signs of developing. Faced with a severe economic crisis, intensifying pressures from abroad for economic and political reforms, escalating popular protest demanding the end to an authoritarian corrupt rule and the uncertain economic implications of the West's Middle East focused policies, until recently Africa was just like still sitting on the "reserve bench." It is likely that an African collective response could be the only way out.

Political Man: The Social Bases of Politics (John Hopkins University Press, Balitmore, 1981) 27-63.

44 L Diamond, 'Introduction: Political Culture and Democracy' in L Diamond (Ed), *Political Culture and Democracy in Developing Countries* (Lynne Rienner, Boulder, Colorado, 1993) 1, 4.

45 J Higley and M Burton, 'The Elite Variable in Democratic Transitions and Breakdowns' (1989) 54 *American Sociological Review* 8, 17.

46 A G Frank, *Critique and Anti-critique: Essays on Dependency and Reformism* (Praeger, Eastbourne, 1984); S Amin, 'Democracy and National Strategy in the Periphery' (1987) 9 (4) *Third World Quarterly* 1129-56.

47 M A Garreton, 'Political Democratisation in Latin America and the Crisis of Paradigms' in J Manor (Ed) *Rethinking Third World Politics* (Longman, Harrow, 1991) 100, 106.

Building an African Dialectic of Regional Cooperation and Development

Whereas in the past the tendency was for African intelligentsia to identify the source of their ills as external to the continent,[48] today there is a mood of introspection and a growing resolve to find African solutions to Africa's problems. As in Western Europe, African countries will have to integrate new variables, rethink the concept of state sovereignty and the establishment of new common rules governing collective intervention and economic integration at a continental scale. The institutional expression of state sovereignty was the Organisation of African Unity (O.A.U.), founded in 1963 after the first wave of accessions to independence. The O.A.U. experienced more failures than successes during its years of existence and was often criticised as too bureaucratic and ineffective in preventing wars. As a result, foreign, mostly European nations dominated conflict resolution in Africa.[49] The transformation of the O.A.U. and its imminent supersession by the African Union (A.U.), however, simply expresses the fact that the O.A.U. has carried out its historic mission, although with considerable imperfections, and the time has come for a new instrument and vehicle more capable of meeting the challenges facing Africa in the new millennium. This challenge is also part of a package, which could be reworded the "new African order."

As the matter stands, the originality of the new inter-African diplomacy lies in the endeavour to manage African politics at the African level. A conception of African unity, historically rooted in a pan-Africanism that originated outside Africa, has significantly influenced inter-African relations. What is clear is that African leaders are now theoretically willing to reconsider such notions of state sovereignty, security, good governance, democracy, reconstruction, and sustainable development. As the international campaign aiming at the cancellation of poor countries' debts has demonstrated, collective action can force the interests of the poor on the international agenda and achieve real gains for human development.

Africa must unite to be strong and speed up development, democracy, human rights, and conflict resolution. The Côte d'Ivoire crisis shows that Africa still has not shaken off the virus of military intervention in politics. President Thabo Mbeki of South Africa called for an *African Renaissance* or pledge to demonstrate good governance, the last thing they then want to see is another military uprising on the continent. The united stance adopted by African countries to solve conflicts in Burundi, D.R.C., Côte d'Ivoire, and Liberia is evidence that their solidarity is empowering. Suddenly, the proposals for continental integration that relied on solidarity for their implementation can spring into life. While colonialism may have been buried, African countries may still find a way of negotiating and ending civil wars, provided they use their collective bargaining intelligently. If Africa sticks together, it

48 See E Hansen (Ed) *Africa: Perspectives on Peace and Development* (Zed Books, London, 1987).

49 Note that Portugal facilitated negotiations between Angola's factions in 1990-92, followed by the UN in 1993-95; Italy mediated the end of the Mozambique civil war during 1991-1992; USA took the lead with regard to Ethiopia in 1991 and Somalia in 1992-1993.

can begin to exercise a collective threat to the developed world. By threatening collectively, they can begin to wield the kind of power that only the developed world has so far monopolised. Alternatively, African countries should forge a new model of inclusive globalisation, based on shared values of equity, justiciability, respect of human life and principles of social justice.

Obviously, though not successfully, Africa is on the collective path. During the newly established A.U. Summit on April 22, 2003, 28 heads of state and 6 prime ministers noted that part of the solution to the continent's conflicts lies in granting the A.U. significantly more powers than its predecessor, the O.A.U. Summit participants resolved to ratify as soon as possible a Protocol creating a Peace and Security Council (African Council) within the A.U. Often referred to as the African equivalent of the United Nations Security Council, it would consist of 15 countries elected in rotation and eventually be able to draw on a stand-by African military force. An early warning mechanism would help the African Council to anticipate and prevent conflicts before they become full-blown wars. The African Council also would be authorised to help in post-war reconstruction. Once set up, it would have powers to mediate conflicts and institute sanctions whenever an unconstitutional change of government takes place.

As in Darfur (Sudan), the African Council has been instrumental during the Côte d'Ivoire crisis.[50] Meeting in its Third Session, on March 27, 2004, it expressed serious concern at the situation and its implications for peace, security and stability in the sub-region at large, and deplored the loss of human lives. The African Council called upon all the parties to respect the terms of the Linas-Marcoussis peace agreement, exercise restraint and resume political dialogue by all means. Recently, the African Council adopted a Presidential Statement on cross-border issues in West Africa. It underscored the need for a regional approach, and urged ECOWAS member states to work closely with the United Nations, international financial institutions and other regional and international organisations in drafting a regional conflict prevention policy.

The A.U. is an attempt to construct solidarity at the continental level; this could be seen not as sentimental illusion but rather a seasoned response to Africa's dependent position in the global economics and political system. African leaders are conscious of the utility of continental cooperation in problem solving at the same time that they have found effective economic, monetary and regional integration policies difficult to achieve in practice. A multitude of states with diverse national conditions, yet a commonality of purpose in the pursuit of economic development – these constitute the thesis and the antithesis of a distinctive African dialectic of regional development.

Following the same line of argument, the New Partnership for Africa's Development (NEPAD) – the continent's new development framework – is the

50 In August 2004 Olesugen Obasanjo, current Chairman of the African Union said the organization needed to beef up the force of 270 troops from Nigeria, South Africa and Rwanda which it was committed to sending to Darfur, in support of 96 African Union monitors already deployed in Sudan.

expression par excellence of this new economic integration. NEPAD formally commits Africa to renewed commitment to democratic governance, rule of law and human rights. However, it is questionable whether Africa will be able to meet the unification challenge comparable to the Schengen model. In March 2003, the government of Equatorial Guinea sponsored massive deportations of West Africans. In addition, freedom of trade and movement is still a dream in so far as most African countries still favour xenophobia and restrictive labour practices to discourage the use of fellow Africans. In most African countries, coercive continental laws and regulations will fail to obtain the domestic seal of approval from public authorities. On this ground, there is a premium to be placed on the state's capacity to engage in flexible and consensual behaviour to sustain development. This behaviour must continuously confront emerging problems with creative solutions, have the capacity to weed out error, rebound with new experiments, and learn.

Conclusion and Observations

In Côte d'Ivoire, as in too many other African countries, autocratic rulers have not permitted institutions to grow that would guarantee continuity and political stability. The poor of these countries can pull a trigger far more than they can combine in a mass movement to present their grievances to the government and force through change. Most of what seems to happen in the politics of African countries is haphazard and arbitrary, with government and rebels each living for the moment and trusting nothing. In Côte d'Ivoire, the seemingly insurmountable hurdle to get the conflicting sides to drop their demands in the national interest appears to be a challenging experience. The conflict has forced migrant workers from neighbouring countries to flee, compounding the region's economic slowdown.

The humanitarian situation is still at a standstill and recent developments in the country remain particularly worrying. The reconciliation process is at an impasse; efforts should focus on the resumption of political dialogue. There has been a rapid decline in the education and health systems. In the education sector, the priority is to re-open the universities in the northern part of the country, rehabilitate the schools, provide the means of transport and recruit 4,000 teachers: 2,500 for primary schools and 1,500 for secondary schools. At the medical and health level, the Ministry of Health has estimated the total cost of the rehabilitation of the health infrastructure and the normal resumption of all activities at 75 billion CFA francs.[51]

Human rights violations are left unpunished. National reconciliation goes hand in hand with justice, reparations and the enforcement of the rule of law. The African Commission on Human and People's Rights should join the ongoing efforts with the establishment of independent commissions of inquiry. In addition, the legislative framework of the country needs a complete reshuffle. To this end, the Linas-Marcoussis peace agreement constitutes the only way out.

51 See *Report of the Chairperson in the Situation in Côte d'Ivoire*, African Union Doc PSC/PR/3 (V) (2004).

Institutionally, the Côte d'Ivoire crisis suggests the instability idiom which is deeply embedded in the African society and state systems- that of patrimonialism, social exclusions, and abuse of state privileges. The opportunity cost of continued warfare, associated with human losses is unquantifiable to many African states already weak economies. Adherence in theory and practice to democratic governance, the rule of law, and civil liberties are essential to the renewal of Africa's desire and efforts to play a meaningful role for the benefits of its beloved peoples. For it to happen, positive inputs should be added to these doctrines, ideas and institutional demands.

The present author shares the view that NEPAD and the A.U. provide all Africans the opportunity to participate and influence Africa's political order. Otherwise, Africans shall remain spectators and interpreters of the making of Africa's history by only a few of its citizens or, worse still, the others who have historically been their oppressors and do not in any case represent Africa's collective interests. It appears at the minimum that NEPAD is a product and expression of historical contestation and balance between the forces of modern capitalist expansion and reconstruction, also known as "globalisation," on the one hand, and pressures from below by the Africans masses who have never ceased to demand justice, social progress and human development, on the other. More importantly, Africans have the duty and responsibility to realise these objectives in practice. Social reform – that is, the more equitable distribution of material and symbolic resources – should join economic development as a conscious and explicit goal of African politics.

Some Methodological Issues with Reconstructing Justice in Post-Conflict Situations

(Training Judges in Afghanistan, Congo and Timor Leste)

Gilles Blanchi

Significant scholarly as well as empirical research has been conducted with respect to post-conflict situations and the forms of assistance required by societies recovering from conflict. However, in the specific domain of judicial reconstruction recent shortcomings and mixed results suggest that insufficient emphasis has been placed on the methodology that should underpin this endeavour.

Reconstruction of the judicial sector and consequently reestablishment of the rule of law is one of the most urgent challenges faced by those delivering technical assistance in post-conflict areas. Reconstruction requires not only the rebuilding of the judicial infrastructure, including the courts, the training of administrative personnel and adequate systems for record keeping, but also entails the re-creation of a qualified, reliable and corrupt-free judiciary. Such an undertaking represents a major challenge to those working in this area, in part because the judiciary may at times have been a victim of or party to the conflict itself. Rebuilding the judiciary calls for a comprehensive approach that includes coordinating the training of the judiciary with the revision or modernization of the country's legislation (as in Timor Leste and Afghanistan). It also requires that attention be given to the conflict-related criminal prosecutions that will ordinarily commence in the post-conflict period. Indeed, reconstruction of the Justice sector will often be taking place simultaneously with the investigation of events that took place during the conflict. The judiciary will only be regarded by society as trustworthy if those who committed crimes in the past are brought to justice through proceedings that are considered honest and transparent. Transitional justice is therefore an important parallel concern when contributing to the reinstatement of the rule of law.

Further, transitional justice must be combined with efforts to rebuild a cohesive community; such efforts may include Truth Commissions as well as activities that focus on reconciliation. Ultimately, the success of the reconstruction of the justice system depends upon the smooth simultaneous implementation of the processes of reconciliation and transitional justice.

Although the reconstruction of the justice sector must be considered an integral and essential part of the comprehensive task of rebuilding a nation, it is imperative to remember that the ultimate beneficiaries of all technical assistance, whether legal or otherwise, are the citizens of a country. The '*raison d'être*' for any legal technical assistance is access to fair justice by all. While the reconstruction of the justice sector

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 231–241.*
 ISBN 90 04 14599 0.

includes rebuilding the judiciary, the goal is not to create a renewed judiciary in itself. A renewed judiciary is only the means for achieving the restoration of equal access to justice.

Post-conflict situations, in spite of the tragedies that have occurred, may represent a unique opportunity for the general population to participate in the rebuilding of the justice sector. In many societies that have experienced conflict, the judicial system was not functioning prior to the commencement of the conflict. Although conflicts cannot necessarily be traced back to a failure of the justice system, it might be argued that a functioning corruption-free judiciary might have prevented some conflicts. As technical assistance agencies, donors, NGOs and other stakeholders embark on the daunting task of rebuilding the system, it is vital that they understand that this could be the occasion to involve the people through representative organisations. For example, the views of the population could be sought on the methods by which access to justice could be improved for underprivileged segments of society such as the poor, women and children. A participatory approach to the design of projects and efforts to reconstruct the justice system may in fact only be possible when tragic circumstances such as a violent conflict, force comprehensive reconstruction of virtually all structures of society.

Reconstruction of the justice system is a monumental task. Such projects cannot be designed in the same manner as initiatives that have been carried out for decades by bilateral and multilateral development agencies as part of their Law and Development efforts. Post-conflict judicial technical assistance is a far more delicate undertaking that demands great attention to design and implementation.

By definition the target population is extremely sensitive. The very persons who were entrusted with the duty to govern are often those who perpetrated the violence. Victims of that violence, therefore, tend to be sceptical of all government initiatives. Since neither members of the present government nor those of the past regime were capable of protecting them, they are unlikely to trust these same people to resolve disputes and prosecute offenders. Similarly, foreign assistance missions, returning after the conflict to a country which they may have abandoned, may be accused of having done little or nothing when the conflict erupted. Thus, they too are not necessarily considered trustworthy. In such a context the successful re-establishment of a functioning judiciary requires humility, caution and constant interaction with the ultimate beneficiaries: civil society and its representatives.

The restoration of the rule of law is a priority and should have the same level of urgency as the reconstruction of health services. The importance of rebuilding the justice sector stems from the fact that the period when violence and crime went unchallenged – a basic feature of conflict periods – must be seen to be at an end. Physical safety and security must be restored, permitting a return to the peaceful existence citizens long for. Government authority must be re-established within a culture of trust. This rebuilding often begins with law enforcement officials, particularly if they were involved, in one capacity or another, in the conflict. The end of impunity must be rapidly evident to all and this requires quick and fair investigation of crimes and prosecution of offenders.

Despite the acknowledged urgency, those who intend to contribute to the reconstruction of the justice sector must first answer threshold questions regarding the methodology they intend to use. Given the specific difficulties of post-conflict contexts, these issues of methodology must be addressed prior to launching ambitious programs for reconstruction.

Among the first questions that should be raised are: 'How do we provide a fair, trusted, predictable and knowledgeable judiciary? How can we assist in the creation/re-creation of a judiciary that would be simultaneously efficient and in a position to administer justice with the participation of the public? How can we guarantee that these judges will know the law and have the means to enforce it?' Regularly we are told and we see that 'democracy cannot be delivered at the end of a gun barrel'. Similarly, a ready-made functioning judicial system cannot be parachuted in. Even if such a custom-made system – necessarily imported – were delivered, it is likely to be ignored and before long, traditional methods of settling disputes, including private justice, would return and prevail. Therefore, a threshold issue is the identification of those critical features that would give a technical assistance program a chance of success.

The response cannot be given in isolation. In fact, success very much depends upon the other ongoing processes of reconciliation and transitional justice. Indeed, one must determine whether or not the involvement of the judiciary in past events was of such a magnitude that a renewed justice system might require a complete change of personnel in order to gain or regain the trust of the people. If some judges or, more worryingly the vast majority of them, are perceived as having 'blood on their hands', no amount of training or mentoring will ever redeem them. This may require, as was the case in Timor Leste – where all the members of the judiciary, ethnic Indonesians, fled – recruitment of a completely new judiciary. Assessment of the credibility or potential for credibility of the judiciary must therefore be made prior to providing them with opportunities for enhancing their skills and knowledge. Consultation with civil society is a prerequisite for the design of any such program if it is to succeed.

With respect to legislation and the necessity to reform the laws of the country, a series of critical questions need to be raised and addressed from the outset. The first one is the issue of the legitimacy of the laws that judges are to apply: will they be applying laws that were formulated by an undemocratic, illegitimate or evil regime? In July 2003 a much-discussed decision of the Court of Appeal of Timor Leste claimed that all decisions based on Indonesian laws were null because Indonesian rule being colonial was illegitimate and therefore judges – and the United Nations – could not have rightfully applied such laws.[1]

1 *Public Prosecutor v. Armando dos Santos* (16/2001). The Court of Appeal, presided over by Judge Claudio de Jesus Ximenes, with Judge Jacinta Correia da Costa dissenting, held that as the Indonesian occupation of Timor Leste was unlawful according to international law, Indonesian law was not validly in place between 1975 and 1999 and could not therefore be the applicable subsidiary law (in accordance with section 165 of the Constitution). After much controversy and criticism including by the former Minister of Justice, a motion for review of the decision was lodged by the General Prosecutor to

A related question to that posed above is whether or not judges will be expected to uphold laws that permitted or even instigated crimes, laws that justified genocide, ethnic cleansing, ethnic discrimination or gender discrimination. A third issue, and one connected to social reconstruction, is the retroactive application of laws designed by successor governments to prosecute those who collaborated with the previous undemocratic government. Perhaps an even more profound question is: should the lawmaker in Cambodia, Timor Leste or Afghanistan be backward-looking and focus on punishment as a necessary step towards the renewal of the rule of law?

These are not theoretical issues for an intellectually gratifying doctoral thesis. These are questions that are facing and have faced judiciaries in the Asia-Pacific region and elsewhere. Justices in Kabul and Dili today and in Phnom Penh and Hanoi yesterday have or had the daunting task of reconstructing 'justice' in war-torn, often socially shattered nations. The dilemma is not limited to whether or not transitional justice should focus on trials of the *ancien régime*, although this is the most visible challenge facing the judiciary and the one most likely to attract the attention of the public. The issue is the adherence to the rule of law in a drastically changing society. As legality shifts from one order to another, usually from an undemocratic one to a liberal principled one, the very concept of the rule of law is being challenged. No reconstruction effort can be launched if these matters have not been clarified and explained. As the population watches the justice system being reconstructed with relief, questions will be asked about the legitimacy of bringing to trial persons who did nothing but apply the law as it stood at the time they engaged in the course of conduct for which they are now on trial. If such laws authorized atrocities – the examples of the Pol Pot regime in Cambodia or of the Taliban in Afghanistan immediately come to mind – these laws must logically be repudiated. However, this process must be explained. It is the duty of the government to publicize not only how it intends to restore law and order but also the specific steps this process will entail, including significant revision of the country's legislation. If the legislative process is going to take time, the judges must be apprised of its progress so they do not apply laws that are about to be revoked.

Because the reconstruction of the justice system is often carried out with foreign assistance and support, another element to be studied is the amount of foreign involvement that is necessary as well as acceptable. It may be that the level of judicial skills and knowledge of future judges and prosecutors is simply not sufficient to allow them to operate on their own. A mentoring program may be required, with local judges performing all the required tasks alongside a foreign qualified judge who provides

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the Court of Appeal (sitting as the Supreme Court and presided over by Judge Claudio Ximenes who had drafted the initial decision). At the time of writing this matter had yet to be heard. In the case of *Public Prosecutor v Joao Sarmento and Domingos Mendoca* (in response to a defense motion by representatives of Mendoca) the UN Special Panel for Serious Crimes held that they were not bound by the decision of the Court of Appeal and subsequently continued to apply Indonesian subsidiary laws. Legislation on the applicable law in Timor Leste was passed in November 2003 stating that Indonesian law continued to be the subsidiary law. Information on these cases can be found on the following website: www.jsmp.minihub.org.

technical assistance. This is a difficult process which demands considerable reciprocal understanding by both foreign mentor and local counterpart. There might also be a need for foreign judges to sit in tribunals for an interim period while new personnel are being trained. As was demonstrated by events in Timor Leste, combining training and actual performance of judicial duties creates a significant problem. A junior judge often finds it difficult to accept that while he/she is actually performing judicial duties in the morning, afternoon training sessions are still necessary. It is preferable, therefore, to delay the actual discharge of judicial duties by an indigenous judiciary until an agreed minimum level of training has been completed, even if a delay of a few weeks or even months may not be politically palatable.

It is essential to understand thoroughly the context in which a program of technical assistance will be implemented. Without indispensable base line information, positive results are impossible. However, experience shows that quite often development agencies or consultants initiate programs with the best intentions but without the awareness of critical elements. For example, the importance of religious reference and knowledge of Shari'a law proved essential to the successful launching of a recent major training initiative for Afghan judges sponsored by a bilateral development agency. Although the fact that instructors would have to be Muslim was not included in the Terms of Reference, this proved crucial to gaining the trust of senior judges who were initially hesitant to participate in a foreign-sponsored project aimed at revisiting many of their practices through skills training. The fact that instructors were not only fellow judges but also fellow Muslims played a significant role in the acceptance of a curriculum that plainly challenged some of their methods of administering justice.

Of equal importance, and too often ignored by providers of technical assistance, is the need to stay away from attempting to deliver a 'ready-made system'. This starts with the natural tendency to believe that one's system is necessarily superior to the system pre-existing in the country in question. Assumptions are often made that 'indigenous' legal infrastructures cannot meet the challenges of the modern global world and therefore should be replaced by one modelled on that existing in an 'efficient modern' State. The second assumption, equally wrong, is that these countries do not have a meaningful legal tradition and that a legal transplant – although repeatedly denounced as counterproductive – can only represent progress. A remarkable example comes from war-torn Afghanistan. Empirical research carried out prior to the launching of a major judicial training project there demonstrated that Afghanistan, far from being the land of the lawless or of ignorant religious zealots, was a country with an extremely rich legal tradition. Research conducted in law libraries around the world unearthed hundreds of legislative texts[2], many of them amazingly progressive and adapted to the demands of the modern global world. The 1972 Law for the Prosecution and Punishment of Bribery or the 1935

2 International Development Law Organization's research enabled the collection of more than 2400 legislative texts in Dari and Pashto as well as more than 100 laws in English. These texts are available on the following site: http://www.idli.org/afghanlaws/index.htm.

Law for the Appropriation of Property for the Public Welfare are illustrations of the quality of the legislative tradition existing in Afghanistan.

Turning to another facet of this problem, no one would question that an independent bar is an essential element of an independent justice system. However what is rarely asked is whether or not a country emerging from a violent conflict is in a position to entertain such a concept. A strong congregation of independent private practitioners is probably what will ultimately guarantee a transparent justice system and reinforce the parallel independence of the judiciary. However, one must first evaluate whether or not those qualified to serve as counsel, are indeed 'qualified'. Here again our experience in Dili and Kabul showed that beyond the inadequacy of the legal qualifications of the profession, what was lacking was a true understanding of the role of defence counsel. It is not uncommon to have a lawyer explain that he will not take the case of such or such defendant because 'he is guilty'. The concept of being obliged to provide counsel to all whether 'guilty' or not is far from being understood. In such a context it is more urgent to create a core of jurists who are able to comprehend their mandate, than it is to focus on the degree of independence of the bar association from the authorities. Indigent defendants in particular will be more interested to know that someone competent has been tasked and given some compensation – albeit by the government – to represent him/her than to know that a group of well-to-do private practitioners have established an association that is totally independent from the authorities.

The two concepts of independence and competence are very much intertwined in democracies of the developed world. It would probably be difficult for someone in these democracies to conceive that a defence attorney can be truly 'competent' if his independence is not simultaneously asserted. In developing countries where the issue of access to justice and access to qualified lawyers is much more urgent, such independence is, in this author's view, less urgent than guaranteeing that defendants have access to someone who has read the law and is qualified to help him/her in the quagmire of the law and can help him/her out of his/her legal predicament. The Lawyers Association of Viet Nam has traditionally been very closely monitored by government authorities, and, although this situation is not ideal, it has not prevented those attorneys from doing a good job in representing their clients.

Because training and particularly skills training is likely to result in changes of behaviour and procedure, it is necessary to understand why a given procedure was utilized. Finding out about and explaining the historical reasons of a particular behaviour will facilitate the decision by trainees to modify their conduct, an outcome immensely preferable to changes imposed by instructors especially foreign instructors.

It is also necessary to assess the manner in which the justice system operated in the various parts of a given country. Restoring a functioning judicial system in southeast Afghanistan near Kandahar and the Pakistani border where the Taliban had (and continue to have) their stronghold raises problems that are considerably different from those encountered in the western provinces where Shi'ite leaders

have close links with neighbouring Iran or in the 'Kabulistan' where Hamid Karzai exerts a less challenged authority with strong ISAF[3] presence.

The work undertaken thus far by various intergovernmental, governmental and non-governmental organizations reveals that more coordination is required in post-conflict situations than elsewhere because of the urgency of the issues at stake. An analogy can be drawn to the coordination required of rescue teams following natural disasters such as earthquakes. A conflict may have resulted in the destruction of the courts as well as the slaughter of judicial personnel. To overcome this 'disaster'; coordination is vital. Agencies addressing the issue of reconciliation must take into account the work of tribunals that will be handling future criminal prosecutions. Even if the process of reconciliation involves 'forgiveness' of past offences, those involved must explain how impunity will be brought to an end. Further, agencies need to explain how their efforts will cater for the future justice needs of the population.

The rebuilding of the justice sector is part of the development process and therefore requires both a 'needs assessment' and 'feasibility study'. Although the urgency of the situation requires that such assessments are undertaken quickly, care has to be taken that basic issues are not overlooked. Experience indicates that suppliers or future suppliers of services should not undertake these assessments. The temptation to identify service requirements as those they are able to provide cannot be ignored. Thus it is imperative that whoever carries out the needs assessment not be eligible for implementing the technical assistance. Also of importance is the necessity for coordination among donors as the patience of a population that has just come out of a conflict will wear thin quickly when there are repeated inception missions, needs assessments and feasibility studies. The same questions are likely to be repeatedly asked to the same counterparts in the same technical ministries and administrations. This was recently the case in the Congo where several donor agencies appeared and the country was treated as if it had become the 'flavour of the month.' Two multilateral agencies commissioned – at great cost – virtually the same needs assessments for the same issues and the same target groups. We can only hope that the 'needs' highlighted as priorities by the various donors will be followed by actual projects in the near future.

While not directly related to legal technical assistance, some recent behaviour in Iraq that triggered resentment by the local population such as the interviewing of women by male army officers and the use of search dogs in private homes could have been avoided with a more thorough preliminary study of accepted traditions and taboos. Similarly, one cannot conceive of designing a technical assistance project aimed at the justice sector in the Democratic Republic of Congo without a minimal knowledge of the ethnic divisions that marred the country for decades and contributed to the recent conflict. Training judges of different regions and therefore of different

3 The role of the International Security Assistance Force (ISAF) is to assist the Government in Afghanistan as well as the international community in maintaining security within the force's area of operations. Initially under a six-month rotating command that saw the United Kingdom, Turkey, Germany and the Netherlands lead the force it has been under NATO command since August 2003.

ethnic origins together may prove difficult and ultimately counterproductive even if eventually they will need to work together. A thorough knowledge of the local situation is unquestionably a requirement, whether the project is implemented in a post-conflict society or a transitional or developing country. However, in post-conflict situations mistakes in the design of technical assistance programmes are more likely to result in major failures because of the emotional strain faced by and the extreme sensitivity of the population due to their recent emergence from an ordeal that has lasted many years or even decades.

Justice sector reconstruction projects will necessarily incorporate a significant component of training for the judiciary. When putting in place such programmes, extreme caution must be exercised as many judges will regard 'training' as either insulting or as a perk giving them opportunities for not-so-useful study tours abroad. A useful strategy is to highlight that continuing legal education for the judiciary is now common and that in many countries it is compulsory. Even when reviewing – and sometimes teaching – basic judicial skills and substantive legal knowledge, it will be essential for the trainers to be respectful of the trainees particularly if some or the majority of them are very senior as this may make it difficult for them to accept easily a change in their mode of thinking and behaviour. Project managers must be attentive in their choice of instructors. More than any other profession, judges are extremely sensitive to the personality and qualifications of the experts who are called upon to train them. The requirement that trainers be exclusively recruited from amongst their peers is universal. This has much to do with the very function of being a judge, that is being entrusted with the noblest duty of administering justice. Judges believe that only those who have been qualified to undertake the same task, albeit in a different jurisdiction, can provide guidance and training. This has proved critical when technical assistance projects have included the publication of Benchbooks for the judiciary. For them to be useful the authors and editors had to be not only members of the judiciary but also nationals of the country. This expectation is in fact quite legitimate and should be readily understood, as none of the judiciary of our own countries would contemplate being guided by a Benchbook drafted by a foreign judge, even if the latter was admittedly a renowned expert.

Some issues are beyond the control of the technical assistance providers or sponsors, yet they may impact significantly on the results of the project and ultimately may jeopardize the outcome of the justice sector reconstruction process. An illustration of this point has been the much-debated issue of the language of judicial proceedings in Timor Leste. The Timorese government decided that Portuguese would be the official language of independent Timor Leste. However, the proportion of Portuguese-speaking Timorese at the time this decision was made was extremely low, by most accounts less than 5% of the population. Most of the practicing lawyers, judges and court personnel spoke Bahassa Indonesian or Tetum and thus everything had to be translated. While this represented a significant cost for the administration of justice, the impact on the USAID-sponsored Training of the Judiciary project was even more negative. Indeed, it was required that all trainers would be Portuguese-speaking and that they would train in that language. This

constraint resulted in the International Development Law Organization (IDLO)[4] recruiting instructors who were neither familiar nor comfortable with practice-oriented participatory training. In addition their training materials and lectures had to be translated into Bahassa because almost none of the trainees had sufficient command of Portuguese to be trained in that language. It also created difficulties because the regular reference to the laws and legal system of Portugal was not necessarily relevant for a legal system that had been shaped by a quarter century of Indonesian rule. Ultimately, a part of the judiciary, the prosecutors, with the support of the Prosecutor General himself, refused to be trained in Portuguese (or to go to Portugal for training). They demanded English language training with translation into Bahassa Indonesian and training was ultimately resumed on this basis. This outcome demonstrates that political considerations have to be accommodated – or confronted – but that reluctance to acknowledge them may ultimately result in failure of an otherwise properly conceived and widely accepted project.

A coherent and comprehensive strategy must be in place if justice sector reform is to be successful. With respect to the criminal law for example, there must be a seamless process that has the confidence of all stakeholders – from the police officer making the initial inquiry or arrest to the prison warden following sentencing. It is not sensible, and ultimately can be counterproductive, to carry out parallel reforms without coordination. A program to reform the police force that includes training in standards of conduct and human rights awareness should be accompanied by the revision of the rules for criminal investigations as well as the country's laws pertaining to criminal procedure. Connected to this is the necessity of training prosecutors and investigating judges (in countries where this office exists). Incoherence in the rules of investigation may result in serious gaps that could jeopardize evidence with the consequence of unpunished crimes. Simultaneously, enhancing the capacity of judges and prosecutors must be conducted in parallel with the reconstruction or modernizing of correctional facilities in line with internationally accepted standards.

Such a seamless comprehensive approach demands a change of attitude among donors. We must move away from each donor concentrating on their piece of the puzzle. To illustrate the point with an example outside of the justice sector, it would not make sense for the development agency providing assistance for the development of a tertiary sector curriculum to be unaware of and unconcerned with what has been taught at secondary level. Similarly with respect to projects that involve the creation of Judicial Academies[5] it is essential that those providing assistance be aware of the substantive legal knowledge and skills imparted to would-be judges during their law school years. In the case of Afghanistan, where Germany and Italy have been nominated to lead reform efforts in the police and justice sectors respectively, coordination is imperative if only to guarantee that the various judicial

4 At the time this paper was delivered in February 2004 the author was the Deputy Director of IDLO.

5 As is the case in Nepal and Pakistan under major Asian Development Bank loans or in Ukraine with a European Union-funded project.

officers will follow compatible procedures and protocols at the various stages of a criminal investigation.

Furthermore it is important to address the needs of all the participants in the justice sector. While training of judges and prosecutors is often given prominence in line with the critical role played by these professionals in the administration of justice, it is equally necessary to focus on court administrators and court clerks. All too often these groups are overlooked in spite of the major role they play in avoiding court congestion and guaranteeing smooth and transparent management of cases.

The same is valid for training of defence counsel. In developed market-oriented countries fee-paying clients provide the return on investment made by defence counsel in their education and training. In developing countries and even more so in post-conflict areas, the very concept of a fee-paying client is virtually non-existent. The majority of individuals accused of crimes cannot afford to pay a defence counsel. In such instances, judicial reform projects must also respond to this need and incorporate, alongside with the training of the judiciary, the creation of a cadre of public defenders. This has been done in Timor Leste and is currently being considered in Afghanistan.

Relying on foreign assistance to initiate legal aid services is an interim but not sustainable solution. The author recommends that donor agencies make it conditional upon the provision of their assistance that recipient countries include resources in their budgets for the creation of a core of defence attorneys to represent indigent defendants. This would ensure that access to justice continues once foreign assistance is no longer available. As with other actors in the justice sector public defenders must receive adequate training. It is also imperative that they be remunerated while undergoing the training programme. The level of remuneration should be commensurate with the resources the Ministry of Justice will be able to provide at the end of the project so that it remains sustainable. If the trainees are compensated during project implementation at a level much higher than other civil servants, they will understandably be dissatisfied once they are transferred to the payroll of the Ministry. Although the level of compensation for civil servants has a modest impact on project budgets developed by the international community, it becomes an important issue when the new government must subsequently compensate these officers in line with state resources. At one stage this issue undermined efforts in Timor Leste leading to a virtual strike of the Timorese judges.

The population of a post-conflict country wants and expects a speedy restoration of Justice. Naturally, this is not feasible. A well-trained judiciary with the technical skills and knowledge and with the professional ethical values that characterize a transparent corrupt-free justice system cannot be delivered overnight, particularly if legal education has been neglected for long periods and ethical standards long forgotten. Nevertheless, quick impact projects should be incorporated into the overall reconstruction project. These quick impact projects are necessary to deliver tangible results that demonstrate to the people that efforts are ongoing and that, along with peace, security is immediately being restored and criminals efficiently prosecuted. It is, therefore, indispensable to include a number of modest yet immediate and highly visible components within the more ambitious long-range projects of capacity and

institution-building. One such component might be a pilot court that would benefit from quick rehabilitation inclusive of equipment and staff – not only with well-trained judge(s) and prosecutor(s) but also clerks. This would allow the population to understand how the restored justice system will function. Another example of these quick impact projects might be assistance given to the prosecution of important corruption cases. The high visibility of such cases, if conducted in a transparent fashion with all due process guarantees being accorded the defendants, would help the public realize that something *is* changing for the better. If ample publicity is given to such pilot projects, whether model courts or the launching of a serious anti-corruption campaign, it would help the general public to wait more patiently for the wider and more comprehensive results of the judicial reform project.

It must be accepted that most results will not be immediately obvious. Indicators of a functioning judiciary must be compiled over time. These include statistics about the number of cases, length of adjudication, number of decisions appealed and number of decisions revoked through appeals. Indicators of the level of trust gained or regained by the judiciary are less easy to come by. Yet here too, monitoring is essential, not only to secure sustained funding, but more importantly to assess whether or not the methodology chosen is proving appropriate and providing the expected results.

Commentators have sometimes referred to the difficulty of promoting democracy and good governance and to the fact that results are far from certain. Donor agencies in particular, acknowledge the fact that 'exporting democracy' is not necessarily welcome everywhere because it may be perceived as conflicting with some local traditions or values. Some have even labelled funds invested in democracy and governance projects as 'venture capital' because of the enormous risks of failure and of the time that it takes to secure tangible results[6]. While I appreciate the humility of such an acknowledgement, I fear that in post-conflict situations we do not have the luxury of contemplating failure as an alternative. When countries are exiting from war, reinstating justice and the respect for the Rule of law *must* succeed. When peace has been achieved and the guns have been silenced, there are always some amongst those who signed the ceasefire or peace treaty who remain resentful and believe that they made a strategic mistake and could have remained in power or overthrown the regime. These are the ones who will watch extremely closely all projects launched, particularly those sponsored by foreign or multilateral agencies that have brokered the peace. Any fumbling in these projects, especially those addressing the issues of restoring security for the people in the street and bringing criminals to trial, will be seen as justification for immediately challenging the whole process of peace and reconciliation. Re-establishing respect for the rule of law is a difficult task, a task that development workers, donor agencies, consultants and civil society representatives must undertake with urgency but also with immense caution and professionalism; for failure to restore justice is tantamount to unleashing once again the demons of war.

6 See in particular presentations made by Jerry Hyman, Director of the USAID Office of Democracy and Governance, at the USAID 'Democracy and Governance Partners Conference' in Washington in December 2003.

A Right to Family Life? Tracing Fractured Family Identities Drawing upon Law, Human Rights and Biology

Barbara Ann Hocking and Michele Harvey-Blankenship[1]

Introduction

This paper deals with one of the most difficult dilemmas facing contemporary family law: the extent to which children have a right to know their biological origins. Or put another way, our concern is the freedom of the individual to know their biological history and trace their parenthood or biological heritage. In essence our concern is with identity. In our paper we outline the many reasons that matters of family identity pose dilemmas for contemporary western legal systems and we turn to international law for clarification. Our central focus is on the capacity provided by modern genetic science which now offers the possibility of linking and reunifying children with their biological relations. While we mention the uses of that technology by children of sperm donors, we concentrate on the efforts of the Grandmothers of the Plaza Mayor in Argentina to use the technology to bring about reunification with their biological grandchildren. Our concern is therefore with reunification in post-conflict situations. We conclude that while those reunifications can be justified in the best interests of the children, there are many such potential reunifications that are far more problematic.

The Challenges of Family

Whether there is a right to know one's biological origins is a pressing issue partly due to the increasing influence of the (albeit overly simplistic) principles of autonomy and self-determination in medical law,[2] and partly because of the policy dilemma as to whether biological parentage should be emphasized over social parentage.[3] The dilemmas have been honed now that modern genetics offers a near-perfect scientific formula to link children with their biological relations. The prospect of having "three genetic parents" has recently been the subject of a license application by British sci-

1 The authors wish to thanks the anonymous referee of this chapter, the conference convenors, and also the editors of the final volume for their patience.

2 Derek Morgan and Kenneth Veitch, 'Being Ms B: B, Autonomy and the Nature of Legal Regulation' (2004) 26 *Sydney Law Review* 6.

3 Australian Law Reform Commission (ALRC) Essentially Yours [Report 96] March 2003, Volume 2, p. 863.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 243-260.*
 ISBN *90 04 14599 0.*

entists.[4] But what of the situation where you have not one known genetic relation as a result of conflict? Given that our DNA can link us with our maternal grandmothers, so it has been used, under the umbrella of human rights law, to assist children and grandmothers with reunification in situations of conflict or post-conflict. The Australian Law Reform Commission, drawing on a submission to their inquiry into the Protection of Human Genetic Information in Australia, recognized that:

> mtDNA analysis has been used to reunite the 'stolen' children of Argentina with their grandparents, and has been used by the United States' Armed Forces to identify the remains of US soldiers from World War II, and the Korean and Vietnam wars.[5]

For the purpose of reunification, scientist Mary-Claire King designed a scientific method that relies heavily on genetic material that is uniquely female: mtDNA.[6] The scientific technique has been extended to El Salvador to reconnect kidnapped or trafficked children with their biological families. The main focus for this paper, though, is Argentina, where the organization and perseverance of the Grandmothers of the Plaza Major to find their missing children and grandchildren led to investigatory and scientific attempts to reunify children who 'disappeared' during the dictatorship. The practical scientific implementation of the reunification concerns us first, and we then turn to the complex issue of whether there is what might be characterized as a human right to such reunification.

The Challenges of Conflict

Contemporary genetics offers some panacea to diseases or disorders with a high genetic inheritance component, such as breast cancer. Freed of its unpleasant links with the eugenics movements of the past, the contemporary or 'new' genetics is said to be finding solutions to so many problems that, as an integral development in contemporary medicine and health care, it has been called 'one of the substitute forums for religion'.[7] And why? Because it provides possibilities as diverse as 'immortalizing our genetic selves'[8] – a claim that continues to ignite the scientific and bio-ethics world with persistent claims that scientists will produce a human clone in only a few years time.[9] Even apart from the debates over cloning, discoveries of the 'gene for'

4 David Derbyshire, 'Now there's Mum and Dad and Mum …' *The Sydney Morning Herald*, October 19, 2004: p. 9.

5 ALRC, op. cit., p. 923.

6 Scientist Steve Jones tells us that 'Eggs are full of mitochondria but those in sperm are killed off as they enter the egg. As a result, such genes are inherited almost exclusively through females … they pass from mothers to daughters and sons, but daughters alone pass them on to the next generation.' *The Language of the Genes* (Flamingo, 2000), p. 33.

7 Margaret Somerville, *The Ethical Canary* (Viking, 2000), p. 4.

8 Ibid, p. 75.

9 BioNews, 12 March 2001: 'Reproductive cloning isn't safe' referring to the 'shambolic' conference in Rome on 8 March at which Antinori and Zavos told scientists and jour-

a disease provide fruitful source of media and public interest in medical science.[10] It has recently been acknowledged however as we celebrate the 50th anniversary of the discovery of the structure of DNA that many of the promises associated with it were 'premature' and that the revolution in medical practice that it presaged in fact 'related to the common diseases of the richer countries.'[11]

And as David Weatherall reminds us, even the complexities of variable susceptibility mediated through many different genes, actions of rapidly changing environmental agents and the complex pathology of ageing 'pale into insignificance compared with the health problems of the developing world.'[12] Those include 4 million children lost each year from infectious diseases for which vaccines or treatments are already available, millions dying each year due to poor sanitation, unsafe water, air pollution, and lack of basic health care.[13] Whilst it is certainly the case that molecular biology has much to contribute to the management of malaria[14] which kills millions of children each year, to a large extent control methods are already available, which have successfully eliminated the disease in the first world. Heart disease kills in third world countries too but they have not yet even gained control over infectious disease.[15] What does this tell us about adequate directions of health budgets? It follows that reflections on mortality are a luxury in countries where murder, trafficking and abuse of people are daily occurrences. In those contexts, we witness not just the extent to which human rights abuses continue unabated, but one small part for DNA in redressing the wrongs suffered by women and children through those abuses.

Genetics and Human Rights Law

Thomas Jefferson's pronouncement upon American independence still provides the core to modern human rights law: 'We hold these truths to be self-evident, that all men are created equal.'[16] The international community has not been tardy in rising to the human rights challenges of the human genome. There is already one 'classic universal statement' for human rights in the context of the genetic revolution: a statement that is suitably 'global in application and individual in focus'.[17] This is the

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nalists of their intention to offer cloning to infertile couples some time in the next two years. <http://www.progress.org.uk/News>.

10 'Hopes, fears in a rogue gene', *Sydney Morning Herald*, 8 February 2002: p. 1.

11 David Weatherall, 'Genomics and Global Health: Time for a Reappraisal', *Science Magazine,* <http://www.sciencemag.org/cgi/content/full/302/5645/597>, (29/10/2003).

12 Ibid.

13 Ibid.

14 Greenwood, B, 'The molecular epidemiology of malaria', (2002) 7 *Tropical Medicine and International Health* 1012-1021.

15 Ibid.

16 Declaration of Independence of the United States of America, quoted in Steve Olson, *Mapping Human History* (Mariner Books, 2003) at p. 54.

17 Michael Kirby, *Through the World's Eye* (Federation Press, Sydney, 1999), p. 6.

1997 UNESCO Declaration on Human Rights and the Human Genome.[18] Freedom of the individual is a central tenet of the Universal Declaration on the Human Genome and Human Rights, which seeks to protect the 'freedom of the individual who may be affected by genetic research, testing or therapy.' The Declaration states in pertinent part:

> the dignity, privacy and integrity of the individual are to be upheld. In short, scientific progress should go ahead in the belief that its tendency is not to diminish human freedom but to enhance the benefits to humanity. But it should go ahead in an environment which respects the freedom of the individual affected.

In Kirby's view the significance of UNESCO's Universal Declaration of Human Rights and the Human Genome, lies in the 'attempt to reconcile the development of genetic technology and research on the human genome with fundamental human rights and human dignity inherent in every individual.'[19] The Declaration 'bases its approach upon the requirement to defend human dignity and the common heritage of humanity.'[20] The opening provision of this Declaration states that 'the human genome underlies the fundamental unity of all members of the human family.' Furthermore it recognises 'the inherent diversity' of the individual. As Kirby has also noted, the International Bioethics Committee of UNESCO is now preparing a program to chart an international response to a range of bioethical concerns going beyond this earlier Universal Declaration. In Kirby's view 'this is truly a major issue of justice for international law.'[21]

Transforming Genetics: Perspectives in International Human Rights

If there is a right to know one's biological origins, then in certain circumstances, genetic technology can make that right a reality. Over the last two decades, DNA analysis has been an increasingly essential part of physical evidence for legal proceedings. With DNA technology proving or disproving the guilt of suspects, and the associated public attention to the strength of the technology, the public demand for genetic services is escalating. Additionally, the rate of technological advance and the extent of its applications are astounding. Justice Michael Kirby tells us it is leaping in advance of legal regulation, while Professor Margaret Somerville tells us that

18 Universal Declaration on the Human Genome and Human Rights, UNESCO Gen. Conf. Res. 29 C/Res.16, reprinted in Records of the General Conference, UNESCO, 29th Sess., 29 C/Resolution 19, at 41 (1997) (adopted by the General Assembly, G.A. res. 152, U.N. GAOR, 53rd Sess., U.N. Doc. A/53/152 (1999).

19 Kirby, 1999, p. 1.

20 Michael Kirby, 'The New Biology and International Sharing – Lessons from the Life and Work of George P. Smith II at: <http://www.lawfoundation.net.au/resources/kirby/papers/20000127_george.html> (January 2000), p. 7 of 13 (accessed 3/11/2003).

21 Michael Kirby, 'Take Heart: International law comes, ever comes' Keynote Speech, Conference dinner, 27 February 2004.

ethics is emerging as the primary regulator. This great pace of change in genetics and its applications has created both a growing comfort with its use as well as a public anxiety regarding the potential misuses.

It is in the unique application of genetics to international human rights violations that the consequences of genetics technology in the legal context are exemplified. Described below is the original application of genetics to international human rights investigations – Argentina and the children of the *Disappeared*.

The Argentinean experience exemplifies, in our view, the extent to which Derek Morgan, drawing on the reflections of John Harris, is correct, and we witness a:

> new generation of acute and subtle dilemmas' that human genetics will create in the millennium, dilemmas that will 'transform the ways in which we think of ourselves and of society.[22]

In thinking about that society we can use genetic reunification such as that documented through the Argentinean experience to highlight the extent to which human rights abuses continue to destroy and fracture children's lives universally, and the role that conflict plays in that destruction.

Argentina: The Children of the "Disappeared"

In 1975, an eight year dictatorship in Argentina began. Between 1976 and 1983, Argentinean military and police forces engaged in the forced disappearances of as many as 30,000 Argentineans whom they perceived as "subversives". They were explicit in their goals: 'First we will kill all the subversives; then we will kill their collaborators; then…their sympathizers; then. …Those who remain indifferent; and finally, we will kill the timid'.[23] Many of these were women who had children, others were pregnant. Children who were not able to speak were usually trafficked – sold or given to military or police-associated families. The women who were pregnant were kept in one of the over 300 detention centers until they gave birth. Upon a successful birth, the infant received the same fate – trafficked. Thus, the term "War Booty" arose to describe the over 500 children trafficked during this dark period of Argentinean history.[24] To date, only 88 have been identified.[25]

The Malvinas/Falklands war marked the fall of the military dictatorship in Argentina. In 1983 democracy was restored, and Raul Alfonsin, a human rights lawyer, took power. A National Commission on Disappearance of Persons was

22 Derek Morgan, 'A Clash of Relatives: The Right to Reticence and the Right to Know' (Paper presented at the International Congress of Law and Mental Health, Sydney, September 2003).

23 General Iberico Saint Jean, Argentinian soldier, politician. Quoted in: Boletin de las Madres de Plaza de Mayo, vol. 1, no 6 (May 1985). General Iberico Saint Jean was governor of the province of Buenos Aires during the military rule in Argentina.

24 Herrera, Matilde and E. Tenenbaum. 1990. Identidad: Despojo Y Restitucion 174. Abuelas de la Plaza de Mayo.

25 <http://www.uni.uiuc.edu/~dstone/dis_timeline.html> (accessed 1/10/04).

established to investigate and report the abuses. A report titled *Nunca Mas* (never again), was issued, describing the horrific extent of the abuses.[26] It was soon realized that in order to identify the children of the disappeared, a thorough and quantitative methodology was going to be needed. At this point, there was little legal precedent for the re-establishment of kidnapped children with their biological family or for punishing their kidnappers. Additionally, there was no accepted scientific test for establishing grand-paternity: that is the biological affiliation between grandchildren and their grandparents. The hallmark case which established the foundation for the rights of the child to reunification in the Argentinian context, and specifically the basis for "the best interest of the child" in the context of familial reunification was that of Paula Logares.[27]

On May, 18, 1978, Paula Logares was abducted at the age of twenty-three months in Uruguay along with her parents.[28] Her parents have not been seen since. During the dictatorship, her grandmother, Elsa Pavon, searched unsuccessfully in Argentina and Uruguay for her granddaughter. She joined the *Abuelas de la Plaza de Mayo,* an organization devoted to finding and identifying the children of the disappeared, to assist in her search. In 1980, Elsa received a photo of a girl resembling Paula from the suspicious neighbor of a police officer named Ruben Lavallen. The child and her "adoptive" family disappeared again and resurfaced three years later, when Paula was 7 years old and registered in a kindergarten. She was registered under a falsified birth certificate. Little by little, the true identity of Paula was put together. Difficulty came when x-rays seemed to indicate that Paula was 6 years old as the Lavallen's claimed, and not the 7 year-old age of the kidnapped child. The Lavallen's refused to provide evidence, including blood testing, claiming they had nothing to prove. After unceasing pressure from the *Abuelas*, the judge issued a warrant for blood tests of the child. The results established that Paula Lavallen was born Paula Logares.

It was thought that since the Lavallens were repressors (Ruben Lavallen was responsible for the death of Paula's parents), immediate return of Paula to her biological family was warranted. The trial that ensued is noteworthy for two aspects. First, the *Abuelas* had accumulated a large body of evidence. The genetic testing in particular provided quantitative, precise, and accurate evidence of identity. Secondly, it was argued that the best interest of the child had to be foremost in the decision of custody. The basis for the "best interests of the child" articulation in Paula's case are summarized in these 6 points:

26 Dworkin, D. *Nunca Mas: The Report of the Argentine National Commission on the Disappeared*, Argentine National Commission on the Disappeared October, 1986. A book has been published by Farrar Straus Giroux, New York, and also by Faber & Faber Ltd, London, 1986.

27 Butler, L., Granich, R., Barrett, K. The Search for Argentina's Disappeared Human Rights Center, UC Berkeley <http://www.hrcberkeley.org/dna/reports.html>.

28 'Nunca Más' Never Again – Report of Conadep (National Commission on the Disappearance of Persons) – 1984, available from <http://www.nuncamas.org>.

- It is unclear what a person remembers from before the age of 22 months.
- The man with whom Paula was living and who was acting as her father was very likely to have been directly involved in the murder of her true mother and father.
- The murder of Claudio and Monica, and of the thousands of others, was not a secret. Paula would eventually learn the truth. To learn as a young adult that she had been raised by the murderer of her parents would be far more traumatic than being told the truth right away.
- Kidnapping is a crime; it remains so even if it takes 6 years to solve it.
- To fail to prosecute crimes against children, even if the child in an individual case was not harmed, is to grant invulnerability to criminals who prey on children.[29]

It was established through expert consultation that it was in Paula's best interest to learn the truth about her history. The judges also concluded that knowing the truth, Paula was to be restored to her legitimate family. The transition for Paula, an eight year-old child, was difficult. On the day of the decision, Paula tried to run away from her grandmother insisting that the Lavallen's were her parents. She was fascinated, though, with the photographs of her as a baby with her biological family, including her missing parents. Within days, the judges found Paula remarkably well integrated with her biological family. Within two weeks, psychologists reported that she was very relaxed around her legitimate family.[30]

In 1987, after considerable effort on the part of the *Abuelas*, the Argentine Congress allowed for the creation of the National Genetic Data Bank. The purpose of the database was to allow family members of members of the "disappeared" generation to submit their genetic data in the event that their missing family member would be found. There is both a physical and psychological dimension to this, for as the grandparents and grandchildren age, this database will provide a link for a missing family member to be identified even without the physical bodily presence of their biological family.[31]

Consent

One of the essential pieces of physical evidence in complex cases such as Paula's is the blood sample from the alleged parents, the claimed biological parents, and Paula. In cases of children, the consent for the blood sample is usually obtained from the alleged parents. In the cases where the alleged parents do not consent to a blood sample, provincial or national legal systems are called into play. In the case of Paula,

29 Butler, L., Granich, R., Barrett, K. The Search for Argentina's Disappeared Human Rights Center, UC Berkeley <http://www.hrcberkeley.org/dna/reports.html>.

30 Butler, L., Granich, R., Barrett, K. The Search for Argentina's Disappeared Human Rights Center, UC Berkeley <http://www.hrcberkeley.org/dna/reports.html>.

31 Oren, Laura, 2001.'Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina' (2001) 14 *Harvard Human Rights Journal* 1-72.

a warrant was necessary to obtain a blood sample. The blood sample, and hence the DNA analysis, was seen by the judge as an essential piece of physical evidence needed to resolve the case.

In the cases in which blood samples and DNA analysis are used as a component of physical evidence in a human rights investigation, consent must be obtained. The elements of the consent are:

– the nature of the decision/procedure
– reasonable alternatives to the proposed intervention
– the relevant risks, benefits, and uncertainties related to each alternative
– assessment of patient understanding
– the acceptance of the intervention by the patient[32]

It should be obvious through the consent process that the involvement of the subject is completely voluntary. The consent must be made by an informed individual free of coercion or pressure. The individual must be told of the nature of the test, the anticipated effects, the significant risks, and the alternatives. A capable individual can refuse the test, or change or withdraw the consent at any time. Exceptions to this autonomy basis for consent are:

– if the consent led to delay that would lead to serious harm or death
– a noncompliant individual with an infectious disease
– individuals who may harm themselves or others, or are incapable of taking care of themselves[33]

Unique to genetic identification consent is that the subject must be told of the subsequent use of the sample[34] and the confidentiality of the sample assured. The consent must be seen as a legal document and the blood sample seen as a piece of physical evidence both of which can be used in legal proceedings. In explaining all aspects of consent, the individual should be made aware of the possibility of non-identification – an individual can go on to be unidentified. In fact there are cases with children of the Disappeared in Argentina who know who they are not but do not know who they are – a very troubling identity.

In the case of Paula Logares, the Lavallens were considered capable and therefore were under no obligation to consent to the blood sample. But was their refusal leading to harm to others – particularly to Paula?

In many identification cases in which mitochondrial DNA is used, a blood sample (and hence a consent) from the child and a maternal relative is adequate. Unfortunately, not all cases can be resolved through mitochondrial DNA. When nuclear DNA analysis is required, we must obtain blood samples (and hence consent) from the closest possible relatives – preferably both sets of grandparents and/

32 <http://ohrp.osophs.dhhs.gov/humansubjects/guidance/ictipp.htm> (accessed 5/10/2004).

33 <http://www.fda.gov/oc/ohrt/irbs/except.html> (accessed 5/10/2004).

34 Although it is far from clear precisely how far this extends. See *Moore v. Regents of the University of California* 793 P 2d 479 (1990) and discussion in Derek Morgan, *Issues in Medical Law and Ethics* (Cavendish Publishing, London, 2001), p. 101.

or aunts and uncles. Nuclear DNA analysis involves the genetic reconstruction of the family and therefore, in the case of a kidnapped or disappeared person, more samples are required.

In all cases of kidnapped and disappeared children, all parties are informed of the developments in the case. If an identification is made, all parties are informed appropriately. Together a team of psychologists, lawyers, and human rights workers are involved with the reunification and subsequent follow-up. Assessments of the child's and family's psychological and social well-being has always been a main focus of the reunifications.

Consent is a key legal issue in these cases and that concept is providing challenges for legal systems in both the developed and developing world in the context of genetic testing of children. The UN Convention on the Rights of the Child recognizes the right of a child with sufficient maturity and understanding to form their own views and to express those views freely in all matters affecting the child. (Art 12(1)). This is determined more with reference to cognitive development and not necessarily with respect to age. So clearly if reunification advances the welfare of the child, as it may in particular situations, and the child is cognizant of that, we may well have no reason to dispute this process.

Problems with this Use of Genetics

Mitochondrial DNA has a high rate of mutation. This can be advantageous or problematic for identification. If two people may have identical DNA it can be said with a calculated probability that they may be from the same biological family. On the other hand, there remains a certain possibility that they are not from the same biological family. Inherent in any identification estimate is the chance, even the most remote, that despite the identical mitochondrial sequence, the individual is from a different biological family.[35] This estimate of identity can be supplemented with additional information using nuclear DNA testing provided that the appropriate biological relatives are available and consent to DNA testing. For this reason it is important to combine mitochondrial DNA identification results (with or without nuclear DNA analyses) with all physical evidence. By combining all studies – forensic studies, paper trails, personal testimonies, and genetic analyses – the accuracy of the identification is maximized.

Extensions and Imperatives in the Uses of Genetics

It is clear that we are looking here at a complex issue of identity, because the Argentinean child(ren) at stake had a legal identity and also an unknown genetic or biological identity, which had been taken from them. Such issues of identity are so complex at the individual level partly because parentage does not necessarily repose

35 Melton & Nelson. Forensic Mitochondrial DNA Analysis: Two Years of Commercial Casework Experience in the United States. (2001) 42 (3) *Croatian Medical Journal* 298-303.

solely in biological or blood connection, but is widely acknowledged as comprising social, environmental, cultural and emotional components.

Further extensions to uses of DNA technology pose further challenges for the law. Once we turn from individual to collective identity, uses of DNA are still more controversial. This is why Presser argues, in a submission to the Australian Law Reform Commission inquiry into protection of genetic information, that the limitations to DNA technology become clear where we seek to establish biological relations to a known Aboriginal person. For:

> In conjunction with other information, especially lineage or family trees, mtDNA is informative as to aboriginality where an unbroken female lineage exists. But it is imperative to remember that if no 'aboriginal' sequence is found, this result is silent as to aboriginality, all you can say is that there is no direct female line of descent and the result is inconclusive. It does not prove non aboriginal descent.[36]

Similarly, de Plevitz and Croft have recently argued in the Australian context that the technology is unhelpful in this context, and further that:

> Judicial language such as 'genetic heritage', 'genetic input' and 'genetic claims' is strongly reminiscent of past distinctions. The terms suggest to the public that Aboriginal people are phenotypically different from non-Aboriginal people and that this difference is susceptible to proof. But phenotypes as the sole basis for classification became obsolete in the 1980's when it became possible to read the genetic code in quantity and classify by genotype, the numerous inherited genetic differences in DNA, rather than by a few simple observable features.[37]

Relatedly, Elliott and Brodwin argue that we are placing too great an emphasis upon our genetic ancestry, which raises the very question raised at the beginning of this paper: is there a role for genetics in determining who we really are? Or is biological identity being given too much authority? Like Presser, they argue that genetic ancestry cannot authoritatively determine the question of whether 'the Lemba are really Jewish or the question of from what African tribe can an individual African-American legitimately claim descent.'[38]

Just as de Plevitz and Croft suggest that DNA technology is not helpful in the context of establishing aboriginality, so the Australian Law Reform Commission has suggested that the language of rights is not helpful in the context of a child's

36 Australian Law Reform Commission, *Essentially Yours*, The Protection of Human Genetic Information in Australia, Report Vol 2, p. 927 (March 2003).

37 Loretta de Plevitz and Larry Croft, 'Aboriginality under the Microscope: The Biological Descent Test in Australian Law' (2003) 7 *QUT Law & Justice Journal* 105.

38 C. Elliott and P. Brodwin, 'Identity and Genetic Ancestry Testing' (2002) 325 *British Medical Journal* 1469, p. 1470.

"right" to know their biological parentage or a man's "right" to know his biological offspring.[39] Rather they suggest that this area:

> requires a careful balancing of interests of mothers, fathers and children in different biological and social relationships with each other. To privilege the interest of one party by accepting a claim to an absolute right fails to give adequate regard to the interests of others involved in the equation.[40]

We now ask the question whether children who were disappeared, killed or abandoned during the 'dirty war' of Argentina, such as Paula Logares were rightly reunified with their grandmothers. For the legacy has been jurisprudential: it has been suggested that during the drafting stages of the related Articles in the Convention on the Rights of the Child, Argentina '… played an active role in proposing the right for the child to retain identity, and made that right prominent in a Human Rights Convention for the first time.'[41]

The Convention on the Rights of the Child (CROC) 1989

It is arguable that 'the single most important international document concerning specific rights and protection of children is the UN Convention on the Rights of the Child (1989)'.[42] Furthermore that Article 8 of that Convention:

> represents the first occasion when States undertook express obligations binding them under international law in respect of children's rights and did so in a legal instrument devoted exclusively to that subject.[43]

How does the Convention deal with identity? According to Article 7: 'The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.' The Convention does not specify, although it may be implied, that those are the biological parents. This is also implicit in related Article 9 (3) that provides that 'State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents.' Article 8 is of particular relevance to protection of identity,

39 *Essentially Yours*, Volume 2, op. cit., p. 862, para 35.13.

40 Ibid.

41 Liu Huawen, 'The Child's Right to Birth Registration International and Chinese Perspectives' in Peter Lodrup and Eva Modvar (Eds) *Family Life and Human Rights* (Gyldendal, Oslo) 441-455 at 446, citing Geraldine Van Bueren, pp. 118-119, 128.

42 Bernard Bekink, 'Striking a balance between parental religious freedom and the rights and best interests of children' in Peter Lodrup and Eva Modvar (Eds) *Family Life and Human Rights* (Gyldendal, Oslo) 59-80 at p. 74.

43 Patrick McCarthy, 'Making the Most of International Law on the Right to Identity: An Analysis of Article 8 of the United Nations Convention on the Rights of the Child' [2004] *Cork Online Law Review* 3.

as it states that State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. It then continues that where a child has been illegally deprived from some or all elements of his or her identity, State Parties shall provide appropriate assistance and protection with a view to speedily re-establishing identity.

As McCarthy points out, drawing on the drafting history of Article 8, Argentina in fact played a prominent role in the inclusion of this Article, putting forward an original proposal for a provision concerning identity in 1985.[44] That proposal, which was not considered at that time, that the child has the inalienable right to retain his true and genuine personal, legal and family identity. Where the child has been fraudulently deprived of some or all elements of that identity, the State must provide special protection. Part of that protection included the obligation of the State to restore the child to his blood-relations. The Argentine rationale for this provision included the significance of the distinction drawn between the true and genuine and legal identities of the child.[45] As McCarthy notes, the Argentine concern about the issue:

> seems to have arisen on account of the 'disappearance' of approximately 150 children during the period of rule by the military junta in that country in which it was alleged the government had been involved.[46]

In the final event, delegations of the Netherlands, Austria, the United States and Canada supported an initial inquiry by Norway as to the appropriateness of the provision and the matter was referred to a working party, following which Argentina proposed a revised text. This revised the focus of the right of preservation of identity using a new term: that of 'family identity'. However that new term was rejected by the Working Group and the term finally adopted was 'family relations as recognised by law.'[47] It is McCarthy's view that the 'Travaux Preparotoirés' of the Convention demonstrate that the ultimate text to Article 8 was meant to refer to a particular meaning of the term 'identity'.[48]

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44 McCarthy, op. cit., p. 4 at 23, citing Detrick et al. (Eds) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoirés* (Martinus Nijhoff, Dordrecht, 1992).

45 McCarthy, op. cit., p. 5 or 23, citing Detrick et al (Eds) op cit., at p. 292: Considerations 1986 Working Group (UN Doc E/CN.4/1986/39) at paras. 34-35.

46 McCarthy, op. cit., p. 5.

47 McCarthy, op. cit., p. 6 of 23, citing Detrick et al (Eds) op cit at pp 294-295: Text as adopted by the 1986 Working Group (UN Doc E/CN.4/1986/39 Annex 1)

48 McCarthy, op. cit., p. 6 of 23, citing the refusal by many delegations to accept the proposals of Argentina to use the term 'family identity', the proposal for a broader definition of 'identity' in relation to Article 8 as originally put forward by Argentina, then the broader definition as put forward by Egypt in the context of Article 7, and finally the acceptance without debate at the 1989 session of the Working Group of a small change of the provision, leading to the conclusion that it would be incorrect to draw an inference from

Retaining Identity: A "Right" to Know?

The Committee on the Rights of the Child is the body that monitors how well States are meeting their obligations under the Convention on the Rights of the Child. In this section we look at the interpretations by the UN Committee as to biological parentage and identity under the relevant provisions of CROC. We take just two examples to demonstrate the Committee's application of these provisions.

In the Committee on the Rights of the Child, Concluding Observations: Seychelles in 2002,[49] the Committee expressed concern that the right of children born out of wedlock to know their biological fathers can be limited, inter alia, owing to the right of the mother not to reveal the name of the father, and that children of divorced or separated parents may not be able to preserve their identity.

The Committee went on to say that in the light of Article 8, the Committee recommended that the State party review its legislation in order to ensure that all children born out of wedlock have, as far as possible, the legal right to know and maintain contact with both their biological parents, and that all children of divorced or separated parents have the legal right to maintain their identity.

In the Committee on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland in 2002,[50] the Committee observed that while noting the recent Adoption and Children Bill (2002), the Committee expressed concern that children born out of wedlock, adopted children, or children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological parents. Thus, in light of Articles 3 and 7 of the Convention, the Committee recommended that the State party take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible.

It is clear from these recommendations that the Committee considers that 'parent' means as far as possible, biological parent. This is not to deny that reunifying children with biological parents or grandparents, of whom they may have no knowledge due to the cruelties or war and dictatorship, raises complex ethical questions that pivot around what constitutes "family" and what is "in the best interests of the child" The law is being called upon to balance competing rights, for example, of parents of an adopted child and their associated rights to privacy.

There are other international instruments of relevance to any interpretation of the provisions in CROC. The primacy of the family, for example, is established in 16 (3) of the Universal Declaration of Human Rights which provides that 'the family

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the use of the word 'including' in Article 8 that there are other elements of identity not there enumerated.

49 See Committee on the Rights of the Child, Concluding Observations: Seychelles, 30/10/2002: <http://www1.umn.edu/humanrts/crc/seychelles2002.html30>.

50 See Committee on the Rights of the Child, Concluding Observations; United Kingdom of Great Britain and Northern Ireland, 09/10/2002: <http://www1.umn.edu/humanrts/crc/greatbritain2002html>.

is the natural and fundamental group unit of society and is entitled to protection by society and the state.' Article 12 of that Declaration provides that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence…'. If there is any limited "right" of some children to know their biological parentage, this therefore needs to be balanced with related rights to family life and to privacy.

From the adult perspective, it has been decided that the protection of Article 8 of European Convention on Human Rights includes the right to recognize a biological child.[51]

A "Right" Not to Know?

To what extent do those and other related 'rights' impact upon the situation that we have described? We have talked a lot about the right to know one's biological family in one limited post-conflict situation, but what of any right not to know as encapsulated in international instruments such as the Council of Europe Convention on Human Rights and BioMedicine (1996) Article 10, and UNESCO's Universal Declaration on Human Genome and Human Rights (adopted by the General Conference of UNESCO in November 1997, Article 5)?

This raises the dilemma of the autonomous child in international law. In that context, the Commonwealth Parliament (Australia) has released a commentary.[52] This clarifies (at p. 9) the concept of the "autonomous child" in the convention:

> There has been a long debate in many countries about the extent and kind of freedom children should have. Some children's rights may be inconsistent such as protective and autonomous rights. The traditional concept that independence and autonomy are central to rights is problematic in respect of children because it depends on their level of development and their capacity to assume responsibilities and obligations. It was argued, however, that the Convention does not suggest that the child should be regarded as completely autonomous and that children's rights were carefully qualified by statements about the role of the family.
>
> Children already benefit from the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights which contain articles relating to special measures for the protection of children. It was argued that these articles represent a balance between protection and autonomy...
>
> The importance of the role of the family is reinforced in preambular clauses 5 and 6 and Articles 7, 16, 18, 24, 27, 29, 3. Parents are referred to beneficially in 11 of the operational articles of the Convention and they stand to benefit as a result of the implementation of a number of the articles. The rights of parents should be complementary and not seen to be in conflict with each other ....

51 Kroon Netherlands A297-C, 36, 40.

52 Commonwealth of Australia: United Nations Convention on the Rights of the Child: Executive Summary, August 1998.

The Convention does not abrogate the rights of parents, nor was it intended to be an alternative to their authority.

Clearly genetic technology is raising ethical problems that international law has yet to provide sufficient guidelines or answers to, and to which responses will be incremental as our knowledge of the capacity of genetics accelerates. As Derek Morgan comments, we are dealing with a 'clash not of absolutes but of relatives'[53] and there is some related European case law suggesting that in balancing non-identifying parental information with a child's quest to discover her biological origins, consideration will be given to the protection of third party interests. In *Odievre* for example, an aspect of the mother's past identity would have been revealed and this would have 'compromised present identity' had the child been able to access information as to her biological identity.[54]

Other Related Quests for Parentage and Identity

The question of a right to knowledge of one's biological origins has recently been confronted by lawmakers in the context of sperm donors in the United Kingdom. The United Kingdom government announced that it intended to remove anonymity from sperm, egg and embryo donors. This prompted this comment from Emily Jackson, senior lecturer in Law, London School of Economics:

> The decision was framed in terms of rights: the child's right to information about her genetic origins should, it was argued, take priority over the donor's right to privacy. This appeal to rights is unsurprising. The UN Convention on the Rights of the Child contains a right to know one's identity, as far as possible; and it has recently been accepted that a person's interest in information about their genetic father might be protected under Article 8 of the Human Rights Act 1998 (the right to private and family life). And rights unquestionably give the impression of a strong and uncompromising commitment to protecting the interests of vulnerable groups. But how accurate or helpful is it to talk about a right to know the identity of one's genetic parents? If we were to say that people conceived using donated gametes have a legally enforceable right to know their donor's identity, we would be treating them very differently from all other children. Children conceived 'naturally' cer-

53 Morgan, op. cit., citing *Odievre* v *France* and Article 8 of the European Convention of Human Rights (protection of a right to identity and personal development and the right to establish and develop relationshipp with other human beings and the outside world).

54 Odievre's quest to discover her origins would also have revealed by definition the 'stigma attached to abandonment' of the mother given she had left the baby for adoption during an era when unwanted pregnancy was not acceptable, and this reunification therefore 'would have cast a long and strong shadow over O's mother's present identity'. (italics in original) This therefore interfered with her private life under Article 8, at least in the outcome of the case which decided (in Morgan's summary), that 'France had not overstepped the margin of appreciations in balancing non-identifying information for O with the equal protection (the everyone of art 8)in ensuring the protection of third party interests.'

tainly do not have such a right. A significant proportion of the population, perhaps as many as 10 per cent, are in fact biologically unrelated to their presumed fathers. Infidelity may then be a statistically greater threat to accurate knowledge of our biological origins than the relatively small number of births using donated gametes and embryos. More importantly still, mothers are under no obligation to name the child's father on the birth certificate: mothers' interests in keeping the father's identity secret are allowed to trump children's interests in knowing the truth.

This in turn leads to an interesting difference from adoption. Adopted children have the right to see their original birth certificate when they reach the age of 18. This will tell them the identity of their mother, but it might or might not reveal their father's identity. Adopted children, therefore, do not have the right to know both birth parents' identities.

It is also difficult to see how any right to information about one's origins might be enforced. Although there is clearly a connection between anonymity and secrecy, it is very important to remember that they are not the same thing. The right to information about the gamete donor will not necessarily eliminate secrecy surrounding the circumstances of a child's conception. Unless the use of donated gametes must be recorded on the child's birth certificate, or a duty is imposed upon parents to tell their child that they were conceived using donated gametes, the right to information will not automatically lead to greater openness.

And for good reasons, it seems extremely unlikely that we would force parents to tell their children that they were conceived using donated gametes. Not only might endorsed birth certificates stigmatise children, but also there could still be no guarantee that children would in fact be told the truth by their parents: children do not necessarily see their birth certificates during early childhood. Parents' freedom to bring up their children according to their own values and beliefs is vigorously protected by family law: interference with family privacy is permitted only when the standard of parenting falls below a minimum threshold level, judged by whether the children are at risk of significant harm such that removal from the family home would be justifiable. In relation to anonymity, it seems inconceivable that parents' freedom to make choices about their child's upbringing would be trumped by a child's 'right' to know the truth.

It would, perhaps, be more helpful to regard the removal of anonymity as a way of protecting a child's interest in (and not her right to) greater openness and transparency about the circumstances of her conception. If donors are identifiable, a clearer message can be sent to parents that children conceived using donated gametes will generally benefit from frank and honest disclosure as early as possible in childhood. But unless we want to single out children conceived in this way and subject them and their parents to a wholly incongruous and exceptional intrusion into family life, we should probably avoid framing our discussion in terms of anomalous and patently unenforceable rights.[55]

55 *BioNews* 26 January 2004.

Another observation on the proposals to end sperm donor anonymity in the United Kingdom is articulated by Jennie Bristow, who points to the disparity between disclosure of company accounts and disclosure of biological origins in this way:

> In fact, the very notion that one should treat the disclosure of biological origins to one's child in the same way as one treats company accounts or parliamentary debates is nothing short of bizarre.[56]

This comment points to the fact that we are dealing with raw human emotions when we reunify young adults with their biological parents, in the event that they have not known them for one reason or another. Yet it might almost be suggested that the reverse to Bristow's comment is now in train, whereby it is easier to trace one's biological origins in certain circumstances than it is to trace the precise basis to major corporate appointments, to salary packages, to severances, and to the myriad 'deals' that go on behind the corporate veil daily.

Why might it be easier to trace biological origins than corporate dealings? In part this is due to DNA and the remarkable power of DNA to alert us to our biological relations. In part this is also the product of social policy that prefers to 'compensate' its corporate executives in private – even when they fail to deliver the corporate goods[57] – and to make its sperm donors pay in public. At the same time, we are witnessing State attempts to separate families: Australia, for example, has recently been criticised by its Human Rights and Equal Opportunity Commission (HREOC) for its failure to ensure family life for children in immigration detention.[58] The United Kingdom reservation to CROC with a view to immigration control was also considered contrary to the spirit of the Convention.[59] Both tort law and constitutional law are considered to have failed the "Stolen Generation" of Australian indigenous families separated from their families and removed to missions for much of the last century.[60]

Caught in the middle are children lost or captured in war, conflict and military dictatorship – children for whom biological transparency brings no real accountability – but who often seek to know their true biological origins after the conflict has

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56 <http://www.spiked-online.com/Articles/0000000CA363.htm>, accessed 21 January 2004.

57 See Elisabeth Sexton, 'Executives may have misled to keep Government in dark' and 'Company has never stopped lying, inquiry told' *The Sydney Morning Herald*, 29 July 2004, p. 4 (on the James Hardie 'corporate culture that was dishonest, secretive and disdainful of the plight of the sick and dying' as revealed by an investigation into the company's handling of asbestos compensation. Several company directors received 'golden handshakes' despite the inquiry).

58 *A last resort?* National Inquiry into Children in Immigration Detention (Human Rights and Equal Opportunity Commission, Sydney, April 2004).

59 'United Kingdom Government's Reservation to the 1989 Convention on the Rights of the Child' available from <http://www.asylymsupport.info/>.

60 See C Cunneen and S Grix, The Limitations of Litigation in Stolen Generation Cases, Research Discussion Paper, No. 15 AIATSIS, 2004.

ended. This is part of a wider trend in seeking confirmation as to identity in non-conflict situations, and there is no disputing McCarthy's contention that identity issues are becoming ever more important, whether through adoption or medically-assisted procreation, or whether through post-conflict situations. This imperative can be matched by the potential of scientific knowledge and it may be that during the next decades the Convention will be revisited, for:

> Scientific knowledge and its practical application have developed on a scale since 1989 which might mean issues related to identity would be given substantially more attention if the CRC were being drafted at the present time.[61]

Post-Conflict Challenges – Conclusion

The use of DNA as a piece of physical evidence has prompted judicial systems and laws to change. Incorporating such accurate information as a component of a larger body of evidence has transformed evidence from subjective, testimonial based and arguable, to objective, scientific, and more concrete. However, in the context of child reunification we would contend that the cases we have documented raise as many questions as they answer. A primary question concerns whether we are in the cultural phase of human evolution and developing more rapidly culturally than genetically or biologically? If we are, then how might the UN Convention that provides for a right to family life best be interpreted in the future? The question is not whether we all have a right to a family but further whether in an age of fractured families, the family to which we have a right is to be a biological one. It is incumbent upon States to secure that protection. In the cases that we have dealt with, it was State-sanctioned violence that led to the fracturing of the families. Here the rights of the grandmothers had also to be considered and we have argued in this paper that in the context of the human rights abuses that had occurred, it was in the best interests of the child that efforts be made to secure the post-conflict biological reunifications discussed in our paper. Our further point is that in seeking this reunification the attention of the world was focused, at least in passing, on the persistent and relentless fracturing of children's lives through conflict and human rights abuses.

61 McCarthy, op. cit., p. 22 of 23.

Justice in the Aftermath of Mass Crimes: International Law and Peacebuilding

Wendy Lambourne

Since the end of the Cold War we have seen an evolution in the approach taken by the international community towards transitional justice in the aftermath of violent conflict in which international human rights and humanitarian law have been violated. Following the Second World War and the creation of the United Nations, the protection of human rights developed as a new focus of international law. However, the Nuremberg precedent of accountability was held hostage to the Cold War for almost 50 years. It was only after the ideological rivalries and concerns of the Cold War were removed that effective enforcement of international humanitarian law in the form of prosecutions returned to the agenda.

In the aftermath of mass violence and genocide in the former Yugoslavia and Rwanda, the UN Security Council in 1993 and 1994 respectively, established international criminal tribunals with a Chapter VII mandate – to counter ongoing threats to international peace and security as well as to promote justice and reconciliation. Following the post-referendum violence in East Timor in 1999, the UN's peacebuilding mandate included a Serious Crimes Unit to investigate the atrocities and prosecute those responsible. In Sierra Leone, the UN instituted a Special Court to try those who committed violations of international humanitarian law and domestic law during the latter stages of the civil war and in the aftermath of the 1999 Lomé Peace Agreement.[1] Following five years of negotiations, the UN General Assembly approved a draft agreement between the UN and the Cambodian government in May 2003 for prosecution under Cambodian law of crimes committed by the former Khmer Rouge nearly 30 years ago.[2] The Rome Statute of the International Criminal Court came into force in 2002 and the first investigations are being planned in relation to atrocities committed by the Lord's Resistance Army in Uganda and the massacres in the Ituri region of the eastern Democratic Republic of the Congo.[3]

1 The Special Court, established jointly by the UN and government of Sierra Leone, issued its first indictments for crimes against humanity in March 2003. 'Sierra Leone: Five indicted by Special Court', IRIN, 11 March 2003.

2 United Nations General Assembly Press Release GA/10135, 13 May 2003.

3 International Criminal Court Press Releases 29 January 2004 and 19 April 2004, <http://www.icc-cpi.int/php/news>, accessed 25 April 2004; *New York Times*, 10 September 2003.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 261–279.*
 ISBN *90 04 14599 0.*

This evolution towards a greater willingness to prosecute those responsible for mass crimes may perhaps be more apparent than real. It can be argued that decisions about how to deal with transitional justice issues reflect the particular conflict circumstances rather than any change in attitude of the international community. However, I would argue that both play a role, mediated by the interests and capacities of the local community involved.

The move towards legal justice for the perpetrators of war crimes, crimes against humanity and genocide may also be seen as a movement from below – from the survivors of these mass crimes who are living with the trauma and open wounds that require psychological as well as physical healing. Policies of impunity ignore the effects of individual and collective trauma and the unmet need for justice in societies attempting to rebuild in the aftermath of mass violence.

However, even when legal trials are held, they may fail to engage with the local population as actors or participants who have needs and perceptions, rather than as passive recipients of 'justice' as defined by others.

In this paper I firstly analyse the evolution in the international approach towards transitional justice and the various factors that contribute to decisions about pursuing accountability versus amnesties. Rather than attempt to evaluate the advisability or efficacy of the different approaches, I concentrate on how peacebuilding goals are affected by the motivations and methodology of the decision-making process. It is important to see decisions about transitional justice as part of a peacebuilding process that aims to meet human needs and transform relationships. I argue that engagement with the local population is critical in this process as supported by evidence from my field research in Cambodia and Rwanda, as well as a preliminary analysis of experiences in former Yugoslavia, East Timor, Sierra Leone, Afghanistan and Iraq.

Accountability vs Amnesties

In the aftermath of mass violence, societies may choose various options for dealing with transitional justice. These options include, but are not limited to, criminal trials, amnesties, truth commissions, lustration laws, compensation, rehabilitation, memorials and indigenous justice or reconciliation processes.[4]

In 1995, Neil Kritz of the US Institute of Peace produced a massive three-volume study of transitional justice, including detailed studies of twenty-one countries and discussion of the issue from political, historical, legal, psychological and

4 For further discussion about these processes see Priscilla Hayner, 'In Pursuit of Justice and Reconciliation: Contributions of Truth Telling' in Cynthia J. Arnson, (Ed.) *Comparative Peace Processes in Latin America.* (Washington, DC/Stanford: Woodrow Wilson Center Press/Stanford University Press, 1999); Neil Kritz, 'War Crimes and Truth Commissions: Some Thoughts on Accountability Mechanisms for Mass Violations of Human Rights', Paper presented at USAID Conference, 'Promoting Democracy, Human Rights, and Reintegration in Postconflict Societies', Washington, DC, 30-31 October 1997; Wendy R. Lambourne, 'Justice and Reconciliation: Post-Conflict Peacebuilding in Cambodia and Rwanda', unpublished PhD Thesis, University of Sydney, 2002.

moral perspectives. In almost all of the cases discussed, the international community was not involved. This trend has shifted in subsequent years, with a consequent increased level of interest in how the international community (in most cases, the UN) interacts with the local government and population in determining the type of transitional justice process to be pursued.

The factors that may contribute to decisions about transitional justice are many and varied.[5] They may be grouped into the following three categories:

Conditions of Conflict and its Termination

- whether the violence was terminated by a peace settlement or military victory
- balance of power between previously warring parties
- existence of a continuing threat of violence
- level and pervasiveness of brutality and suffering
- proportion of population involved in the violence and perpetration of crimes

Interests and Capacities of the International Community

- perceived national interests of the major players involved
- ideological priorities and allegiances
- capacity of the United Nations or individual nations to intervene
- strength of international legal regime
- level of commitment to human rights
- perception regarding compatibility of peace and justice
- extent of moral outrage: "shock"
- need to assuage guilt for not intervening to prevent the atrocities: "shame"

Interests and Capacities of the Local Community

- goals of political leaders
- local capacity for conducting legal trials
- local capacity to maintain peace and security
- level of commitment to human rights
- perception regarding compatibility of peace and justice
- perceived needs of the survivors
- extent to which the community (survivors and perpetrators) needs to be reintegrated
- existence of indigenous mechanisms for achieving justice and reconciliation
- cultural and religious approaches to justice and reconciliation

5 This list of factors is drawn partly from Michelle Sieff & Leslie Vinjamuri Wright, 'Reconciling Order and Justice? New Institutional Solutions in Post-Conflict States', (1999) 52 (2) *Journal of International Affairs*, pp. 757-779.

These factors interact and in many cases may contradict each other; in other cases the outcome may be clearly determined by the combination of factors present. This process is illustrated by the following examples relating to Cambodia, the former Yugoslavia, Rwanda, East Timor, Afghanistan and Iraq.[6]

Cambodia

In the immediate aftermath of the Cold War, the UN was just getting its feet wet in the newly evolving area of post-conflict peacebuilding. Cambodia was a test case of this new era; Australia and other international players were keen to prove themselves as peacebrokers. Including the Khmer Rouge in the peace negotiations was seen as a necessary compromise and the idea of holding them accountable for crimes against humanity was seen as a barrier to successful conclusion of a peace agreement. The ideological and national interests of the international community and the threat of continuing violence thus combined with the low local capacity and interest in human rights to produce a culture of impunity in Cambodia.[7] The needs of the Cambodian people for justice or reconciliation were not sought nor considered as part of the peace process, although a subsequent UN mission did consult with Cambodian NGOs thought to represent civil society views towards a possible tribunal or truth commission and several researchers have subsequently attempted to ascertain the attitudes of Cambodians towards accountability for the former Khmer Rouge (as discussed later in this paper).

Former Yugoslavia

The international community took a radically different approach just two years later in the former Yugoslavia with the establishment of the first international tribunal since Nuremberg, the International Criminal Tribunal for the Former Yugoslavia (ICTY). Justice and accountability were seen as necessary for peace. An atmosphere of "shock and shame" emerged in the light of massacres, ethnic cleansing and other crimes against humanity that the UN found itself unable to prevent. The proposal for a truth commission to establish a joint historical accounting of the war and human rights violations was effectively blocked by representatives of the ICTY who saw the two processes as incompatible.[8] Both the US Institute of Peace which sup-

6 See also Sieff & Wright, 1999 for an analysis of the role of some of these factors in determining choices of transitional justice mechanisms in Argentina, South Africa, Rwanda and the former Yugoslavia.

7 See, for example, James Rae, who discusses the obstructions to legal accountability posed by domestic forces and outside powers in both Cambodia and East Timor: 'War Crimes Accountability: Justice and Reconciliation in Cambodia and East Timor?', (2003) 15 (2) *Global Change, Peace & Security*, pp. 157-178.

8 Representatives of the ICTY were very critical of the proposal to establish a Bosnian truth commission. Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford: Oxford University Press, 2000); Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).

ported the truth commission proposal and the ICTY representatives have subsequently claimed to be concerned about responding to the needs of Bosnians, but these needs were not explicitly investigated.

Rwanda

Similarly in Rwanda, justice and accountability for the perpetrators of genocide was given a high priority – partly because of the international community's desire to do something after failing to prevent the genocide, and as a reflection of the moral outrage felt in response to the widespread brutality and killing. The international community's experience of "shock and shame" and the termination of the conflict by military victory combined to ensure legal accountability was pursued. But the Rwandan people were not consulted in decisions about the establishment and functioning of the International Criminal Tribunal for Rwanda (ICTR) and the needs of the various constituencies of the Rwandan population were not taken into account (see later discussion).[9]

Sierra Leone

The Special Court in Sierra Leone was not originally envisaged in the 1999 Lomé Peace Agreement that allowed for the establishment of a Truth and Reconciliation Commission and amnesty for the perpetrators of human rights abuses during the eight-year civil war. There was a concern that justice in the form of prosecutions would undermine peace. However, the UN entered a reservation specifying that the amnesty could not apply to crimes against humanity and war crimes. In the aftermath of further crimes against humanity and disruption of the peace process, the Sierra Leone government supported the UN's approach and requested the establishment of a special tribunal. The extent of moral outrage, commitment and capacity of the international community, combined with local incapacity to maintain peace and security and a perception that peace and justice needed to be pursued simultaneously, led to the decision to establish the Special Court as well as a truth commission.

The international community's support for both a tribunal and a truth commission in Sierra Leone signifies a break from the previous position in relation to the former Yugoslavia, and provides a significant opportunity to observe and assess these two transitional justice mechanisms operating in cooperation or conflict with one

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ICTY Chief Prosecutor, Justice Louise Arbour, for example, actively lobbied against any reconciliation mechanisms that could interfere with the process of justice (N. Dyson & M. Spencer, 'Prosecuting War Criminals', (2000) 16 (2) *Peace Magazine* pp. 16-23). The US Institute of Peace was actively promoting the truth commission proposal which it claimed was a Bosnian initiative, and yet Justice Arbour has subsequently indicated that she opposed the truth commission because she did not believe it was supported by the Bosnian people (personal communication, Adelaide, 27 February 2004).

9 Jean Marie Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR', (2003) 16 *Leiden Journal of International Law*, pp. 115-133.

another.[10] The case of Sierra Leone allows us to examine how these two approaches work together in enhancing or interfering with the justice and reconciliation experienced by victims, survivors and perpetrators.[11]

The Prosecutor of the Special Court for Sierra Leone, David Crane, and his team have met with various community groups and their representatives throughout Sierra Leone including school children, local civil society leaders, ex-combatants, religious leaders and victims of the civil war, in order to listen to their concerns and answer questions about the Special Court.[12] Unlike in Rwanda in relation to the ICTR, the focus has been on furthering the understanding the people have of the work of the Special Court: 'If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneons of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities.'[13]

East Timor

Following the post-referendum violence in August 1999, the UN International Commission of Inquiry on East Timor recommended the establishment of both an international tribunal and a truth commission to promote both justice and reconciliation for the East Timorese. As in Rwanda, an element of "shock and shame" undoubtedly influenced the international response. The degree of suffering of the East Timorese people, and the low level of threat of continuing violence because of the presence of an international peacekeeping force, also pointed to the likelihood of prosecutions. However, the goals of local political leaders prevailed, and the idea of an international tribunal was put on hold while the Indonesian government pursued justice in its own courts. The UN Transitional Administration in East Timor (UNTAET) did set up a Serious Crimes Unit in Dili to try the perpetrators of serious crimes and human rights abuses committed in East Timor in 1999, but unfortunately its work has been hampered by resource constraints and the inability to obtain custody of Indonesian military leaders and the militia still in West Timor. The ad hoc tribunal in Jakarta has been even less effective because of its limited mandate and a lack of political will to try those responsible for the militia violence.

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10 William A. Schabas, 'The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone', (2003) 25 (4) *Human Rights Quarterly*, pp. 1035-1066.

11 An initial contribution to this assessment of the needs of Sierra Leoneans and their responses to the TRC and Special Court is being made by researcher Rosalind Shaw as part of a project funded by the US Institute of Peace (personal interview, US Institute of Peace, Washington, DC, 14 January 2004). See also 'Dialogue on justice and reconciliation' in David Lord (Ed.), *Paying the Price: The Sierra Leone Peace Process*. (London: Conciliation Resources, 2000), pp. 58-59.

12 Press Release, Special Court for Sierra Leone Public Affairs Office, 15 October 2002.

13 United Nations Security Council, 'Report of the Secretary-General on the establishment of a Special Court for Sierra Leone', S/2000/915, 4 October 2000, p. 2.

The East Timorese Commission on Reception, Truth and Reconciliation established in July 2001 has been more successful in promoting justice and reconciliation for the perpetrators of less serious crimes.[14] The focus on a truth commission approach to transitional justice reflects the need for the many perpetrators of less serious crimes to be reintegrated into their communities rather than facing legal trials which would challenge the capacity of the local courts.

The international community and local political leaders initially took into account the needs of the East Timorese in relation to justice and reconciliation. Xanana Gusmao reportedly toured the villages of East Timor seeking the input of the local people, and the UN High Commissioner for Human Rights together with UNTAET held workshops in Dili to consult with East Timorese groups and international truth commission experts on the idea of a truth commission in East Timor.[15] In the end though, the political leaders of East Timor have taken a more pragmatic approach, ignoring some of the expressed justice needs of the population, and opposing war crimes trials because they 'could be prejudicial to the country's increasingly friendly relationship with Indonesia'.[16] A report from the International Center for Transitional Justice concludes that the government 'ignores … at its peril' the need for effective participation and communication regarding transitional justice that meets the 'hopes and needs of its people'.[17] The report found that 'even in the context of acute social and economic deprivation and the daily struggle for survival, the need and desire for justice remains a priority for many'. Truth recovery and accountability were regarded as important components of justice without which the prospects for sustainable reconciliation were 'dire'.[18]

Afghanistan

According to Barnett Rubin, there has been little call for accountability for past abuses in Afghanistan, perhaps partly because there has been no peace settlement as such, and as a result of the recognition that such an undertaking would be extremely complex because of the number of groups involved in abuses over the years. These groups are required to live in close proximity in post-Taliban Afghanistan and the threat of violence continues, so legal justice is not seen as a priority. On the other hand, amnesties for past violations have not been declared by the Afghani Administration, so options are still open. The Afghan Independent Human Rights

14 Piers Pigou, 'The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation', Report for UNDP Timor-Leste, Dili, April 2004.

15 Lambourne, 2002, pp. 256-261.

16 Jill Jolliffe, 'Wiranto to testify at war crimes hearing', *Sydney Morning Herald*, 6 February 2004, p. 8.

17 'Crying Without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations', by Piers Pigou for the International Center for Transitional Justice, New York, August 2003, p. x. (http://www.ictj.org/downloads/Crying_Without_Tears_designed.pdf).

18 'Crying Without Tears', 2003, p. ix. This conclusion was supported by my subsequent research in East Timor in July 2004 (publication forthcoming).

Commission established by the Bonn Agreement convened a working group on accountability for past crimes, and international human rights organizations have conducted inquiries seeking the views of Afghans in relation to how best to deal with the past.[19] Rubin suggests a national commission of inquiry might be the best approach, and calls on the Human Rights Commission to prepare a set of proposals for public discussion.[20]

Iraq

Iraqi political leaders and interested members of the international community were involved in negotiating details of the transitional justice processes to be pursued in Iraq.[21] UN Security Council Resolution 1483 dealing with the rebuilding of Iraq 'affirmed the need for accountability for crimes and atrocities committed by the previous Iraqi regime' in its preamble, but provided no guidance in its text on how to deal with past crimes in Iraq and who should take responsibility for developing transitional justice policy other than an appeal to member states to 'deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice'.[22] The continuing violence and need for groups to live together and work together politically in the rebuilding of Iraq seem to suggest legal justice would take a low priority. On the other hand, the emphasis on human rights and accountability espoused by the occupying powers led by the US indicate the likelihood of criminal prosecutions against the former leader, Saddam Hussein, and other former members of the Baath Party regime.

A report published by the United States Institute of Peace in April 2003 advocated the establishment of a special war crimes tribunal (whether international, local or joint international/local) to try former President Saddam Hussein, senior members of the Baath Party and military commanders who were responsible for massive human rights abuses in Iraq. The report also recommended a truth and reconciliation commission to enable victims to tell their stories and create a formal historical record. At the same time, the report cautions that 'the Iraqis will require a process for achieving justice and reconciliation that is in keeping with their unique his-

19 The International Center for Transitional Justice, for example, has developed a proposal for consultation to help determine a transitional justice policy for Afghanistan that has been largely incorporated into the work plan of the Afghan Independent Human Rights Commission. <http://www.ictj.org/asia/afghanistan.asp>, accessed 25 April 2004.

20 Barnett R. Rubin, 'Transitional Justice and Human Rights in Afghanistan', (2003) 79 (3) *International Affairs*, pp. 567-581.

21 'Post-Conflict Reconstruction in Iraq', *PeaceWatch* (United States Institute of Peace), 9:5-6, August/October 2003, pp. 4 & 10.

22 'Transitional Justice in Iraq: An ICTJ Policy Paper', International Center for Transitional Justice, New York, May 2003. <http://www.ictj.org/downloads/Iraq%20Transitional%20Justice%20Policy%20Paper.pdf>.

tory, culture, and political needs'.[23] Psychological needs are not specifically mentioned. However, Neil Kritz of the US Institute of Peace has urged the Coalition Provisional Authority in Iraq to 'engage the public and gain increased support for its undertakings'.[24]

Leslie Vinjamuri, by contrast, argues from a realist perspective that 'the politics of justice in a post-war Iraq must be carefully integrated with the politics of peace'.[25] Domestic instability and a divided society in Iraq suggest that widespread prosecutions of war criminals may have destabilising effects and undermine the peacebuilding process. Absolute justice should not be pursued at any cost, according to Vinjamuri: 'without stability and order, justice will have little meaning for the average Iraqi, and no purchase in the long term'.[26]

Goals of Peacebuilding

> Peace-building involves a switch of focus away from the warriors, with whom peace-keepers are mainly concerned, to the attitudes and socio-economic circumstances of ordinary people … So whereas peace-keeping is about building barriers between the warriors, peace-building tries to build bridges between the ordinary people.[27]

I define peacebuilding as 'strategies designed to promote a secure and stable lasting peace in which the basic human needs of the population are met and violent conflicts do not occur or recur'.[28] This definition takes a long-term focus[29] and incorporates the goals of both negative peace (absence of physical violence) and positive peace (absence of structural violence), a distinction first outlined by Johan Galtung.[30]

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23 Robert Perito, 'Establishing the Rule of Law in Iraq', *United States Institute of Peace Special Report 104* (Washington, DC: USIP, April 2003).

24 'Post-Conflict Reconstruction in Iraq', 2003, p. 10.

25 Leslie Vinjamuri, 'Order and Justice in Iraq', (2003-04) 45 (4) *Survival*, p. 142.

26 Vinjamuri, 2003-04, p. 150.

27 Stephen Ryan, *Ethnic Conflict and International Relations* (Aldershot: Dartmouth, 1990), pp. 61-62.

28 See Boutros Boutros-Ghali, *An Agenda for Peace* (New York: United Nations, 1992) and Gareth Evans, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond* (Sydney: Allen & Unwin, 1993) for alternative definitions of peacebuilding.

29 Long-term follow-through has been identified by a number of researchers as important to the success of peacebuilding. See, for example, Stephen J. Stedman & David Rothchild, 'Peace Operations: From Short-Term to Long-Term Commitment', (1996) 3 (2) *International Peacekeeping*, pp. 17-35; C.P. David, 'Does Peacebuilding Build Peace? Liberal (Mis)steps in the Peace Process', (1999) 30 (1) *Security Dialogue*, pp. 25-41.

30 Johan Galtung, 'Violence, Peace and Peace Research', (1969) *Journal of Peace Research*, pp. 167-191. Galtung distinguishes between negative peace as the outcome of efforts to stop physical or personal violence (direct violence), and positive peace as the goal of efforts to end indirect structural and cultural violence (indirect violence) that threaten the economic, social and cultural well-being and identity of individual human beings and groups.

It is focused on meeting human needs as the basis for ensuring the sustainable resolution of conflicts.[31]

The ultimate goal of post-conflict or post-settlement peacebuilding is societal transformation: from a state of destructive conflict and violence to one characterised by peaceful relationships and constructive conflict resolution. According to Spence, 'the process of peacebuilding calls for new attitudes and practices: ones that are flexible, consultative and collaborative and that operate from a contextual understanding of the root causes of conflict'.[32] The approach is transformative: it is based on terminating something undesired (violence) and the building of something desired through the transformation of relationships and construction of the conditions for peace.[33]

Oliver Ramsbotham provides a useful framework for UN peacebuilding incorporating five dimensions covering three different time spans: interim/short-term measures; medium-term measures; and long-term measures. The five dimensions are: military/security; political/constitutional; economic/social; psycho/social; and international. Specific peacebuilding activities include: humanitarian relief and economic reconstruction; promotion of the rule of law and respect for human rights; refugee repatriation and reintegration; development of police forces and judiciaries; strengthening of civil society, election monitoring and support for democratisation; de-mining; disarmament and demobilisation of militaries; transformation of cultures of violence; prosecution of war criminals; trauma healing and reconciliation processes.[34]

Promotion of the rule of law as part of post-conflict peacebuilding can comprise many different activities, including judicial reform, redrafting constitutions, rebuilding courthouses, protecting human rights, and training lawyers, as well as support for international war crimes tribunals.[35] Hideaki Shinoda proposes five stages of

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31 John W. Burton, 'Human Needs Theory' in *Conflict: Resolution and Provention* (London: Macmillan, 1990), pp. 36-48.

32 Rebecca Spence, 'Post-Conflict Peacebuilding: Who Determines the Peace?' in Bronwyn Evans-Kent & Roland Bleiker (Eds.) *Rethinking Humanitarianism Conference Proceedings*, 24-26 September 2001. (St Lucia: University of Queensland, 2001), p. 145.

33 John Paul Lederach, 'Journey from Resolution to Transformative Peacebuilding' in Cynthia Sampson & John Paul Lederach (Eds.), *From the Ground Up: Mennonite Contributions to International Peacebuilding* (Oxford/New York: Oxford University Press, 2000), pp. 45-55.

34 Gareth Evans, 1993; Jane Gronow, 'What Happens When the Guns Stop?' Paper presented to the National Refugee Week Forum, Sydney, 27 June 1996 (summary published as 'After the Guns Stop', (1996) 5 (2) *Horizons* (Community Aid Abroad), pp. 4-5); United Nations, Department for Economic and Social Information and Policy Analysis, *An Inventory of Postconflict Peace-Building Activities* (New York: United Nations, 1996); Oliver Ramsbothan, 'Reflections on UN Post-Settlement Peacebuilding' in Tom Woodhouse & Oliver Ramsbotham (Eds.), *Peacekeeping and Conflict Resolution* (London: Frank Cass, 2000), pp. 169-189.

35 Rama Mani, 'Conflict Resolution, Justice and the Law: Rebuilding the Rule of Law in the Aftermath of Complex Political Emergencies', (1998) 5 (3) *International Peacekeeping*, p. 3.

the rule of law approach to peacebuilding: creating a peace agreement; holding an election; establishing and strengthening law enforcement agencies; restoring justice through the judiciary; and promotion of the value of human rights and humanitarian norms.[36]

In parallel with the increasing focus of the international community on legal accountability since the end of the Cold War, the reports and publications of the United Nations and its Secretary General have increasingly emphasised the importance of the rule of law in peacebuilding, culminating in the Brahimi Report which recommended the establishment of collegial 'rule of law' teams.[37] As argued by Shinoda, the 'rule of law approach to peace-building is based upon the philosophy that conflict resolution does not aim at total elimination of conflict, but transformation of the nature of conflict.' Legal institutions and processes provide the channels through which conflicts can be resolved legitimately using non-violent methods, thereby helping to build a culture of peace.[38]

However, as Shinoda warns, the application of international criminal law as part of a rule of law approach to peacebuilding can be accused of representing a new brand of Western imperialism in which political theories of democratic liberalism are imposed on non-Western societies. In addition to this ideological objection, the rule of law approach has been criticised for its violation of the norms of non-interference in the affairs of sovereign states and because it creates 'a practical problem relating to the 'ownership' of peace-building'.[39] This critique highlights the importance of involving local citizens in the development of legal and other transitional justice mechanisms that are consistent with local customs, culture and needs. The conflict participants need to become players in the transitional justice process in order to counter claims of cultural imperialism as well as to ensure that the needs of the survivors and perpetrators are being met.

The multiple and varied psychological and relationship needs of the population in question need to be addressed if peacebuilding is to be realised. Victims and survivors – and perpetrators – need to be seen as 'subjects' and not just 'objects' in the peacebuilding process. A methodology of consultation and inclusion is essential for ensuring that justice needs are met in the promotion of peace.

In neither Cambodia nor Rwanda were citizens consulted about their needs in relation to justice and reconciliation; only in the aftermath of official decisions about transitional justice have the Rwandan government, non-government organizations and researchers begun this enquiry. In the following two sections I provide a brief overview of the approaches to justice and reconciliation in each of Cambodia and Rwanda and my findings in relation to survivors' responses when asked about their

36 Hideaki Shinoda, 'Enforcing International Criminal Law as a Tool for Peace-building: An Exploration of the Rule of Law Approach to Peace-building', Paper presented to the 43rd Annual ISA Convention, New Orleans, Louisiana, 25 March 2002.

37 United Nations, *Report of the Panel on United Nations Peace Operations* [Brahimi Report], A/55/305. (New York: United Nations) 21 August 2000.

38 Shinoda, 2002, pp. 1-3.

39 Shinoda, 2002, pp. 8-9.

needs in this area. I conclude with some suggestions regarding how international interveners could incorporate the views of citizens in their decisions about transitional justice processes and mechanisms.

Cambodia: Peace Without Justice

Between July 1975 and January 1979 the notorious Khmer Rouge regime led by Pol Pot was responsible for the deaths of between 1 and 2 million Cambodians, or 25% of the population. The 1991 Paris Peace Agreement did not preclude the Khmer Rouge from participating in the Cambodian elections, nor did it prevent former officials of the Khmer Rouge associated with the 'killing fields' from holding office in the future. There was a reference to ensuring 'the non-return to the policies and practices of the past' but there was no provision made for war crimes trials or other means of achieving justice.[40] Numerous Khmer Rouge leaders subsequently defected and joined the Cambodian government and military. In the interests of 'national reconciliation', the Hun Sen government accepted the former Khmer Rouge and, in some cases, offered them immunity from prosecution.

The UN began negotiations with the Cambodian government for a tribunal to prosecute the former Khmer Rouge leaders in 1997, but efforts were delayed by Hun Sen's inconsistent attitude and his desire to maintain domestic control over the tribunal despite international concerns about the ability to produce fair trials without international involvement. Finally in May 2003 after five years of negotiations the UN General Assembly approved an agreement reached in March with the Cambodian government for a tribunal to try the surviving former leaders of the Khmer Rouge.[41]

When I visited Cambodia in October 1999 I interviewed survivors of the Pol Pot era who expressed their desire for international legal justice. For example, a female survivor of the genocide who heads a Cambodian human rights NGO, told me that 'almost the whole Cambodian population would like a tribunal'. Another of my interviewees, a 30 year-old survivor, said that 'if they [former Khmer Rouge] are still detained and there is no tribunal, then all Cambodian people will be unhappy because they want the UN to find the justice for Cambodian victims'. Furthermore, he told me how he went with an Italian journalist to a Khmer Rouge stronghold and observed that 'people want peace, to be included back in Cambodian society, and for the leaders to be tried.'

Further evidence showing widespread Cambodian support for an international tribunal has included a rally of 5000 people during the visit of a UN delegation to Phnom Penh in August 1999,[42] and the results of a number of surveys that have been conducted in recent years. These include surveys by the Khmer

40 Trevor Findlay, *Cambodia: The Legacy and Lessons of UNTAC* (Oxford: Oxford University Press, 1995), p. 10.

41 Edith M. Lederer, 'U.N. Approves Cambodia Tribunal Agreement', Associated Press, 13 May 2003.

42 *The Australian*, 27 August 1999, p. 6.

Journalists' Association in 1995 or 1996[43] and the Institute of Statistics and Research on Cambodia (IFFRASORC) in 1999, both of which reported that over 80% of Cambodians wanted the surviving Khmer Rouge leaders to be prosecuted.[44] At a series of public forums on 'National Reconciliation and the Khmer Rouge', organised by the Centre for Social Development in 2003, a majority of participants indicated in secret polls that they supported the idea of a trial for the former Khmer Rouge.[45]

Although at least some Cambodians are aware of the potential limitations of a tribunal for the Khmer Rouge, the Cambodians I interviewed still believe some justice would be better than none. For example, one of my interviewees said: 'The government agree [*sic*] with US proposal for a tribunal – it's good – will help in Cambodia. Can do justice – but not for all.' Another said that trying the Khmer Rouge leaders could have a good impact on impunity: 'not a magic wand, but can show to criminals or bad people that even the Khmer Rouge who are powerful must be punished'. One survivor said he thought the leaders responsible for the genocide should be in prison for their whole lives, and that he 'wouldn't stop all people involved in the killing fields from standing in front of court and being brought to justice'. Another survivor said she thought that there should be a tribunal because so many were killed during the Khmer Rouge regime: 'somebody should be brought to court'. She said she was still angry but if the Khmer Rouge were in jail that would help her to feel better. A woman interviewed by journalist, Adam Piore, in the 1990s said, 'as tears streaked her wrinkled face' that: 'They killed my children. That's why I am like this'.[46] It is possible that a tribunal that offered some hope of justice might help heal the sorrow and trauma still suffered by Cambodians 25 years after the Pol Pot regime.

Rwanda: Justice for Whom?

In barely 100 days from April to July 1994, nearly one million Rwandan men, women and children were brutally massacred by armed militia and ordinary civilians who were incited to kill their Tutsi neighbours and moderate Hutu political opponents.

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43 The existence of this survey was reported to me by former Director of the Cambodian Genocide Program based at Yale University, Ben Kiernan (personal interview, Melbourne, 2 July 1999). Despite personal approaches to both the Khmer Journalists' Association (through a former member of the now disbanded organisation) and The Asia Foundation (the funding agency), I was unable to find any written reports of the survey results. In Phnom Penh I interviewed a former member of KJA who remembered the survey, but not any of the findings. He remembered only that there was 'lots of conflict over the methodology' and that 'many Cambodians didn't want to answer'. (Lambourne, 2002, p. 298).

44 'Most Cambodians Want Trial for K. Rouge – Poll', Reuters, 27 January 1999.

45 82% in Phnom Penh, 76% in Sihanoukville, and 64% in Battambang. Lambourne, 2002, pp. 303-305.

46 Adam Piore, 'Cambodia's Killers Win Again', *Newsweek International*, 25 February 2002.

Both the international community and the Rwandan government regarded legal justice as crucial to the peacebuilding process in the aftermath of the genocide, and yet Rwandans have not necessarily experienced justice as a result of the trials implemented locally and at the international level. The Rwandan domestic courts are trying those accused of genocide and crimes against humanity committed since October 1990, while the UN established the International Criminal Tribunal for Rwanda (ICTR) to prosecute those accused of genocide, crimes against humanity and war crimes committed during 1994.

The domestic trials of genocide suspects in Rwanda have been marred by an inadequate justice system and the large numbers of accused. In order to speed up trials and sentencing, as well as revealing the truth about the genocide and fostering reconciliation, the Rwandan government has introduced *gacaca* courts based on traditional community justice to try those accused of all but the most serious crimes. It is too early to assess the contribution of the *gacaca* system to justice and reconciliation in Rwanda, although some preliminary observations have been made by writers such as Vandeginste and Harrell.[47]

The ICTR, meanwhile, has been plagued by mismanagement and lack of resources, and has been criticised by the Rwandan government for failing to provide justice because of the slow trials and inadequate sentencing. The non-government sector has further criticised the ICTR for its lack of concern and protection for witnesses, and the inaccessibility of its proceedings to the great majority of Rwandans.[48] While the ICTR is an international legal instrument, its mandate is to provide justice for Rwandans, not just the international community. It is only justice experienced by Rwandans that will contribute to peace and reconciliation in that country, which is the goal of the Tribunal as outlined in UN Security Council Resolution 955 that set up the ICTR. One of the genocide survivors whom I interviewed in Arusha in July 1998 echoed the sentiment that 'reconciliation occurs between people, not governments. People need to see the ICTR working on the ground.'

As a result of my interviews and observations in Arusha and Kigali in July 1998 I concluded that the Tribunal would need to make itself more accessible and relevant to the expressed needs and perspectives of the Rwandan people if it were to fulfil its mandate to promote justice and reconciliation. The increasing use of the local language Kinyarwanda in addition to French and English, and more compre-

47 Stef Vandeginste 'Rwanda: Dealing with Genocide and Crimes Against Humanity in the Context of Armed Conflict and Failed Political Transition' in Nigel Biggar (Ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Washington, DC: Georgetown University Press, 2001); Peter E. Harrell, *Rwanda's Gamble: Gacaca and a New Model of Transitional Justice* (New York: Writers Club Press, 2003). For further details about the procedures, inadequacies and achievements of the domestic trials and the development of the *gacaca* alternative see also: Paul J. Magnarella, *Justice in Africa: Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal* (Aldershot, England: Ashgate Publishing, 2000); Peter Uvin, 'Difficult Choices in the New Post-Conflict Agenda: The International Community in Rwanda After the Genocide', (2001) 22 (2) *Third World Quarterly*, pp. 177-189.

48 According to Kamatali (2003, p. 120) 'it is surprising how little the ICTR is known in Rwanda'.

hensive radio transmissions of the Tribunal proceedings are steps in the right direction. Also important would be the holding of trials in Kigali as the ICTR has been planning.[49]

Another area needing addressing is the lack of compensation or restitution that has been a significant area of dissatisfaction experienced by genocide survivors in relation to the ICTR. Many of the Rwandans I interviewed stressed the importance of compensation or socioeconomic justice to promote reconciliation. For example, a Tutsi survivor whom I interviewed in Arusha told me 'women in Rwanda want compensation. They don't understand that the ICTR is not a social institution so they are not fulfilled; their expectations are not being met.' Another genocide survivor said that:

> In practice it is very difficult compared with theory. People still need material things to reconstruct houses and replace stolen or burnt things. Therefore they can't forget and live peacefully together with others. They need some compensation. If their material needs are met, they are more able to reconcile.

This approach was echoed by another Tutsi survivor who said, 'the government is asking us to forget – but how? … The government should try to reduce poverty, especially for the survivors, because it is hard to forget when living in such conditions'.

A Tutsi returnee and lawyer similarly argued for a more victim-oriented justice that would foster reconciliation by addressing social and economic justice as well as legal justice. She maintained that the current 'lack of rehabilitation [of prisoners] and reparations and communication can't help in the process of national reconciliation'. Economic justice could not, however, replace legal justice, she said: 'economic empowerment won't break impunity'. In the face of the 'problem of poverty, money is not all that the survivors need. They also need visibility of the crimes and recognition of the genocide'.

After focusing primarily on justice in the immediate aftermath of the genocide, the Rwandan government in 1999 created a National Unity and Reconciliation Commission with a mandate to encourage a culture of peace, unity and reconciliation and to monitor government programs to ensure their observance of policies of national unity and reconciliation.[50] As described by Staub and Pearlman, the Commission has conducted discussion meetings with Rwandans to ask what they need in order to reconcile.[51] For example, according to Staub, women at a meeting organised by the Commission 'expressed the need for a better economic situation for

49 Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', (2001) 95 *American Journal of International Law*, p. 25.

50 *National Unity and Reconciliation Commission: Background Functions, Structures & Responsibilities*, Government of Rwanda, Kigali, [April 1999].

51 Ervin Staub & Laurie Anne Pearlman, 'Healing, Reconciliation, and Forgiving after Genocide and Other Collective Violence' in Raymond G. Helmick. & Rodney L. Petersen (Eds.), *Forgiveness and Reconciliation: Religion, Public Policy, & Conflict Transformation* (Philadelphia: Templeton Foundation Press, 2001), pp. 206-7.

their families as part of the kind of justice that will help with reconciliation'.[52] Staub and Pearlman argue that the advantages of this elicitive process include: giving Rwandans an opportunity to engage with the idea of reconciliation; helping them to identify what they need for reconciliation to take place; and giving them an opportunity to express their views and actively engage with each other.[53] Focusing on the needs expressed by the survivors (as well as perpetrators) is a process that could be supported more by the international community in an effort to promote justice and reconciliation as part of post-conflict peacebuilding.

People as Participants

> Civil society is the key. It pulls the divergent time scales and dimensions of political and economic reform together. It is the ground in which both need to be anchored in order not to be blown away. The hour of the lawyer and the hour of the politician mean little without the hour of the citizen.[54]

This paper has highlighted how the citizen has been neglected in decisions about transitional justice as part of peacebuilding in the aftermath of mass violence. In Cambodia a pragmatic peace settlement did not prioritise reconciliation or justice, while in Rwanda the road of international legal justice was followed with little regard for its impact on reconciliation. In both cases, the needs of the Cambodians and Rwandans in relation to reconciliation and justice were not considered in the decision-making process; instead the focus in Cambodia was on geopolitical considerations and in Rwanda on the implementation of international law to satisfy the needs of the international community. I argue that psychological needs as well as political priorities and legal imperatives should be considered in the design of transitional justice mechanisms that will contribute to long-term peacebuilding.

Involvement of many disciplinary perspectives including psychological as well as economic, political and legal can produce a more holistic and integrated approach to peacebuilding.[55] Harold Saunders goes even further, suggesting the need to break down disciplinary boundaries in order to 'deal with whole human beings in whole bodies politic'.[56] This transformation in disciplines to produce 'non-disciplin-

52 Ervin Staub, 'Genocide and Mass Killing: Origins, Prevention, Healing and Reconciliation', (2000) 21 (2) *Political Psychology*, pp. 379.

53 Ervin Staub & Laurie Anne Pearlman, 2001.

54 Ralf Dahrendorf, *Reflections on the Revolution in Europe*. (New York: Random House, 1990), p. 100.

55 Robert Ricigliano, 'Networks of Effective Action: Implementing an Integrated Approach to Peacebuilding', (2003) 34 (4) *Security Dialogue*, p. 445. Ricigliano refers to combining approaches from human rights, humanitarian assistance, sustainable development, environment, conflict resolution, security and the rule of law.

56 Harold H. Saunders, 'Two Challenges for the New Century: Transforming Relationships in Whole Bodies Politic', (2002) 23 (1) *Political Psychology*, pp. 151-164. Saunders lists the relevant disciplinary dimensions as including economic, political, psychological, sociological, historical and religious.

ary spaces' he believes is necessary in order to develop the required conceptual and methodological frameworks to transform conflictual relationships and build peaceful societies.

Decisions about whether to pursue accountability or amnesties require more than political priorities and national interests to be taken into account if peacebuilding is the ultimate goal. The application of international law in response to mass crimes needs to be seen as an instrument in the quest for justice and reconciliation rather than simply an opportunity to test and develop legal principles. Academics and practitioners therefore need to consider and incorporate the needs of the local population in the design and implementation of tribunals and truth commissions in transitional justice situations. For example, the international community could have focused more on meeting the justice needs of Rwandans by locating the ICTR in Rwanda rather than in another country; ensuring continuous translations of court proceedings into the local language, Kinyarwanda; and incorporating better witness protection and restitution to address the security and socioeconomic needs of survivors.

The importance of involving ordinary citizens or 'grassroots' in conflict transformation and peacebuilding is argued by a number of authors. As discussed by Ralf Dahrendorf in relation to reconstruction in post-Cold War Europe, and by Stephen Ryan in relation to peacebuilding and transformation of divided societies, political and economic reform and the development of the rule of law need to be grounded in the support of civil society.[57] Ryan focuses on the contribution of grassroots peacebuilding involving the need for three levels of transformation: inner change, intercultural dialogue and structural change.[58] Harold Saunders includes the roles of both citizens inside government and citizens outside government in his conceptual framework of 'whole bodies politic'.[59] Rebecca Spence defines peacebuilding as including:

> those activities and processes that: focus on the root causes of the conflict, rather than just the effects; support the rebuilding and rehabilitation of all sectors of the war-torn society; encourage and support interaction between all sectors of society in order to repair damaged relations and start the process of restoring dignity and trust; recognize the specifics of each post conflict situation; encourage and support the participation of indigenous resources in the design, implementation and sustainment of activities and processes; and promote processes that will endure after the initial emergency recovery phase has passed.[60]

57 Dahrendorf, 1990; Stephen Ryan, 'Peacebuilding Strategies and Intercommunal Conflict: Approaches to the Transformation of Divided Societies', (1996) 2 (2) *Nationalism & Ethnic Politics*, pp. 216-231.

58 Ryan, 1996, p.216.

59 Saunders, 2002, p. 153.

60 Spence, 2001, pp. 137-8.

While stopping short of advocating the involvement of local actors in decision-making, Carrie Manning argues that closer attention should be given to building capacity at local levels to complement the focus on central political institution-building as part of post-conflict peacebuilding.[61]

As part of his assessment of justice and reconciliation in Cambodia and East Timor, James Rae emphasises the need to include the level of analysis of 'people on the ground' in addition to perspectives of power politics and liberal ideas of ethics and justice.[62] He advocates the need for comprehensive fact-finding missions and the importance of 'questions which link institutional processes with their effects on human actors' as critical components of a successful peacebuilding model. One of the questions he poses supports the central argument of this paper: 'Does the society need justice done to those who committed massive human rights abuses?'[63]

Robert Ricigliano's proposed 'network of effective action' provides one potential alternative for an integrated model of peacebuilding that involves the participation of actors at all levels of society. The operating principles he espouses include building a network that is inclusive of governmental and nongovernmental organisations; organisations that span political, social and structural fields; and the views of actors at the international, national and subnational level, with an emphasis on the latter. He also suggests that information must be shared within the network; that organisations should work with each another in an iterative fashion; and that the network should be characterised by decentralised decision-making, self-organisation and flexibility.[64]

Hideaki Shinoda's rule of law approach to peacebuilding could also be adapted to include consultation and inclusion at each level of implementation, as previously discussed.[65] The International Center for Transitional Justice based in New York is one organization which assists countries pursuing accountability for mass atrocities and human rights abuses by conducting strategic research and making recommendations based on community perspectives, expectations and responses.[66]

While writing this paper I was struck by a current affairs story on the ethics of factory farming in which the argument was made that we should be asking animals what they want.[67] According to the researcher interviewed, humans should not be deciding how best to raise animals for our consumption, but rather should be studying what makes animals happy and content, or stressed and fearful. In other words, science has progressed to the stage of considering animals as active participants in determining their own well-being. Surely legal and political scholars and practitioners can show at least the same level of regard for those in societies recovering from

61 Carrie Manning, 'Local Level Challenges to Post-conflict Peacebuilding', (2003) 10 (3) *International Peacekeeping*, pp. 25-43.

62 Rae, 2003, p. 164.

63 Rae, 2003, pp. 165-169.

64 Ricigliano, 2003, p. 459.

65 Shinoda, 2002.

66 See the ICTJ website at http://www.ictj.org.

67 ABC Radio National 'Background Briefing', 8 February 2004.

mass violence and enable them to actively participate in deciding how to meet their needs for justice and reconciliation.

More recent evidence relating to Sierra Leone, East Timor, Afghanistan and Iraq reveals that international actors are taking a more consultative approach to decisions about justice in the aftermath of mass crimes. It is hoped that these efforts to recognize and meet the multiple and complex needs of people in relation to transitional justice will contribute to more successful peacebuilding.

Part III

International Criminal Law, Humanitarian Law and State Responsibility

Take Heart – International Law Comes, Ever Comes

The Hon Justice Michael Kirby

Hope amidst the Gloom

In December 2003, I found myself in India. In West Bengal to be exact. I was taking part in a series of meetings concerned with the AIDS epidemic. As I left for home, my hosts pressed a book into my hands.[1] It contained poems of Rabindranath Tagore, translated from Bengali into English by the poet himself.

One of the poems[2] caught my eye. It is not enough to read it to oneself. It must be said aloud. Does it speak of love? Of the onrush of problems, like HIV? Or is it a metaphor for the advent of a better world?

> Have you not heard his silent steps? He comes, comes, ever comes.
> Every moment and every age, every day and every night he comes, comes, ever comes.
> Many a song have I sung in many a mood of mind, but all their notes have always proclaimed,
> 'He comes, comes, ever comes.'
> In the fragrant days of sunny April through the forests path he comes, comes, ever comes.
> In the rainy gloom of July nights on the thundering chariot of clouds he comes, comes, ever comes.

My thesis is that it is so with international law. Even in times of discouragement and despair, we can take great heart. The future is on the side of human progress and international law. It comes, comes, ever comes. But we are not released from the obligation, in every proper way, to contribute to its arrival.

1 R Tagore, *Gitanjali – Song Offerings*.

2 No 45, p 43.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 283–298.*
 ISBN *90 04 14599 0.*

Feelings of Discouragement

In some ways these are sombre times for international law. In his speech to the Centre for International and Public Law at the Australian National University in January 2004, Ambassador John Dauth opened his remarks gloomily;[3]

> To say 2003 was a bad year for the United Nations is undoubtedly a significant under-statement. We in the international community who still broadly support the UN, are a long way from the euphoria of late 2001, when, in the immediate aftermath of the appalling terrorist attacks … the Security Council reacted decisively with Resolutions 1368 and 1373, established the Counter-Terrorism Committee and, with the undivided support of the Council, authorised the removal of the Taliban in Afghanistan. The emblem of those measures of activity was the Nobel Peace Prize, shared between the Organisation and the Secretary-General, Kofi Annan. 2003, by comparison, has been racked with divisions over Iraq … This sad period in the Council's history was a major contributor in 2003 to the dented image of the organisation as a whole.

To similar effect was a speech given in February 2004 at Indiana University by Professor Ivan Shearer. Speaking to a mainly American audience, he described the growing mood of unilateralism that had caused some jurists to describe the present age as 'the end of a great experiment' in collective security established by the United Nations *Charter.*[4] In his lecture, titled 'In Fear of International Law',[5] he was blunt.[6]

> It has been evident that at many points international law has been ignored or pushed to the sidelines by the governments of the United States and – to a lesser extent – of Australia. … [T]his is not only wrong, but unnecessary, since the objectives we strive to attain may be made compatible with international law. Our security is made stronger if we can bring the rest of the international community with us, and show that we are prepared to live by the same rules as all … [I]nternational law is a necessary curb and restraint on the exercise of power and [it] … should be recognised more widely as such, not only at the executive level but also at the judicial and legislative level.

Taking up a similar theme, but with reference to developments in the Australian governmental system, Professor Hilary Charlesworth and her colleagues in a recent

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3 J Dauth, 'The UN in 2003: Letter from New York', unpublished address, Canberra, 29 January 2004, 1. Ambassador Dauth is the Permanent Representative of Australia to the United Nations in New York.

4 M J Glennon, 'Why the Security Council Failed' 82 *Foreign Affairs* 16 (May/June 2003), 1.

5 George P Smith Lecture, Indiana University School of Law, Bloomington, unpublished, 2 February 2004.

6 *Ibid,* manuscript, 32, 33.

essay in the *Sydney Law Review*[7] describe what they call 'Deep anxieties: Australia and the international legal order'. They note the increasing internationalisation of many aspects of Australian life. But they observe that 'international law has become a charged and politicised field in Australia [often portrayed] as an intrusion from 'outside' into our self-contained and carefully bounded legal system'.[8]

The authors of this article suggest that the perception of international law 'as a source of un-Australian, fanciful and chaotic norms' is connected to the 'politics of Australian fundamentalism – the 'shrinking society' described by Ghassan Hage'.[9] According to this description, Australia is 'a worrying, defensive society – in which anxieties about our own individual positions are projected into the nation. Nationalism has thus become characterised by a focus on the politics of preserving our borders from outsiders.'[10] As Hage puts it, '[t]he defensive society … suffers from a scarcity of hope and creates citizens who see threats everywhere. It generates worried citizens and a paranoid nationalism.'[11] International law is rejected as having no relevance to domestic law precisely because it represents the voice of outsiders. It is ever the danger of people who live on islands – even those as big as Australia – that they feel the need, from time to time, to pull up the drawbridge. For such people, international law, like the wogs of old, begins at Calais – or in Australia's case Dili or Bali.

The contemporary feeling of discouragement over international law is traced in the Charlesworth paper by reference to the debates leading up to Australia's ratification of the statute of the International Criminal Court (strongly supported by the Foreign Minister and the then Federal Attorney-General but attacked by others).[12] It is followed through the responses of the Australian Government to decisions of the United Nations Human Rights Committee[13] (upon which Professor Shearer serves) through the responses of successive governments, Labor and Coalition, to the High Court's decision in *Teoh v Minister for Immigration and Ethnic Affairs,*[14] and into the utilisation of international law in the domestic decisions of our national courts.[15]

The highly critical view about what is left of *Teoh,* as stated by the High Court of Australia in its new composition in *Re Minister for Immigration and Multicultural*

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7 Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams in (2003) 25 *Sydney Law Review* 423.

8 *Id*, at 424.

9 G Hage, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society* (2003). See Charlesworth *et al supra* at 425.

10 G Hage, *id*, 47.

11 *Id*, 77.

12 Charlesworth *et al supra* at 434.

13 *A v Australia* (No 560/1993), 3 April 1997, UN Doc CCPR/C/59/D/560/1993, noted in *id* at 436-437; cf D Hovell, 'The Sovereignty Stratagem – Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 297.

14 (1995) 183 CLR 273.

15 Charlesworth *et al supra* at 452-454.

Affairs; Ex parte Lam,[16] is portrayed as a far cry from the halcyon days of Justice Brennan's embrace in *Mabo v Queensland [No 2]*,[17] of the international law of human rights – as a legitimate influence on the development of the common law of Australia. The importance of that approach was that it provided the key that unlocked the door to permit examination of past common law authority in Australia. It was the international law against racial discrimination that encouraged the High Court to over-rule the former doctrines on the extinguishment of indigenous title to land in this country. But, for the critics, that is precisely what was wrong with this invocation of international law.[18]

A later, similar talk by Professor Charlesworth at the centenary conference of the High Court in October 2003[19] attracted the usual rantings of media polemicists, with their infantile views of a modern democracy and of its judicial process.

But do all these developments combine to suggest an international and national setback for international law? Particularly, do they indicate a retreat from multilateral solutions to world problems and from the advance of global human rights in the place of the brute power, cruelty and oppression of the past?

Human Rights Machinery

Whilst disappointing and worrying developments have certainly occurred in the political organs of the United Nations, important advances continue to be made in the agencies of the Organisation. It is here that I have seen, and participated in, activities that promote the aspirations of universal human rights in highly practical ways and shore up their defences. They happen within mechanisms established to promote and protect universal human rights in accordance with the norms of international law.[20] In the three years prior to my appointment to the High Court of Australia, it was here that I came face to face with the United Nations human rights system at work.

Between 1993 and 1996 I served as Special Representative of the Secretary-General for Human Rights in Cambodia. I found myself one of nearly thirty such Special Rapporteurs and Special Representatives. We reported to the Secretary-General and the Commission on Human Rights on compliance, and non-compliance, twice a year. My office derived from a provision in the 1991 *Paris Peace Agreements* by which the United Nations brought peace to Cambodia after decades

16 (2003) 214 CLR 1 at 28 [83] per McHugh and Gummow JJ and 47 [145] per Callinan J. See Charlesworth *et al supra* at 450.

17 (1992) 175 CLR 1 at 42.

18 J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 1. First published (2003) 47 *Quadrant*, 9.

19 H Charlesworth, 'Human Rights, International Standards and the Protection of Minorities', unpublished paper for the centenary conference of the High Court of Australia, 11 October 2003 (to be published in conference papers, forthcoming).

20 Z Kedzia, 'United Nations Mechanisms to Promote and Protect Human Rights' in J Symonides, *Human Rights: International Protection, Monitoring, Enforcement* (UNESCO, 2003), 3.

of war, revolution, genocide, invasion and resistance.[21] My mission was to encourage Cambodian adherence to United Nations human rights treaties; to advise on the conformity of Cambodian law and practices with the obligations of those treaties; and to promote discussion and awareness of the international law of human rights amongst politicians, officials, the media and civil society organisations.

There were by this time no blue helmets to sanction non-compliance as all but two of the military forces of UNTAC had withdrawn. There were, of course, failures. But there were also many successes.[22] The sanction of reports to the Commission can be significant. Cambodia made progress during my time.[23] Not without ongoing problems and setbacks, my successors as Special Representative, Thomas Hammarberg and Peter Leuprecht, have continued this important work of translating the grand language of human rights treaties into practical reality on the ground. The Human Rights Office in Cambodia headed by Margo Picken – a past Director of Interrights – works creatively and energetically to fulfil the noble goals of the United Nations.

As I sat in the Human Rights Commission in 1996, waiting for the call to present my last report, I saw the Special Rapporteur on the Sudan bring to account, in a way totally impossible at home, the oppressive government of that country. Here, truly, I witnessed the building blocks of a world order that will ultimately render tyrants accountable to humanity. There are countless other elements to the building of the New World Order. We should remember them when we feel despair.

Amidst the failures of the United Nations' political arms, we need to remember the important, and often useful but unsung, work of countless officials of the United Nations and its agencies helping to identify common problems and the ways to address them. For example the outstanding officers of the United Nations in Cambodia, such as Daniel Prémont, who quietly works with the government and officials to build judicial independence, to abolish military and civil service immunity from courts, to defend the political opposition and to promote freedom of expression. Also Christoph Péschoux, who went into dangerous areas to respond to complaints about interference with the rights of ethnic minorities and who helped to organised land mine clearance and investigation of individual complaints. He was in Baghdad last year when the third High Commissioner for Human Rights, Sergio Vieira de Mello, and other brave workers for international law were killed in the service of the world community. Francesca Marotta is another who helped in the promotion of women's rights and who joined me to put HIV/AIDS on the agenda of the government, with valuable consequences a decade later in the steady fall in infection rates. A number of Cambodian officers, including Heng Ham Kheng

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21 *Yearbook of the United Nations* (1993) Vol 47, pp 360-381, 932-933; cf M D Kirby, 'Cambodia: The Struggle for Human Rights' in M D Kirby, *Through the World's Eye* (2000, Federation), 24.

22 Kirby, *id,* 31.

23 *Yearbook of the United Nations* (1994) Vol 48 pp 445-450, 1057-1058; *Yearbook of the United Nations* (1995) Vol 49, pp 466-469; esp 712-715; *Yearbook of the United Nations* (1996) Vol 50, pp 588-591.

overcame centuries of hostility to the Vietnamese minority to support the work of the United Nations to make human rights a reality in a country where a tenth of the population had died in genocide. This is not theory. This is highly practical work.

So this is international law in action at the grass roots. It is not perfect. But without it, the world and its people, especially the disadvantaged, would be much worse off. In my time, I have also witnessed international law at work in the field through the eyes of the International Labor Organisation,[24] through the United Nations Development Programme,[25] the World Health Organisation,[26] UNESCO,[27] the OECD[28] and the Commonwealth Secretariat.[29] Whenever I get discouraged about the role of international law, and international agencies, I think of the highly useful work done through these and like bodies – intergovernmental and non-governmental.

In recent years I have been serving on two of them where I have witnessed attention to topical issues of the world we live in. In the International Bioethics of UNESCO (IBC), we have begun the essential response of humanity to the challenges presented to our species by the developments of the Human Genome Project and the amazing symbiosis between information technology and the new biology.

Under delegation from the General Conference of UNESCO, the IBC is preparing a programme for an international response to a range of bioethical concerns going beyond its earlier *Universal Declaration on the Human Genome and Human Rights*.[30] This is not simply another United Nations document. One of the chief concerns of the IBC relates to the operation of the World Trade Organisation's TRIPS Agreement,[31] with its consequences for domestic law on intellectual property protection in respect of genomic discoveries.[32] Ensuring that these discoveries are fairly available to all humanity and that genomic progress responds to the needs

24 As a member of the International Labor Organisation Fact-Finding and Conciliation Commission on Freedom of Association, Inquiry into South Africa (1991-1992).

25 As co-chair of the Malawi Constitutional Conference, 1994.

26 As a member of the Global Commission on AIDS 1988-1992.

27 As chairman and rapporteur of the UNESCO Expert Group on the Rights of Peoples, 1988-1991.

28 As chairman of Expert Groups on Privacy (1978-1980) and Data Security (1992-1993).

29 As a participant in the International Colloquia on the Domestic Application of International Human Rights Norms (1988-1993).

30 Adopted by the General Conference of UNESCO, 29th Session, 1997.

31 World Trade Organisation, Agreement on Trade Related Aspects of Intellectual Property Rights of 1994 (2001) *Australian Treaty Series* 1995, No 8. See also International Bioethics Committee of UNESCO, Report of the IBC on *Ethics, Intellectual Property and Genomics* (SHS-503/01/CIB/8/2 Rev., Paris, 10 January 2002); cf R Cook-Degan, *The Gene Wars: Science, Politics and the Human Genome*, New York, Norton (1995), 28; P Drahos and J Braithwaite, 'Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context' (2002) 20 *Wisconsin International Law Journal* 451; Nuffield Council on Bioethics, *The Ethics of Patenting DNA: A Discussion Paper* (2002).

32 M D Kirby, 'Intellectual Property and the Human Genome' (2001) 12 *Australian Intellectual Property Journal* 61.

of the developing world is truly a major issue of justice for international law. It is a potential source of future conflict unless we can nip that conflict in the bud.[33]

The other body on which I now serve is a panel established by UNAIDS. It has been created to advise that inter-agency organisation on human rights issues of the epidemic. At present, it is in the midst of considering an urgent strategy to tackle the spread of HIV in developing countries. This was rightly noted by Ambassador Dauth as one of the failures of the United Nations in recent years.[34]

The new Director-General of the World Health Organisation, together with UNAIDS, is promoting the so-called 3x5 Initiative. With new and beneficial antiretroviral drugs (ARVs), now to be available at low cost in the developing world, this initiative envisages the rapid provision of medication to three million recipients by 2005. ARVs have life transforming impact on people with an advanced condition of HIV or AIDS. It is critical to bring the human right of access to health to millions of people in poorer countries.

This can only be done by stepping up HIV testing. The UNAIDS panel is advising on ways that testing can safely be introduced according to a formula that ensures the *utility* of testing (by the access to ARVs) and *protection* from stigma and discrimination. In both of these components of the global strategy, most of the countries of the developing world are sorely in need of help. This is not theory. This is the practical provision of the means to assure the most basic of human rights – the right to life and to essential healthcare.

The AIDS pandemic is an area where law can actually play a supportive role, as we have found in Australia. In mid-February 2004, on the visit to Australia by Dr Richard Feachem, Executive Director of the Global Fund on HIV, Malaria and Tuberculosis, the Australian government announced a commitment to the Fund of $US10 million over three years. In the struggle against HIV in our region and the world, as well as at home, Australians, their government and its agencies (especially AUSAID) have played an admirable role over decades. International law, and the principles of universal human rights, helps to sustain that role. The UNAIDS panel works closely with the Office of the High Commissioner for Human Rights. International human rights law underpins the strategy of UNAIDS and of WHO in this struggle. The effort rarely attracts media headlines. Those who thrive in disaster and conflict are not interested. But it is an instance of international law and human rights at work to help solve problems, to save lives and to protect human dignity.

In the Courts

When we turn from the international agencies to the courts, the position is by no means bleak.

Every September at the Yale Law School, I participate in a global conference on constitutionalism. Another participant is Judge Luzius Wildhaber, President of

33 UNESCO, International Bioethics Committee, Report of the IBC on *Ethics, Intellectual Property and Genomics*, (2002), above n 30.

34 Dauth, above n 3, 2.

the European Court of Human Rights. His court now exercises jurisdiction from Ireland in the west to the Pacific Coast of the Russian Federation in the east. The jurisprudence of the European Court is increasingly felt in the country that is the source of our own legal system, the United Kingdom. It helps promote principled decisions that are increasingly noticed in our own academic and judicial writings.

As Professor Charlesworth and her colleagues point out, by reference to decisions of the High Court of Australia going back to *Jumbunna Coal Mines NL v Victoria Coal Miners' Association*;[35] *Chow Hung Ching v The King*;[36] *Dietrich v The Queen*;[37] *Mabo [No 2]*[38] and *Teoh*,[39] there is nothing heretical in the acknowledgment by our courts of the existence and force of international law. So far as it is not inconsistent with legal rules enacted by statutes or finally declared by courts of high authority, judges of our tradition have long utilised universally recognised principles of international law to inform themselves in the performance of their own municipal duties.[40]

This is all that the *Bangalore Principles on the Domestic Application of International Human Rights Norms* proposed.[41] They are not heretical, even if some Australian judges continue to think them so.[42] Nor is it inappropriate, or even particularly novel, for our courts to construe legislation, so far as they properly can, in favour of a meaning that conforms to international law rather than one which does not.[43]

In the important recent decision of the High Court of Australia *Plaintiff S 157/2002 v The Commonwealth*,[44] which reasserted the operation of the constitutional writs in the face of "privative clause" provisions in the *Migration Act* addressed to refugee decisions, Chief Justice Gleeson put succinctly a principle long established by the law of this nation:[45]

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35 (1908) 6 CLR 309 at 363. See below.

36 (1948) 77 CLR 449 at 478.

37 (1992) 177 CLR 292 at 305, 359-360.

38 (1992) 175 CLR 1 at 42.

39 (1995) 183 CLR 273.

40 *Chow Hung Ching v The King* (1948) 77 CLR 449 at 462 per Latham CJ, 470-471 per Dixon J. See also *Chung Chi Cheung v The King* [1939] AC 160 at 167-168; cf *Thai-Europe Tapioca Service v Government of Pakistan* [1975] 1 WLR 1485; *R v Bow Street Metropolitan Stipendiary Magistrate [No 3]* [1999] 1 AC 147 at 197, 200, 215, 218, 241, 276-278, 288.

41 A Lester, 'The Judicial Protection of Human Rights in the Commonwealth' (2003) 8 *Law and Justice* (India), 15. The revised *Bangalore Principles* are set out in this article at 21-24.

42 *Western Australia v Ward* (2002) 213 CLR 1 at 388; 191 ALR 1 at 273 [956] per Callinan J. See Charlesworth *et al supra* at 457.

43 *Teoh* (1995) 183 CLR 273 at 287-288 per Mason CJ and Deane J; *AMS v AIF* (1999) 199 CLR 160 at 180 per Gleeson CJ, McHugh and Gummow JJ. See also *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 at 304 per Gummow J.

44 (2002) 211 CLR 476.

45 (2003) 211 CLR 476 at 492 [29]; cf A M Gleeson, 'Global Influences on the Australian Judiciary' (2002) 22 *Australian Bar Review* 1 at 4; D Shanahan, 'Chief Justice's quiet struggle', *Weekend Australian*, 27 December 2003, 2.

> [W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international conventions, in cases of ambiguity, a court should favour a construction which accords with Australia's obligations.[46]

There are many other decisions that state a wider principle that the current Chief Justice and the High Court have reaffirmed. Courts do not impute to the legislature an intention to abrogate, or curtail, fundamental rights or freedoms unless that intention is clearly manifested by unmistakable and ambiguous language.[47] Nowadays, this rule may be illuminated by the experience of international law. The rule has been applied in many recent court decisions in Australia.[48] It is defensive of the rules of international law expressing universal human rights. The rules of international law often coincide with the rules of the common law of Australia, even where international law has not been expressly incorporated.

The real controversy in Australia, as Professor Charlesworth and her colleagues correctly note, has concerned the extent to which, in constitutional interpretation, our courts may have regard to international law, specifically the international law of human rights, in resolving any ambiguities in the constitutional text.[49]

In a number of cases I have suggested that they may.[50] Contrary views have been voiced by other members of the High Court of Australia.[51] In Canada,[52] South

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46 *Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J. See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

47 (2002) 211 CLR 476 at 492 [30].

48 See eg *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], 562-63 [43], 578 [93]-[94], 591 [132]; *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 133-137 [160]-[181].

49 Charlesworth *et al supra* at 461-463.

50 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 380-381 [68]; *Austin v The Commonwealth* (2003) 215 CLR 185 at 293 [257].

51 *AMS v AIF* (1999) 199 CLR 160 at 180 referring to *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 74, 75, 78, 79. *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1112 [62].

52 See eg *Re Public Service Employee Relations Act* [1987] 1 SCR 313 at 349 per Dickson CJ; *United States v Cotrioni* [1989] 1 SCR 1469 at 1486; *Sleight Communications Inc v Davidson* [1989] 1 FCR 1038 at 1056; *The Queen v Ewanchuk* [1999] 1 SCR 330 at 365 [73]; *United States v Burns* [2001] 1 SCR 283 at 286 [8]; *Suresh v Canada (Minister of Citizenship and Immigration* [2002] 1 SCR 3 at [46]; *United States v Shulman* [2001] 1 SCR 616 at 635-636 [41]-[42] per Arbour J considered *Pasini v United Mexican States* (2002) 209 CLR 246 at 274-279 [78]-[95]; cf A F Bayefsky, 'International Human Rights in Canadian Courts' in B Conforti and F Francioni (eds) *Enforcing International Human Rights in Domestic Courts* (1997) 195 at 296; R St J MacDonald, 'The Relationship Between International and Domestic Law in Canada' in R St J Macdonald et al (eds), *Canadian Perspectives on International Law and Organisation,* 88; L C Green, *International Law: A Canadian Perspective* (2nd ed, 1988), 85; 'International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms' in E P Belobaba and E Gertner, *The New Constitution and the Charter of Rights* (Butterworths, 1982) 287.

Africa[53] and other countries of our legal tradition, it is common for international law, particularly the international law of human rights, to be invoked to assist in the task of constitutional interpretation. That great Canadian judge, Chief Justice Dickson, put it this way:[54]

> The content of Canada's international obligations is, in my view, an important *indicia* of the meaning of 'full benefit of the Charter's protection'. I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Increasingly in most final courts of the world, it has been considered increasingly appropriate to extend the dialogue between international law and constitutional law, recognising the fact that, in this century, the two must live and work together. Yet, against this global movement, two great courts have, until now, steadfastly resisted: the High Court of Australia and the Supreme Court of the United States. It now appears, however, that the Supreme Court of the United States is joining the courts of the rest of humanity.

An early indication of the new approach in the contemporary court can be found in 1997 in Justice Stephen Breyer's dissenting opinion in *Printz v The United States*.[55] He said:

> Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own … But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem – in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.

Even amongst those Justices considered generally unfavourable to this attention to international norms, there has been some movement in the United States. Thus Chief Justice Rehnquist, in extra-judicial writing a few years before *Printz*, noted that for more than a century the Supreme Court of the United States had not looked beyond its own courts being unconvinced that precedents elsewhere would be of much help. However, Chief Justice Rehnquist acknowledged:[56]

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53 *S v Makwanyane* 1995 (3) SA 391 [37]-[39]; *S v Williams* 1995 (3) SA 632 [22]; *Ferreira v Levin* 1996 (1) SA 984 [72]; *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 [3]; cf J Dugard, 'International Human Rights' in D van Wyk *et al, Rights and Constitutionalism: The New South Africa Legal Order* (Juta, 1994), 171 at 193.

54 *Re Public Service Employees' Relations Act* [1987] 1 SCR 313.

55 521 US 898 at 921 n 11, 977 (1997).

56 W H Rehnquist, 'Constitutional Courts – Comparative Remarks' (1989) reprinted in P Kirchhof and D P Conners (eds) *Germany and Its Basic Law: Past, Present and Future – A German-American Symposium* (1993), 411 at 412 quoted in Harold Hongju Koh,

> But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.

Variations upon this theme can be noted over the past decade, particularly in speeches and extra-judicial statements of Justices O'Connor, Kennedy, Ginsburg and Breyer.

Then came the 2002 Term of the Supreme Court. History may record it as an important turning point in constitutional doctrine in the United States. The issue was presented in *Atkins v Virginia*.[57] That was a case involving the question whether it was contrary to the provisions of the Eighth Amendment of the United States Constitution, forbidding cruel and unusual punishments, to execute a convicted prisoner with established mental retardation. In an extended footnote to his opinion Justice Stevens, for the Court, referred to the *amici curiae* briefs, including those demonstrating that 'within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved'.[58]

This reference to international experience and law elicited a dissent from Chief Justice Rehnquist urging that the Court 'limit … our inquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practises of sentencing juries in America'.[59] More vigorously, Justice Scalia denounced the majority invocation of the views of the "world community" and their reference to the brief of the European Union, stating that it deserved 'the Prize for the Court's Most Feeble Effort to fabricate national consensus'.[60] He declared the opinions of the "world community" irrelevant because their 'notions of justice are (thankfully) not always those of our people'.[61] Resonances of Australian judicial nationalism may be recognised in this dissent.

Far from deflecting the new majority, in *Atkins* the members pursued their endeavours and even gathered up new adherents. In the 2003 Term, Justice Ruth Bader Ginsburg asked a pertinent question during oral argument in an affirmative action case concerned with constitutional law. She said:[62]

> [W]e're part of the world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa and they have all approved this kind of, they call it positive discrimination … [T]hey have rejected what you

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'International Law as Part of Our Law' (2004) 98 *American Journal of International Law* 2 at 6-7 ('Koh').

57 536 US 304 (2002); 70 USLW 4585.

58 536 US at 316 fn 21 (2002); 70 USLW 4585 at 4589, fn 21.

59 536 US at 307 (2002); 70 USLW 4585 at 4591.

60 536 US at 325 (2002); 70 USLW 4585 at 4598 (Scalia J, with whom Thomas J joined).

61 536 US at 325 (2002); 70 USLW 4585 at 4598.

62 Quoted from transcript, Koh, 8; Transcript of oral argument at 24. *Gratz v Bollinger* 123 S Ct 2411 (2003) (No 02-516), available in 2003 US Trans Lexis 27.

> recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?

In her concurring opinion in the case, *Grutter v Bollinger*,[63] Justice Ginsburg answered her own question affirmatively. Joined by Justice Breyer, she said that:

> [T]he Court's observation that race-conscious programs 'must have a logical end point' accords with the international understanding of … affirmative action.

She cited the text and annex of the *International Convention on the Elimination of All Forms of Racial Discrimination*, which was ratified by the United States in 1994.[64] International law comes, comes, ever comes.

Three days after *Grutter*, with a larger majority, in *Lawrence v Texas*,[65] the Supreme Court of the United States invalidated a State law providing criminal punishment for consensual adult homosexual conduct in private. Not only did the Court overrule its 1986 decision in *Bowers v Hardwick*,[66] it stated that *Bowers* had been wrong when decided.[67] Most importantly, in the text of the opinion of Justice Kennedy (for the Court), not in a footnote this time, the Supreme Court majority cited the decisions of the European Court of Human Rights in *Dudgeon v The United Kingdom*[68] that had been decided five years before *Bowers* but not mentioned in argument or in the decision of the earlier Supreme Court case. Justice Kennedy wrote:[69]

> To the extent *Bowers* relied on values we share with a wider civilisation, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v The United Kingdom, Modinos v Cyprus* … [and] *Norris v Ireland*. … Other countries too have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct … The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

Justice Kennedy went on to refer to the pages of an *amicus* brief filed by Ms Mary Robinson, then United Nations High Commissioner for Human Rights. It was on those pages that the brief described the decision of the United Nations Human

63 539 US 344 (2003); 123 S Ct 2325 at 2347.
64 539 US 344 (2003); 123 S Ct 2325 at 2347.
65 539 US 558 (2003); 123 S Ct 2435 at 2472.
66 478 US 186 (1986).
67 539 US 558 at 578-79 (2003); 123 S Ct 2235 at 1484.
68 (1981) 4 EHRR 149.
69 539 US 558 at 578-79 (2003); 123 S Ct 1435 at 1483. See Koh, above n 56, 8-9.

Rights Committee in *Toonen v Australia*.[70] Moreover, it explained how the Australian Federal Parliament had enacted a law to implement the Committee's interpretation of the *International Covenant on Civil and Political Rights*.[71]

Professor Harold Hongju Koh, of Yale University, has described constitutional doctrine in the United States as it stands at this time. His description is relevant to Australia, the only difference being the currently dominant opinion:[72]

> … [T]he last Supreme Court Term confirms that two distinct approaches now uncomfortably coexist within our Supreme Court's global jurisprudence.[73] The first is a 'nationalist jurisprudence', exemplified by the opinions of Justices Scalia and Clarence Thomas.[74] That jurisprudence is characterised by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives. This line of cases largely refuses to look beyond US national interests when assessing the legality of extra-territorial action. … [It] dismiss[es] treaty or customary international law rules as meaningful constraints upon US actions. … When advised of foreign legal precedents, these decisions have treated them as irrelevant, or worse yet, an impermissible imposition on the exercise of American sovereignty.[75]
>
> A second, more venerable strand of 'transnationalist jurisprudence', now being carried forward by Justices Breyer and Ginsburg[76] began with Justice … Jay and Justice … Marshall, 'who were familiar' with the law of nations and 'comfortable navigating by it'.[77]

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70 *Toonen v Australia,* Communication No 488/1992, UN doc.CCPR/C/50/D/488/1992 (1994). See Koh, above n 56, 9.

71 *Human Rights (Sexual Conduct) Act* 1994 (Cth).

72 Koh, above n 56, 10. I acknowledge my debt to Professor Harold Hongju Koh's 2004 article for many of these points.

73 This analysis builds on an earlier discussion in Harold Hongju Koh, 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479 at 1513-1515; Harold Hongju Koh, 'International Business Transactions in United States Courts' (1996) 261 *Recueil des Cours* 13, 226-234.

74 Despite his occasional extrajudicial writings, according to Professor Koh, in his Court opinions Chief Justice Rehnquist 'remains firmly in the nationalist camp'.

75 See eg *Foster v Florida* 537 US 990, 990n (2002) (Thomas J, concurring in denial of *certiorari*) ['[T]his Court … should not impose foreign moods, fads or fashions on Americans'].

76 According to Professor Koh, Justices Stevens and Souter are also regular members of the transnationalist camp. Through their extra-judicial statements and opinions in the past Terms, Justices Anthony Kennedy and Sandra Day O'Connor 'have also increasingly demonstrated transnationalist leanings'.

77 A cross-reference to H A Blackmun, 'The Supreme Court and the Law of Nations' (1994) 104 *Yale Law Journal* 39 at 49. For elaboration of this theme see Harold Hongju Koh, 'Justice Blackmun and the World Out There' (1994) 104 *Yale Law Journal* 23 at 28-31 (collecting cases).

> In later years, this school was carried forward by Justice Gray [and others] … [T]hese Justices [do not] distinguish sharply between the relevance of foreign and international law, recognising that one prominent feature of a globalising world is the emergence of transnational law, particularly in the area of human rights, which merges the national and the international.[78]

As a judge of a final court, I naturally watch this American judicial contest with close attention. As an adherent to transnationalist jurisprudence, I take heart from what is happening, virtually everywhere and now in the apex court of the United States. I believe it to be natural and inevitable. It is spurred on by elements of politics, economics, technology even possibly the evolution of our species. Putting it quite bluntly, without international law and its institutions the evolution of humanity is most seriously endangered.

As an Australian lawyer, I know that transnationalist jurisprudence has a venerable strand in Australia too.[79] As a member of a minority (and which of us is not?), and because of my own sexuality, I am sensitive to the battleground in which the issue came to the fore in *Lawrence*. Just as, earlier it did in the *Toonen* case before the United Nations Human Rights Committee. In both venues one can see the backward looking and the forward looking. In both, one can see the difference between those who reason against discrimination towards homosexuals in terms of *privacy* norms (as Justice Kennedy did) and those who reason in terms of fundamental notions of *equality* (as Justice O'Connor did).[80] In Australia, these issues remain to be resolved.[81]

However, we can all take heart from Justice Kennedy's conclusion:[82]

> Had those who drew and ratified [the Constitution] known the components of liberty in its manifest possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

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78 Compare Harold Hongju Koh, 'The Globalisation of Freedom' (2001) 26 *Yale Journal of International Law* 305 at 306.

79 Dating back at least to the opinion of O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 where he said: 'Every statute is to be so interpreted and applied, so far as its language permits, as not to be inconsistent with the comity of nations or with the established rules of international law'; cf A F Mason, 'The Tension Between Legislative Supremacy and Judicial Review' (2003) 77 ALJ 803 at 808-809.

80 539 US 558 at 576-77 (2003); 123 S Ct 2325.

81 *Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 [45] per McHugh J.

82 *Lawrence v Texas* 539 US 558 at 578-79 (2003); 123 S Ct 1435 at 1483.

Courts Exercising International Jurisdiction

Following one of the few truly original ideas in their Constitution,[83] Australian lawyers are familiar with the notion that State courts may be vested with federal jurisdiction by valid federal law. The reverse cannot occur.[84] However, the experiment in exercising other jurisdictions has been successful. It has ensured that federal law permeates every corner of this continental country.

Now we are seeing a development at the international level that, in some ways, bears comparison. National courts are no longer exclusively vehicles for national law. Increasingly, they are giving effect to the norms of international law, including the universal principles of human rights. They do this most clearly where national law incorporates treaty provisions into local law.[85] They do it in countries where the Constitution gives explicit local significance to international law or, in terms, directs attention to its provisions.[86] In limited circumstances, they have long done so (and may still do) in respect of crimes of universal jurisdiction.[87]

Now we are seeing a broader and deeper movement for the reconciliation of the systems of national and international law, including national constitutional laws. A municipal tribunal, applying international law, is no longer merely an organ of its national legal system. Instead, as Professor Ian Brownlie suggests, it exercises a kind of 'international jurisdiction'.[88] It becomes, in a sense, an organ of the international judiciary. This point is also made by Justice La Forest of the Supreme Court of Canada who said: 'Our courts – and many other national courts – are truly becoming international courts in many areas involving the rule of law'.[89]

A past Secretary-General of the Commonwealth of Nations put it well:[90]

> At Bangalore, a pebble was cast into the waters of the common law. … [T]he ripples it created will reach into the farthest corners of the Commonwealth.

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83 Constitution, s 77(ii). See *Al-Kateb v Godwin supra* at 1131 [169].

84 *Re Wakim; Ex pare McNally* (1999) 198 CLR 511; cf *Gould v Brown* (1998) 193 CLR 346.

85 Eg *Migration Act* 1958 (Cth), s 36 incorporating by reference the Refugees Convention 1951 with its amending Protocol.

86 As in the references to international law in the Indian Constitution, s 51(c) and the South African Constitution, s 59(1)(b).

87 M D Kirby, 'Universal Jurisdiction and Judicial Reluctance: A New 'Fourteen Points" in S Macedo (ed), *Universal Jurisdiction – National Courts and the Prosecution of Series Crimes Under International Law* (Uni of Pennsylvania Press, 2004) at 240.

88 Cf I Brownlie, *Principles of Public International Law* (5th ed, Clarendon, 1998), 584, 708.

89 See G V La Forest, 'The Expanding Role of the Supreme Court of Canada in International Law Issues' (1996) 34 *Canadian Year Book* 89 at 100. See also *The Queen v Finta* [1994] 1 SCR 701 at 774 where La Forest J remarked that a Canadian judge's interpretation of international law 'bears some force internationally' citing art 38 of the Statute of the International Court of Justice. See G van Ert, *Using International Law in Canadian Courts* (Kluwer, 2002), 46.

90 S Ramphal, Introduction by the Secretary-General to *Developing Human Rights Jurisprudence: The Domestic Application of Human Rights Norms* (1988), p viii noted in Lester, above n 41, 25.

Now, we bring this idea for the twenty-first century even beyond our legal tradition to the courts and lawyers of the entire world.

Other Indications of Hope

According to the ancients, when Pandora's Box was opened all the virtues escaped save that of hope. Hope remained, because it was at the bottom.[91] We can find that hope, even in the gloomy times of global terrorism, of dangers of nuclear proliferation and of the institutional failings in the United Nations.

As to the latter, the Secretary-General has created a panel that includes Australia's former Foreign Minister, Gareth Evans, to propose institutional changes.[92] We can see how the great powers quickly rediscover the indispensable utility of the United Nations. Pre-emptive unilateralism is not a doctrine well suited to the long haul of modern international relations. Despite its failings, the United Nations is essential and ultimately indispensable. True, some of its officers are time-servers. However, that is true of any large organisation. In my experience, most of its leaders are noble and dedicated servants of humanity.

This is plainly the case with the Secretary-General. It is also true of the new High Commissioner for Human Rights (Madame Justice Louis Arbour). She combines in her person the prudence of the first High Commissioner; the imagination and commitment of the second; and the courage and experience of the third. It is also true of Professor Ivan Shearer in his work on the Human Rights Committee. It is true of the scholars of international law who spread its boundaries that continue to expand.

People sometimes ask me if I am ever discouraged by judicial dissent.[93] Sometimes, of course, I am. But on the great issue of the reconciliation of national and international law in the courts, I am not discouraged in the slightest. I know, without doubt, that the reconciliation of international and national law will continue. The process is inevitable. It is already happening. Australia will not be exempt.

> Have you not heard his silent steps?
> He comes, comes, ever comes.
> Every moment and every age, every day and every night
> He comes, comes, ever comes.[94]

91 Cf *Zumpano v Montagnese* [1997] 2 VR 525 at 528 per Brooking JA.

92 J Dauth, above n 3, p 3.

93 As to hostility to my approach see K Walker, 'The Intersection of International Law and Australian Constitutional Law' in J S Jones and J Macmillan (eds) *Public Law Intersections,* (Centre for International and Public Law, ANU, 2001) 97.

94 Tagore, above n 1.

International Criminal Law, Humanitarian Law and the Responsibility of States for Choice of Forum and Effective Enforcement

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International criminal law has expanded, over the past decade, to the point where there is now a selection of enforcement mechanisms. I will focus on the three primary models of accountability for international crimes: the International Criminal Court (ICC), *ad hoc* international or regional tribunals, and prosecution and punishment by national courts. Each has its proponents and detractors and recent commentary by the international community and academics shows no consensus over which model will assert itself as dominant, or whether all models or some combination will continue to be with us, at least in the near future.

In the long-term, however, I suggest that the preferable model is a truly international criminal court, with a broad reach and base of support, if not a truly universal scope, and with primacy over national jurisdiction. As stated by the Secretary-General of the United Nations, Kofi Annan, the establishment of the ICC means that 'impunity has been dealt a decisive blow.'[2]

While each of the current models has its shortcomings, in my view, those of a properly conceived international criminal court are the most surmountable, given appropriate financial and political support by the international community. An international criminal court is also the most defensible model on the basis of procedural fairness and the formulation of theoretical and juridical underpinnings of the emerging legal discipline of international criminal law.

Meanwhile, the responsibility of States is to focus on 1) compliance with humanitarian law, 2) the promotion of a universal culture of compliance with the demands of international criminal law, in parallel with the development of a culture of rights, through legislation, extradition, the providing of information and other forms of support, including financial support, to existing legitimate forums, and 3) insistence on enforcement, either domestically or through existing international options.

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1 I am grateful to my law clerk, Tania Bubela, for her assistance in the preparation of this paper.

2 Rome, Italy, 11 April 2002 – Press conference with President Carlo Ciampi following ratification of the Rome Statute of the International Criminal Court (ICC), available at: UN Secretary-General, Office of the Spokesman, <http://www.un.org/apps/sg/offthecuff.asp?nid=80> at 11 January 2004.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 299-314.*
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The point I wish to emphasize is that, in the end, States have the dual responsibility of encouraging enforcement and upholding the rule of law both on the international stage and within their territorial boundaries. This must be achieved while respecting civil liberties, due process guarantees, and human dignity.

Choice of Forum

The International Criminal Court

The current shortcomings of the ICC are structural and relate directly to the constraints imposed upon it by the *Rome Statute*, ratified on April 11, 2002. The current substantive jurisdiction of the ICC is limited to the perpetrators of the most serious of crimes including genocide, crimes against humanity, and war crimes.[3] Accused must bear the nationality of a State Party or have committed crimes within the territory of a State Party to fall within the jurisdiction of the ICC.[4] Those requirements, however, may be waived when the case has been 'referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.'[5]

Other shortcomings may be overcome over time with ratification and implementation of the Rome Statute by States that have not yet done so, most significantly, the United States whose current administration has adopted an isolationist stance in "un-signing" the Statute, ostensibly to protect its own citizens from prosecution despite the inclusion of complementarity. Other operational deficiencies may emerge with an increasing prosecutorial caseload such as timeliness, physical logistics, and costs of investigations and trials. On these issues, administrators may learn much from the experience of the *ad hoc* tribunals that have also been criticised on the basis of delay and expense.

However, the major shortcoming, and one that may stymie the development of the ICC is the major compromise that emerged from the negotiations at the Rome Conference that limits the jurisdiction of the ICC through the principle of comple-

3 *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9 (1998). Art. 1: 'An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.' Art. 5(1): 'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.' Art. 5(1)(d) is not yet in force.

4 Ibid. Art. 12(2) states: 'In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.'

5 Ibid art. 13(b).

mentarity.[6] The question of primacy was, apparently, the non-negotiable *sine qua non* condition for the wide support enjoyed by the Rome Statute. Consequently, a case is "admissible" before the ICC only when a State is unable or unwilling to carry out an investigation or prosecution of a crime otherwise within the mandate of the ICC or where such an investigation or prosecution has been carried out for the purpose of shielding an accused from prosecution by the ICC.[7]

Previously, I have argued strongly in favour of the primacy of jurisdiction of the ICC over national courts. Let me give an illustration of the failings of the current jurisdictional structure by supposing that the existing *ad hoc* Tribunals were operating under such a regime, which is not the case. The *ad hoc* Tribunals and national courts have concurrent jurisdiction over serious violations of international humanitarian law committed in the former Yugoslavia. However, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has primacy over national courts, and may request a deferral and take over national investigations and proceedings at any stage if this proves to be in the interest of international justice. Primacy of the ICTY, imposed under Chapter VII of the United Nations Charter is the sole reason why the Federal Republic of Yugoslavia (FRY) could be compelled to surrender Milosevic to stand trial in the Hague.

Had the FRY had primacy over the ICTY, not only for domestic crimes, but also for the crime of genocide faced by Milosevic in The Hague, the ICTY would have had to challenge the genuine ability or willingness of the FRY to carry on the case. This is the model faced by the ICC. Unlike the ICTY and the International Criminal Tribunal for Rwanda (ICTR), the ICC may have to establish jurisdiction virtually every time it is claimed, resulting in long delays and costly preliminary litigation. Indeed, under that model, the ICTY would likely still be embroiled in jurisdictional issues.

It is a safe assumption that the ICC's jurisdiction will remain unchallenged only on the rare occasion when no State has an interest in investigating or prosecuting the crimes in question. Alternatively, the ICC will have to seize jurisdiction under the terms of Article 17(1)(a) of the *Rome Statute* if the Prosecutor demonstrates that the State, having expressed interest in investigating or prosecuting, is not genuinely willing and able to do so. By necessity, such a determination will involve the consideration of highly complex jurisdictional facts of a systemic nature, without precedent in domestic criminal trials, including inquiries calling into question the good faith of the State Party, the independence and impartiality of its prosecutors and judiciary, or the quality of the State's criminal justice system. The passing of judgment on entire legal systems, to the inevitable disadvantage of those systems most vulnerable to criticism, by reason of lack of development, funding, or internationally acceptable

6 Ibid art. 17 provides that national courts have primacy over the ICC, and that the international forum must decline to proceed when a matter otherwise falling under its competence is adequately dealt with by a national court.

7 The application of complementarity and the meaning of 'unwilling or unable to prosecute' will be determined by the ICC. The Statute and the Rules of Procedure and Evidence provide some assistance on this issue.

democratic norms, will undoubtedly be viewed as political. The risk is that the ICC will become the default forum only for failed, failing, and disenfranchised States in the developing world, thereby exacerbating the perception of a unidirectional flow of accountability from South to North.

More profoundly, however, a negative ruling on the viability and performance of a judicial system is counterproductive to the very model that I advocate, partnership and co-operation between national courts and the ICC. The ICC's aim, in keeping with the rationale of the principle of complementarity, and in light of its own limitations, should be to encourage the domestic prosecution of a greater number of international crimes. National courts should be encouraged to carry the bulk of prosecutions of secondary importance, while the international forum tackles the most complex and politically charged leading cases. Apart from trumping the primacy of national courts in a given case, the Prosecutor of the ICC has nothing to gain in giving ammunition, to those who will subsequently be charged domestically, to argue that the local courts are substandard or biased. Furthermore, an adversarial process pitting Prosecutor against State is unlikely to foster a long-term relationship of trust and co-operation. If the international prosecutor wins the original jurisdictional battle, she or he may lose the war of universal accountability and enforcement.

International and Regional Ad Hoc *Tribunals*

The current model that seems to be supported by the United States is that of *ad hoc* international and regional tribunals such as the ICTY and the ICTR. James O'Brien has suggested, accusations of arbitrariness aside, that international tribunals are a reasoned response for future action by the Security Council 'to violations of international humanitarian law that can protect State sovereignty while reinforcing the protection of individuals under that law.'[8] I agree that international tribunals may be powerful instruments for the prosecution of violations of international humanitarian law that threaten international peace and security if they are set up under the Chapter VII powers of the Security Council powers.[9] Both the ICTY[10] and the ICTR[11] were so established.

The ICTY Statute was adopted by Security Council Resolution 827 and some of the main strengths of the *ad hoc* tribunal model rest within its provisions. For example, States 'shall cooperate fully' with the tribunal, by taking 'any measures necessary under their domestic law' to enable them to comply fully with requests for assistance or orders issued by a trial chamber. The Security Council also urged States

8 James C. O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *American Journal of International Law* 639, 644.

9 *Charter of the United Nation,* Chapter VII, arts. 39, 41, 49.

10 *Statute of the International Criminal Tribunal for the Former Yugoslavia*, as amended, UNSC Resolution 827 (1993) ("ICTY Statute").

11 *Statute of the International Criminal Tribunal for Rwanda*, UNSC Resolution 955 (1994).

and both inter- and non-governmental organizations to contribute funding, thus making States responsible for the success of international endeavours that may one day protect their own citizens from threats to international peace and security. In addition, all the parties to the conflict are bound by the Geneva Conventions and are thus required to search for, prosecute, or extradite persons against whom a *prima facie* accusation of grave breaches has been made.[12] This then, places accountability for the apprehension of accused squarely on the States where such persons might otherwise hide.

The ICTR was created by Security Council Resolution 955 on the 8 November 1994 to aid in the process of national reconciliation in Rwanda and the maintenance of peace in the region. The ICTR has jurisdiction for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law (genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II) committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period.

Part of the great benefit to the international community of having established the *ad hoc* international Tribunals is their contribution to the international jurisprudence on both substantive and procedural questions that will inform proceedings before the ICC and other *ad hoc* Tribunals. Unlike the statute of the Nuremberg Tribunal, those of the ICTY and the ICTR allow for jurisdictional challenges that are heard by the Tribunal itself. There are two jurisdictional issues. First whether the Security Council powers under Chapter VII to take measures necessary to maintain international peace and security include establishing an *ad hoc* international tribunal. This question has been answered unequivocally in the affirmative.[13] The second issue on the scope of the jurisdictional grant of an enabling statute arises once the Tribunal has been established.

Early in its mandate, the jurisdiction of the ICTY was challenged in *The Prosecutor v. Dusko Tadic (Jurisdiction of the Tribunal)*[14] on the grounds that it had not been lawfully established, its primacy over national courts was unlawful, and it lacked subject-matter jurisdiction in respect of the charges laid against Tadic. The innovative decision by the Appeals Chamber will have profound implications for the development of international humanitarian law in internal conflicts that will be heard before the ICC. On the issue of the nature of the conflict in Bosnia-Herzegovina, the Appeals Chamber held that the conflicts in the former Yugoslavia

12 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 Aug. 1949, 75 U.N.T.S. 287, art. 146 (entered into force 21 October 1950).

13 *The Prosecutor v. Dusko Tadic (Jurisdiction of the Tribunal)* (1995) IT-94-1-AR72 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), 105 *International Law Reports* 453, 527.

14 Ibid.

had both international and internal characteristics.[15] It was left to the Trial Chamber at the trial of the defendant to determine, based on the evidence, whether the portion of the conflict at issue could be characterised as international, in which case Article 2 of the ICTY Statute[16] would apply and the Tribunal would have subject-matter jurisdiction over charges brought under that provision.[17]

Some of the charges against Tadic were also laid under Article 3 of the ICTY Statute,[18] the content of which was not confined to international armed conflicts but included violations of humanitarian law applicable to internal armed conflicts. As stated by Greenwood 'the confirmation by the Appeals Chamber of the existence of a body of customary, Hague law regarding internal armed conflicts is of the greatest importance and is likely to be seen in the future as a major contribution to the development of international humanitarian law.'[19] Most importantly, however, the Appeals Chamber affirmed that individual criminal responsibility under international law attaches to violations of the law of internal armed conflict, including both common Article 3 of the Geneva Conventions[20] and customary international law.

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15 Ibid para 77.

16 ICTY Statute, above 10, art. 2: 'The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (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.'

17 Christopher Greenwood, 'International Humanitarian Law and the *Tadic* Case' (1996) 7 *European Journal of International Law* 265, 274-5.

18 ICTY Statute, above 10, art. 3: 'The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.'

19 Greenwood, above 14, 279.

20 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 Aug. 1949, 75 U.N.T.S. 31, common art. 3 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 Aug. 1949, 75 U.N.T.S. 85, common art. 3 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 Aug. 1949, 75 U.N.T.S. 135, common art. 3 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, above 12 common art. 3.

A recent empirical study has concluded that the ICTY has been very effective in bringing to justice violators of international humanitarian laws and conventions during the conflict in the former Yugoslavia.[21] The effectiveness of the Tribunal is premised on continued support by the international community in general and the Security Council in particular. Success has been dependent on the level of autonomy granted to the Tribunals, the effective leadership by the Chief Prosecutors and the Presidents that has rallied international support, and the externalisation of the democratic norms of judicial independence and open proceedings that have left the Tribunals largely free of political interference. The authors of the study suggest that the success of the ICTY and the ICTR will serve as a model for the regional tribunals set up to adjudicate international humanitarian law in Cambodia, Kosovo, Sierra Leone, and East Timor.

Regional tribunals are possible where the political climate is not overtly hostile to their establishment and if procedural protections are in place for witnesses and the accused.[22] The adjudicators may be local, international, or a mixture of the two and the applicable law may be a combination of national and international criminal and humanitarian law. It is argued that trials held in the locality of the crimes may aid in reconciliation and healing and may add legitimacy to the proceedings in the eyes of the affected community. They may also serve to promote respect for the rule of law. However, in reality, there are many obstacles to the potential success of regional tribunals. Often, the local infrastructure is damaged and there is a lack of trained legal and administrative staff at all levels. In many cases there are significant concerns around political interference and perceptions of bias, particularly when there is a multiplicity of clashing cultural groups. Finally, regional tribunals are not free; to function effectively, they too require a long-term and significant funding commitment by the international community.

In the preceding discussion, I have spoken optimistically about the role of *ad hoc* tribunals, including in the development of substantive international humanitarian law. However, in the long-term, the efficacy of this model is limited. To be powerful and effective, the tribunals have to be creatures of the Security Council like the ICTY and the ICTR, preferably set up under Chapter VII of the UN Charter. These types of international tribunals may be difficult to set up in the future for the traditional political reasons such as the veto power of the permanent members of the Security Council, and the increasingly apparent logistical issues and the overall inefficiencies of the administrative structure resulting in spiralling costs and proce-

21 James Meernik and Kimi Lynn King, 'The effectiveness of international law and the ICTY-preliminary results of an empirical study' (2001) 1 *International Criminal Law Review* 343. This study looked at issues of fairness by examining sentencing outcomes.

22 Professor Gilbert's paper in this volume, entitled 'What Price Justice? Prosecution for Crimes vs. State-Building', offers a comprehensive account of the pros and cons of regional tribunals and comparison of specific examples.

dural delays.[23] Indeed, the ICTY is under pressure to wrap up its caseload by 2008.[24] There are concerns around legitimacy, fairness and the alienation of local victims and citizens for *ad hoc* tribunals set up outside of the jurisdiction where the crimes occurred.

Now that the ICC has been established, it seems duplicative of both effort and cost to support *ad hoc* or regional tribunals and an ICC with overlapping jurisdictions. The Security Council can and should now simply refer a case to the ICC.[25]

The shift away from *ad hoc* tribunals to national jurisdiction may be apparent in Iraq. The most high profile war criminal there is Saddam Hussein, currently being held as a prisoner of war[26] in an undisclosed location by the American forces in Iraq. The most recent word from the Bush administration is that Mr. Hussein will eventually be turned over to a new Iraqi government to be put on trial with the participation of international observers.[27] At the moment, it seems unlikely that a tribunal in partnership with the United Nations along the lines of the Sierra Leone model will be established to try war criminals and former high ranking Ba'ath Party members in Iraq. However, the Bush administration continues to vacillate over this issue. The only model that appears to have been ruled out is an *ad hoc* international tribunal such as the ICTY or the ICTR.

Indeed, on December 9, the Coalition Provisional Authority in Iraq issued an order establishing an Iraqi Special Tribunal to try genocide, war crimes, and crimes against humanity.[28] The current President of the Governing Council, Abdul Aziz al-Hakim has stated that there is no question that Mr. Hussein would be tried by the new Tribunal, and that 'if it is proven that he is guilty, he could be condemned to death.'[29] The Order provides for no direct or formal role for the United Nations or the international community, but non-Iraqi nationals may be appointed as judges and there is a commitment to meet 'at a minimum, international standards of justice.'[30]

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23 For 2002-2003 the General Assembly of the United Nations decided to appropriate to the ICTR a total budget of US$177,739,400 and 872 posts. More than 80 nationalities are represented at the Tribunal (Arusha and Kigali). International Criminal Tribunal for Rwanda <http://www.ictr.org/default.htm> at 13 February 2004.

24 UNSC Resolution 1503 (2003).

25 *Rome Statute of the International Criminal Court*, above 3, art. 14(b).

26 Douglas Jehl, 'The Struggle for Iraq: Captive: Hussein given P.O.W. Status; Access Sought' *New York Times* (New York), 10 January 2004, A1.

27 Colin Powell cited ibid.

28 Iraq, Coalition Provisional Authority, *Delegation of Authority Regarding an Iraqi Special Tribunal* Order/9 Dec 2003/48. Coalition Provisional Authority Official Documents <http://www.cpa-iraq.org/regulations/20040110_CPAORD48_IST.pdf> at 13 February 2004.

29 Neil A. Lewis, 'The Capture of Hussein: Hussein's Fate; Bush Leaves Unclear Role of Iraqis in Any Trial' *New York Times* (New York), 16 Dec 2003, A18.

30 *Delegation of Authority Regarding an Iraqi Special Tribunal*, above 28.

National Courts and Universal Jurisdiction

At this point, I will examine the logical partners to the ICC for offences falling within its jurisdiction–and the exercise of traditional and universal jurisdiction by States. Criminal jurisdiction is traditionally asserted on a territorial basis, complemented by one or all of the four forms of extraterritorial jurisdiction: jurisdiction based on (1) the nationality of the suspect, (2) the nationality of the victim, (3) harm to the interests of the forum State and, (4) universal jurisdiction. Universal jurisdiction is independent of the first three. Here, I will focus on universal jurisdiction for crimes under international law, such as war crimes, crimes against humanity and genocide, as well as torture, extrajudicial executions, and "disappearances".

Until recently, it seemed that universal jurisdiction was increasing in scope, but a series of judicial decisions and legislative reforms have narrowed it to its more traditional confines. Universal jurisdiction is commonly understood as the ability of the courts of any State to try persons for crimes committed outside its territory, and which are not linked to the State by the nationality of the suspect or the victims or by harm to the State's own national interests. This rule, sometimes called permissive universal jurisdiction, is now part of customary international law and is reflected in treaties, national legislation, and the jurisprudence of international courts. It applies to crimes that constitute attacks on the international community: war crimes committed in international and internal armed conflicts, crimes against humanity, and genocide. Typically, however, there remains some link to the State exercising permissive universal jurisdiction, such as the suspect being apprehended on the territory of the prosecuting State.[31]

The normative foundations of permissive universal jurisdiction are not particularly problematic. There exists a variety of international treaties that militate in favour of an obligation on States to prosecute or extradite for prosecution persons suspected of war crimes, crimes against humanity, and war crimes.[32] Indeed, Professor Antonio Cassese in his discussion on whether the death knell has been struck for universal jurisdiction argues that it is alive and well when conceptualized as a default jurisdiction. 'Such jurisdiction may only be triggered when the territorial or national State fails to act, and provided the prosecuting State shows an acceptable

31 See Georges Abi-Saab, 'The Proper Role of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 596.

32 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 U.N.T.S. 102, art. 6 (entered into force 12 January 1951) expressly requires State Parties in whose territory persons responsible for genocide and ancillary crimes are found to bring them to justice in their own courts or to surrender them to an international penal tribunal with jurisdiction. More generally, the Preamble of the Rome Statute, above 3, reaffirmed the fundamental obligation of every State to bring to justice at the national level those responsible for international crimes. See Antonio Cassese, 'Is the Bell Tolling for Universality?' (2003) 1 *Journal of International Criminal Justice*, 589 for a discussion of the international treaties that militate in favor of an obligation on States to prosecute or extradite.

link with the offence.'[33] What is more problematic is the form of universal jurisdiction that is known as absolute universal jurisdiction or the exercise of universal jurisdiction with *no* connection between the accused and the prosecuting State.

Prior to its repeal, Belgium's controversial 1993 *Act Concerning Grave Breaches of International Humanitarian Law* granted the broadest exercise of universal jurisdiction.[34] The Act saw several successful prosecutions for war crimes in 2001, including two Rwandan catholic nuns. In a more controversial vein, numerous victims and victims groups filed complaints seeking criminal investigations against high-level officials, including current or former Heads of State with no connection to Belgium. Ostensibly, the Act applied equally to all persons irrespective of official capacity. Accordingly, in the *Arrest Warrant* case that made its way to the International Court of Justice, Belgium issued an arrest warrant for an acting minister of the Democratic Republic of Congo.[35] The ICJ held that foreign ministers enjoy personal immunity from universal jurisdiction while in office and *in obiter* commented that once having left office, ministers may only be prosecuted in their private capacity.

In August 2003, Belgium repealed its relevant statute. This effectively put an end to cases pending in Belgium. These included cases against Ariel Sharon, former US President George Bush and General Colin Powell in reference to the 1991 bombing of Baghdad, as well as General Tommy Franks regarding the alleged use of cluster bombs and illegal attacks on civilians in the course of the more recent war in Iraq. As it now stands, international criminal law is no longer governed by a special statute but instead, the three core crimes defined in the ICC Statute have been included in the criminal code.[36] The new provisions provide for foreign sovereign immunity as well as immunity for any officials invited to Belgium to visit *inter alia* NATO headquarters. Universal jurisdiction over grave breaches of international humanitarian law now extends to acts committed overseas by Belgian nationals and any person whose principal residence is in Belgium and acts committed overseas against Belgian nationals and legal residents. Prosecutions may now only take place at the request of the federal prosecutor and no longer by foreign complainants with no connection to Belgium. The prosecutor's discretion may be constrained if another international tribunal has jurisdiction, and a prosecution may only be pursued if 'the courts of the States more directly concerned are either not competent or not independent, impartial and fair.'[37] Universal jurisdiction has therefore not been eliminated, but is articulated as a sort of default jurisdiction, in line with statutory grants

33 Antonio Cassese, Ibid 595.

34 See Luc Reydams, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law' (2003) 1 *Journal of International Criminal Justice* 679 on Loi du 16 juin relative à la répression des infractions grave aux Conventions internationales de Genève du 12 août 1949 et aux Protocols I et II du 8 juin 1977.

35 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] ICJ Rep 3.

36 Luc Reydams, above 34.

37 Ibid 687.

of universal jurisdiction in other countries such as Canada, whose statutory regime with respect to universal jurisdiction I will discuss below.

In Spain, where a very broad notion of universal jurisdiction was also favored, the High Court (*Tribunal Supremo*) has recently placed a restrictive interpretation on universality.[38] In *Guatemalan Generals*,[39] the Court recognized that universal jurisdiction may be exercised if another State with greater jurisdictional claims fails to act but only if there is a link between the foreign offence and Spain through the nationality of the victims or the presence of the accused in Spain. Ironically, this curtailing of universal jurisdiction has occurred in the country that has indicted high-profile perpetrators of atrocities. It may be indicative of the lessening role that universal jurisdiction will play in future prosecutions of international crimes.

Up to this point, Spain had taken a leading role in exercising its universal jurisdiction. Spain's internationally known investigative magistrate, Baltasar Garzon has indicted Augusto Pinochet, Osama bin Laden, the Al Jazeera correspondent, Tayssir Alouni, and other members of Al Qaeda.[40] On 16 October 1998, Augusto Pinochet, the former President of Chile described by Dr. Kissinger as 'a fashionably reviled man of the right',[41] was arrested in London in response to the Spanish arrest warrant, charging Pinochet with human rights violations including murder, torture and "disappearances" committed during his administration in Chile between 1973 and 1990. Although some of his alleged victims were Spaniards, most of the crimes that Pinochet was charged with were committed in Chile against Chilean nationals. Spain applied for Pinochet's extradition so that he could be prosecuted in Spain. Belgium, France and Switzerland also issued extradition requests.

Pinochet's lawyers challenged the arrest and extradition on the basis that as a former Head of State he was immune from prosecution. In March 1999, the House of Lords ruled that Pinochet's immunity extends only to acts done in his official capacity as Head of State.[42] The Law Lords ruled that acts of torture, as crimes under international law, could not be acts within the official capacity of a Head of State and that extradition proceedings to Spain should continue.

In March 2000, by ministerial discretion of the UK Home Secretary, Augusto Pinochet was returned to Chile on grounds that he was not medically fit to stand trial. Proceedings were then commenced against Pinochet in Chile, and he was placed under house arrest. The Chilean courts continue to be seized of the matter.

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38 Herve Ascensio, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*' (2003) 1 *Journal of International Criminal Justice* 690.

39 *Tribunal Supremo, Sala de lo Penal*, Sentencia no. 327/2003, Recurso de casación no. 803/2001, 25 February 2003.

40 Dale Fuchs, 'Spanish Judge is Charging Bin Laden and 9 in 9/11 Plot' *New York Times,* (New York) 18 September 2003, A6.

41 Henry Kissinger, 'Pitfalls of Universal Jurisdiction that is Risking Judicial Tyranny' *Foreign Affairs* July/Aug 2001, Foreign Affairs <http://www.foreignaffairs.org/20010701faessay4996/henry-a-kissinger/the-pitfalls-of-universal-jurisdiction.html> at 13 February 2004.

42 *Reg. v. Bow Street Magistrate, Ex p. Pinochet,* [2000] 1 AC 61 (HL).

It was reported on 23 December 2003 that a Chilean judge had asked the Santiago Appeals Court to strip Pinochet of his immunity as former President so that he can be tried for his campaign against leftists in South America known as "Operation Condor".[43] Meanwhile, the House of Lords ruling stands as an important precedent on immunities and universal jurisdiction.

The response of the legislature in Belgium and the courts in Spain to narrow universal jurisdiction seems to be a reaction to international, particularly United States, concerns about what Dr. Kissinger has termed 'the dictatorship of the virtuous.'[44] This, he claims, has often led to inquisitions and even witch-hunts. However, past experience, starting with national prosecutions of Nazi war criminals and culminating in more recent attempts at prosecutions in Europe do not support this characterization. The prosecution of Nazi leaders and executioners was far from zealous, and the few cases actually prosecuted certainly did not reveal a failure of due process. Between the end of World War II hostilities and the early 1980s, the global trend was in fact against prosecuting Nazi war criminals.[45] Two notable exceptions were Israel, which kidnapped Nazi SS Lieutenant Adolf Eichmann in Argentina in 1960 and convicted and sentenced him to death in an Israeli court in 1961, and Germany, which was encouraged by the Eichmann trial to prosecute many of its own nationals for offences committed during the war.[46]

It was not until the 1980s that the movement to bring Nazi war criminals to justice was revived. Canada, Australia and the United Kingdom reformed their legislation in order to permit the exercise of universal jurisdiction over these crimes, and all three countries investigated and initiated some prosecutions against alleged Nazi war criminals residing in their territory, based on universal jurisdiction. Canada, after a few unsuccessful prosecutions, opted for extradition, although it has since set up a Modern War Crimes Unit which is mandated to look at prosecutions as well as other appropriate measures. In short, it is fair to conclude that the prosecution of Nazi war criminals was a lukewarm effort at best, and hardly a witch-hunt.

I turn now to an examination of more recent efforts to use universal jurisdiction to call modern alleged war criminals to account, using the Canadian experience as an example. Canada has extended its universal jurisdiction for international

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43 'Chilean judge makes new attempt to lift Pinochet's immunity' *Yahoo News* 23 December 2003.

44 Henry Kissinger, above 41.

45 Irwin Cotler, 'National Prosecutions, International Lessons: Bringing Nazi War Criminals to Justice' in Christopher C. Joyner and M. Cherif Bassiouni (Eds), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Rights: Proceedings of the Siracusa Conference (17–21 September 1998)*; Amnesty International Compendium, Chapter 2, citing, R. John Pritchard, 'The Gift of Clemency following British War Crimes Trials in the Far East, 1946-1947' (1996) 7 *Criminal Law Forum* 15, 17-18.

46 German courts have handed down approximately 7,000 convictions and their investigations there continue. See A. Zuroff, Wiesenthal Centre Annual Status Report of April 2002, "Worldwide Investigations and Prosecutions of Nazi war Criminals (January 1, 2001- March 31, 2002)", <http://www.wiesenthal.com/social/pdf/index.cfm?ItemID=5423> at 13 February 2004.

crimes as part of its enabling legislation implementing its ratification of the Rome Statute. In June 2000, Canada adopted the *Crimes Against Humanity and War Crimes Act*.[47] As is now the case with the Belgium legislation, no proceedings may be commenced without the personal consent of the Attorney General of Canada or his or her Deputy. The Attorney General is a member of cabinet and therefore plays an important political role but is concomitantly expected to act independently from partisan political considerations and to act in the best interest of justice in exercising prosecutorial discretion. The question of whether to initiate a prosecution for an international crime against a non-national must involve some level of public policy considerations, and the Attorney General has been granted authority to effectively weed out, at the earliest opportunity, unjustifiable attempts to highjack the Canadian court system for improper purposes and to ensure prosecutions are brought forward in the public interest.

It is notable, however, that no prosecutions have yet been brought under the *Crimes Against Humanity and War Crimes Act*. A search of Canadian jurisprudence reveals that the Act has, to date, been used only in immigration and refugee hearings. Immigration and refugee legislation in Canada[48] disallows refugee and immigration claims if an applicant has violated human rights or committed crimes against humanity within the purview of the *Crimes Against Humanity and War Crimes Act*, respectively. Deportation cases or application for judicial review of decisions that

47 S.C. 2000, c. 24.

48 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27: '35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for (a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act; (b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or (c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association. … 101. (1) A claim is ineligible to be referred to the Refugee Protection Division if … (f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c); *Immigration Act*, R.S.C. 1985, c. I-2 (repealed): '19. (1) No person shall be granted admission who is a member of any of the following classes: (j) persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the Crimes Against Humanity and War Crimes Act; (k) persons who constitute a danger to the security of Canada and are not members of a class described in paragraph (e), (f) or (g); or (l) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations, or any act or omission that would be an offence under any of sections 4 to 7 of the Crimes Against Humanity and War Crimes Act, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.'

deny refugee status have arisen from a diverse array of international and internal conflicts, ranging from the Democratic Republic of Congo,[49] Tunisia,[50] Ethiopia,[51] Lebanon,[52] Afghanistan,[53] and India[54] to Nicaragua.[55]

The most high profile of these has been the case of Léon Mugesera, a senior Hutu politician in Rwanda prior to the genocide that was heard by the Federal Court of Appeal in 2003.[56] Mr Mugesera is attempting to avoid deportation from

49 *Bukumba v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. 102 (T.D.). Mr Bukumba was employed by the Comité de Securité de l'État in the Democratic Republic of Congo. He was excluded from the Convention definition of Refugee as a knowing accomplice to crimes against peace, war crimes and crimes against humanity in the late 1990s. His application was dismissed. *Sungu v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 192 (T.D.). Mr. Sungu's application was successful because, even though he was a member of government under President Mobutu, he had no common purpose with that regime with respect to crimes against humanity.

50 *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. 1292 (C.A). Mr. Zrig was accused of being involved in the Ennahda in Tunisia. His appeal was dismissed because, as an important official in Ennahda, Zrig could not have been unaware of the crimes committed by that organisation.

51 *Bogale v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. 1247 (T.D.). Mr. Bogale's application was allowed because he did not have the opportunity to respond to the existence of an indictment against him in Ethiopia on criminal charges for crimes against humanity.

52 *Andeel v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. 1399 (T.D.). The application was allowed because there was a lack of evidence to support the finding that actions of the wife of the applicant constituted a crime against humanity, war crime, or genocide, even though she was employed by the South Lebanese Army. *Harb v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. 707 (T.D.) Mr. Harb's application was dismissed because he worked for the Amal movement and had personal and knowing participation in crimes against humanity committed by the South Lebanese Army.

53 *Yassin v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. 1354. Judicial review of a decision to deny a refugee claim. Mr Yassin was a member of the police force of Afghanistan and was accused of being complicit in torture. The case considered the defence of superior orders. The application for judicial review was denied. *Zazai v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. 831 (T.D.). Mr Zazai was accused of being a member of KHAD, the secret police in Afghanistan and having participated in crimes against humanity and therefore was excluded from entry as a refugee. The application was allowed. *Mahzooz v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J 1203. Mr Mahzooz' application for judicial review of a decision that he was inadmissible under the *Immigration Act* for crimes against humanity committed while he was a judge for the Marxist regime in Afghanistan was dismissed.

54 *Sian v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. 1295 (T.D.). Mr Sian was a voluntary member of the Khalistan Liberation Force at a time that it was engaged in terrorism and was accused of being complicit in crimes against humanity committed by that group. His application was allowed

55 *Murillo v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 287 (T.D.). Mr Murillo served in an executive squadron of the Sandanista Air Force and was directly implicated in the army's deportation of Miskitos. The deportation order was set aside.

56 *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. 1292; 2003 FCA 325.

Canada on the grounds that a speech he gave at a political meeting in Rwanda in 1992 did not in fact exhort Hutus to murder Tutsis and was therefore not a crime against humanity nor a war crime. A report of the International Commission of Inquiry on the genocide in Rwanda had pinpointed Mr Mugesera's speech as part of the political landscape leading up to the 1994 genocide. However, the report was found by the Court of Appeal to be incomplete, inaccurate, and biased against Mr Mugesera and accordingly his appeal was successful. Leave to appeal to the Supreme Court of Canada has been allowed.

The Responsibility of States

Where will this all these new developments lead? The answer is complicated by the lack of support for the ICC by the United States. It is apparent that new initiatives in enforcement of international criminal law will not come from the United States that, so far, has endorsed only the *ad hoc* model or trial by national courts.

The Iraqi example is illustrative; the *ad hoc* tribunal model and all its associated shortcomings may be of limited use in the future, only being efficacious in States with failed judicial systems and infrastructure or post-conflict jurisdictions under United Nations authority. This leads to the conclusion that national courts may have an increasing role to play through the exercise of either their traditional or universal jurisdiction, keeping in mind that the scope of universal jurisdiction has been significantly curtailed in the past year.

Professor Abi-Saab has come closest to envisioning the future roles of the various models I have discussed and in reconciling the issue of complementarity. The starting point of his argument is that international crimes are attacks on the entire international community, and, accordingly, society at large has an interest in seeing perpetrators brought to justice. In exercising universal jurisdiction, a State does not act in its own name, but in the name of the international community. However, and here is the crucial point, 'once this community develops its own specialized organs to fulfil precisely these same tasks, they take precedence over states acting as their surrogates.'[57]

Political compromise may have granted national courts primacy over the ICC. However, States exercising their universal jurisdiction face ensuing costs and political fallout. They may often find it in their best interest to cede jurisdiction to the ICC.

To that end, the responsibility of States extends to the promotion of a universal culture of compliance with the demands of international criminal law, through legislation, extradition, the providing of information and other forms of support, including financial support, to existing legitimate forums. States must insist on enforcement, either domestically or through existing international options. As a first step, States should legislate to implement cooperation with the ICC so that the most complex and politically charged cases may be transferred to ICC jurisdiction. This requires financial support with arrangements for prosecutorial and enforcement

57 Georges Abi-Saab, above 31, 602.

assistance such as the sharing of information. States must also improve compliance with humanitarian law in all missions involving armed forces and insist on others doing the same.

Regardless of which model becomes dominant, we have entered a modern era of enforcement through personal criminal responsibility. As I have stated previously, this culture carries with it the legitimate expectations of millions of human rights holders who until very recently did not perceive themselves as such. If the enforcement agenda is to be furthered by Sovereign States, then that implies a dual responsibility, both to promote compliance with international norms of enforcement of humanitarian law and a strong commitment to respect basic human rights within their territorial boundaries. That is, '[s]overeignty as responsibility has become the minimum content of good international citizenship.'[58]

The ultimate responsibility of States, then, in the field of international criminal law as in all others, is to pursue vigorously the enforcement of the law, while fully respecting international civil and human rights instruments that guarantee a fair process and the advancement of human dignity.

58 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), para. 1:33. This report was produced against the background of the then surprising NATO military intervention in Kosovo without Security Council approval, the Commission sought to develop a framework for legitimate international or multinational humanitarian intervention. The Commission had interesting comments about State responsibility in that context.

Challenges for the International Criminal Court: Terrorism, Immunity Agreements and National Trials

Gillian Triggs

The Rome Statute came into effect on 1 July 2002, creating the world's first permanent International Criminal Court (ICC). The President of the Court, Judge Phillipe Kirsch, reported in September 2003 that:

> The ICC has become a reality. [It] is no longer an aspiration, but a functioning institution. The most senior officials have been appointed and the Court is in the process of building its structures and devising its procedures. We are preparing to meet the challenge that is set for us by the international community …

The new Court was duly inaugurated on 11 March 2003, its 18 judges have been elected and the Prosecutor appointed.[1]

In close parallel with the creation of the ICC, the world has experienced the war in and occupation of Iraq, detention at Guantanamo Bay without trial of over 600 prisoners of war from the conflicts in Afghanistan and Iraq, the arrest of Saddam Hussein, the bombing of the United Nations headquarters in Baghdad and a global rise in terrorism. In the face of these events, only two matters have been referred thus far to the Office of the Prosecutor for the ICC; both of them in respect of African States. The Prosecutor, Luis Moreno Ocampo, has agreed to investigate the deaths in 2004 of over 200 people in North Eastern Uganda. Criminal acts in the Congo are also under investigation with the approval and cooperation of the President of the Democratic Republic of the Congo.[2] The emerging gulf between the jurisdictional reach of the ICC and its practice prompt the following questions:

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1 The Assembly of States Parties met for the first time in September 2002 and the judges were sworn in at The Hague on 11 March 2003. The President of the Court is Phillip Kirsch of Canada, with the vice-presidents being Kuenyehia of Ghana and Benito of Costa Rica; <www.iccnow.org/building>.

2 "Prosecutor receives referral of the situation in the DRC" The Hague, 19 April 2004, <www.iss-cpi.int/pressrelease>; a provisional Memorandum of Understanding on the Privileges and Immunities of the Court was signed on 12 October 2004 between the ICC and the DRC to facilitate the activities of the Court on Congolese territory while awaiting ratification of the Agreement on the Privileges and Immunities of the ICC which guarantees that the Court will be able to carry out its activities in the field inde-

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 315-330.*
 ISBN *90 04 14599 0.*

– How effective can the ICC be in prosecuting those responsible for war crimes, crimes against humanity or genocide arising from these events after July 2002?
– Is the ICC equipped to respond to acts of terrorism?
– Is the ICC already outdated and ineffective?

There are undoubtedly some significant challenges to the future work of the ICC.

First, the risk that the ICC could be marginalized has been fostered by the unprecedented attempt by the United States to protect its nationals from prosecution by the negotiation of 53 bilateral immunity agreements.[3] The proliferation of these so-called "Article 98 Agreements" dilutes the legal commitment of States Parties to the Rome Statute itself and also provides impunity for the nationals of the United States. As the world's leader in international peacekeeping forces, the United States is arguably more likely than any other State to be involved in activities that could attract prosecution. United States concerns are that political prosecutions will be brought against its serving officers and these may well be justified.

Secondly, the ICC seems to have been overshadowed by national responses to international criminal acts. The willingness of national legislatures and courts, to prosecute individuals for their international crimes confirms the essentially secondary role of the ICC. Notable and controversial examples include the Belgian law of 1993, now significantly amended, and the House of Lords decisions in the *Pinochet Cases.*[4] The recent introduction by Australia, United Kingdom, South Africa and Germany, among others, of legislation to give domestic effect to their obligations under the Rome Statute also demonstrates the policy of States Parties to act upon their primary right to prosecute.[5] Moreover, the United States has declared its intent to try the detainees at Guantanamo Bay through specially constituted military commissions and Iraq will create its own tribunal to try its former president.[6]

Thirdly, the jurisdiction of the ICC over war crimes, crimes against humanity and genocide does not appear, at least at first glance, quite to 'fit' the acts of national or international terrorists.

This brief paper explores each of these issues and concludes that while the Rome Statute has been inspirational in creating procedures under which individuals can be

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pendently, safely and confidently. An agreement on judicial cooperation was also signed on 6 October 2004 between the Court and the DRC.

3 As of 12 October 2004, 97 countries have ratified the Rome Statute, 26 from Africa, 26 from Western Europe and other states, 19 from Latin America and the Caribbean, 15 from Eastern Europe, 12 from Asia and the Pacific, 1 from North America and I from the Middle East. Notable absences are the United States and Iraq.

4 *R v. Bow Street Metropolitan Stipendiary Magistrate:* Ex Parte *Pinochet (No 3)* [1999] 3 WLR 827.

5 Eleven states have now enacted domestic legislation to implement the Rome Statute. For a discussion of Australia's legislation see, G Triggs, "Implementation of the Rome Statute for the ICC: a quiet revolution in Australian Law" (2003) 25 *Sydney Law Review 507-34.*

6 Negotiations continue with the UK and Australia regarding the conduct of military commissions, but dates for trials have yet to be set.

prosecuted for egregious crimes contrary to international law, initial enthusiasm for the new ICC has been dampened by a dose of pragmatic realism.

The ICC and the War in Iraq

The war in Iraq has involved the following activities that may attract the criminal jurisdiction of the ICC:

- Launching an attack on Iraq by the 'coalition of the willing', including the United States, United Kingdom and Australia, without Security Council authorization and in the absence of any right to individual or collective self defence.
- Conduct of the war in Iraq and attacks on civilian targets and infrastructure.
- "Belligerent occupation" of Iraqi territory by the United States and other members of the coalition, involving breaches of the Geneva "Red Cross" Conventions of 1949.
- Activities of members of the Iraqi regime arrested during or after the war.
- Detention without trial for nearly three years of prisoners of war and other detainees at Guantanamo Bay.

Various jurisdictional and procedural limitations have meant that the ICC can play little, if any, role in prosecuting those responsible for the war in Iraq or for international crimes that have been committed on Iraqi territory. The following are matters have been communicated thus far to the ICC in relation to Iraq.[7]

- *Crime of Aggression.* The Prosecutor's Office has received 38 communications asserting that the coalition has committed crimes of aggression in launching an attack on Iraq. While the international crime of aggression has been included within the jurisdiction of the Court, it and the conditions for the exercise of jurisdiction have yet to be agreed.[8] Currently, therefore, the ICC cannot exercise any jurisdiction over these offences.
- *Allegations against non-parties.* Sixteen communications have also been received by the Prosecutor's Office alleging that war crimes and crimes against humanity have been committed by the US on the territory of Iraq. As neither the United States nor Iraq is a party to the Rome Statute, the ICC has no jurisdiction. It is possible for Iraq to accept the jurisdiction of the Court for the prosecution of specific crimes, though no such declaration has yet been sought.[9] Were Iraq to make a declaration in relation to the activities of United States personnel in Iraq, the ICC would appear to have jurisdiction over such acts.
- *Allegations against State Parties.* The Office of the Prosecutor has received "some"[10] communications alleging that State Parties, members of the coalition forces during the war in Iraq, committed crimes within the jurisdiction of the Court. The principle of complementarity has, however, had a significant chilling effect

7 Press Release, 16 July 2003, <www.icc-cpi.int>.

8 Article 5 (1) (d).

9 Article 12 (3).

10 Above n15.

> on the ability of the Prosecutor to proceed with an investigation. Prosecutor Ocampo has advised that his office will seek an indication as to whether these State Parties, possibly including the United Kingdom and Australia, are unwilling or unable to investigate or prosecute.[11] In future, the Prosecutor will ask that all communications with his office should include information describing efforts undertaken to seek redress by the relevant States Parties. Such self-imposed restrictions on the power of the Prosecutor to investigate communications suggest that prospects for referral of criminal acts relating to Iraq are dim or likely to be significantly delayed. The principle of complementarity could thus prove to be a strong brake on the power of the Prosecutor to give the ICC any role where the Security Council or States Parties do not themselves choose to trigger the procedures. While doubtless such restrictions reflect the intentions of the negotiating States, such a careful approach to referrals disappoints expectations for the world's first permanent international criminal court and prompts suggestions that it can proceed only slowly and is dependent upon the cooperation of the territorial states.

In summary, the ICC appears to have a limited role in relation to the war in Iraq, primarily because it lacks jurisdiction.

Terrorism and the Rome Statute

International customary laws and treaties regulating the use of force have generally been intended to respond to conflicts between States. Individual terrorists typically act independently of a State. For this, and other reasons, the prosecution of terrorists by the ICC raises some complex questions of interpretation as the crimes defined by the Rome Statute do not easily 'fit' the activities of many terrorist groups.

A preliminary issue to consider is whether international responsibility extends to individual acts. With the prosecutions before the Nuremburg and Tokyo tribunals after the Second World War it became clear that individuals can be held responsible for their international criminal activities. The principle of individual responsibility has been adopted by the Rome Statute that gives the ICC "jurisdiction over persons for the most serious crimes of international concern".[12] Under Article 25, the ICC has jurisdiction over natural persons. Any such person:

> who commits a crime within the jurisdiction of the Court shall be criminally responsible and liable for punishment …

While the Court may try individuals of 18 years and over, it has no jurisdiction whatsoever over States or other international persons, such as international organizations.

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11 Press Release 16 July 2003.

12 Article 1.

Terrorist groups typically act independently of the States of which they are nationals or in which they carry out their activities. In these circumstances, the traditional law of State responsibility for international crimes will not apply.[13] The impediments that might otherwise apply to State responsibility, including establishing the element of 'attribution' of the acts of individuals to the State, are not preconditions to the offences committed by individuals under the Rome Statute. Thus, in principle and providing a referral is made to it, the Court could try those accused of terrorist acts where such acts amount to genocide, crimes against humanity and war crimes. The following discussion considers the extent to which terrorist acts fall within the *Elements of Crime* as drafted by the Preparatory Commission for the ICC.

Terrorism as Genocide

A terrorist act might lie within the jurisdiction of the ICC if, for example, it amounts to genocide. Genocide is defined to include:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> a Killing members of the group
> b Causing serious bodily or mental harm to members of the group
> c Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part…

The *Elements of Crime* adopted by the Preparatory Commission requires in addition that "the conduct took place in the context of a manifest pattern of similar conduct directed against that [targeted] group or was conduct that could itself effect such destruction".[14] Depending upon the evidence, terrorist attacks could be acts that fall within the definition of genocide. The attacks on Palestinian homes, Jewish settlements in the occupied territories, US overseas embassies, major US cities, on international tourist destinations or civilian facilities provide examples of acts that could satisfy the definition. If so, and if the terrorists are captured, it would be entirely possible for their acts to be the subject of a referral to the Prosecutor through the Security Council or by a State Party.

Conviction for such acts will, however, depend on whether the evidence of an intent to destroy certain groups in whole or in part is sufficient to meet the elements of the definition of genocide. Many recent acts of terrorism appear to do so.

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13 States have a continuing obligation to prosecute for grave beaches of the Geneva Conventions.

14 Note that Australia did not adopt this additional requirement, rendering it easier to gain a conviction for genocide.

Terrorism as a Crime against Humanity

> As is the case in relation to genocide, a crime against humanity requires highly specific elements to be met for the successful prosecution of terrorist acts. Each case will, of course, depend upon its particular facts. A crime against humanity requires that the act, for example, of murder, enslavement, torture, rape, sexual violence or apartheid, is:
> committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

An "attack directed against any civilian population" means:

> a course of conduct involving the multiple commission of acts … against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.[15]

The definition of "attack" has the effect that a crime against humanity will probably be committed by a State rather than individual terrorists. For the terrorist act to be in furtherance of State policy it is presumably necessary to demonstrate some link between the two; a requirement that may be difficult to demonstrate to the satisfaction of the Court. A crime against humanity does, however, additionally envisage that a terrorist act amounts to such a crime if it is in the furtherance of an "organizational policy" that is not necessarily that of a sovereign State. It could be argued that the acts of a terrorist group further the organizational policy of their own or another non-State group. If so, the Court could determine that it has jurisdiction over such acts for the purposes of a prosecution for a crime against humanity.

Terrorism as a War Crime

War crimes, including willful killing, taking of hostages, intentional attacks against the civilian population and the willful causing of great suffering, both in international and non-international armed conflict, are typical examples of terrorist acts that could attract the jurisdiction of the ICC. Terrorist acts will, however, amount to war crimes subject to prosecution before the Court only when they are committed "as part of a plan or policy or as part of a large scale commission of such crimes".[16] It is not necessary, however, that the perpetrator has made any legal evaluation of the character of the conflict as international or non-international.

It remains to be seen whether the ICC or the Prosecutor will determine that particular terrorist acts and their circumstances satisfy the test of "plan or policy". As contemporary terrorism is often the result of sophisticated planning to achieve identifiable policies, (Basque separatists, East Timorese freedom fighters, Herzbullah,

15 Article 6 (2) (a).

16 Article 8 (1).

Jamia Islamia, Al-Qaeda) it is possible, even likely, that the ICC would have jurisdiction over terrorist acts in support of such objectives.

A significant impediment to prosecuting terrorists for war crimes before the ICC is the *Elements of Crime* that provides that war crimes are to be interpreted "within the established framework of the international law of armed conflict". As the elements of each war crime listed by the Rome Statute are different from each other, care must be taken to ensure that the evidence is sufficient to meet the requirements for each offence. Under Article 8(2) (a) (i), for example, the war crime of willful killing requires that:

- The Perpetrator killed one or more persons.
- Such person or persons were protected under one or more of the Geneva Conventions of 1949.
- The Perpetrator was aware of the factual circumstances that established that protected status.
- The conduct took place in the context of and was associated with an international armed conflict.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

These elements do not "fit" easily with terrorist acts. However, taking Al-Qaeda as an example, each of the elements might be satisfied on the facts; there is arguably an "armed conflict" between Al-Qaeda groups with a plan to kill Western business men and women and tourists in locations throughout the world; if an armed conflict is found to exist, the other elements are more readily demonstrated. Similarly, the terrorist acts of certain Palestinian and Israeli groups might be considered as part of an international armed conflict.

Summary

This brief analysis of the jurisdictional "fit" of terrorist acts with the jurisdictional power of the ICC indicates that terrorism might be prosecuted as a crime against humanity or possibly genocide. There is no need to demonstrate that a State has been the perpetrator, as the emphasis of the Rome Statute lies with individual responsibility.[17] It may be queried, however, whether the ICC would be willing to interpret the offences covered by "war crimes" sufficiently widely to embrace most acts of terrorism.

Beyond the formal requirements of jurisdiction, the international community may consider it appropriate that a permanent international tribunal of high juridical standing and objectivity should have jurisdiction over international terrorism. The alternatives – trial by the States of which they are nationals, by States on whose territory the acts are committed, by States whose nationals are victims or by States who capture the perpetrators – are viable means of ensuring prosecution. Under the

17 Though the *Nicaragua (Nicaragua v. United States) (Merits)* case raises some important issues regarding State sponsored terrorism, [1986] ICJ Rep 14.

principle of complementarity, the State with any basis of jurisdiction will have the first option to try those accused of such offences.

Immunity of United States Personnel from Prosecution

The future of the ICC seemed bright when in June 2002 it became clear that the growing number of ratifications would be sufficient to enable the Rome Statute to come into force earlier than had been hoped. In an unexpected way, however, the integrity and standing of the ICC has been threatened since that time. The Security Council has granted immunities to United States peacekeepers and a significant majority of State Parties to the Rome Statute have agreed not to transfer United States nationals to the Court.[18] These developments modify the optimism of the international community that, at last, an international criminal court with highly qualified jurists was in place; that even-handed justice could be seen to be done through a permanent international institution; that individuals could now be brought to account for their international criminal activities. The transformation in attitude to the Court has been in response to United States policy of acting unilaterally, or with certain allies, to achieve its objectives through the use of force or peacekeeping exercises. From the point of view of the United States administration, the risk of referrals of its military officers to the ICC for prosecution for crimes arising from such activities is too high to tolerate. Indeed, the United States has long doubted the ability of the ICC to resist what it describes as "politically motivated" prosecutions.

When the Rome Statute attracted the required 60 ratifications, the United States uniquely nullified its earlier signature of the treaty and asserted that its nationals are not subject to the jurisdiction of the Court.[19] Under the *American Service Members' Protection Act* (ASPA) of 2002, United States participation in United Nations peacekeeping operations is barred unless the President can certify to Congress that United States' service members are protected from prosecution by the ICC.[20] An exception to the ban lies in bilateral agreements negotiated with States in which United States forces are deployed. Under these agreements, States Parties to the Rome Statute agree not to transfer members of United States forces to the ICC.[21] In addition, as from 3 July 2003, there may be no further military assistance to States Parties to the ICC unless the President waives the requirement in relation to those States entering into an Article 98 Agreement. A general waiver applies, nonetheless, to NATO and non-NATO allies of the United States and in cases of United States national interest.

In these circumstances, it is not surprising that 53 impunity agreements have now been negotiated with nations from Africa (18), Latin America (6), Asia (13), the

18 The latest report being on 16 June 2003.

19 The United States had not proceeded to ratification and thus was able to notify the Secretary–General of its intention.

20 US Public Law No. 107-206, 116 Stat. 820 (2002). For a discussion of the legislation see (2003) 97 *American Journal of International Law* 200.

21 ASPA s2007.

Pacific (6), Europe (6) and the Middle East and North Africa (4).[22] Most of these agreements are subject to ratification and completion of domestic constitutional arrangements and are either not binding or have yet to be implemented in national laws. Regardless of the technical status of these Article 98 Agreements, the message is clear; over half of the 92 parties to the Rome Statute have agreed in principle that they will not send United States nationals to the Court if called upon to do so in the future.

The bilateral agreements pose serious issues for international law. Indeed, several countries have objected that the Article 98 Agreements are contrary to international law.[23] The Rome Statute does, nonetheless, facilitate the adoption of mechanisms for immunity of certain persons. The Rome Statute recognizes that the Court should not require the surrender of an accused person from a State if to do so would breach a prior treaty obligation. Article 98 (2) provides that:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

It is not clear what this provision was designed to protect. It may be reasonable to suppose that it was not intended to allow States to avoid their obligations by negotiating a conflicting agreement with a non-party.

The Council of Europe, through its Parliamentary Assembly, resolved that Article 98 Agreements are:

> not admissible under the international law governing treaties, in particular the Vienna Convention on the Law of Treaties, according to which States must refrain from any action which would not be consistent with the object and purpose of a treaty …
>
> State Parties to the ICC treaty have the general obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction (Art. 86) and…the Treaty applies equally to all persons without any distinction based on official capacity (Art. 27) … the "exemption agreements" are not consistent with these provisions.

For the reasons set out in the resolution by the Council of Europe, the Article 98 Agreements appear to be contrary to both the letter and the spirit of international law. It is, however, a measure of the political context that the Council of Ministers

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22 See eg the agreement with Timor-Leste discussed at (2003) 97 *American Journal of International Law* 200, 201-2; comments regarding the other agreements can be found at <www.icc-cpi.int/php/statesparties>.

23 Canada, Germany and Officials of the European Union, (2003) 97 *American Journal of International Law* 202.

of the European Union has since adopted "guiding principles" that permit bilateral Article 98 Agreements with European Union members. Any such agreement should require that the United States authorities investigate the alleged crimes and that, where the evidence is sufficient, the accused should then be prosecuted by the United States. The immunity granted by any such agreement may apply only to United States military personnel and to those with state or diplomatic immunity.[24] It is arguable that, in these ways, the guiding principles reflect the concept of complementarity that is central to the Rome Statute. Were the United States a party to the treaty, it would have the primary right to try those accused of all crimes that fall within the jurisdiction of the ICC. The Under Secretary of State for the US, John Bolton, argues that:

> One of the foundations of the Rome Statute is the principle of deference to national judicial systems…We think that these Article 98 agreements reflect the deference that the Rome Statute requires for national judicial systems. We do not think it does violence to those States … that freely chose to become parties to the Rome Statute …[25]

It is, however, one thing to exercise a right to prosecute under national laws in accordance with the Rome Statute and quite another to negotiate agreements (under threat of reduction of military assistance) that purport to allow a State Party to refuse to surrender an accused at the request of the Court. "Guiding principles" are also presumably designed to guide rather than to create an obligation that is binding at international law. For a State Party to the Rome Statute to agree with a non-party that it will not surrender to the Court those United States nationals alleged to have committed international crimes appears to be directly contrary to the object and purpose of the treaty and inconsistent with the obligation to cooperate with the Court. Article 98 Agreements also appear to breach the fundamental obligation at international law to act in good faith.[26]

The ASPA further authorizes the United States President to use "all means necessary and appropriate" to free United States personnel who might be detained by the Court. The authorization appears to sanction force to release those United States service personnel detained subject to trial and held pursuant to a valid international treaty. It is also in conflict with the customary law right to prosecute for "universal" crimes.

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24 European Union Council of Ministers, 2450th Sess., General Affairs and External Relations, Doc. 12134/02, (Presse 279) at 9-10 (30 September 2002).

25 US Department of State Press Release, Signing of Art.98 Agreements of the Rome Statute (August 1, 2002), at <www.state.gov>; (2003) 97 *American Journal of International Law* 203.

26 Article 2(2) United Nations Charter; see generally Sir Richard Jennings and Sir Arthur Watts (Eds), *Oppenheim's International Law* (Longman, London, 9th ed, 1992) 38.

The United States also successfully gained Security Council agreement to extend immunity from prosecution by the ICC for the acts of US peacekeeping forces.[27] Immunity is permitted by the Rome Statute under Article 16 in cases involving current or former officials or personnel from a non-party State that is contributing to an "operation" established by the United Nations. Under Resolution 1422, the Security Council provides that:

> If a case arises involving current or former official 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, 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 is framed as a "request" to the ICC from the Security Council, thereby avoiding any difficulty with the binding nature of a Security Council resolution upon an international institution. Resolution 1422 merely asks the ICC to refrain from any investigation or prosecution of military or civilian officials from the United States, or other non-parties, working on any United Nations operations for one year. Moreover, Resolution 1422 provides for its own annual renewal "for as long as may be necessary". In fact, the Security Council has renewed the exemption for a second twelve-month period, taking the immunity through to 1 July 2004. The Security Council has not extended the exemption beyond this date.

It is possible that the Security Council was acting *ultra vires* in granting immunity under Chapter VII for Article 16 covers only those situations where the Security Council makes a request in a specific, on-going case. The drafting history and plain language of Article 16 indicates that it does not allow an interpretation that permits the Security Council prospectively to defer prosecution for an entire class of individuals from the consequences of acts they might yet to commit. The practical need for United Nations peacekeeping requires a mechanism to protect non-parties from prosecution by the ICC. It may be that the so called "opt-out" clause under Article 124 of the Rome Statute is a useful means of ensuring a continuing United States role in peacekeeping operations without granting a blanket immunity from the jurisdiction of the Court. It is possible, alternatively, that the Security Council is competent to judge its own powers under the Charter and would not be limited by a narrow interpretation of Resolution 1422.[28]

Principle of Complementarity

The alacrity with which States have adopted legislation to give domestic legal effect to their obligations under the Rome State was to be expected in light of the principle of "complementarity". This primary right of States Parties to prosecute for inter-

27 SC Res. 1422, (2002) 96 *American Journal of International Law* 725.

28 B. MacPherson, "Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings" *ASIL Insights* July 2002.

national crimes under national laws is a foundational principle of the Rome Statute that recognized the sovereign right of States to prosecute for the crimes within the mandate of the ICC.[29] Public discussion about the new Court, justly emphasizing the significance of a permanent international criminal tribunal, overshadowed the more prosaic point that States may, and almost certainly will, assert their right to prosecute under domestic laws. Where States choose to do so, they will thereby "oust" the jurisdiction of the ICC.

It is not surprising that the core principle of "complementarity" should have been insisted upon both by State negotiators of the Rome Statute and acted upon by legislators in order to protect the national interest in prosecuting those over whom they have jurisdiction. South Africa, United Kingdom, Germany and Australia have already introduced legislation to give effect to their rights and obligations under the Rome Statute. Indeed, in light of the decision by the Federal Court that the crime of genocide did not exist in Australian law, the *International Criminal Court (Consequential Amendments) Act 2002* has created a "quiet revolution" in domestic law by introducing crimes that had not existed before in Australian jurisprudence. [30]

The principle of complementarity has thus tempered public expectations that the ICC would play a leadership role in prosecuting international criminal activities; expectations that were unrealistic once the primary right of State Parties to prosecute international crimes was understood. In the 20 months since the Court came into existence, jurisdictional impediments, the adoption of cautious policies by the Office of the Prosecutor and increasing State efforts to prosecute international crimes in domestic tribunals, indicate that the ICC will play a secondary role in the future as it attempts to build international confidence in its practices. In short, the ICC is alive and developing, although its first steps are tentative.

One of the early legacies of the ICC may prove to be that it has stimulated national efforts to prosecute international criminal acts. The primacy of a State's right to prosecute under national laws for activities amounting to crimes within the jurisdiction of the ICC has been noted above. Australia's unique approach to implementing its right to prosecute amply demonstrates that States will almost always attempt to assert their primary rights where possible. The consequence for the ICC is that it may be consigned, at best, to a preliminary investigative role.

Other recent examples of national assertions of jurisdiction include:

– The decisions of the House of Lords in the *Pinochet Cases* moderated the accepted view that sovereignty immunity will protect former representatives of the State or government from prosecution for acts in their "official capacity". The International Court of Justice in the *Congo v. Belgium* case has, nonetheless, confirmed the traditional rule that serving ministers remain immune from the jurisdiction of national courts.[31]

29 Article 17. The ICC may assume jurisdiction if the State with the primary right to prosecute is "unwilling or unable genuinely to carry out the investigation or prosecution".

30 Triggs, above n 5.

31 Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) (2000-2002) <www.icj-cij.org/icjwww/idecisions.htm> [51].

- Belgian legislation of 1993, leading to arrest warrants for Ariel Sharon and others. This legislation was modified 1999 and again in 2003 by the Belgian Government to confine prosecutions to cases where there is a clear link with Belgium and in so far as international law permits. [32]
- Arrest warrant from the Special Court, a mixed international and domestic *ad hoc* tribunal, for Sierra Leone that has issued a warrant for the arrest of Charles Taylor and has eleven indictments to consider.
- Prosecutions under the United States *Alien Tort Claims Act* of 1789.[33]
- A judge in Argentina is reported to have ordered the arrest of 46 former top officials from the military regime of 1976-83 for possible extradition to Spain on human rights charges.[34] Moreover, the Chilean Supreme Court has recently removed the immunity of Augusto Pinochet from prosecution under national laws.[35]

Recent Practice of the Office of the Prosecutor

Procedure

Since 1 July 2002, the Office of the Prosecutor has received over 500 communications from individuals and non-governmental organizations (NGOs) from 66 different countries requesting investigation and prosecution of alleged criminal acts. The ICC may exercise its jurisdiction on a referral by the Security Council or by a State Party of a situation in which a crime has been committed. No referrals have yet been received from the Security Council. The Rome Statute makes a distinction between a preliminary analysis of a situation and a formal investigation. Before initiating an investigation, the Prosecutor must analyse the available information to ensure that the conditions to proceed under the Rome Statute have been satisfied.

Uganda

The first request for prosecution was made by Uganda. In December 2003, the President of Uganda, Yoweri Musevani, referred the situation regarding the Lord's Resistance Army (LRA) to the ICC. The Prosecutor has since determined that there are sufficient grounds for the initiation of an investigation over the coming months.[36] While an amnesty has been enacted by the Ugandan government, the President has

32 Ibid; *Certain Criminal Proceedings in France (Congo v. France),* currently pending submission of written proceedings, Press Release 2003/21, <www.icj-cij/icjwww/ipresscom>.

33 The United States Supreme Court has confirmed the continuing role of this legislation in *Sosa v. Alvarez- Machain et al,* decided 29 June 2004 (slip opinion).

34 AFP "Argentine rights warrants issued", *The Age*, July 2003.

35 By 9 votes to 8, the Chilean Supreme Court voted to uphold a lower court ruling that Pinochet could be prosecuted for acts in the 1970s despite evidence of a deteriorating mental condition; the case was brought by the families of those dissidents who 'disappeared' during the Pinochet regime; Human Rights Watch, Washington D.C., 26 August 2004, <www.hrw.org/english/docs/2004/08/26>.

36 "Media Alert" ICC, Hague 29 Jan. 2004; <www.icc-cpi.int/php/news>.

indicated that he will amend the legislation to ensure that leaders of the LRA can be held responsible for crimes against humanity.

Democratic Republic of the Congo

Since the fighting began in Congo in 1998, deaths have been estimated at between 2.5 and 3.3 million people arising from fighting, "starvation, landmines, untreated injuries and diseases (including the transmission of HIV/AIDS through rape)".[37] The Prosecutor has received six communications, two of them being detailed reports from NGOs. Information indicating the commission of war crimes, crimes against humanity and genocide has also been corroborated by the reports of four Security Council missions to Congo and by national human rights, media and NGO bodies.[38]

While conscious of the continuing peace process, the Office of the Prosecutor announced that it would seek authorization from the Pre-Trial Chamber to start an investigation "if necessary".[39] In a significant interpretation of its mandate, the Office noted the importance of investigating the financial support for atrocities given by other countries. In the belief that "peace cannot be restored without an end to impunity,"[40] the Prosecutor also kept a watching brief on the difficulties the transitional government was having in investigating and prosecuting crimes. It appears that, as in Iraq, the Prosecutor will not seek authorization to investigate alleged international crimes until the inability of the relevant government is overwhelmingly established. Such a timid approach may underscore the political and jurisdictional restraints upon an effective role for the ICC in the future.

After a disappointing beginning, the government of the DRC has now referred the situation to the Prosecutor and the first formal investigation is now underway. The Prosecutor has commenced analysis in the Ituri region and formal arrangements are being negotiated between the ICC and Congo to facilitate the work of the ICC in the territory. While millions of civilians are believed to have died in the civil conflict in Congo, the jurisdiction of the Court clearly extends only to crimes committed after 1 July 2002. States, international organizations and NGOs have, nonetheless, continued to report thousands of deaths by mass murder and summary execution since that time.[41]

*Investigation "*Proprio Moto*" by the Prosecutor*

There is a third basis upon which the ICC may exercise jurisdiction. Where the Prosecutor has initiated an investigation "proprio moto on the basis of informa-

37 Ibid.

38 The latest report being on 16 June 2003.

39 Press Release, 16 July 2003.

40 Ibid.

41 Hague, 23 June 2004, Press Release, "The Office of the Prosecutor of the ICC opens its first investigation", <www.icc-cij.int/pressrelease>.

tion", the Court may assume jurisdiction over the matter.[42] Any such investigation must be against an individual for genocide, crimes against humanity or war crimes committed after 1 July 2002. The Prosecutor may initiate a prosecution only with the prior authorization of a Pre-Trial Chamber of the ICC.[43] The precise meaning of the words "on the basis of information on crimes within the jurisdiction of the Court" is not entirely clear. Do they envisage that the information can come from any person or organization or must they have some kind of recognized international legal standing? It might be implied from Article 15 that the information may come from any source, as the Prosecutor is bound to

> seek additional information from States, organs of the UN, intergovernmental or non-governmental organizations, or other reliable sources…

Article 15 suggests the States negotiating the Rome Statute had anticipated the practical importance of the Prosecutor's power of investigation–particularly in the predictable situation in which the Security Council and States Parties take no action-by setting limits on the exercise of that power. Nonetheless, once the Prosecutor has concluded there is a reasonable basis on which to proceed, he or she is bound to submit to the Pre-Trial Chamber a request for authorization of an investigation. The nearly 500 communications received by the Office of the Prosecutor over the last few months suggest that individuals and organizations with information on the commission of international crimes view the Prosecutor as the person most likely to take the lead in referrals to the Court. Any consideration of the future role of the ICC will thus focus on how the Office of the Prosecutor performs its obligations.

In addition to restrictions on the power of the ICC to exercise its jurisdiction, where a prosecution is based upon a referral by the Prosecutor, the alleged crimes must have been committed by the nationals of a State Party or to have taken place in the territory of a State Party.[44]

Conclusions

Despite the war in Iraq and a significant increase in world terrorism, the ICC has not yet been able to play the leadership role that might have been expected of it by the international community. There appear to have been no jurisdictional grounds on which the Prosecutor can initiate investigations into the attack on Iraq, the conduct of subsequent hostilities or the current belligerent occupation by the United States. The marginal role of the Court in this first major conflict since the Rome Statute came into force has been rendered the more ignominious by the willingness of a majority of States Parties to sign Article 98 Agreements giving immunity from the Court to United States nationals. Moreover, the initially cautious approach by the Office of the Prosecutor to the conflict in Congo suggests the ICC may be slow

42 Article 15(1).

43 Article 15 (3).

44 Article 12(2).

to assert any right to investigate and prosecute, even where it has substantive jurisdiction. The Prosecutor appears to be confining the role of the ICC to case where it is abundantly clear that a State will not or cannot assert its primary right to prosecute international criminal activities or where the State agrees to refer the matter to the Prosecutor.

The precedents created by the investigations in Uganda and Congo raise another specter; that the ICC will be an international tribunal for conflicts arising in poor developing States with limited infrastructure or motivation to devote resources to judicial prosecutions. Western developed nations will almost invariably ensure that their own nationals, or those responsible for criminal acts against national interests, are prosecuted in domestic courts. Such an imbalanced role of the Court could raise problems of credibility with the international community and attract the criticism that the ICC is a Western institution founded to prosecute those from more troubled and poorer nations.

The dominant contemporary concern of the international community is, however, less the risk of international wars between or within States than the systematic growth of international terrorism. The offences listed in the Rome Statute were not drafted to deal with terrorism. The international crimes, as expanded by the *Elements of Crime*, nonetheless, could be interpreted to apply to acts that amount to genocide, crimes against humanity and war crimes. It will be for the ICC to develop its own jurisprudence as to the scope of the crimes within its jurisdiction and to decide if certain acts of terrorism fall within its mandate.

The ICC's secondary role in the prosecution of international crimes has been emphasized by the exercise by States of their primary right to prosecute for such acts. The willingness of national legislatures and courts to enable prosecutions under local laws may have been stimulated by the establishment of the ICC. The prosecution of international crimes may, more simply, reflect the growing determination to assert a universal jurisdiction to try international crimes and to confine traditional concepts of sovereign immunity to a narrow range of official activities.

These recent developments provide some insight into the future role of the ICC. While the ICC may have technical jurisdiction over many individual terrorist acts, and eventually over State aggression, the probability is that national tribunals of one kind or another will continue to exercise the primary right of States to prosecute international crimes.

The Sexual Violence Jurisprudence of The International Criminal Tribunal for the Former Yugoslavia and The International Criminal Tribunal for Rwanda:

The Silence Has Been Broken but There's Still a Lot to Shout About

Carrie McDougall

> [It is] something you never forget. I carry it around with me in my heart, in my soul. I think of it when I go to bed and I think of it when I get up. It doesn't let you go.
> *Rape survivor, Yugoslav conflict.*[1]

When the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established,[2] they were urged by the General Assembly and the Security Council of the United Nations to pay particular attention to crimes of sexual violence.[3] Such urgings were perhaps required given the international community's past tolerance of the use of sexual violence as a weapon of war. A decade after the establishment of the Tribunals, it can be seen that a strong body of sexual violence jurisprudence is emerging from the ICTY and the ICTR and that sexual violence has developed into a discrete category of crime, requiring special recognition under international humanitarian law. But, while the achievements of the Tribunals are numerous, have they obscured the fact that the protections afforded to victims of sexual violence are far from adequate?

A Silent History

Sexual violence has a long history of being categorised as an unfortunate by-product of war. Ancient Greek, Roman and Hebrew women were regularly seized by military victors, along with the lands and livestock of the vanquished. In the Middle Ages, the licence to rape was regarded as a significant incentive for the soldier involved in siege warfare. Unfortunately, not a lot has changed.

Despite the fact that as long ago as 1385 rape was prohibited under the military code of Richard II and in 1625 Hugo Grotius argued that rape in war was contrary

1 Cited in A. Stiglmayer, 'The Rapes in Bosnia-Herzegovina', in A. Stiglmayer (Ed), *Mass Rape: The War Against Women in Bosnia-Herzegovina* (1994), 92.

2 Security Council Resolution 827, U.N. Doc. S/Res/827 (1993); Security Council Resolution 955, U.N. Doc. S/RES/955 (1994).

3 Security Council Resolution 798, U.N. Doc. S/798/1992; *Rape and Abuse of Women in the Areas of Conflict in the Former Yugoslavia*, U.N. Doc. A/48/143 (1993).

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 331-346.*
 ISBN *90 04 14599 0.*

to natural law and 'subject to punishment',[4] the use of sexual violence as a weapon of war has long gone unpunished. Even during the landmark Nuremberg trials following World War II, no defendant was tried in relation to the evidence of brutal rape, sexual sadism, sexual mutilation or forced prostitution, sterilization and abortion that appears in the trial transcripts.[5] Indicative of thinking at the time, Stalin is reported to have said: '… can't you understand if a soldier who has crossed thousands of kilometers through blood and fire has fun with a woman or takes a trifle?'[6]

It appeared that the silence had been broken when a number of defendants under the jurisdiction of the International Military Tribunal for the Far East were charged with war crimes that included rape and crimes against humanity (referred to by the Tribunal as 'atrocities').[7] Protection against sexual violence was extended by the post-war international community under the Geneva Conventions and their Protocols.[8] By the second-half of the twentieth century, non-marital rape and serious sexual assault were also criminalised under a majority of domestic military and civil codes.

Such protections, however, were of little use to the victims of sexual violence in the armed conflicts in Cyprus, Vietnam, Peru, Sudan, Pakistan, Bangladesh, El Salvador, Liberia, Korea, Colombia, Guatemala, Afghanistan, Kuwait, Algeria, Burma, Somalia, Haiti, Uganda and Burundi, given that there was a complete failure

4 *The Law of War and Peace*, Book 3, Ch 19 (1625), cited in A.M. Hoefgen, '"There will be no Justice Unless Women are Part of the Justice": Rape in Bosnia, the ICTY and "Gender-Sensitive" Prosecution' (1999) 14 *Wisconsin Women's Law Journal* 155.

5 Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945-1 October 1946 (42 vols), (1947). See V. Morris and M.P. Scharf, *The International Criminal Tribunal for Rwanda,* vol 2, (1998), 473-479. See, however, *Control Council Law No 10, 20 Dec 1945* (Official Gazette of the Control Council for Germany, No 3).

6 Cited in K.D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997), 49.

7 See generally K.D. Askin, *ibid* and V. Morris and M.P. Scharf, above n5, 485-489. There were significant omissions from the charges laid before the Tribunal. In particular the crimes committed against the so-called "comfort women" were ignored, although the Allied Powers had knowledge of them.

8 Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) [Fourth Geneva Convention] specifically prohibits rape, any form of indecent assault and the enforced prostitution of women. Article 76(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978) [Protocol I] requires that women be protected from rape, forced prostitution and any other form of indecent assault. Article 4(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 December 1977, 1125 UNTS 609 (entered into force 7 December 1978) [Protocol II] provides that all persons are entitled to respect for their person and honour, while Article 4(2) prohibits rape, enforced prostitution and any form of indecent assault. Common Article 3 also prohibits outrages upon personal dignity.

by the international community to employ international humanitarian law to prosecute the perpetrators of sexual violence in such conflicts.

Feminist analyses have attributed the lack of sexual violence jurisprudence to the fact that international humanitarian law has been drafted and interpreted primarily by men. They argue that male military lawyers, witnesses, judges, governmental experts and scholars have accorded insufficient attention to women as subjects of international law. It is further argued that the limited role accorded to women was tailored towards the women of "*womenandchildren*": virtuous, vulnerable and maternal archetypes, archetypes against whom violence is not readily perceived.[9] Bassiouni, on the other hand, argues that the absence of jurisprudence is explained by the traditional link between sex and morality in many societies. This, he argues, has led to an emphasis being placed on issues of consent and a traditional suspicion placed over women who claim they are victims of sexual violence.[10]

Sexual Violence in the Former Yugoslavia and Rwanda

During both the Yugoslav and Rwandan conflicts, sexual violence was used as a means to destroy culture and community, to instill terror, to boost morale and as the messenger of defeat.

In the former Yugoslavia, the greatest number of assaults were committed by Serbs against Muslim women.[11] The Commission of Experts found that gang rapes were common; they found evidence of victims having been sexually abused with guns, truncheons and broken bottles. Family members were forced to assault each other. Ritualistic rapes were reported during which women's breasts were cut off

9 D.E. Buss, 'Women at the Borders: Rape and Nationalism in International Law' (1998) 1:2 *Feminist Legal Studies*, 192; P. Viseur Sellers and K. Okuizumi, 'Prosecuting International Crimes: An Inside View: International Prosecution of Sexual Assaults' (1997) 7 *Transnational Law and Contemporary Problems*, 56; A.M. Hoefgen, above n4, 165, 166, 168; J. Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *International and Comparative Law Quarterly* 55, 56-57, 64, 67; C.N. Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia' (1995) 17:4, *Human Rights Quarterly* 672; C. Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1999) 5 *European Journal of International Law* 331-2, 334; M. Etienne, 'Addressing Gender-Based Violence in an International Context' (1995) 18 *Harvard Women's Law Journal* 144, 146-8, 154-7; C.A. MacKinnon, 'Rape, Genocide and Women's Human Rights' and R. Copelon, 'Surfacing Gender: Reconceptualizing Crime Against Women in Time of War', in A. Stiglmayer (Ed), *Mass Rape,* above n1,197, 200-1.

10 M.C. Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 558.

11 *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992) S/1994/674, Annex (1994), para 251; *Report of the Team of Experts on Their Mission to Investigate Allegations of Rape in the Territory of the Former Yugoslavia from 12 to 23 January 1993,* Annex II, UN Doc. A/48/92, S/25341 (1993), para 84. It should be noted that Catholic Croats and Ashkenazi and Sephardic Jews were also targeted and that there is evidence of Muslim and Croatian rape facilities in which Serbian women were assaulted.

and their stomachs slit open.[12] The Yugoslav conflict also bred a new form of sexual terrorism. Unprecedented was the manner in which rape was employed to create "*Chetnik babies*"[13] – evidence of a systematic military policy aimed at the ethnic cleansing of Muslims from Serbian territory, possible because in Slavic Muslim and Serb cultures, ethnicity is inherited from the paternal line.[14] As Tadeuz Mazowiecki, Special Rapporteur of the UN Commission on Human Rights, noted: '…rape has been used not only as an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group.'[15]

The UN fact-finding mission in Rwanda did not detect evidence of systematic sexual violence until nine months after the genocide when women began to give birth in unparalleled numbers.[16] Given the significance of rape in Tutsi and Hutu cultures, many Rwandan women have been unwilling to discuss their ordeals. It is nevertheless clear that an enormous number of rapes were committed, primarily by Hutu men against Tutsi women.[17] Special Rapporteur René Degni-Segui stated in his report that: 'rape was the rule and its absence the exception.'[18] The attacks were often brutal: there are numerous reports of women impaled through their vaginas, of slashed breasts and the cutting out of pregnant women's uteri. The situation of victims in Rwanda has been compounded by an extremely high incidence of HIV

12 *Final Report of the Commission of Experts,* above n11, para 247, 250 (a)(d); *European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia,* UN Doc. S/25240 (Annex) (1993), paras 9, 14-20; *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992,* UN Doc. E/CN.4/1993/50 (1993), paras 82-9, Annex II; and *Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives: Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, Report of the Secretary-General,* UN Doc. A/48/858 (1994), paras 11-13.

13 Chetnik is a slang term for a Serbian extremist.

14 B. Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (1996), 90-91; D.A. Nebesar, 'Gender-Based Violence is a Weapon of War' (1998) 4 *VC Davis Journal of International Law and Policy* 150-157; *Final Report of the Commission of Experts,* above n11, para 248; T.A. Salzman, 'Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural and Ethnic Responses to Rape Victims in the Former Yugoslavia' (1998) 20:2 *Human Rights Quarterly* 355, 364, 656.

15 *Report of Mr Tadeusz Mazowiecki,* above n12 at para 85.

16 See *Report on the Situation of Human Rights in Rwanda submitted by Mr René Degni-Segui, Special Rapporteur of the Commission on Human Rights*, UN Doc. E/CN.4/1996/68 (1996), 7; Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath* (1996), 3, 24.

17 *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Submitted by Ms Radhika Coomaraswamy, Addendum, Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict*, UN Doc. E/CN.4/1998/54/Add.1 (1998), para 87.

18 *Report of Mr René Degni-Segui,* above n16, 7. See also Human Rights Watch, above n16, 24; *Report of Ms Radhika Coomaraswamy,* above n17, paras 25-35, 38.

infection and the discriminatory treatment of women under the domestic laws of the State.[19]

Of course, it must not be forgotten that in both conflicts men were also the victims of sexual violence.

Sexual Violence and the ICTY and ICTR

Given that the Tribunals faced a virtual vacuum of sexual violence jurisprudence, it can only be concluded that under the auspices of the Tribunals the law relating to sexual violence has advanced in leaps and bounds.

Prior to the inception of the Tribunals, there existed no conventional or customary definition of any form of sexual violence at international law. In this void, the Tribunals have developed customary definitions of different crimes of sexual violence. The definitions are wider than those frustrating many domestic prosecutors, and have been applied without distinction to the different heads of subject-matter jurisdiction under the Tribunal Statutes.

Initially the Tribunals espoused a conceptual definition of rape. In *Akayesu,* the ICTR held that: 'the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.'[20] The Tribunal defined rape as: 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.'[21]

This definition was initially affirmed by the ICTY in *Delalic.*[22] Since then, however, the ICTY has adopted a more mechanical definition of the *actus reus* of rape:

> 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. where such sexual penetration occurs without the consent of the victim.[23]

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19 See Human Rights Watch, above n16, 75-77, 83-84.

20 *The Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, Opinion and Judgment, Trial Chamber I, 2 September 1998 [*Akayesu (Judgment)*], para 597.

21 *Akayesu (Judgment)*, para 688. See also *The Prosecutor v Alfred Musema*, Case No. ICTR-96-13, Opinion and Judgment, Trial Chamber, 27 January 2000 [*Musema (Judgment*)], para 226.

22 *Prosecutor v Zejnil Delalic, Zaravko Mucic also known as 'Pavo', Hazilm Delic, Esad Landzo also known as 'Zenga'*, Case No. IT-96-21, Opinion and Judgment, Trial Chamber II, 16 November 1998 [*Delalic (Judgment)*], para 478-479.

23 *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T, Trial Chamber II, Judgment, 22 February 2001 [*Kunarac (Judgment)*] para 460, which modified the definition of rape outlined in *The Prosecutor v Anto Furundzija* Case No. IT-95-17/1, Opinion and Judgment, Trial Chamber II, 10 December 1998 [*Furundzija (Judgment*)], para 185. The definition has been affirmed by the ICTY Appeals Chamber (*The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-A, Judgment, Appeals Chamber, 12 June 2002 [*Kunarac (Appeal)*], para 127-133) and adopted by the ICTR (*The Prosecutor v Juvénal Kajelijeli*, Case No. ICTR-98-44A-T,

It is interesting to note that the ICTY considered the forced penetration of the mouth by the penis of the perpetrator a 'humiliating and degrading attack on human dignity'[24] and largely for this reason included oral penetration in its definition, despite division as to whether or not such acts should be criminalised among domestic jurisdictions.[25] As such, while it would appear difficult to demonstrate sufficient evidence of state practice or *opinio juris* to establish a prohibition of oral rape under customary international law per se, based on an analysis of the types of acts that constitute a violation of the different heads of subject-matter jurisdiction, the Tribunals have ensured that while a conceptual definition of rape has been abandoned, rape was not too narrowly defined.

As significant is the realistic approach of the Tribunals to the issue of consent, so often a bugbear in domestic jurisdictions. According to the Tribunals, consent must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.[26] The recognition that consent may be vitiated by circumstances inherent to armed conflict is a huge step away from the archaic stereotype in which women often 'asked' to be brutalized and raped.

Also hailed is the Tribunals' definition of sexual violence as:

> any act of a sexual nature which is committed on a person under circumstances which are coercive.[27]

As noted by the Tribunal in *Akayesu*, this definition is wide enough to include acts that do not involve physical contact, such as an incident in that case where a student was forced to perform gymnastics in front of a crowd while naked.[28] The Tribunals have therefore been rightly congratulated for recognizing that a victim's sexual autonomy may be impeded upon violently, even in situations that fall outside of the traditional concept of violence.

Judgment and Sentence, Trial Chamber II, 1 December 2003 [*Kajelijeli (Judgment)*]; *The Prosecutor v Laurence Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, Trial Chamber, 15 May 2003 [*Semanza (Judgment)*], para 345). As such, the weight of authority supports its application, despite the recent decision of the ICTR in *The Prosecutor v Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, Trial Chamber I, 16 May 2003 [*Niyitegeka (Judgment)*], para 456, which reverted to the *Akayesu* definition.

24 *Furundzija (Judgment),* para 184-6.

25 Similarly, part of the ICTR's motivation for espousing a conceptual definition of rape was to 'better accommodate the evolving norms of criminal justice': *Musema (Judgment)*, para 228.

26 In *Furundzija (Judgment)*, the Tribunal stressed that 'any form of captivity vitiates consent' (para 271). Affirmed in *The Prosecutor v Miroslav Kvocka, Milojica Kos, Mlado Radic, Dragoljub Prcac*, Case No. IT-98-30-T, Judgment, Trial Chamber, 2 November 2001 [*Kvocka (Judgment)*], para 178.

27 *Akayesu (Judgment),* para 598, 688. Affirmed *Musema (Judgment)* para 229; *Delalic (Judgment)*, para 479; *Kvocka (Judgment)*, para 180.

28 *(Judgment)* para 688. Approved *Kvocka (Judgment)*, para 180.

Another of the Tribunals' key achievements is the fact that the various crimes of sexual violence recognised by the Tribunals[29] have been held to constitute violations of each head of subject-matter jurisdiction under the Statutes,[30] provided that the requisite *chapeau* elements are satisfied.[31] This is despite the fact that crimes of sexual violence are only specifically enumerated under two of the statutory heads of subject-matter jurisdiction.[32]

During consultations leading up to the promulgation of the Statute of the ICTY, efforts were made to have the list of enumerated crimes against humanity (which include rape) expanded to include forced prostitution, forced pregnancy and other acts of sexual abuse.[33] The efforts were unsuccessful. Nevertheless, the Tribunals have found that the lists are not exhaustive and that acts of sexual violence other than rape fall within the scope of torture, persecution, enslavement or 'other inhumane acts'.[34] By way of example, the ICTR in *Niyitegeka* found that the insertion of a sharpened piece of wood into a dead Tutsi woman's genitalia was an act of seriousness, comparable to other enumerated crimes against humanity, causing mental suffering to civilians and constituting a serious attack on the human dignity of the Tutsi community as a whole, thereby satisfying the definition of 'other inhumane acts'.[35]

Sexual violence was conceptualised as an act of genocide for the first time in the landmark *Akayesu* decision. In its judgment, subsequently affirmed by other decisions,[36] the ICTR held that rape and sexual violence can constitute the *actus reas* of the prohibition against 'causing serious bodily or mental harm'. The Chamber stated

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29 In addition to the crimes referred to above, indecent assault was first defined as a crime in *Musema (Judgment)*, para 285. Sexual assault was recognized as a crime under customary law in *Furundzija (Judgment)*, para 168-9, although it has not yet been defined by the Tribunals.

30 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, Annex (1993); 32 ILM 1192 (1993)[ICTY Statute]; Security Council Resolution 955, UN Doc. S/INF/50, Annex (1996) [ICTR Statute].

31 See for example *Furundzija (Judgment)*, para 172, *Akayesu (Judgment)*, para 688.

32 Rape is listed as a crime against humanity under ICTY Statute Article 5(g) and ICTR Statute Article 3(g). 'Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' are specified as violations of common Article 3 and Additional Protocol II under ICTR Statute Article 4(e).

33 D.E. Buss, above n9, 185.

34 See for example *Akayesu (Judgment)*, para 688; *Musema (Judgment)*, para 212; *Semanza (Judgment)*, para 345; *Kajelijeli (Judgment)*, para 916; *Kvocka (Judgment)*, para 206; *The Prosecutor v Milomir Stakic* Case No.IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003, para 757.

35 *Niyitegeka (Judgment)*, para 463-465.

36 *Musema (Judgment),* para 156; *The Prosecutor v Clément Kayishema & Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment and Sentence, Trial Chamber, 21 May 1999 [*Kayishema (Judgment)*], para 95; *The Prosecutor v Ignace Bagilishema*, Case No. ICTR-95-1A-T, Opinion and Judgment Trial Chamber 7 June 2001, para 59; *Stakic (Judgment)*, para 516; *Kajelijeli (Judgment)*, para 815.

that such acts are 'one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.'[37]

Acts of sexual violence, such as sexual mutilation, enforced sterilisation and forced birth control, have also been held to be capable of constituting 'measures intended to prevent births within the group'.[38] According to the ICTR, rape can also be a measure intended to prevent births when the person raped subsequently refuses to procreate,[39] although the requisite mental element may be difficult to establish.

Importantly, the ICTR has also recognised that in societies where ethnic identity is determined by the identity of the father, the deliberate impregnation of a woman by a male of another ethnic group, with the intent to have her give birth to a child who would not be perceived as a member of his or her mother's ethnic group, may also constitute a 'measure intended to prevent births within the group', and as such, may be prosecuted as genocide.[40] This reflects the psychological reality that has afflicted many victims in both the former Yugoslavia and Rwanda.[41]

Article 3 of the ICTY Statute pertaining to the laws and customs of war has been defined as a residual clause, designed to ensure that no serious violation of international humanitarian law is omitted from the jurisdiction of the Tribunal.[42] The ICTY has ruled that acts of sexual violence are prohibited under various laws

37 *Akayesu (Judgment)*, para 731. See also *Semanza (Judgment)*, para 320.

38 *Akayesu (Judgment),* para 507; *Musema (Judgment)*, para 158; *Kayishema (Judgment),* para 108. Rosalind Dixon argues that rape is also effective as genocide in patriarchal societies because it 'renders female victims socially infertile, by virtue of their 'unmarriageability' or untouchability', R. Dixon, 'Rape as a Crime in International Humanitarian Law: Where to From Here?' (2002) 13:3 *European Journal of International Law*, 703-4.

39 *Akayesu (Judgment),* para 508; *Musema (Judgment)*, para 158.

40 *Akayesu (Judgment),* para 507. See S.A. Healey, 'Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia' (1995) 21:2 *Brooklyn Journal of International Law* 371; A. Kovalovska, 'Rape of Muslim Women in Wartime Bosnia' (1997) 3:3 *ILSA Journal of International and Comparative Law* 934; G.H. Carlton, 'Equalised Tragedy: Prosecuting Rape in the Bosnian Conflict Under the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia' (1997) 6:1 *Journal of International Law and Practice* 94; A.M. Hoefgen, above n4, 162; R.C. Carpenter, 'Surfacing Children: Limitations of Genocidal Rape Discourse' (2000) 22 *Human Rights Quarterly* 436, 442-4, 454-7, 466-7. Carpenter raises the question of 'What specific rights [of the subsequently born child] are violated, if any, when a child is forcibly and intentionally conceived in a context that precludes [him or] her from acceptance by [his or] her family, identity with a community, or access to resources?' (at 430).

41 Estimates of the number of *enfants non-desirés* born of rape in Rwanda range from 2000 to 5000. Human Rights Watch, above n16, 3, 24; *Report of Mr René Degni-Segui*, above n16, 7. Orphanages in Bosnia-Herzegovina, Serbia and Croatia are similarly full of unwanted children.

42 See *The Prosecutor v Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment, Trial Chamber II, 7 May 1997 [*Tadic (Judgment)*], para 610; Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber, 2 October 1995, [*Tadic (Jurisdiction)*], para 87. The Tribunal rejected the Secretary-General's opinion that the laws and customs of war were reflected solely in the Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations, opened for signature 18 October 1907, 1 Bevans 631, 651 (entered into force 4 September 1900).

and customs of war, including Article 46 of the 1907 Hague Convention (IV),[43] Article 27 of the Fourth Geneva Convention, Article 75(2)(b) and 76(1) of Additional Protocol I, common Article 3 of the Conventions and Article 4(2)(e) of Additional Protocol II.[44] In *Furundzija*, the Trial Chamber stated that there is also a customary prohibition against rape and 'serious sexual assault'.[45]

The applicability of common Article 3 and Protocol II to international conflicts is significant. While these provisions do not contain prohibitions relating to sexual violence that are not captured by Article 27 of the Fourth Geneva Convention, it can be easier to establish the constituent elements of the provisions, as opposed to articles of the main Conventions. Moreover, as the prosecution of sexual violence under the customary prohibition does not require the fulfillment of any additional elements, it represents a significant development in sexual violence jurisprudence.

No form of sexual violence is specifically prohibited under Article 147 of the Fourth Geneva Convention, which lists the crimes known as grave breaches. The list of grave breaches, however, is not viewed as being exhaustive.[46] For example, the International Committee of the Red Cross Commentary to the Conventions suggests that the grave breach of 'inhuman treatment' was included to cover possibilities that had not been foreseen by the drafters of the Convention, including sexual violence, which, it was argued, also falls within 'wilfully causing great suffering or serious injury.'[47] Other writers, however, argued that the fact that rape is specifically referred to in Article 27 of the Fourth Geneva Convention, but not in Article 147, militates against such a broad interpretation.[48]

In the event, the ICTY has affirmed the position of the ICRC and has significantly extended sexual violence jurisprudence by ruling that rape and other acts of

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43 Judith Gardam, ('Women and the Law of Armed Conflict', above n9, 74) and Theodor Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 37 *American Journal of International Law* 425 note that Article 46 was not regarded as designating rape or sexual violence as a war crime at the time it was adopted.

44 See *Delalic (Judgment)*, para 476; *Furundzija*, para 165-166; *Akayesu (Judgment)*, para 688; *Musema (Judgment)*, para 285.

45 Para 168-169. Unfortunately the Trial Chamber did not define serious sexual assault. Arguably, however, this would mirror the definition of indecent assault, as defined by the ICTR in *Musema (Judgment)* at para 285.

46 *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)* S/1995/134 1995), 141; T. Meron, 'Rape as a Crime under International Humanitarian Law', above n43, 425; R. Copelon, 'Surfacing Gender', above n9, 202; P. Viseur Sellers and K. Okuizumi, above n9, 59-62; *Final Report of the Commission of Experts,* above n11, para 105; G. H. Carlton, above n40, 101; C.P.M. Cleiren and M.E.M. Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural and Evidentiary Issues' (1994) 5:2-3 *Criminal Law Forum* 491-492; J.C. O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *American Journal of International Law* 645.

47 J. Pictet (Ed), *Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), 39.

48 See J. Gardam, 'Women and the Law of Armed Conflict', above n9, 75.

sexual violence can constitute grave breaches if they satisfy the requisite elements of torture, inhuman treatment or wilfully causing great suffering or serious injury.[49] This is a crucial recognition that acts of sexual violence rank among the most serious war crimes.

It is particularly notable that the Tribunals have held that rape and other forms of sexual violence inflict the requisite degree of pain and suffering to constitute torture[50] and that the prohibited purposes of intimidation, coercion and punishment can be integral components of sexual violence.[51] It should be noted that in *Delalic* the ICTY also stated that sexual violence is often inflicted on a victim because she is a woman. In this context the Tribunal stated that: '… this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.'[52] Given that gender is so often ignored as a ground of discrimination, this is enormously significant.

Critical to these accomplishments is the fact that the Tribunals, confronted with an incomplete and fragmented normative framework, have clarified (and arguably broadened) customary norms of international humanitarian law. As an added benefit, the Tribunals' recognition of the customary status of several key international humanitarian law treaties, and their application to both internal and international armed conflicts, as well as the finding of a customary prohibition against rape and other forms of serious sexual violence, establishes the means for prosecuting nationals of States not party to the instruments.

Victims of sexual violence frequently under-report the crimes they suffer for a variety of reasons, not least of which is the fact that the legal process can be a hostile environment.[53] To combat this problem, several measures have been incorporated into the Tribunals' mirror Rules of Procedure and Evidence to encourage victims and witnesses to testify against the perpetrators of sexual violence and to protect

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49 For definitions of inhuman treatment and willfully causing great suffering or serious injury see *Delalic (Judgment),* para 511, 543.

50 *Delalic (Judgment)*, para 440-442, 469, 475-493; *Furundzija (Judgment)*, para 163, 171; *Kunarac (Appeal)* para 150-151; *Kvocka (Judgment)*, para 144; *The Prosecutor v Dusko Tadic*, Case No. IT-94-1-T, Judgment, Appeals Chamber, 15 July 1999 [*Tadic (Appeal)*], para 327. Interestingly, the ICTY in *Furundzija (Judgment)* found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer (at para 267). See also *Akayesu (Judgment)*, para 597, 687 and *Report to the United Nations Commission on Human Rights, Submitted by the Special Rapporteur on Torture* (12 January 1995), UN Doc. E/CN.4/1995/42, para 18. For the Tribunals' definition of torture see *Kunarac (Judgment)*, para 496, *Kunarac (Appeal)*, para 148, *Semanza (Judgment),* para 342.

51 *Delalic (Judgment)*, para 471.

52 Para 491. See also *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict: Final Report submitted by Ms Gay J. McDougall, Special Rapporteur*, E/CN.4/Sub.2/1998/13, (1998), para 55; R. Dixon, above n38, 701.

53 F. Ni Aolain, 'Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War' (1997) 60:3 *Albany Law Review* 887; C.N. Niarchos, above n9, 684.

those who do. In this respect, it should not be forgotten that one of the Tribunals' primary aims is the rebuilding of communities shattered by armed conflict. The reintegration of the survivors of sexual violence has arguably been especially difficult in both the former Yugoslavia and Rwanda, cultures in which sexual violence is seldom spoken about. The stigma attached to crimes of sexual violence is also a very real danger: reports of victims of sexual violence having been killed by their own families have emerged from both the Former Yugoslavia and Rwanda.[54] In this context, the punishment of the perpetrators of sexual violence crimes serves as a crucial educative device, teaching the lesson that the violence in question is an offence, the fault for which lies with the perpetrator, not the victim.

Under Rule 69 the Prosecutors are permitted to seek an order preventing the disclosure of the identity of a victim or witness who may be at risk during the investigative stage of proceedings. Rule 75 allows the Tribunals to order a wide array of measures before or during the trial, to ensure the privacy and protection of victims and witnesses. These measures have been applauded for the recognition they accord to victims who may face a second round of victimization or even grave danger in testifying before the Tribunals, especially given the unresolved tensions in both the former Yugoslavia and Rwanda, and the continuing liberty of large numbers of indicted war criminals.[55]

Under Rule 96, the Trial Chambers do not require corroboration of a victim's testimony in cases of sexual assault. As noted by the ICTY in *Tadic*, this rule 'accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long been denied to victims of sexual assault by the common law.'[56] In a practical sense this rule is important, for in many crimes of sexual violence there is an absence of eyewitnesses and, particularly in war-time situations where victims rarely have access to medical services or to law enforcement bodies, no means for corroborative evidence to be preserved.

Importantly, Rule 96 also dispenses with the privilege of admitting the prior sexual conduct of the victim into evidence.[57] This is an enormous step forward, for in many domestic jurisdictions a woman's sexual past remains relevant, emphasising the 'desirability' of female chastity and offering little protection to women who lack a state's version of virtue.

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54 See T.A. Salzman, above n14, 367; A. Kovalovska, above n40, 935; A.E. Ray, 'The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries' (1997) 46 *American University Law Review*, 805; V. Folnegovic-Smalc, 'Psychiatric Aspects of the Rapes in the War against the Republics of Croatia and Bosnia-Herzegovina', in A. Stiglmayer (Ed), *Mass Rape*, above n1, 176-177.

55 See F. Ni Aolain, 'Sex-Based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law' (2000) 12 *Yale Journal of Law and Feminism* 89; K.L. Fabian, 'An Analysis of the Tadic and Akayesu Trials' (2000) 49 *De Paul Law Review* 1004.

56 *Tadic (Judgment)*, para 536.

57 See *Delalic (Judgment)*, para 70.

In addition to the accomplishments listed above, it is notable that under the Tribunals sexual violence has been punished for the first time by the international community in the context of an internal armed conflict and, for the first time in history, an indictment (in the *Kunarac* case) was based solely on crimes of sexual violence. Despite all of the accomplishments of the Tribunals, however, it is fair to say that the protection afforded by our current sexual violence jurisprudence is less than perfect.

Adequate Protection?

On a practical level, the Tribunal Prosecutors have been criticized for failing to investigate and prosecute crimes of sexual violence to the fullest extent of their powers.[58] Former Chief Prosecutor of the ICTY, Justice Louise Arbour, has acknowledged this fact but states that given the limited resources of the Tribunal, it was difficult to pursue an agenda against sexual violence at the expense of ignoring other crimes, such as mass exterminations.[59] At any rate, given the enormous number of sexual violence crimes known to have been perpetrated, it must be accepted that the overwhelming number of victims will never see justice meted out to their attackers.

The Tribunals have also been criticised for not always clearly articulating prohibitions against sexual violence. Although Dusko Tadic, for example, was found guilty of violations of the laws or customs of war (cruel treatment) and crimes against humanity (inhumane acts) and, on appeal, of grave breaches (torture, or inhuman treatment and wilfully causing great suffering or serious injury), for forcing two prisoners to commit oral sexual acts on a third and to mutilate him sexually, neither the trial judgment or the appeal decision contains any specific discussion of the application of international humanitarian law to sexual violence.[60]

The language of existing treaty provisions is also a source of concern. References to 'honour'[61] and 'dignity'[62] are wholly inadequate to express the suffering of victims

58 The Special Rapporteur on Violence Against Women, after hearing of the levels of sexual violence during the Rwandan conflict, was, in her words, 'absolutely appalled that the first indictment on the grounds of sexual violence at the International Tribunal for Rwanda (ICTR) was issued only in August 1997, and only then after heavy international pressure from women's groups.' *Report of Ms Radhika Coomaraswamy,* above n18, para 38.

59 Justice Arbour was kind enough to discuss the author's paper after its presentation at the Challenge of Conflict: International Law Responds Conference in Adelaide on 28 February 2004.

60 It should be noted that Tadic was also charged with, and found guilty of, other acts of sexual violence that were classified more broadly. See, for example, Count 1 of the indictment where Tadic was charged with a crime against humanity (persecution) for taking part in a 'campaign of terror which included killings, torture, sexual assaults, and other physical and psychological abuse.'

61 See Article 46 of the Hague Convention (IV) and Article 27 of the Fourth Geneva Convention.

62 See common Article 3(1)(c) of the Geneva Conventions, Article 75(2)(b) of Additional Protocol I and Article 4(2)(e) of Additional Protocol II.

of sexual violence. Mere injury to honour implies that such crimes are less worthy of prosecution, as well as suggesting that only honourable women can be raped, and that the survivor of sexual violence is somehow 'dishonoured' in the attack.[63] The alignment of provisions protecting dignity and honour alongside 'private property', 'religious convictions' and 'customs' also points to a lack of understanding of these crimes as acts of violence.[64] It is also noted that some sexual violence provisions are drafted in terms of providing 'protection', as opposed to the majority of IHL provisions that refer to the concept of 'prohibition'.[65]

The language of treaty-based offences raises the question of whether or not sexual violence crimes should be regarded as gender-based offences. Currently, both Article 27 of the Fourth Geneva Convention and Article 76(1) of Additional Protocol I apply explicitly to women. Niarchos argues that crimes of sexual violence are motivated by gender, not simply by membership in the enemy camp. She, and others, note that in terms of numbers, rape is essentially a crime committed by men against women. Moreover, women suffer particular side-effects from rape, such as forced impregnation, abortion and maternity that are not shared by men.[66] Violence against women can perpetuate socially constructed gender roles or the power discrepancy between men and women.[67] And women face gender-related obstacles in seeking redress for these violations in most legal systems.[68] Against such contentions, Cleiren and Tijssen argue that these crimes should not be regarded as specifically gender-based offences, but as crimes of violence of a sexual nature.[69] In fact,

63 See *Report of Ms Gay J. McDougall*, above n52, (at para 16); C.N. Niarchos, above n9, 674-6; S. A. Healey, above n40, 351; R.C. Carpenter, above n40, 433; Human Rights Watch, above n16, 28; *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict (Update to the Final Report), Submitted by Ms Gay J McDougall, Special Rapporteur,* UN Doc. E/CN.4/Sub.2/2000/21 (6 June 2000), para 91; K.D. Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslavian and Rwandan Tribunals: Current Status' *American Journal of International Law* 123; S. Reynolds, 'Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict' (1998) 16 *Law and Inequality* 601; R. Copelon, above n9, 100, 200-201; *Report of Ms Radhika Coomaraswamy,* above n17, para 95.

64 See Article 46 Hague Convention (IV) and Article 27 of the Fourth Geneva Convention.

65 J. Gardam and H. Charlesworth, 'Protection of Women in Armed Conflict' (2000) 22 *Human Rights Quarterly* 159.

66 C.N. Niarchos, above n9, 671; K.D. Askin, *War Crimes Against Women,* above n6, 14; B. Stephens, 'Humanitarian Law and Gender Violence: An End to Centuries of Neglect?' (1999) 3 *Hofstra Law and Policy Symposium* 108; T.L. Hessel, 'War Crimes Against Women: Prosecution in International War Crimes Tribunals' (1998-1999) 22 *The Maryland Journal of International Law and Trade* 422; R.C. Carpenter, above n40, 436-9, 440-2.

67 B.S. Moshan, 'Women, War and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity' (1998) 22 *Fordham International Law Journal* 157.

68 *Final Report of Ms Gay J. McDougall,* above n52, para 18.

69 C.P.M. Cleiren and M.E.M. Tijssen, above n46, 474. They do argue, however, that gender should not be disregarded when such crimes are committed against women. See also J.L.

there may be a need for a specific reference to men, who are often overlooked as the victims of sexual violence.[70]

The international community appears to agree with Cleiren and Tijssen. The Rome Statute of the International Criminal Court[71] employs gender-neutral language. For example, rape is defined under the *Elements of Crimes* as:

> 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
> 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[72]

The *Elements* specify that the concept of 'invasion' is intended to be broad enough to be gender-neutral. In this way the definition is wider than that developed by the Tribunals, for it covers oral rape, whether the perpetrator or victim is male or female, the female rape of male victims, whether the forced intercourse is vaginal or anal and situations where two males are forced to engage in sexual intercourse with each other.[73]

The fear that the Tribunals could be haunted by accusations of breaching the fundamental norm of *nullum crimen sine lege* should also be noted.[74] Watson and Meron among many others are critical of the Tribunals' failure to cite adequate examples of state practice and *opinio juris* in support of their proclamations of customary prohibitions; the Tribunal in *Tadic* stating that it is 'difficult to discern the

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Falvey, 'Criminal Sexual Conduct as a Violation of International Humanitarian Law' (1997) 12 *St. John's Journal of International Legal Commentary* 389, 399.

70 A.G. De Busschere, 'The Human Treatment of Women in Times of Armed Conflict: Equality and the Law of Humanity' (1987) 26 *Revue de Droit Pènal Militaire* 575, cited in E.A. Kohn, 'Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia' (1994) 24 *Golden Gate University Law Review* 202.

71 Rome Statute of the International Criminal Court, signed 17 July 1998, 37 ILM 999 (entered into force 1 July 2002).

72 See Report of the First Assembly of States Parties, UN Doc. ICC-ASP/1/3(Supp), (2002), Elements of Crimes, Article 7(1)(g)-1, 119; Article 8(2)(b)(xxii)-1, 141; Article 8(2)(e)(vi)-1, 152.

73 Under the Tribunals' definition if two men were forced to have sexual intercourse with each other, one of the victims would not, in the absence of penetration of his body, be regarded as having been raped. See G. Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2002) 43:1 *Harvard International Law Journal* 292.

74 See for example J. McHenry, 'The Prosecution of Rape Under International Law: Justice that is Long Overdue' (2002) 35 *Vanderbilt Journal of Transnational Law* 1299-1302.

actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour.'[75]

In this context, it is noted that the drafters of the Rome Statute were not convinced that the Geneva Conventions and other international humanitarian law instruments have been replicated at customary law, preferring instead to specify a list of prohibitions against the laws and customs of war. One is at least comforted by the fact that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and 'other forms of sexual violence' have been specified as being capable of constituting serious violations of the laws and customs applicable in both international and internal armed conflicts.

Nonetheless, there is still a perceived need to specify that acts of sexual violence constitute grave breaches of the Geneva Conventions by amendment to the Conventions and the Rome Statute. This would alleviate the need to first establish that acts of sexual violence satisfy the *actus reas* of one of the listed grave breaches, as well as dispensing with the need to prove the additional elements required to establish a breach such as torture. It should not be necessary to rely upon judicial interpretation to recognise that serious acts of sexual violence are of equal, if not greater, seriousness as other grave breaches, such as the destruction or appropriation of property.

Victims of sexual violence commonly suffer from severe physical injuries and long-lasting psychological sequelae shaped by the particular social and cultural context in which the sexual violence occurs. Victims report feelings of shock, a fear of injury or death that can be paralyzing, and a sense of loss of control over their lives. Longer-term effects can include persistent fears, avoidance of situations that trigger memories of the violation, profound feelings of shame, difficulty remembering events, intrusive thoughts of the abuse, a decreased ability to have an interactive life and difficulty re-establishing intimate relationships. All of these symptoms are exacerbated in situations where victims have witnessed the horrors of war, and have no access to an infrastructure of support.[76]

In this context, the Tribunals have been criticised for treating victims as 'witnesses' rather than 'complainants'.[77] Financial limitations have made it impossible for the Tribunals' Victims and Witnesses Units to offer either the full range of sup-

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75 *(Jurisdiction)* at para 99. G.R. Watson, 'The Humanitarian Law of the Yugoslavian War Crimes Tribunal: Jurisdiction in *Prosecutor v Tadic*' (1996) 36 *Virginia Journal of International Law* 710-714; T. Meron, 'International Criminalisation of Internal Atrocities' (1995) 89 *American Journal of International Law* 246.

76 See S. Swiss and J.E. Giller, 'Prosecuting Rape as a Crime of War: A Medical Perspective' (1993) 270:5 *Journal of the American Medical Association* 613. See also *Commission of Experts Report, Annexes IX to XII,* S/1994/674/Add.2 (Vol v), para 25. Swiss and Giller note that this data comes from studies of adult Western women in peacetime who have endured a single rape. They add that to understand the effects of rape in wartime, 'one must consider the additional trauma that women have experienced: death of loved ones, loss of home and community, dislocation, untreated illness and war-related injury.'

77 See R. Dixon, above n38 at 705, where she quotes a Rwandan victim of sexual violence who testified before the ICTR and told a Preparatory Commission meeting on the Rome Statute that 'she did not feel [the] justice [of the ICTR] was 'hers".

port services or the protection required by witnesses. The protective measures that are afforded to witnesses have been criticized on the ground that they deny fundamental guarantees to an accused.[78] The protective measures are often futile: at least two witnesses who testified in Arusha were killed upon their return to Rwanda and many others have been threatened.[79] This shortcoming has at least been recognized by the international community who have expanded the scope of the Victims and Witnesses Unit under the Rome Statute, which allows victims to present their views to the Court at all stages of the proceeding.

Conclusion

Although the Statutes of the Tribunals are necessarily contextual and are only applicable to crimes committed within the former Yugoslavia and Rwanda during specified periods, the Tribunal Statutes are likely to become normative instruments in international humanitarian law. Moreover, the jurisprudence developed by the Tribunals is likely to make a significant contribution to the development of customary law, as already reflected in the International Criminal Court's *Elements of Crimes*, as well as providing persuasive judicial precedent to the future judges of the ICC. Hopefully, this will ensure that the Yugoslav and Rwandan experiences indicate a lasting reversal of centuries of silence regarding the use of sexual violence as a weapon of war.

This said, the international community should not feel content to rest on its laurels. Like many of the other scourges that afflict humanity, work on the eradication of sexual violence has only just begun.

78 The Statutes attempt to strike a balance, stating that proceedings must be held 'with full respect for the rights of the accused and with due regard for the protection of victims and witnesses'. Article 20(1), ICTY Statute; Article 19(1), ICTR Statute. See also Rule 75(a) and *The Prosecutor v Tihomir, also known as Tihofil, Blaskic*, Decision on the application of the Prosecutor dated 17 October 1996 requesting protective measures for the victims and witnesses, Case No. IT-95-14-T, 5 November 1996, para 41.

79 *Report of Ms Radhika Coomaraswamy*, above n17, para 51-54.

Political Constraints upon the International Criminal Court

Roderic Pitty

Introduction: A Contrast of Two Horizons

Two different perspectives about the prospects for the International Criminal Court (ICC) derive from whether the viewer focuses principally on the character of the Court's creation, or on the political context that will largely determine whether it succeeds in helping to end impunity for the most serious international crimes. This contrast of horizons was made dramatically clear in March 2003 at the time of the inauguration of the ICC's initial judges. In itself this proceeded as successfully as might have been imagined, with informed approval of the process of selecting judges from the Coalition for the International Criminal Court, comprising those non-governmental organisations that were instrumental in lobbying States to establish the Court and who are carefully monitoring its performance.[1] One observer of the internal horizon of the Court noted that diplomatic 'vote trading and block voting did not distort the outcome', and that the Court's progress 'is rapid and profound'.[2] The Court has emerged much quicker than many of its influential supporters ever imagined. Half the States in the world have joined it, with most support from Europe, Latin America and Africa, some support in the Pacific, less in Asia and almost none in the Middle East, although Jordan's participation is significant.[3]

The bleak external horizon of the Court was highlighted one week after the inauguration of ICC judges by the US invasion of Iraq. Although concerns about large numbers of people fleeing to Jordan to escape the war were unfounded, the difficulties of the Court's external environment were made clear by the war and the divisions in the Security Council that it caused. The Court's first judges were

1 For an account of the role of the Coalition in helping create the Court, see William Pace and Jennifer Schense, 'International lawmaking of historic proportions: Civil Society and the International Criminal Court' in Paul Gready (Ed) *Fighting for Human Rights* (Routledge, London, 2004) 104-16.

2 M.C. Kane, 'The World Will Judge', *The World Today*, April 2003, 22-3.

3 The Jordanian Foreign Minister, Marwan Muasher, at the 59th session of the UN General Assembly on 27 September 2004 called upon all States to join the Court, respect its integrity and cooperate with it in order to maintain international peace and security. The Minister's statement (see pp 4-5) is available at:<http://www.un.org/webcast/ga/59/statements/jorengo40927.pdf>.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 347-365.*
 ISBN *90 04 14599 0.*

chosen at a time of international diplomatic crisis concerning Iraq, which not only overshadowed the new institution but also showed that its survival was far from assured. Despite the strong commitment to the Court from many States around the world, it is obviously far too soon to expect it to help restrain or avert every illegal use of force against civilians. Indeed, the crime of aggression remains to be legally defined at a review conference of the Court, to be held in 2009. Of the permanent members of the Security Council, Russia has said often that the ICC will in future have jurisdiction over aggression only when authorised by the Security Council.[4] Yet when the ICC was created in 2003, the prospect of international agreement in the Security Council was less likely than when the Court's Statute had been formulated in 1998. Indeed, one proponent of Hedley Bull's theory of international society has concluded that, when the ICC was created, such a society based on respect by States for common rules and institutions had 'ceased to exist', because the US had rushed to war in Iraq ignoring the consequences for the United Nations (UN) and international law.[5] However, events in 2004 suggest that view was too pessimistic, as the US then failed to get the Security Council to acquiesce in its continued campaign against the ICC.

The tension between the ICC's organisational effectiveness and its uncertain political environment will take time to resolve. According to the ICC's first President, Justice Philippe Kirsch, time is what the Court needs most of all. Speaking before his selection as the ICC's top judge, Kirsch said that 'announcements by prophets of doom and gloom of the demise of the ICC before it is even born strike me as a little premature'.[6] Stressing that the ICC is in its infancy compared to the Security Council, he argued that 'the ICC has to be given time to be seen as a natural part of the international scene', playing an effective role 'in cooperation with existing institutions'.[7] Whether the Court will have time to grow depends a lot on its interaction with the Security Council, and the extent to which Council decisions concerning the Court occur 'in the shadow of law'.[8] While this is far from certain, it is not impossible, because of the growing resonance of the rhetoric of justice in international affairs. Previously, there was a false dichotomy between international law and power politics. As Justice Krzysztof Skubiszewski said in the case about the Timor Gap Treaty, power politics has 'more often than not consisted of crime and lawlessness on a massive scale', but in large areas it has 'proved to be less real and less per-

4 Speech to the 6th committee of the UN General Assembly, 14 October 2004, by S. Kuzmenkov on behalf of the Russian Federation, available at:<http://www.iccnow.org/documents/statements/governments/6thcmt59UNGA/Russian_Federation6thComm14Oct04.pdf>.

5 Tim Dunne, 'Society and Hierarchy in International Relations', (2003) 17 (3) *International Relations* 316.

6 Philippe Kirsch, 'Keynote Address', (1999) 32 *Cornell International Law Journal* 437, 442.

7 Ibid.

8 Ruti Teitel, 'Humanity's Law; Rule of Law for the New Global Politics', (2002) 35 *Cornell International Law Journal* 355, 368, 380, 384-5.

manent than many assumed'.[9] The ICC's Prosecutor, Luis Moreno-Ocampo, once quoted Karl Popper's comment that 'the history of power politics is nothing but the history of international crime and mass murder (including, it is true, some of the attempts to suppress them').[10] Concluding his first speech in the job, he said we must learn to understand that 'there is no safe haven for life and freedom if we fail to protect the rights of any person in any country of the world'.[11] The ICC exists to ensure, as Justice Skubiszewski had earlier affirmed, that 'even in apparently hopeless situations respect for the law is called for', and to ensure 'that respect should not mean taking an unrealistic posture'.[12] There are grounds for believing that the Court could strengthen attempts to suppress the worst atrocities, at least in parts of the world.

As the ICC is only just initiating its first investigations into crimes committed in Ituri in the Democratic Republic of Congo and in northern Uganda, it is too early to assess the Court's effectiveness in practice. Yet there has already been much international political attention given to the Court since its creation in July 2002, particularly by the Security Council in Resolutions 1422 (12 July 2002) and 1487 (12 June 2003).[13] Insight into the likely constraints that will be imposed by the Security Council on the Court can be gained by examining those Resolutions, and analysing the conduct towards the ICC of the permanent members of the Council. It will largely be the policies of these States that will determine how far the tension between the internal and external horizons of the Court can be resolved. By the end of 2000, four of the five permanent members of the Council had signed the ICC Statute, with China the notable exception.[14] China's policy regarding the ICC became very significant in mid-2004, when it joined France and several non-permanent members of the Council in refusing to accept a renewal of Resolution 1487. The previous October, a Chinese diplomat had described the ICC in a speech to

9 Dissenting Opinion of Judge Skubiszewski, in *Case Concerning East Timor (Portugal v Australia)* ICJ Judgment of 30 June 1995, reprinted in Heike Krieger (Ed), *East Timor and the International Community: basic documents* (Cambridge University Press, Cambridge, 1997) 470.

10 Luis Moreno-Ocampo, 'Beyond Punishment: Justice in the Wake of Massive Crimes in Argentina', (1999) 59 (2) *Journal of International Affairs* 669. Moreno-Ocampo was a prosecutor in Argentina in the mid-1980s of grave crimes committed under the military regime.

11 Statement by Luis Moreno-Ocampo at the Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, The Hague, 16 June 2003, 4.

12 Dissenting Opinion of Judge Skubiszewski, above n 9, 470.

13 UN Security Council Resolution 1422 adopted by the Security Council at its 4572nd meeting, on 12 July 2002, UN Doc S/Res/1422 (2002) ('Resolution 1422'); UN Security Council Resolution 1487 adopted by the Security Council at its 4772nd meeting, on 12 June 2003, UN Doc S/Res/1487 (2003) ('Resolution 1487').

14 France signed the ICC statute on 19 July 1998 and ratified on 9 June 2000 (with a "transitional" declaration under article 124 postponing for seven years the jurisdiction of the court concerning war crimes), Britain signed on 30 November 1998 and ratified on 4 October 2001, Russia signed on 13 September 2000 but has yet to ratify, and the US signed at the last possible date on 31 December 2000 but declared on 6 May 2002 that its signature should be disregarded.

the UN General Assembly as an 'infant' that 'needs time to grow and mature', and whose 'future evolution is fraught with uncertainties'.[15] There is no doubt that the ICC remains an 'infant' at much risk. While weakness may have been 'essential to its birth',[16] whether the Court can grow will depend not only on its survival over time, but principally on how much its authority and legitimacy can be protected from attacks upon it, particularly by the US.

The US Attempt to Destroy the ICC's Authority

The chief destroyer of the ICC is undoubtedly the US Government. This is not an anti-American view, but a very widespread perception of the nature of US policy under the current Bush administration, which has entrenched the opposition of the Pentagon to the Court. Many American lawyers hold this view, such as Benjamin Ferencz, who was a prosecutor at Nuremberg. Writing after the ICC Statute had been approved by 120 States in 1998, with the US joining China, Israel, Iraq and Libya among 7 opponents, Ferencz said the US had 'suffered a resounding defeat' in trying to stop the vote, and was widely seen 'as a superpower bully that wanted to be above the law'.[17] Other Americans have criticised the US Government's blatant hypocrisy, in supporting the International Criminal Tribunal for the former Yugoslavia (ICTY) which imposes justice on others while refusing to accept a much weaker ICC based on the principle of complementarity, which gives precedence to national not international prosecutions.[18] Indeed, one recent point of agreement between Serbians and Croatians is their displeasure with Washington's inconsistency about international justice, as the US Government has pressured Balkan leaders to both cooperate with the ICTY and to ensure the immunity from any potential ICC jurisdiction of US nationals operating in the Balkans.[19]

The key political problem for the US with the ICC is its potential or symbolic independence from the Security Council. Such independence is symbolic because the ICC lacks enforcement powers, so its capacity will derive only 'from its moral and

15 Statement by Ambassador Zhang Yishan, Deputy Permanent Representative of China to the UN, at the 6th Committee of the 58th session of the General Assembly, 20 October 2003. Available at: <http://www.iccnow.org/documents/statements/governments/China 6thComm20Oct03.pdf>.

16 Giulio Gallarotti and Arik Preis, 'Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court', (1999) 52 (2) *Australian Journal of International Affairs* 107.

17 Benjamin Ferencz, 'A Prosecutor's Personal Account: From Nuremberg to Rome' (1999) 52 (2) *Journal of International Affairs* 467.

18 Carl Boggs, 'Outlaw Nation: the Legacy of US War Crimes', in Boggs (Ed), *Masters of War: Militarism and Blowback in the Era of American Empire* (Routledge, New York, 2003) 195.

19 Diane F. Orentlicher, 'Unilateral Multilateralism: United States Policy Toward the International Criminal Court', (2003-4) 36 *Cornell International Law Journal* 415, 426-7.

legal authority'.[20] States supporting the ICC made many compromises at the Rome Conference to gain US acquiescence, but the US tried 'to anchor the jurisdiction of the ICC upon the authority of the Security Council', offering 'only a regressive move back toward ad hoc international justice rather than progress toward equal international justice'.[21] Despite realising 'considerable' objectives at the Rome Conference, the US insisted on 'a court controlled by the Security Council'.[22] This alienated it from many supporters of the ICC. Under the Bush administration, the gap between the US Government's view of the ICC and the view of most US allies has widened. Even close US allies outside Europe such as South Korea and Australia have joined the ICC, and refused to back the US Government's attempt to destroy it.

It is not only critics of the US Government who have highlighted the 'course of hostility' that it has pursued with regard to the ICC.[23] In 1998 John Bolton, who later became Undersecretary for Arms Control and International Security in the Bush administration, told the US Senate that the US objective should be to 'maximize the chances that the ICC will wither and collapse'.[24] A clear statement of US opposition to the ICC was made in July 2000 at hearings before the Committee on International Relations of the US House of Representatives by President Clinton's Ambassador for War Crimes, David Scheffer. When asked by the chair of the Committee how the US Government was then trying to deal with the ICC, Ambassador Scheffer said:

> Mr BEREUTER [presiding] … Are you trying, in effect, to fix the Rome Statute so that eventually the United States can sign it, can ratify the treaty to create the ICC? Or, are you trying to fix it so that our nation can remain a permanent non-party to the treaty without fear that our service members and other government officials will become targets for prosecution by the ICC?
> Ambassador SCHEFFER. Thank you, Mr Chairman. It's actually neither, but it's mostly the latter that you have just described. In other words, we are not in a posture at this point of trying to, shall we say, fix the treaty in contemplation of signing and ratifying it; rather, we are seeking to fix what I very accurately describe as

20 Sarah Sewall and Carl Kaysen, 'The United States and the International Criminal Court: the choices ahead', American Academy of Arts and Sciences, Committee on International and Security Studies Occasional Paper, 9. Available at: <http://www.amacad.org/projects/iccarticle/htm>.

21 Bartram Brown, 'Unilateralism, Multilateralism and the International Criminal Court', in Stewart Patrick and Shepard Forman (Eds), *Multilateralism and US Foreign Policy* (Reinner, Boulder, 2002) 335.

22 Robert W. Tucker, 'The International Criminal Court Controversy', (2001) 18 (2) *World Policy Journal* 75, 77, 80.

23 Ibid 80. A selection of press criticism from within the US of US policy towards the ICC is reprinted in (2002) 19 (2) *World Policy Journal* 106-8.

24 Quoted in Fiona McKay, 'US Unilateralism and International Crimes: the ICC and Terrorism', (2003-4) 36 *Cornell International Law Journal* 455, 463.

> the treaty regime, because it is simply not plausible at this stage to consider actually amending the text of the treaty.[25]

Subsequently, in December 2000, Scheffer persuaded President Clinton to sign the ICC Statute. Later he claimed that the Statute did not have 'significant flaws' (as Clinton had said as a sop to opponents of the ICC), because of the compromises that the US had attained in negotiating the Treaty and the Court's various regulations.[26] Scheffer said this 'term would only provide ammunition to the opponents of the ICC on Capitol Hill and elsewhere to recklessly bash the Treaty, using our words to do so'.[27] This is what happened under President George W. Bush, when what Scheffer calls 'a dangerous, futile and indeed embarrassing presumption' about the ICC as a threat to the US became prevalent.[28]

Much legal analysis of the ICC Statute has been devoted to trying to show that US concerns about a threatening and all-powerful Court are misplaced.[29] It is much more credible to see the US as a threat to the ICC. Indeed, Scheffer, writing in late 2001, referred to a widespread public and Congressional false presumption that the US could still prevent the ICC 'from being established and, whether or not it is created, wage a virtual war against the Court and thus deny it legitimacy and effectiveness'.[30] The official declaration of this war occurred on 6 May 2002 when the US renounced its signature of the ICC Statute. In June 2002 'the battle was joined in earnest', when the US created a diplomatic crisis in the Security Council by refusing to extend UN peace-keeping mandates for Bosnia and Herzegovina unless US personnel were exempted from any possible international prosecution.[31] In the first week that the jurisdiction of the ICC began, its integrity as a step towards equal international justice was under attack from the most powerful State in the Security Council. Recalling the Chinese diplomat's subsequent description of the 'infant' ICC's evolution as 'fraught with uncertainties', an appropriate metaphor for this battle over the Court's future might be found in an actual account of official US thinking in 1963 about how to deal with the prospect of China building nuclear weapons. When the US State Department Policy Planning Council considered this threat, it described the issue as 'the problem of "how to strangle the baby in the

25 US Congress, Hearings before the Committee on International Relations, *The International Criminal Court*, 26 July 2000, US Government Printing Office, Washington, 2000, p 45.

26 David Scheffer, 'Staying the Course with the International Criminal Court', (2001-2) 35 *Cornell International Law Journal* 47, 64.

27 Ibid.

28 Ibid 53.

29 Marc Weller, 'Undoing the global constitution: UN Security Council action on the International Criminal Court', (2002) 78 (4) *International Affairs* 701-4, reviews US concerns.

30 Scheffer, above n 26, 53.

31 See Weller, above n 29, 706, and Roberto Lavalle, 'A Vicious Storm in a Teacup: the action by the United Nations Security Council to narrow the jurisdiction of the International Criminal Court', (2003) 14 (2) *Criminal Law Forum* 195-220.

cradle" before Beijing tested a weapon'.[32] In the event cooler heads prevailed, and the US rejected an attack on China, despite a legacy of hostility deriving from the Korean War that had prevented China from occupying its position as a permanent member of the Security Council. When faced with a much lesser 'threat' from what might much more appropriately be seen as the ICC baby in the cradle of justice, the US launched a diplomatic assault. It remains to be seen if this assault will succeed, but the initial diplomatic victories that the US Government attained in 2002 and 2003 seem less impressive now.

In an attempt to constrain the ICC from hypothetically being able to review if not challenge the use of US power, the US has tried to use a specious interpretation of Article 16 of the ICC Statute to dramatically restrict the ICC's jurisdiction. Article 16 enables the Security Council, by adopting a resolution under Chapter VII of its Charter in response to a threat to international peace and security, to request that the ICC defer an investigation or prosecution for 12 months, a period that may be renewed. Some observers such as Geoffrey Robertson considered Article 16 itself as a 'fatal concession' in the ICC Statute, but this opinion is premature.[33] There have been concessions to the US position based on Article 16, even though, according to William Schabas, nobody at the Rome Conference 'expected Article 16 to be invoked by the Security Council even before the Court was actually operational', which is what happened.[34] However, because of what was originally a Canadian proposal to limit the period of any such resolution to 12 months, concessions made to the US position based on Article 16 are not necessarily cumulative.[35] Perhaps, the way in which Article 16 was used by the US in 2002 and 2003, arguably in breach of its proper scope, may prove to be exceptional not normal.

Most writers agree that the drafting history of Article 16 clearly shows an intended application only to specific cases in which the Security Council judges that the demands of justice should be subordinated to an urgent attempt to protect international peace and security.[36] Distinguished international lawyers have argued strongly that 'the power of the Security Council should be interpreted restrictively, as *absolutely exceptional*', not as routine.[37] Further, it is claimed that the need for a deferral to prevent a threat to international peace and security should not just be

32 William Burr and Jeffrey Richelson, 'Whether to 'Strangle the Baby in the Cradle': the United States and the Chinese Nuclear Program, 1960-64', (2000-01) 25 (3) *International Security* 78. When the ICC's jurisdiction began the London *Economist* noted US policy towards the Court was an attempt 'to strangle it at birth'. 'Tipping the Scales of Justice', *Economist*, 1 July 2002.

33 Geoffrey Robertson, *Crimes Against Humanity*, (Penguin, London, 2nd ed, 2002) 371.

34 William A. Schabas, *An Introduction to the International Criminal Court*, (Cambridge University Press, Cambridge, 2nd ed, 2004) 83.

35 Lionel Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', in Roy S. Lee (Ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999) 151.

36 See Lavalle, above n 31, at 211.

37 Luigi Condorelli and Santiago Villalpando, 'Referral and Deferral by the Security Council', in Antonio Cassese et al (Eds), *The Rome Statute of the International Criminal*

asserted 'in abstract terms but shall be determined by the effect of the continuation of specific proceedings before the Court on the entire situation being dealt with by the Security Council'.[38] Significantly, even Scheffer thought that the US could only use Article 16 to prevent ICC action when it 'has the credibility, as a constructive signatory of the ICC Treaty, to persuade other Council members, both permanent and non-permanent, that such suspension of ICC action is not intended as an assault on the ICC or as a challenge to its legitimacy but rather as a necessary action to restore or maintain international peace and security'.[39] The initial response to the US demand for immunity was widespread opposition. In an open session of the Security Council on 10 July 2002, a large majority of States clearly rejected the US demand. Analysis by the Coalition for the International Criminal Court suggested all but a few States opposed the US position, and almost all (except India, Russia and Singapore) affirmed that the ICC was not itself a threat to international peace and security.[40] However, two days later the Security Council adopted a resolution substantially based on the US demand. Resolution 1422, passed unanimously, stipulated that the ICC must not, for 12 months, commence or proceed with any case involving crimes committed by any citizens of States outside the ICC serving on 'a United Nations established or authorized operation'.[41] This Resolution was renewed for a further 12 months in June 2003, although France, Germany and Syria abstained.[42] One legal observer had suggested that use of the Security Council's power under Article 16 of the ICC statute 'would be difficult to justify and to support in the eyes of the international community'.[43] In 2003 that judgment seemed doubtful, with the US using the power generally and providing no justification at all. But a year later that observer's prediction became very relevant.

In 2002 and 2003 the Security Council's resolutions concerning the ICC were subject to strong criticism from senior international lawyers. M. Cherif Bassiouni, who played a key role in the Rome Conference, wrote in a major text that Resolution 1422, by granting 'a blanket immunity to nationals of non-states-parties' involved in UN operations, appeared to be 'somewhat inconsistent with Article 16 of the ICC Statute', although he viewed the threatened US withdrawal from peace-keeping operations as a threat to peace and security.[44] This threat was not accepted as relevant by Philippe Kirsch, soon to become President of the Court, who commented

Court: a Commentary (Oxford University Press, Oxford, 2002) vol 1, 647 (emphasis added).

38 Ibid.

39 See Scheffer, above n 26, 91.

40 Coalition for the International Criminal Court (hereinafter CICC), Chart Summarizing Governmental opposition to US proposals, expressed at an open meeting of the UN Security Council on 10 July 2002, available at: <http://www.iccnow.org/documents/otherissues/1422/countrychart20020710english.doc>.

41 UN Security Council Resolution 1422, 12 July 2002, [1].

42 UN Security Council Resolution 1487, 12 June 2003.

43 Stephane Bourgon, 'Jurisdiction *Ratione Temporis*', in Cassese et al., above n 37, 554.

44 M. Cherif Bassiouni, *Introduction to International Criminal Law*, (Transnational, Ardsley, 2003) 539.

about the context of this Resolution that 'there appeared to be a manifest absence of any threat to the peace'.[45] However, Kirsch 'hoped that the Council will be reflective of the costs of renewing [Resolution] 1422'.[46] A similar view was expressed by UN Secretary General Kofi Annan, who suggested that routine renewal of that blanket immunity would diminish the authority of the Court and the Council and also UN peacekeeping.[47] Such views may not have been influential in preventing another renewal of Resolution 1422/1487 in 2004 if not for the public scandal surrounding the abuse of prisoners at Abu Ghraib. In June 2004, when the US could not muster sufficient support for this renewal, Annan remarked that it would be 'unfortunate' for the US to press its demand for an exemption, and 'even more unwise on the part of the Security Council to grant it'.[48] The opposition to immunity from France and Germany was strengthened by support from Brazil, Chile, Romania, Spain and Benin, who resisted US pressure and indicated they would abstain, which was sufficient to stop the exemption being renewed. Significantly, this opposition could coalesce because of a decision by China in May 2004 to request a delay in voting on a resolution that the US had tabled. After China indicated in June that it would also abstain, the US stopped pressing for a more limited extension, to avoid losing a prolonged and divisive debate.[49] The significance of China's changed position is discussed later in this chapter.

Apart from seeking temporary immunity from any investigation or prosecution of US (and other non-ICC) nationals on UN operations, the US has attempted to restrict the Court's jurisdiction by entering into bilateral treaties with a number of States designed to commit them to never surrendering any US personnel to the Court. By December 2004, about 90 States had agreed to these non-surrender agreements, but only a quarter of these had been ratified, and nearly two-thirds of ICC States Parties had not agreed, despite some smaller States losing US aid.[50] Most States that have agreed to these agreements are relatively small, or are not parties to the ICC such as India. Many observers have disputed whether such agreements are legitimate under Article 98 (2) of the ICC Statute, or a ruse to enable the US to

45 Philippe Kirsch, John T Holmes and Mora Johnson, 'International Tribunals and Courts' in David M Malone (Ed), *The UN Security Council: from the Cold War to the 21st Century* (Rienner, Boulder, 2004) 289-90.

46 Ibid 290.

47 'States Send Clear Message that ICC Exemption will not be Automatic', CICC, *International Criminal Court Monitor*, issue 25, September 2003, 4.

48 Coalition for the International Criminal Court (CICC) fact sheet, 'Chronology of the Adoption of Security Council Resolutions 1422/1487, 2. Available at: <http://www.iccnow.org/documents/declarationsresolutions/unbodies/FS-1422Chronology19July04.pdf>.

49 Caroline Baudot, 'Integrity of the ICC and the Security Council Preserved', *Insight on the ICC*, issue 2, September 2004, 10. Benin's position supporting the ICC followed advocacy from groups within Benin supported by the CICC, *International Criminal Court Monitor*, issue 27, June 2004, 7.

50 CICC analysis, 'Status of US Bilateral Immunity Agreements, 1 December 2004', available at <http://www.iccnow.org/documents/otherissues/impunityart98/BIAsByRegion_current.pdf>.

avoid any ICC jurisdiction over US personnel serving outside UN operations. This issue has received most attention in Europe, where almost all States have ratified the ICC Statute, and refused to accept such agreements. Significantly, Romania was the only country in Europe closely linked with the European Union (EU) to have accepted an agreement, but under pressure from the EU it has not been ratified. A set of guidelines formulated by the EU in September 2002 seems to have restricted such agreements largely to areas outside Europe, but this does not reflect a common and consistent EU position in defence of the Court.

The European Union's Limited Support for the ICC

Apart from the permanent members of the Security Council, the position of the EU concerning the ICC has the most significance. All 25 current members of the EU have ratified the ICC statute except the Czech Republic (which has had difficulty passing legislative amendments). Six of the ICC's 18 judges are from Western Europe, with one from Eastern Europe.[51] Many European states participated in the "Like Minded Group" that argued for a relatively independent court at the Rome Conference. Indeed, the new caucus of Friends of the ICC is led by Germany, which has consistently been one of the strongest supporters of the Court.[52] There is a clear difference in attitude towards the Court between European and US politicians, despite differences among EU States about how much to resist the US attack on the Court. Some US politicians have described the Court as reflecting a European willingness 'to give up elements of their sovereignty', which the US would not do.[53] In July 2002, during the US diplomatic attack on the Court, the former President of the ICTY Antonio Cassese was reported as suggesting that the US was less afraid for its troops than for senior political or military leaders, who in future might have to face international justice without immunity.[54] At this time there seemed to be strong opposition in Europe to what a British paper called the US 'contempt of court'.[55] On 4 July 2002 the gulf between the US and the EU concerning the ICC was reported in an editorial comment in the *International Herald Tribune*. The Bush administra-

51 The European judges are Claude Jorda (France), Maureen Harding Clark (Ireland), Adrian Fulford (UK), Hans-Peter Kaul (Germany), Mauro Politi (Italy), Erkki Kourula (Finland) and Anita Usacka (Latvia). In addition, Georghios M. Pikis from Cyprus was elected by the Asian Group of States at the UN. Thus out of the ICC's 18 judges 8 or nearly half are from EU States.

52 The Like Minded Group included 65 States mainly from Europe, Africa and Latin America.

53 Mr Doug Bereuter, Hearings before the Committee on International Relations, *The International Criminal Court*, 26 July 2000 (US Government Printing Office, Washington, 2000) 35-6.

54 Reported in Claire Trean, 'Washington Versus International Justice', *Le Monde*, 2 July 2002, reprinted at Global Policy Forum <http://www.globalpolicy.org/intljustice/icc/crisis/0702wash.htm>.

55 'Contempt of court: US puts ideology before justice', *Guardian*, 2 July 2002, 9, and Hugo Young, 'We can't allow US tantrums to scupper global justice', *Guardian*, 2 July 2002, 8.

tion was criticised for having chosen 'to point the world's sole superpower right at a craggy protuberance marked Isolation Reef', making the US 'look every bit as unilateral as the country's critics contend it is', and allowing 'the United States to be utterly isolated on the world stage'.[56] While this criticism of unilateralism was warranted, the isolation was not as great as it seemed.

Two members of the EU, Britain and France, were, as permanent members of the Security Council, hypothetically capable of opposing the US attack on the ICC, but they were not the strongest European critics of the US position. In fact Germany was the primary defender of the Court, disputing the basis of what became Security Council Resolution 1422. The German Ambassador to the UN, Hanns Schumacher, speaking during the open meeting of the Security Council on 10 July 2002, pointed out that the Resolution had to be based on 'the existence of a threat to the peace, breach of the peace, or an act of aggression – none of which in our view are present here'.[57] Furthermore, he stated that if Article 16 of the ICC Statute was used to provide immunity to a general category of people rather than to respond to a particular situation, this would improperly use the Security Council's power 'to, in effect, amend an important treaty ratified by 76 states' at the behest of the US.[58] This was a much stronger statement than what was said by the EU collectively, or France. The EU justified Resolution 1422 as a helpful 'compromise' that 'does not harm the integrity of the Rome statute'.[59] With the renewal of the Resolution on 12 June 2003,[60] statements from the EU and France were more critical. Yet France made no suggestion of using its veto to protect the Court's legitimacy. The EU statement suggested that 'it is ultimately up to the ICC itself to determine whether' Article 16 of the ICC Statute had been invoked properly or improperly by the Security Council.[61] This begs the question of how the ICC, if it decided the Security Council had erred, could secure US respect for its opinion, when the resolutions have sought to constrain the jurisdiction of the ICC and question its authority.

After the renewal of Resolution 1422, the EU adopted a very bland common position on the ICC, mainly encouraging non-Parties to the ICC to ratify the treaty. This avoided mention of the US attacks on the Court, evidently because of differences between Germany and France, critics of the US, and Britain and Italy, closely

56 'Bad judgment by Bush', *International Herald Tribune* (from *The Boston Globe*), 4 July 2002, 6.

57 Ambassador Hanns Schumacher, Representative of Germany, speaking at the Open meeting of the Security Council on the Situation of the Bosnia Peacekeeping Mission, 10 July 2002. Available at: <http://www.iccnow.org/documents/statements/governments/GermanySCDebate10July02.pdf>.

58 Ibid.

59 Declaration by the Presidency of the European Union on the UN Security Council's unanimous decision concerning Bosnia-Herzegovina/International Criminal Court, Brussels, 13 July 2002.

60 UN Security Council Resolution 1487.

61 EU Presidency Statement on the proposed renewal of the provisions of SCR 1422 (ICC), Statement by Ambassador Adamantios Th. Vassilakis, Permanent Representative of Greece to the UN, on behalf of the European Union, New York, 12 June 2003, 2.

aligned with Washington. The EU statement simply affirmed that 'it is eminently important that the integrity of the Rome Statute be preserved', without identifying the threat to this integrity.[62] However, such limited agreement amongst European States does not reflect the broader attitude of European publics and politicians. Thus, in June 2003 the Parliamentary Assembly of the Council of Europe (which also includes Russia) expressed regret 'that all Security Council members that are members of the Council of Europe [i.e. Britain, France and Russia] did not maintain a united, unequivocal stance in favour of the integrity of the ICC'.[63] Since Russia has not ratified the ICC Statute, this was a criticism directed principally at Britain. Together with Canada, the EU has strongly supported open discussion about the ICC within the UN General Assembly. This led to a General Assembly Resolution supporting the ICC in November 2004.[64] Following this Resolution, the EU declared itself 'available to develop a broader dialogue on all matters relating to the ICC, including future relations between the United States and the Court'.[65] Yet, because of differences amongst its leading members about relations with the US, the EU has not been able to pursue a common response to continuing US attacks on the ICC. This has diminished its influence on other States, particularly Russia.

Russia's Support for Limiting the ICC's Jurisdiction

Russian policy toward the ICC has been ambivalent. It has been characterised by a wait and see attitude, not by the antagonism of the US. Broadly, there have been five aspects to Russia's ambivalence, which can be explained by the relative weakness of both the domestic and international influences favouring Russian ratification of the ICC Statute. First, Russia was consistently involved in negotiations leading to the creation of the ICC, despite criticism within Russia of the ICTY as an institution not based on State consent. At the Rome Conference, Russia was opposed to an independent Prosecutor and thought the ICC should exercise jurisdiction over non-party states only 'by means of a Security Council decision', but it was nevertheless prepared to accept the Statute achieved through compromise.[66] Second,

62 Council of the European Union, Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, *Official Journal of the European Union*, 18 June 2003, L 150/67.

63 Council of Europe, Parliamentary Assembly, resolution 1336 (2003), Threats to the International Criminal Court, adopted 25 June 2003, 3. Available at: <http://www.iccnow.org/documents/declarationsresolutions/intergovbodies/CoEResBIAs25June03Eng.doc>.

64 UN General Assembly Resolution A/59/512, adopted at its 59th session, 19 November 2004.

65 EU statement on the adoption by the General Assembly of the ICC resolution, 2 December 2004, available at: <http://www.iccnow.org/documents/statements/governments/2004/EUstatement%20GAadoptsICCresolution.pdf>.

66 Comments of Mr Pantin for the Russian Federation at the Rome Conference on 22 June 1998, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998, Official Records,* (UN, New York, 2002) vol II, 196; also comments of Mr Gevorgian in the final plenary session, and on 9 July, 128, 301.

Russia has always insisted that the Security Council should 'take the preliminary decision regarding the determination of aggression'.[67] While supporting the ICC in principle, it has emphasised that 'a court not working in close combination with the Security Council would be doomed to failure'.[68] Third, Russia has given consideration to legislative changes needed to implement the ICC Statute, but President Putin, who will determine the decision, has delayed sending the Statute for legislative approval.[69] Fourth, although Russian politicians have been critical of the US, affirming that in regards to the ICC there should be 'no double standards, and no exemptions for peacekeepers', official Russian statements have been circumspect, avoiding any criticism of the US.[70] Finally, Russian officials have suggested that the ICC may in practice operate principally, if not entirely, 'in the context of asserting international standards of legality in post-conflict states'.[71] As of late 2004, Russian policy toward the ICC remained as the Foreign Minister, Mr Ivanov, had put it on Russian television shortly before Resolution 1422, saying Russia would 'support the ICC politically today, and see how things develop with it tomorrow to determine our future policy'.[72] Russia's statement to the UN General Assembly on the ICC in October 2004 said any future decision about joining the Court would depend upon 'an assessment of the first results of the ICC's practical operation'.[73] A Russian decision to ratify the ICC Statute is clearly not imminent.

Such a decision would only be made if the international influences on President Putin favouring ratification became stronger than domestic opposition. Since the ICC's jurisdiction began, the favourable influences have diminished. Significant discussions about the ICC have occurred in Moscow, organised by Russian and interna-

67 Comments of Mr Kuzmenkov, in ibid at 289. After the Rome conference Russia made this point at the ICC Preparatory Commission; see also Giorgio Gaja, 'The Long Journey towards Repressing Aggression', in Cassese et al, above n 37, 433.

68 Mr Ushakov, in *Diplomatic Conference*, above n 66, 115.

69 Bakhtiyar Tuzmukhamedov, 'The implementation of international humanitarian law in the Russian Federation', (2003) 85 (850) *International Review of the Red Cross* 391. In early 2003 at an international conference in Moscow it was claimed 'that President Putin had issued instructions to the Duma to implement the Rome Statute into national law' (CICC, *International Criminal Court Monitor*, no. 24 April 2003 p 11) but this has yet to occur, Coalition for the International Criminal Court, *European Newsletter*, n 37, February 2004, 17.

70 Dmitri Rogozin, President of the Foreign Relations Committee of the Duma, speaking in February 2003 to an international conference in Moscow, reported in CICC, *International Criminal Court Monitor*, 24 April 2003 11. In the open Security Council debate on Resolution 1422, the Russian representative expressed understanding of US concerns.

71 Statement of Russian Foreign Minister, Mr Igor Ivanov, to the ministerial meeting of the Security Council on Justice and the Rule of Law: the United Nations Role, New York, 24 September 2003, available at: <http://www.iccnow.org/documents/statements/governments/SCdebateExcerpts24Sept03.pdf>.

72 Mr Ivanov, speaking on the program Vremena, Russian TV channel 1, 7 July 2002.

73 Speech of Mr Kuzmenkov to the 6th Committee of the UN General Assembly, 14 October 2004, 2.

tional civil society groups, but the political influence of human rights organisations such as Memorial (which helped to organise the first such meeting in February 2002) has declined amidst growing authoritarianism.[74] Liberal politicians such as Vladimir Lukin, who in 2002 called for Russia to ratify the ICC Statute 'without looking at the US stance', have lost their political influence.[75] Opposition to ratification from the military, the security police and the Prosecutor's office reflects the shadow of Chechnya, which nobody in Russia sees yet as a 'post-conflict state'. The government pretends the conflict has finished, while human rights organisations such as Memorial continue to monitor many abuses. They view as 'absolutely correct and natural' the call in March 2003 from the Legal Issues and Human Rights Committee of the Council of Europe's Parliamentary Assembly for an international tribunal to investigate alleged war crimes and crimes against humanity in Chechnya.[76] No Russian government is likely to add to the slight risk of Russian officials facing a prosecution in domestic courts abroad (such as in Belgium) the possible risk of investigations by the ICC, which could not be blocked by Russia without the acquiescence of all other permanent members of the Security Council.[77] The inadequate nature of official investigations of war crimes in Chechnya suggests that, if the ICC had jurisdiction over this territory, it might have to exercise it, so Russia is unlikely to ratify the ICC Statute before the war is resolved.[78]

In the longer term, it is possible that Russia will choose to ratify the ICC Statute before the first review conference, at which unresolved issues, including the definition of aggression, may be determined. Such a decision would reflect the increasing importance of the EU, rather than the US, in Russia's economic and political development. According to an informed Russian observer, the most significant potential influence on Russian ratification would be the perception in Russia that such a move would 'raise its international prestige, and become a significant step towards a multipolar world', since this would 'bring Russia closer to the European Union, which

74 This meeting was organised together with the Paris-based International Federation for Human Rights, and produced *The Moscow Appeal for the Fight Against Impunity* on 16 February 2002. Memorial was established during the Gorbachev period of reforms. It has campaigned continually for investigations of crimes against humanity and war crimes in Chechnya, and extensively documented historical crimes within the USSR, such as forced migration analysed in Pavel Polyan, *Ne Po Svoei Vole … (Against Their Will)* (Memorial, Moscow, 2001).

75 Lukin, quoted at <www.iccnow.org/countryinfo/europecis/russianfederation.html>. Lukin is Russia's Human Rights Commissioner but no longer has a key parliamentary position.

76 Statement of O.P. Orlov, chairperson of Memorial, The impunity of criminals makes creating an International tribunal necessary (in Russian), March 2003. (Sent to the author as an email attachment, 11 March 2003.)

77 Gennady M Danilenko, 'The ICC Statute and Third States', in Cassese et al, above n 37, 1876.

78 See Matthew Evangelista, *The Chechen Wars* (Brookings, Washington, 2002) chapter 7, for a discussion of war crimes in Chechnya and the responses of Russia and Western countries.

sees the ICC as a common European project'.[79] An analogy with the Kyoto Protocol on greenhouse emissions may be useful here. One Russian academic commentator recently observed that 'concerning the purely practical aspect of global problems, it should be stressed that Russia has in a number of cases mistakenly followed the example of the US', when 'really it should be taking its lead from the civilised community of states, and above all from the European Union'.[80] In the year following this comment Russia eventually agreed to ratify the Kyoto Protocol, but there is no direct parallel with the ICC because that Protocol is more directly linked to Russia's economic cooperation with Europe. There has also been a unified EU policy concerning greenhouse emissions for many years, whereas there is still no common European view about the ICC that could influence Russia.

China's Ambivalence about the ICC's Independence

China is unlikely to ratify the ICC Statute in the foreseeable future, but this does not make its policy concerning the Court insignificant. As noted above, China has already changed its diplomatic position in the Security Council concerning the ICC. Indeed, given China's opposition to the ICC Statute at the Rome Conference and its refusal subsequently to sign it, the fact that it was China not Russia (which did sign) that shifted away from supporting the US in the Security Council is remarkable. At the Rome Conference China opposed not only the role of an independent Prosecutor, but also 'the inclusion of non-international armed conflicts in the jurisdiction of the Court and the reference to crimes against humanity'.[81] China's main objections to the ICC Statute were expressed in terms of its defence of sovereignty, and thus were similar to US objections. In 2002 and 2003 China supported the US over the Security Council resolutions, and made very few comments on the ICC. An official Chinese spokesman objected to US legislation that put Taiwan in the same category as US allies in regards to the jurisdiction of the ICC.[82] Yet China still supported the US in June 2003 on Security Council Resolution 1487, even when France, Germany and Syria abstained.

After the establishment of the ICC in 2003, Chinese statements on the Court started to reflect the Russian wait and see position. There was a symposium on the Court held in Beijing in October 2003, in which two ICC judges, including the President, Justice Kirsch, took part. Panel discussions were held on Security Council Resolutions 1422 and 1487.[83] Following this a Chinese official welcomed 'the

79 Vladimir Oivin, 'High Level Sabotage: Russia against the International Criminal Court' (in Russian), *Obshchaya Gazeta*, no. 18/19 (456/457), 2-15 May 2002, 4.

80 Aleksei Arbatov, discussing US-Russian relations, in *Mezdunarodnaya Zhizn*', 2003, no. 11, 11.

81 Comments of Mr Liu Daqun for China, in *Diplomatic Conference*, above n 66, 124.

82 Chinese Foreign Ministry, spokesperson Kong Quan on Taiwan-related clauses in Supplemental Appropriations Act for Fiscal Year 2002, statement on 12 September 2002, available at <www.fmprc.gov.cn/eng/xwfw/2510/2535/t14792.htm>.

83 Chinese Society of International Law, Symposium on the Comparative Study of International Criminal Law and the Rome Statute, Beijing, 15-17 October 2003. Available

practical and transparent approach adopted by the Prosecutor' of the ICC.[84] This suggested that some Chinese concerns were being resolved, and an official statement in October 2003 raised 'the possibility of considering [China's] accession to the Statute at an appropriate time' in the future, depending on the Court's performance.[85] Clearly, such a time was not imminent, but nor was China simply prepared to cooperate silently with the US attacks on the Court.

Indications of a clear change in China's diplomatic tactics toward the ICC became clear in May 2004, when the US failed to have an urgent vote taken on a renewal of Resolution 1487. This was reportedly because the Chinese Ambassador to the UN had not received instructions on how to vote.[86] After the vote was postponed, press reports quoted the Chinese Ambassador, Wang Guangya, saying his government was thinking about whether to support the US, abstain, or even veto the resolution. The Ambassador said that China shared the concerns of other countries about the US military's 'misbehaviour' in Iraq, 'which is a violation of international and humanitarian law'.[87] China's decision was critical to the failure of US diplomacy in this case, because five other States were definitely not going to support the US (France, Germany, Spain, Brazil and Chile) and, while Benin was likely to join them, the Romanian Ambassador said his country would abstain 'unless his vote is decisive in defeating the US initiative', which would have been the case without China's refusal to support the US.[88] When explaining China's decision, a foreign ministry official aligned his country with the 'views expressed by UN Secretary-General Kofi Annan', namely, that it would be wrong to pass such a resolution 'in the context of wide concern in the international community about the POW incident in Iraq'.[89] Thus, while China shared the Pentagon's concerns about the independent jurisdiction of the ICC, the Pentagon's fiasco in Iraq had contributed to a remarkable alteration in Chinese diplomacy. This change was not simply a reflection of Chinese displeasure with the US over Taiwan, since if that had been the case the Chinese position might have changed earlier. China's change was also not the result of any lobbying from the EU, which as discussed above has yet to formulate a common position about relations between the Security Council and the ICC. Significantly, the issue of China and the ICC seems not to have been raised in representations

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at <http://www.iccnow.org/conferencesmeetings/reportsdeclarations/asiaoceaniareports/2003/BeijingSummary15Oct03.pdf>.

84 Statement by Zhang Yishan, above n 15.

85 China and the International Criminal Court, part of Chinese Foreign Ministry statement, 28 October 2003, available at <www.fmprc.gov.cn/eng/wjb/zzig/tyfls/tyfl/2626/2627/t15473.htm>.

86 CICC fact sheet, above n 48, p 5.

87 Colum Lynch, 'China May Veto Resolution on Criminal Court', *Washington Post*, 29 May 2004, A22.

88 Ibid.

89 Chinese Foreign Ministry, spokesperson Zhang Qiyue's remarks on US withdrawal of its draft resolution submitted to the Security Council on the jurisdiction of the International Criminal Court, 28 June 2004, available at <www.fmprc.gov.cn/eng/xwfw/2510/t140766.htm>.

made to the EU on human rights in China from the International Federation of Human Rights, although it has campaigned in support of the ICC elsewhere in the world.[90] However, one result of China's decision may be to assist NGOs supporting the ICC, such as the Asian Forum for Human Rights and Development, which congratulated China on the position it had adopted.[91] This is because the US may not be able to prevent more Asian States from ratifying the ICC, now that China has demonstrated some independence.

Conclusion: The Security Council and the Authority of the ICC

Before the creation of the ICC, there already existed what Justice Kirby has called 'building blocks that will ultimately render tyrants accountable to humanity'.[92] Amongst the most important of these were the ideas of fundamental human rights and international scrutiny of abuses without fear or favour. In late 1998, a few months after the ICC Statute had been formulated, those ideas led to the arrest in London of the former Chilean military dictator, Augusto Pinochet. Although ultimately allowed to return to Chile, he has not entirely escaped the possibility of a Chilean judicial investigation of his crimes. That would not have been conceivable without the example of international law. It is significant that it was Chile, together with another Latin American State, Brazil, and four European States plus China and Benin that helped to preserve the ICC's integrity despite the US attempt to destroy the Court. The lesson of the Pinochet case, as stated by the Chilean writer Ariel Dorfman, is that it is vital that not 'only the war criminals of weak nations are put on trial'.[93] Writing in 2000, Richard Falk thought it was 'not a likely prospect in the decade ahead' that the new Court would be able to 'apply the authority of law to representatives of all states, both strong and weak'.[94] That sceptical view seemed confirmed by the passage of Resolutions 1422 and 1487, but the contribution of Chile and the other States that prevented a renewal of those resolutions is a cause for

90 Submission to EU on Human Rights in China, 24 February 2004, prepared by the International Federation for Human Rights and Human Rights in China. Available at: <www.hrichina.org/fs/downloadables/pdf/downloadable-resources/EUChinaWeb.pdf?revision_id=10337>. An article written for the Chinese press by EU foreign policy chief Javier Solana on the EU and China as strategic partners with global objectives ignored the ICC. Available at: <http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/articles/79742.pdf.>

91 Asian Forum for Human Rights and Development, press statement, 24 June 2004, available at: <http://www.iccnow.org/pressroom/membermediastatements/2004/FrmAsia%20Stmt%200n%20US%20Withdrawal%200f%201487.pdf>.

92 Kirby, 'Take Heart – International Law Comes, Ever Comes', Speech to Delegates of The Challenge of Conflict, International Law Responds conference. The text of the speech is reproduced in this volume. It is also available from the High Court website: <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_27feb04.html>. The quote appears at page 4 of the High Court text.

93 Ariel Dorfman, *Exorcising Terror: the Incredible Unending Trial of General Augusto Pinochet*, (Seven Stories Press, New York, 2002) 200.

94 Richard Falk, *Human Rights Horizons* (Routledge, New York, 2000) 213.

optimism. Those resolutions went beyond what various legal analysts of the Statute considered the proper scope of Article 16. They threatened the Court's potential, as its effectiveness 'will come from its legitimacy', not from any 'power to act coercively against States'.[95] The potential of the ICC will be seen in its first operations, but the Court has established itself as a body that could become legitimate.

The ICC's future legitimacy and authority will depend partly on its future interaction with the Security Council. Arguably, the only way that the ICC can act coercively is as an instrument of the Security Council. This is what the US intended, and what Scheffer still thought feasible after the US signed the Statute. He said then that, 'if the Council seizes the opportunity, particularly in a situation that has already engaged the Council as a threat to international peace and security, to refer a situation to the ICC, then such referral *can be tailored to minimize the exposure to ICC jurisdiction of military forces deployed to confront the threat*'.[96] The Security Council, acting together, could essentially reconstruct the ICC Statute in practice, turning it into little more than a permanent version of the ad hoc tribunals, operating to impose international justice only on States without credible judicial institutions. The ICC would then be used only in post-conflict states, to which the former Russian Foreign Minister Mr Ivanov implied it should be limited. The problem with such a scenario imposed by the external horizon of the ICC is that this would endanger the legitimacy of the Court as an institution of global justice, albeit far from a universal one. Since the ICC will depend crucially on its moral and legal authority, as well as on substantial cooperation from States and the Security Council, limiting the Court's operation to particular contexts would diminish and perhaps undermine the extent to which it will be able 'to grow, evolve and acquire a strength of its own making'.[97] That would constrain the benefits of general deterrence, since prospective criminals in other contexts might think they are beyond the authority of the Court.

If the ICC is to become an institution of global not imperial justice, it is crucial that the Security Council does not seek to place certain people potentially within the Court's jurisdiction above the law. This is what the Secretary General, Kofi Annan, warned against following the passing of Resolution 1487. He feared that, if this resolution became an 'annual routine', the world would see the Council as claiming 'absolute and permanent immunity for people serving in the operations it establishes or authorizes'.[98] The double standard thus established would undermine the integrity of the Court, and severely constrain its independence. The ICC's challenge has been clearly stated by the Prosecutor, Mr Moreno-Ocampo. He observed that it must be 'independent and interdependent at the same time', in order to enhance

95 Board of Editors, 'The Rome Statute: a tentative assessment', in Cassese et al, above n 37, vol II, 1907, 1910.

96 Scheffer, above n 26, 90 (emphasis added).

97 M. Cherif Bassiouni, 'Policy Perspectives Favoring the Establishment of the International Criminal Court', (1999) 52 (2) *Journal of International Affairs* 810.

98 Kofi Annan, CICC, *International Criminal Court Monitor*, no. 25, September 2003, 4.

its support and 'achieve universal participation'.[99] The independence and integrity of the ICC partly depends on its successful operation, but beyond that it requires appropriate conditions in which to grow. In that context one of the ICC's judges, Justice Navanethem Pillay, has suggested that the current development of international criminal law 'mirrors the same slow historical development of the common law itself within national boundaries'.[100] Of course, some common law doctrines have taken a long time to overcome human rights abuses domestically, including in Australia. Politicians neglectful of human rights have been able to slow, but yet not halt, what Justice Kirby sees as an 'inevitable' process of 'the reconciliation of national and international law in the courts'.[101] So it may be with the future growth of the ICC. Ironically, the divisions in the Security Council that prevented a renewal in 2004 of Resolution 1487 might provide the ICC with a crucial breathing space, in which its jurisdiction can expand, thus allowing it to develop the ability to resist any future attempts to impede its authority.

99 Moreno-Ocampo, above n 11, 2.

100 Judge Navanethem Pillay, *A Society of Mankind, Not States*, Centre for International and Public Law, ANU, Law and Policy Paper 20 (Federation Press, Sydney, 2002) 14.

101 Kirby, above n 92, 10.

Redressing the Wrongs of The International Criminal Justice System

Stuart Beresford[1]

Introduction

Following the success of the post-World War Two trials of major Nazi and Japanese war criminals there was considerable hope that the international community would go on to create a more permanent international criminal justice system that would prosecute future war criminals and deter others from committing such crimes. However, the onset of the cold war ended such optimism, as the major world powers concentrated more on extending their spheres of influence than prosecuting those who committed acts of mass violence.

All this changed in May 1993 with the establishment of the International Criminal Tribunal for the former Yugoslavia.[2] Since then there has been a rapid proliferation of international (and quasi-international) criminal tribunals. The International Criminal Tribunal for Rwanda was set up in November 1994 to try those responsible for the genocidal frenzy that swept Rwanda the previous summer.[3]

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1 The views expressed in this article are those of the author alone and do not reflect the views of the New Zealand government or any other organisation with which he may have worked previously.

2 On the creation and operations of the ICTY see generally M Bergsmo, 'The Establishment of the International Tribunal on War Crimes', (1993) 14 *Human Rights Law Journal* 371; M Cherif Bassiouni, 'Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal', (1994) 25 *Security Dialogue* 409; T Meron, 'War Crimes and the Development of International Law', (1994) 88 *American Journal of International Law* 76; D Sharga and R Zachlin, 'The International Criminal Tribunal for the former Yugoslavia', (1994) 5 *European Journal of International Law* 360; *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia:* vol 1 (V Morris and M Scharf, 1995); *The Law of the International Criminal Tribunal for the former Yugoslavia* (M Cherif Bassiouni and P Manikas, 1996); and S Beresford, 'The International Criminal Tribunal for the former Yugoslavia: The First Four Years', (1999) 9 *Otago Law Review* 537.

3 On the establishment of the ICTR see, amongst others, P Magnarella, 'Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda', (1994) 9 *Florida Journal of International Law* 421; M Meier Wang, 'The International Criminal Tribunal for Rwanda: Opportunities for Clarification Opportunities for Impact', (1995) 27 *Columbia Human Rights Law Review* 177; L Sunga, 'The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda', (1995) 16 *Human Rights Law Journal* 121; J Karhil, 'The Establishment of the International

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 367-392.*
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The United Nations has also established a regime for the prosecution of atrocities that were committed following East Timor's decision to seek independence from Indonesia in 1999. A special panel of judges within the Dili District Court is currently trying those persons accused of committing offences such as crimes against humanity, torture and violations of the Indonesian Penal Code.[4] A similar regime has been created within Kosovo for war crimes committed in that region in 1999.[5]

In early 2001, the United Nations concluded an agreement with the Sierra Leonean government establishing a special court – made up of international and domestic judges – to try those most responsible for the horrendous atrocities that were committed in the civil war that ravaged the country in the 1990s.[6] Discussions

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Criminal Tribunal for Rwanda', (1994) 64 *Nordic Journal of International Law* 683; L Johnson, 'The International Criminal Tribunal for Rwanda', (1996) 67 *International Review of Penal Law* 211; *The International Criminal Tribunal for Rwanda* (V Morris and M Scharf, 1998); and S Beresford, 'In Pursuit of International Justice: The First Four-Year Term of the International Criminal Tribunal for Rwanda', (2000) 8 *Tulsa Journal of Comparative & International Law* 99.

4 For information on the East Timor Special Panels see, amongst others, H Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', (2001) 95 *American Journal of International Law* 46; S Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor', (2001) 25 *Melbourne University Law Review* 122; and S Katzenstein, Hybrid Tribunals: 'Searching for Justice in East Timor', (2003) 16 *Harvard Human Rights Journal* 245.

5 On the approach taken to prosecute crimes committed in Kosovo see, generally, H Strohmeyer, 'Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor', (2001) 25 *Fletcher Forum of World Affairs* 107 ; R Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration,' (2001) 95 *American Journal of International Law* 583; 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', (2002) 7 *ARIEL;* E Villmoare 'Ethnic Crimes and UN Justice in Kosovo: The Trial of Igor Simic', (2002) 37 *Texas International Law Journal* 373; L Dickinson, 'The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade: The Relationship between Hybrid Courts and International Courts: The Case of Kosovo" (2003) 37 *New England Law Review* 1059; and M Bohlander, 'Kosovo: The Legal Framework of the Prosecution and the Courts', in *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (K Ambos and M Othman Eds., 2003).

6 On the establishment of the Special Court for Sierra Leone see, amongst others, N Fritz and A Smith, Current apathy for coming anarchy: Building the Special Court for Sierra Leone, (2001) 25 *Fordham International Law Journal*; S Beresford and A Muller, The Special Court for Sierra Leone: An Initial Comment, (2001) 14 *Leiden Journal of International Law* 635; D Mundis, New Mechanisms for the Enforcement of International Humanitarian Law, (2001) 95 *American Journal of International Law* 934; A McDonald, Sierra Leone's Shoestring Special Court, (2002) 84 *International Review of the Red Cross* 121; A Tejan-Cole, The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, (2003) 6 *Yale Human Rights & Development Law Journal* 139; M Miraldi, U.N. Report: Overcoming obstacles of Justice: The Special Court of Sierra Leone, (2003) 19 *New York Law School Journal of Human Rights* 849; and L Hall and N Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, (2003) 44 *Harvard International Law Journal* 287.

are currently under-way between UN officials and Cambodian government leaders to establish a similar court for offences committed by the Khmer Rouge in the 1970s.[7] Most significantly, on 1 July 2002 the treaty creating the International Criminal Court (ICC) – which is commonly known as the Rome Statute – entered into force. Thus began the jurisdiction of the world's first permanent tribunal capable of trying individuals accused of the most serious crimes known to mankind: namely war crimes, crimes against humanity, genocide and, once defined, aggression.[8]

With the creation of these judicial institutions, the international criminal justice system has established itself as the appropriate legal mechanism for the investigation and prosecution of war crimes in situations where domestic courts are unable or unwilling to do so. Although much has been written about this system of law, the majority of commentators and legal academics have concentrated their writings on the establishment of the tribunals and the crimes over which they have jurisdiction. While there is an important need for the tribunals to recognise and protect the human rights of victims of armed conflict, we should not lose sight of the fact that these institutions may potentially violate human rights themselves. It is therefore unfortunate that only a few have commented on the rights of suspects and accused persons: a result that is surprising given that the integrity and, ultimately, the success of the tribunals will depend on their adherence to fair trial guarantees. The author proposes to examine this and an even less discussed but equally important topic, namely

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7 On the ongoing attempts to establish a special court to try the leadership of the Khmer Rouge see, generally, S Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, (2001) 12 *Criminal Law Forum* 185; W Burke-White, A Community of Courts: Toward a System of International Criminal Law Enforcement, (2002) 24 *Michigan Journal of International Law* 1 at 30-41; I Bantekas and S Nash, International Criminal Law (2003) at 406-408; and D Donovan, Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal, (2003) 44 *Harvard International Law Journal* 551.

8 On the establishment and jurisdiction of the International Criminal Court see, generally, M Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court', (1997) 10 *Harvard Human Rights Journal* 11; *The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee, and Administrative and Financial Implications* (M Cherif Bassiouni, 1997); H von Hebel, 'Putting an End to Impunity: From the Hague to Rome', 1998-1999 *Hague Yearbook of International Law* 83; *Commentary On The Rome Statute Of The International Criminal Court: Observers' Notes, Article By Article* (Otto Triffterer Ed., 1999); E La Haye, 'The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising Its Jurisdiction', (1999) 46 *Netherlands International Law Review* 1; *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (H von Hebel, J Lammers and J Schukking Eds., 1999); M Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *American Journal of International Law* 22 (1999); A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (2000) 10 *European Journal of International Law* 144; R Fife, 'The International Criminal Court: Whence It Came, Where It Goes', (2000) 69 *Nordic Journal of International Law* 63; *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (R Lee Ed., 2001); and *The Rome Statute of the International Criminal Court: A Commentary* (A Cassese, P Gaeta, and J Jones Eds., 2002).

the procedural sanctions that may be imposed and the remedies available for unjustified infringements of these rights.

After identifying the standards to which international criminal trials should adhere, the paper will proceed to examine the rationale behind protecting the fair trial rights of suspects and accused persons. As explained in the next section, there is a great deal of tension between the guarantee of these rights and the practical considerations involved in trying war criminals. Given that most of the international criminal tribunals mentioned above are still in their infancy, the paper will draw on the experiences of the ICTY and the ICTR (the *ad hoc* Tribunals) to show why the international criminal justice system cannot always fully guarantee a fair trial. The paper will then discuss the procedural sanctions and other forms of redress that are available to suspects and accused persons whose rights have been breached. It will note the lack of specific provisions dealing with the consequences of human rights violations has left the Judges in a position where they must decide such issues on a case-to-case basis. The paper will conclude that this is not satisfactory and recommend that provisions specifying the consequences of breaching due process rights be inserted into the constituent instruments of the existing international criminal tribunals.

The Extension of Fair Trial Standards to International Criminal Tribunals

The right to a fair trial is one of the most fundamental rights afforded to individuals by international and regional human rights treaties and is considered as holding a prominent place in a democratic society.[9] This right is fundamental to the international criminal justice system, just as it is to domestic systems and is an explicit component of the legal framework of the ICC and other international criminal tribunals. Its importance was recognised by the UN Secretary-General who stated during the establishment of the ICTY that it 'is axiomatic that the [court] must fully respect internationally recognised standards regarding the rights of the accused at all stages of the proceedings'.[10] These standards are applicable at all times despite the fact that international criminal tribunals are of an extraordinary nature, often operating at a time of regional conflict and political instability, and deal with extremely violent and organised crime.[11]

But what are the internationally recognised standards for a fair trial that international criminal tribunals must guarantee? Fair trial rights 'enter' the legal framework

9 *De Cubber v Belgium*, ECHR, 26 October 1984, Ser A, n 86, para 30.

10 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc S/25704 (1993), reprinted in 32 ILM 1159 (1993) at para 106.

11 S Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003) at 6 (observing that 'it would be illogical to believe that [such tribunals] could avoid complying with due process guarantees on account of the crimes within their jurisdiction. It would be arduous to maintain that an international body, which has been created to avoid the use of national criminal justice as an instrument of vengeance by one of the parties involved in the conflict, may do without due process rules').

of international criminal tribunals in a number of ways.[12] The most direct route being the rights enumerated in the constituent instruments of the judicial institutions.[13] These provisions derive their language almost directly from fair trial guarantees set out in the International Covenant on Civil and Political Rights (ICCPR), in particular Article 14 thereof. However, they are far from complete and lack some important guarantees. For instance, the Statutes and constituent instruments of the *ad hoc* Tribunals are silent on the right not to be subjected to arbitrary arrest and detention, despite the fact that it is expressly protected by Article 9 of the ICCPR.[14]

International criminal tribunals are also bound in their activities by those human rights norms that form part of customary international law or the general principles of law. The author notes, however, that the courts face a difficult task identifying such norms. This is because the practice of States – who are entitled to derogate from human rights standards when this is 'necessary in a democratic society'[15] or 'in time of public emergency that threatens the life of the nation'[16] – does not fit snugly within the application of human rights by an international criminal tribunal. For this reason, Sluiter recommends against resorting to customary law or general principles to identify the scope of such rights.[17] Instead he advocates reference to international and regional human rights treaties – specifically the ICCPR, the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR)[18] – and, more importantly, the interpretations of their provisions by

12 G. Sluiter, 'The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade: International Criminal Proceedings and the Protection of Human Rights', (2003) 37 *New England Law Review* 935 at 936.

13 For instance, the rights of suspects are set out in Article 55 of the Rome Statute, Rule 42 of the ICTY Rules of Procedure and Evidence and Rule 42 of the ICTR Rules of Procedure and Evidence while the rights of accused persons are listed in Article 67 of the Rome Statute, Article 21 of the ICTY Statute and Article 20 of the ICTR Statute.

14 See Sluiter, *supra* note 12, at 936. The right to be free from arbitrary arrest and detention is guaranteed by Article 55(1)(d) of the Rome Statute.

15 European Convention on Human Rights, article 8, para 2 (adopted 4 November 1950).

16 International Covenant on Civil and Political Rights, article 4, para. 1 (adopted 16 December 1966).

17 Sluiter, *supra* note 12, at 938 (noting that such an exercise would be highly complicated as well as time and energy consuming).

18 Harris has noted that 'the three human rights treaty texts between them define the right to a fair trial in criminal proceedings in full and basically satisfactory terms. There are no important omissions. […] Of the three, the UN text is the most complete. The remaining two, however, guarantee all of the essential features of a fair trial. […] There is […] a common core of meaning of sufficient dimension as to permit a detailed statement of the scope of that right which can command widespread international consent.' D Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right', (1967) 16 *International and Comparative Law Quarterly* 352. This view is shared by Van Dijk who considered that 'the terms of […] Article 6 [ECHR] are almost identical with those of the other provisions mentioned above [ie Article 14 ICCPR and Article 8 ACHR].' P van Dijk, *The Right of the Accused to a Fair Trial under International Law* (Utrecht: SIM Special, 1983) at 1.

the relevant supervisory body.[19]

The *ad hoc* Tribunals have endorsed this approach. In the Celebici case, for instance, various rulings from the European Court of Human Rights (EurCourtHR) were taken into account when determining the scope of the right to legal assistance.[20] Similarly, in the Blaskic case, when deciding whether contempt proceedings could be brought in absentia against individuals who did not comply with a subpoena, the ICTY Appeals Chamber held that the guarantees provided by the ECHR should be respected.[21] More recently, the ICTR Appeals Chamber held that:

> The [ICCPR] is part of general international law and is applied on that basis. Regional human rights treaties, such as the [ECHR] and the [ACHR], and the jurisprudence developed thereunder, are persuasive authorities that may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.[22]

The importance of ensuring that suspects and accused persons receive a fair trial

At this stage, the author would like to clarify that by looking at the concept of a fair trial from the perspective of the accused, he does not mean to suggest that a trial should not also guarantee the rights of the other participants in the trial process, in particular victim witnesses. It is just that there is a minimum level of rights below which international criminal tribunals cannot go, regardless of the practical impact of the guarantees.[23] This was recognised by Justice Robert Jackson, Chief Counsel for the Prosecution in the Nuremberg Trial, who stated in his opening address:

> We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspiration to do justice.[24]

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19 Sluiter, *supra* note 12.

20 Prosecutor v Delalic and others, Case No IT-96-21-T, *Decision on Zdravko Mucic's Motion for the Exclusion of Evidence* (2 September 1997) at paras 50-51.

21 Prosecutor v Blaskic, Case No IT-95-14-AR108bis, A Ch, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997), para 59.

22 Prosecutor v Barayagwiza, Case No ICTR-97-19-AR72, *Decision* (3 November 1999), para 40.

23 S Stapleton, 'Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation', (1999) 31 *New York University Journal of International Law & Policy* 535 at 545.

24 *Opening Address of Robert Jackson to the Nuremberg Tribunal* reprinted in T. Taylor, *The Anatomy of the Nuremberg Trials* (1992) at 168. Richard Goldstone, first Prosecutor of the *ad hoc* Tribunals, has echoed similar sentiments by commenting that 'whether there

This statement acknowledges the value of a fair trial and places particular emphasis on an international criminal tribunal's obligation to protect due process rights. More importantly, it draws attention to the role fairness plays in the international community's perception and judgement of these courts.[25]

A fair trial is significant at both the domestic and international level, but at the international level the significance is magnified for several practical and philosophical reasons.[26] On a practical level, international criminal tribunals depend on the acceptance as well as the financial and administrative support of the global community. Moreover, they depend on this community to arrest and hand over individuals for prosecution. If trials appear to be unjust then it is likely that the support and cooperation the tribunals receive from the international community will start to wane. On a philosophical level, some commentators have advocated that one of the aims of an international criminal tribunal should be to extend 'the rule of law and to bring national courts up to the standards of international law.'[27] International and regional human rights treaties are committed to providing a comprehensive view of rights and to extending the rights of individuals so that national governments will follow their example.[28] Allowing international criminal tribunals to deviate from the minimum standards for a fair trial would undermine the credibility of existing human rights norms and could set back the human rights movement several years.[29] For instance, how can a national government be expected to follow minimum fair trial standards if international criminal tribunals do not?

When you compare the Rome Statute and those of other international criminal tribunals with the Nuremberg Charter,[30] it is clear that substantial progress has been made in the statutory protections accorded to the accused. Nonetheless, the statutory guarantee of a right is not the same as a procedural guarantee, and due

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are convictions or whether there are acquittals will not be the yardstick [of the *ad hoc* Tribunals]. The measure is going to be the fairness of the proceedings' quoted in M Ellis, "Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defence Counsel" (1997) 7 *Duke Journal of Comparative & International Law* 519 at n 37.

25 Stapleton, *supra* note 23, at 546.

26 Ibid.

27 See, for instance, Human Rights Watch, *Non-governmental Organisation Action Alert (no 3): Establishing an Effective International Criminal Court* (February 1998) available at <http://www.hrw.org/hrw/campaigns/icc/docs/aaFeb98.pdf>.

28 Stapleton, *supra* note 23, at 546.

29 Ibid.

30 The fair trial provisions of the Nuremberg Charter were set out in three sub-sections of Article 16 as follows: In order to ensure fair trial for the defendants, the following procedure shall be followed: (a) The indictment […]; (b) during any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him; (c) A preliminary examination [….]; (d) A defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel; and (e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1845, 82 UNTS 279, 59 Stat. 1544.

process requires the presence of both. There is widespread agreement that the rights accorded to the accused under the Nuremberg Charter were an illusion and the subsequent trial unfair.[31] It is too early to make such a judgement in case of the ICC and most of the other existing international criminal tribunals. However, the actions of the *ad hoc* Tribunals have highlighted the tension that exists between the minimum procedural guarantees of the right to a fair trial and the practical considerations involved in trying individuals accused of the most abhorrent crimes known to humankind.

It is true that during their short history the *ad hoc* Tribunals have generally complied with the fair trial rights of suspects and accused persons throughout the criminal proceedings, including those phases that take place outside the courtroom. But in some areas they have failed to guarantee the minimum standards set by international human rights treaties. Suspects have been arrested in dubious circumstances and have been held in detention for significant periods without being charged or receiving legal representation.[32] Once transferred to the seat of the respective tribunal, accused persons have often had to wait several days and in some cases weeks before being brought before the court and, despite the presumption of innocence, are seldom provisionally released.[33] A number of rights of detained persons – including the right not to be segregated from other prisoners and the right to communicate with family, friends and, in limited circumstances, the media – have been eroded.[34] Further, applications for *habeas corpus* have been improperly dealt with and, in one instance, seem to have been ignored.[35]

Although the *ad hoc* Tribunals have gone out of their way to protect the rights of witnesses, a similar degree of concern has not been shown towards the accused during the trial stage of the proceedings. The prosecution has been criticised for failing to comply with its discovery obligations and, on one occasion, was found to have deliberately withheld exculpatory material from the accused.[36] The snail's pace of the

31 Bassiouni, *supra* note 8.

32 See note 22 above and notes 106 to 117 below and accompanying text (re the Mucic and Barayagwiza cases respectively).

33 See P Wald and J Martinez, 'Provisional Release at the ICTY: A Work in Progress', in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk Mcdonald* (Richard May et al. Eds., 2001) M DeFrank, ICTY+ Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, (2002) 80 *Texas Law Review* 1429; D Rearick, 'Innocent Until Alleged Guilty: Provisional Release at the ICTR', (2003) 44 *Harvard International Law Journal* 577;

34 For instance, in December 2003 the ICTY Deputy Registrar prohibited Slobodan Milosevic and Vojislav Seselj from communicating via telephone and visits with any person (particularly the media) with the exception of immediate family, lead counsel and diplomatic or consular representatives and even then communications with family members were to be monitored. See Prosecutor v Milosevic, *Decision*, Case No IT-02-54-T (11 December 2003); and Prosecutor v Seselj, *Decision*, Case No IT-03-67-PT (11 December 2003).

35 See notes 106 to 117 below and accompanying text (re the Baragawiza case).

36 See note 105 below and accompanying text (re the Furundzija case).

trials has affected the accused's right to a speedy trial,[37] while their right to a fair and independent trial has been eroded by the scarcity of judicial resources, which has resulted in Judges presiding over cases even though they confirmed the indictment in question.[38] Budgetary constraints have had a huge impact on the legal aid systems operated by the courts and have seriously affected the ability of counsel assigned to indigent accused to mount an adequate and effective defence of their client.[39]

Factors that Hinder the Provision of a Fair Trial

So why has the international criminal justice system failed to fully comply with the minimum standards for a fair trial? In the author's opinion, four broad factors underlie the reasons for these failures. For sake of presentation, this paper will concentrate on these factors as opposed to going through the constituent instruments of the various international criminal tribunals article by article, rule by rule.

The need to protect victim witnesses and other persons who testify

The first factor relates to the requirement that the entitlement to due process is subject to any rules an international criminal tribunal enacts for the protection of victim witnesses and other persons who testify. In the case of the *ad hoc* Tribunals, the inclusion of a witness protection rule was logical given that the courts, unlike the Nuremberg Tribunal, would not have the luxury of large volumes of documentary evidence and thereby cases would be witness driven. More importantly, the ICTY was established while the conflict in the former Yugoslavia was still ongoing and many witnesses were, at the time, reluctant to testify in open court because they were afraid they or their family would suffer retribution at the hands of the accused or their supporters. Since the court was not equipped with a witness protection program and did not have the resources to operate one, there was a real danger that witnesses would not testify without protection.

The *ad hoc* Tribunals have sought to protect victims and witnesses in a number of ways. For instance, the courts have redacted names and identifying information from the public record, used image or voice altering devices during testimony and

37 See H Lahiouel, 'The Right of the Accused to an Expeditious Trial', in May et al., *supra* note 33.

38 See Zappala, *supra* note 11, at 105 (concluding that as the reviewing judge has already decided that there are sufficient grounds for believing that an accused committed certain crimes, it is doubtful whether the practice of allowing them to sit on the trial or the appeal of the accused conforms with the principle of impartiality).

39 See S Beresford, 'The International Criminal Tribunal for the Former Yugoslavia and the Right to Legal Aid and Assistance', (1998) 2 *International Journal of Human Rights* 29 ; R Wilson, 'Assigned Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach', (2002) 2 *International Criminal Law Review* 145; and M Ellis, 'The ICTY at ten: A critical assessment of the major rulings of the International Criminal Tribunal over the past decade: The evolution of Defence Counsel appearing before the International Criminal Tribunal for the former Yugoslavia', (2003) 37 *New England Law Review* 949.

assigned aliases to vulnerable witnesses.[40] These measures do not derogate excessively from a defendant's right to a fair trial. However, the courts have employed other witness protection devices that weaken the rights of the accused, particularly the right to confront witnesses.

The *ad hoc* Tribunals have adopted an adversarial model for the examination of witnesses:[41]: a central tenet of which is the right of the accused to confront his accuser. By placing the protection of witnesses on an equal footing with the right to confrontation, the *ad hoc* Tribunals have 'strayed from the accusatorial model's dictate that [this] right has priority over all but the most compelling of circumstances.'[42] As stated above, among the measures the Judges have used to protect witnesses is the assignment of a pseudonym to a witness. The assignment of a pseudonym does not, in itself, pose a threat to an accused's right of confrontation so long as the accused is informed of a witness's true identity.[43] But the ICTY has experimented with the idea of granting full anonymity to vulnerable witnesses.

The danger of this measure was illustrated in the *Tadic* case where the prosecution sought permission for three witnesses to give testimony anonymously.[44] Responding to the defence's objection that such a measure would infringe upon the rights of the accused,[45] the Trial Chamber reviewed the general principles relevant to the issue and stated that 'a fair trial means not only fair treatment to the defence but also to the prosecution and witnesses.'[46] After examining relevant case law, the Chamber concluded that the rights of the accused must be weighed against the public interest in witness anonymity.[47]

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40 For an analysis of the types of measures that the *ad hoc* Tribunals have adopted to protect witnesses see Y Featherstone, 'The International Criminal Tribunal for the former Yugoslavia: Recent Developments in Witness Protection', (1997) 10 *Leiden Journal of International Law* 179; A Cassese, 'The International Criminal Tribunal for the former Yugoslavia and Human Rights', (1997) 4 *European Human Rights Law Review* 329; A Rydberg, 'The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC,' (1999) 12 *Leiden Journal of International Law* 455 (1999); and P Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', (2002) 5 *Yale Human Rights & Development Law Journal* 217.

41 On the adoption of the fundamental features of the adversarial system at the international level see A Cassese, *International Criminal Law* (2003) at 365-388; and A Orie, 'Accusatorial v Inquisitorial Approach in International Criminal Proceedings', in A Cassese, P Gaeta, and J Jones, *supra* note 8.

42 Antonia Sherman, 'Sympathy for the Devil: Examining a Defendant's Right to Confront before the International War Crimes Tribunal', (1996) 10 *Emory International Law Review* 833at 868.

43 Ibid.

44 See Prosecutor v Tadic, Case No IT-94-1-T, *Motion Requesting Protective Measures for Victims and Witnesses* (18 May 1995).

45 Prosecutor v Tadic, Case No IT-94-1-T, *Response to the Motion of the Prosecutor Requesting Protective Measures for Victims and Witnesses* (2 June 1995).

46 Prosecutor v Tadic, Case No IT-94-1-T, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, (10 August 1995) at para. 55.

47 Ibid. For detailed commentaries on this particular decision, see M Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused', (1996) 90 *American Journal*

The Chamber, nonetheless, insisted that certain general criteria needed to be met to justify an order for anonymity.[48] In particular, there must be a real fear for the safety of the witness and their testimony must be sufficiently relevant and important to the case.[49] Moreover, there must be no prima facie evidence that the witness is untrustworthy in any way.[50]

Unfortunately, these protections fell well short of those adopted in domestic jurisdictions that allow witness anonymity.[51] In particular, there was no requirement that the credibility of the witness be independently examined. Without such an examination, there is a heightened risk that an accused person will be convicted on the false testimony of an anonymous witness. This eventuality almost arose in the first case where anonymous testimony was used. Witness L provided detailed testimony implicating Dusko Tadic in various rapes and murders. While testifying, however, the witness provided a number of personal details that enabled the defence to uncover his identity and, as a result, it soon became apparent that he was lying.[52] When confronted with evidence of his deception, Witness L admitted that he had

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of International Law 235; C Chinkin, 'Due Process and Witness Anonymity', (1997) 91 *American Journal of International Law* 75 (1997); M Leigh, 'Witness Anonymity is Inconsistent With Due Process', (1997) 91 *American Journal of International Law* 80; M Momeni, 'Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Tribunal for the former Yugoslavia', (1997) 14 *Howard Law Journal* 155; and N Affolder, 'Tadic, the Anonymous Witness and the Sources of International Procedural Law', (1998) 19 *Michigan Journal of International Law* 445.

48 Affolder, *id*, at 458 (noting that for guidance as to the factors that should be taken into account when granting anonymity, the Trial Chamber relied principally on the decision of the English Court of Appeal in *R v Taylor and Crabb* [1994] Times LR 484; [1995] Crim LR 253 and the decision of the Supreme Court of Victoria in *Jarvie v The Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84.

49 Prosecutor v Tadic, Case IT-94-1-T, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses,* 10.8.95, paras. 62-63

50 Ibid, para. 64. The Chamber also stated that the effectiveness or non-existence of a witness protection programme and the unavailability of less restrictive protective measures must also be taken into account when deciding whether to grant anonymity to a witness. Ibid paras 65-66.

51 For a detailed summary of the use of anonymous witnesses in domestic systems see New Zealand Law Commission Discussion Paper, *Evidence Law: Witness Anonymity*, NZLC PP29 (1997) A9; see also N Demleitner, 'Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?' (1998) 46 *American Journal of Comparative Law* 641; S Beresford, 'The New Zealand Approach to Witness Anonymity and the Right to a Fair Trial', 7 *Canterbury LR* (2000) 465 (for an overview and analysis of the New Zealand Evidence (Witness Anonymity) Amendment Act 1997), D Lusty, 'Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials', (2002) 24 *Sydney Law Review* 361.

52 The story of Witness L can be found in various news accounts, including *Internet Nasa Borda* (28 October 1996), Reuters (25 October 1996) and Associated Press (25 October 1996). One of the most detailed accounts was broadcast on Dutch VPRO Radio's *Argos* program on 10 September 1999, a transcript of which (in English) is available at <http://www.domovina.net/opacice.html>.

fabricated all the accusations he had made against the accused and his testimony was withdrawn.[53]

Another example of a problematic witness protection device is the use of one-way closed circuit television by vulnerable victim witnesses. In a number of systems where the adversarial model is followed, face-to-face confrontation is obligatory in all but the most exceptional circumstances. This is because the effect on a witness in facing a defendant, although potentially traumatic, tends to reveal false testimony.[54] In the author's view, the current practice of the *ad hoc* Tribunals lessens this safeguard of the adversarial model as the witness is not in the same room as the accused and, therefore, will not see him or her.[55]

Reliance on State Cooperation

The next factor that has tilted trials against the accused relates to the degree to which the *ad hoc* Tribunals rely on the cooperation of States to provide them with things, such as money, evidence, access to defendants, witnesses and so forth. Without such cooperation, as one former Judge noted, the *ad hoc* Tribunals would 'turn out to be utterly impotent.'[56] Although the problems the co-operation regime creates for effective prosecution are reasonably well documented, the effect on the rights of the accused is less appreciated. To illustrate this concern, the author will provide a few examples where the lack of State co-operation has restricted the ability of the accused to mount an adequate and effective defence.

The first example is in the area of evidence gathering. In September 1998, Stephan Todorovic[57] was arrested in what were highly questionable circumstances. The accused claimed (and the evidence seemed to support his allegation) that he was kidnapped from his home in Serbia by professional bounty hunters and then taken across the border into Bosnia where the International Stabilisation Force (SFOR) arrested him.[58] Since such an arrest is an illegal form of apprehension under inter-

53 Witness L claimed that the Bosnian Muslims, while he was in their custody, forced him to agree to lie against Tadic and was then trained by them in the testimony he was to give in the ICTY. Confronted with this statement, the prosecution informed the court that it did not regard the testimony as reliable and invited the court to disregard it. R Hayden, 'Biased "Justice": Humanrightsism and the International Criminal Tribunal for the former Yugoslavia', (1999) 47 *Cleveland State Law Review* 549 at 562.

54 Coy v Iowa, 487 US 1012 (1988). See also Sherman, *supra* note 42, at 872 (noting that the US Supreme Court has permitted the use of one-way closed circuit television where the witness is a victim of child molestation, but only upon relatively stringent conditions).

55 See also Sherman, *id.*

56 A Cassese, 'Reflections on International Criminal Justice', (1998) 61 *Modern Law Review* 1 at 10.

57 Todorovic, who was appointed the Chief of Police for Bosanski Samac after Serb forces occupied the area in April 1992, was accused of committing various murders, beatings and rapes during the take over of the town. See Prosecutor v Simic and others, Case No IT-95-9-I, *Second Amended Indictment*, (11 December 1998).

58 Todorovic's testified about the circumstances surrounding his kidnapping and arrest on 24 November 1999. A transcript of his testimony can be found at <http://www.un.org/

national law, he sought an order directing the various military forces operating in Bosnia to supply him with information pertaining to his arrest.[59] The Trial Chamber granted the request and ordered SFOR and the North Atlantic Council to hand over any documentation in their possession that related to the arrest.[60] In addition, a subpoena was issued to the commander of the military base where Todorovic was apprehended, requiring him to testify about the circumstances surrounding the arrest.[61]

Understandably, States contributing forces to SFOR were far from pleased and the majority filed requests seeking review of the Trial Chamber's decision.[62] To highlight its concern, the United States went so far as to say that the decision of the Appeals Chamber 'will be of utmost significance to the future of the Tribunal, and its relationship with those engaged in the apprehension of persons indicted for war crimes.'[63] Before the appeal was heard, however, Todorovic entered a plea bargain with the Prosecutor.[64] In return to pleading guilty and dropping any outstanding motions 'in which the accused sought an evidentiary hearing regarding the circumstances of his arrest',[65] the Prosecutor agreed to withdraw all but one of the twenty-seven charges against the accused. Moreover, the Prosecutor recommended a sentence of no more than twelve years imprisonment instead of the life sentence allowable under the ICTY's Statute.[66]

Although the detrimental consequences of an accused person's inability to secure evidence did not fully materialise in this case, a more pertinent example of the difficulties of the co-operation regime in the area of evidence gathering occurred

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icty/transe9/991124MH.htm>. In December 2000, nine Serbs were convicted of abducting Todorovic in exchange for US$22,700 and were sentenced to terms of imprisonment ranging from six months to eight-and-a half years. See *None who handed over Bosnian war crimes suspect sent to Jail*, Agence France-Presse (11 December 2000), available at 2000 WL 24779222.

59 Prosecutor v Simic and others, Case No-IT-9-PT, Notice of Motion for Judicial Assistance (24 November 1999).

60 Prosecutor v Simic and others, Case No-IT-9-PT, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others (18 October 2000).

61 See Jerome Socolovsky, *Tribunal Subpoenas NATO General*, AP Online (20 October 2000) available at 2000 WL 28614085.

62 See J Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', (2002) 27 *Yale Journal of International Law* 111 at 126.

63 See Jerome Socolovsky, *US Opposes Tribunal's Subpoena*, AP Online (6 December 2000) available at 2000 WL 30319246 (quoting the US brief).

64 See Jerome Socolovsky, *Bosnian Serb Suspect Pleads Guilty*, AP Online (13 December 2000) available at 2000 WL 30832710.

65 Prosecutor v. Simic and others, Case No-IT-9-PT, *Order Separating Proceedings and Scheduling Order* (24 January 2001).

66 Although the court provided no direct rationale to justify the plea bargain, Deputy Prosecutor Graham Blewitt admitted that Todorovic's ongoing appeal had resulted in a decline in arrests preceding the plea agreement. M Kovac, 'Apprehension of War Crimes Indictees: Should the United Nations' Courts Outsource Private Actors to Catch Them?' (2002) 51 *Catholic University Law Rev* 619 at 640.

in the Blaskic case. During the spring of 1993, Bosnian Croat forces attempted to rid central Bosnia of non-Croats and in various acts of ethnic cleansing massacred hundreds of Muslim civilians in that area. Tihomir Blaskic – who was the commander of the Bosnian Croat army during this period – was indicted on the basis of command responsibility for the crimes committed by his subordinates[67] and after a three-year trial was found guilty and sentenced to forty-five years imprisonment.[68]

One of the cornerstones of Blaskic's defence was that the atrocities were committed by the Bosnian Croat military police, whose actions he claimed were directed by government officials in Zagreb and not himself. The accused thus argued that he should not have been held responsible for their crimes. He alleged that President Tudjman and other individuals within the Croatian leadership had framed him in order to divert suspicion from the real culprits. To substantiate this claim, his lawyers repeatedly sought access to the archives of the Croatian government, but, not surprisingly, their requests were denied.

Fortunately for the accused, Tudjman died shortly before the end of his trial and the new regime in Zagreb was far more receptive to requests for assistance. Five days after the conviction, the Croatian authorities announced that they had found various documents that would exonerate the accused.[69] This evidence, which was passed on to the defence, forms the basis of Blaskic's appeal – which the ICTY's appellate chamber heard in December 2003.

It will be interesting to see whether the discovery of these documents will alter the verdict in the case or reduce Blaskic's sentence. But even if the appeal fails, this case illustrates the inherent constraints that are placed on accused persons. As one commentator observed:

> Evidence necessary to prove innocence or assert a legal defence may be beyond the reach of the court, either because of the court's inability to successfully coerce the evidence-holder or because the evidence-holder deliberately seeks to influence the outcome of the trial by manipulating the release of probative information.[70]

Accused persons face similar difficulties procuring witness testimony, where the danger of state manipulation is ever present. In January 2000, for example, Milan Vujin – a former member of the Tadic defence team – was found guilty of contempt for directing witness testimony so as not to reveal the culpability of Bosnian Serb and Yugoslav leaders.[71] Another similarity is the unequal access to information.[72]

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67 Prosecutor v Blaskic, Case No IT-95-14-I, *Second Amended Indictment* (25 April 1997).

68 Prosecutor v Blaskic, Case No IT-95-14-T, *Judgement* (3 March 2000).

69 Cogan, *supra* note 62, at 122.

70 Id., at 124.

71 Prosecutor v Tadic, Case No IT-95-1-A, *Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin* (31 January 2000). This incident adds significant weight to claims that throughout the trials there have been serious attempts, encouraged at the highest level, to manipulate the ICTY's proceedings. Cogan, *id.*, at 128.

72 Cogan, *id.*, at 129.

An example of this arose in the Tadic case. At the time of the trial most of the witnesses who testified for the prosecution were living as refugees in Western Europe and North America. The prosecution thus encountered very few problems speaking to these persons and bringing them to The Hague. This was not the case for the defence. The majority of witnesses who had information that may have exonerated the accused resided in Republika Srpska and, unfortunately for the defence, the Bosnian Serb authorities decided not to cooperate with them.[73]

These examples demonstrate that the cooperation regime upon which international criminal tribunals rely is problematic as it affects the ability of accused persons to present an adequate and effective defence. It is true that these problems are not confined to the international criminal justice system, as many defendants in domestic criminal trials face such difficulties. However, the difficulties are magnified at the international level, as accused persons are:

> … limited by the structure of the courts in their ability to procure evidence and witnesses and to have orders issued on their behalf enforced, despite statutory and judicially imposed obligations on states. Moreover, [their] opportunities for getting evidence, witnesses and orders enforced are substantially less than those of the prosecutor, who has all the powers of her office and often the sympathies of governments, on her side.[74]

In the author's opinion, the accumulative effect of these problems poses a potentially insurmountable obstacle to the provision of a fair trial.

Dependence on States for Financing and Judicial Assistance

The next factor that affects the right to a fair trial relates to the *ad hoc* Tribunals' dependence on States for financing and judicial assistance. The author has already highlighted some examples of this. In the *Blaskic* case, it can be argued that the Croatian authorities' refusal to cooperate with the ICTY was intended to affect the outcome of the trial. More alarmingly, States contributing forces to SFOR resisted cooperating in the *Todorovic* case and, in another case, threatened to withdraw their overall support and protection to the ICTY if the issue of the accused's arrest proceeded further. But state influence on the *ad hoc* Tribunals' proceedings is not con-

73 According to Tadic's lawyers 'the lack of cooperation displayed by the authorities in the Republika Srpska had a disproportionate impact on the Defence. … [And accordingly] there was no equality of arms between the Prosecution and the Defence at trial. … The effect of this lack of cooperation was serious enough to frustrate the accused's right to a fair trial.' Prosecutor v Tadic, *Decision*, Case No IT-94-1-A, A Ch (15 July 1999) at 29. Defence counsel appearing before the ICTR have encountered similar problems and have repeatedly complained about unequal access to and improper government tampering with witnesses. Isabel Vincent, *Canadian lawyers say hand tied in Arusha*, National Post (28 July 2001) at B1.

74 Cogan, *supra* note 62, at 131.

fined to individual cases. Such influence also impacts on the manner in which they operate and make decisions.[75]

A good example occurs in the area of financing. The international criminal justice system does not come cheap. For instance, the ICTY's budget for the biennium 2002-2003 was 250 million US dollars: a figure that represented ten percent of the whole expenditure of the UN Secretariat. As organs of the United Nations, the *ad hoc* Tribunals have been affected by the financial crisis that has plagued the organisation during the last few years and are constantly under immense pressure to reduce their operational costs and expenditures.

The area where this pressure is felt hardest is in the provision of legal aid (which represents a staggering 15 percent of the budgets of the *ad hoc* Tribunals).[76] Given the economic situation in Rwanda and the former Yugoslavia and the personal circumstances of the majority of the accused, the right to free legal assistance is one of the most important rights afforded to the accused. In order for indigent accused to receive legal aid, they must make a request for the assignment of counsel to the Registrar, who decides whether or not the accused person has sufficient means to retain counsel of their choice. After determining that a particular accused is entitled to free legal assistance, the Registrar will assign counsel to him or her.[77]

Under the rules, assigned counsel may hire the services of investigators, researchers, translators and interpreters and other support staff necessary for the preparation of the defence and, under exceptional circumstances, may request the assignment of a second counsel. Lead counsel are paid between $80 to $110 per hour depending on experience – this rate being comparable to the salaries received by the trial attorneys working for the prosecutor's office. Co-counsel receive a fixed rate of $80 per hour.[78]

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75 Id., at 132.

76 Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc A/54/634 (1999) at para 210; see also Ellis, *supra* note 39 at 951; and D Tolbert, 'The ICTY at ten: A critical assessment of the major rulings of the International Criminal Tribunal over the past decade: The ICTY and Defence Counsel: A Troubled Relationship', (2003) 37 *New England Law Review* 975 at 982 (noting that since its establishment the ICTY has spent US$ 50 million on legal aid).

77 See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Directive on the Assignment of Defence Counsel, UN Doc IT/73 Rev.9, 12 July 2002 (ICTY Directive), Articles 7 to 12; International 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 and 31 December 1994, Directive on the Assignment of Defence Counsel, as amended, 27 May 2003 (ICTR Directive), Articles 5 to 10.

78 See ICTY Directive, *id.*, Article 22 & Annex 1; ICTR Directive, *id.*, Article 22.

On account of budgetary constraints, restrictions have been placed on the number of investigators and consultants assigned counsel may hire and the amount they may be paid.[79] More alarmingly, limitations have been imposed on the maximum number of hours assigned counsel may claim as remuneration. For instance, during the trial phrase the maximum number of hours assigned counsel are remunerated per month is 125, excluding hearing time.[80] While this figure is reasonable, during the pre-trial and appellate stages of the proceedings assigned counsel until recently could only invoice 100 hours per month.[81]

In 2001, the ICTY shifted to a lump sum remuneration system for the pre-trial and appeal phases, whereby defence counsel are paid a specified sum for each phrase, depending on the case's complexity. Under this system, the Registrar ranks cases as (1) difficult, (2) very difficult, or (3) leadership. All cases are initially ranked at Level 1 (difficult). The complexity of the case is then determined in consultation with the Trial Chamber by taking into account various factors.[82] The ranking system – in the view of the ICTY and the United Nations Secretariat – ensures that the appropriate level of payment is made to defence teams, while guaranteeing the efficient use of the funds of the legal aid system.[83]

It is true that counsel who elect to represent indigent accused generally acknowledge the financial constraints inherent in the provision of legal aid. They thereby accept that the remuneration they will receive for their services will be less than that received from privately paying clients. Nonetheless, the magnitude and complexity of cases that are brought before the *ad hoc* Tribunals necessitate that all assigned counsel work full time on their clients' defence, especially during the pre-trial phase. The financial constraints imposed on defence counsel are discouraging competent counsel, particular those from Europe and North America, from representing accused persons. It is also having a huge impact on the ability of those counsel that remain to adequately and effectively prepare their client's defence, especially as many are spending considerable time and effort persuading the ICTY Registrar to allocate additional financial

79 *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991*, UN Doc A/52/375 (1997), para 88; see also *Comprehensive Report on the Progress made by the International Criminal Tribunal for the former Yugoslavia in Reforming its Legal Aid System*, UN Doc A/58/288 (2003) ["Report on ICTY's Legal System"] at para 9.

80 Report on ICTY's Legal System, *id*., at para. 22.

81 See J Ackerman, 'Assignment of Defence Counsel at the ICTY' in Richard May et al., *supra* note 33 at 173.

82 The factors that are considered include the number and nature of counts in the indictment; possible amendments to the indictment; the nature of preliminary motions and challenges to the ICTY's jurisdiction; the number of accused joined in the same case; the number of witnesses and documents involved; the geographical territory covered in the indictment; the position of the accused within the military and political hierarchy; and the legal issues expected to arise in the course of the trial. Report on ICTY's Legal Aid System, *supra* note 79, at para 17.

83 *Id*., para 18.

resources to them.[84] The constraints are also affecting the equality of arms between the defence and the prosecution, which has virtually unlimited resources at its disposal.[85]

In 2002, the pressure to reduce the legal aid budget forced the *ad hoc* Tribunals to address the much publicised, but somewhat overstated practice of fee splitting, where an assigned counsel pays a portion of his fee to a client or provides gifts and other indirect support and maintenance to the client and/or their family.[86] It is true that an investigation conducted by the ICTY Registry revealed that during the four years that Zoran Zigic was detained $175,000 in legal aid fees was funnelled to the accused and his family.[87] However, the pressure to eliminate this practice and thus repair their tarnished reputations in the eyes of the States that contribute to their budget has prompted the *ad hoc* Tribunals to establish special teams to identify instances of fee splitting; a number of investigations are currently underway.[88] The author is not trying to condone the practice of fee splitting especially as it strikes another blow at those the accused have egregiously harmed, namely the dead and the survivors. But the practical effect of these investigations – which, unfortunately, have the hallmarks of a witch hunt – is that a number of defence counsel have been forced to devote valuable time and resources to protect their reputation and that of their clients. Their ability to prepare an adequate and effective defence for their clients is being severely strained.

Financial considerations are also having a major impact on the ability of the *ad hoc* Tribunals to rectify mistakes they have made. Although the best means of vindicating innocent accused is acquittal, in many domestic jurisdictions innocent persons who have been prosecuted or convicted of an offence may be compensated for the deprivation of liberty they have suffered and economic losses incurred as a direct result of the proceedings against them. Awards of compensation may also be made to persons who have been victims of unlawful arrest or detention. This remedy – which is codified in various international human rights treaties – is not included

84 Id., para. 20. See for instance, Prosecutor v Milutinovic and others, *Decision on Interlocutory Appeal on Motion for Additional Funds*, Case No IT-99-37-AR73.2 (13 November 2003).

85 See Ackerman, *supra* note 81, at 174 (noting that although a lot of concern has been raised over the fact that the legal aid budget consumes 15% of the ICTY's resources, little if any concern has been expressed about the fact that the Office of the Prosecutor consumes 30%).

86 See *Report of the Office of Internal Oversight Services on the Investigation into Possible Fee-Splitting Arrangements Between Defence Counsel and Indigent Detainees at the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia*, UN Doc A/55/759 (2001). Lawyers have also been accused of hiring friends or relatives of the suspect or accused as investigators. Ellis, *supra* note 39, at 965.

87 See *Legal Aid to Accused Zoran Zigic Withdrawn Following the Completion of a Financial Investigation by the Registry*, ICTY Press Release CC/PIS/686-e (8 July 2002). The ICTR have also uncovered instances of fee-splitting and in once case discharged the two counsel involved, see *Defence Lawyer Removed for Financial Dishonesty*, ICTR Press Release ICTR/IBFO-9-2-299.EN (6 February 2002).

88 Report on ICTY's Legal Aid System, *supra* note 79, at para 40.

with the Statutes of the *ad hoc* Tribunals (although it is provided for in the Rome Statute).

Since the *ad hoc* Tribunals must fully respect internationally recognised standards on the rights of accused, the lack of any provision authorising awards of compensation to persons who have been wrongly detained, prosecuted or convicted raises serious concerns. Even though only a handful of trials have been completed thus far, a steadily increasing number of persons have been deprived of their liberty only to be acquitted or have the proceedings against them dropped. In one of the most serious cases, Zejnil Delalic – a Bosnian Muslim, who was indicted on the basis of command responsibility for crimes committed at the Celebici detention facility – spent almost one thousand days in custody, most of them in isolation from other detainees before being acquitted.[89]

On 19 September 2000, the ICTY President, Judge Claude Jorda, sent a letter addressed to the Secretary-General asking the Security Council to amend the ICTY Statute to enable it to award compensation to persons who have been wrongly detained, prosecuted or convicted.[90] Seven days later, his counterpart in the ICTR, Judge Navanetham Pillay, sent a virtually identical letter to the Secretary-General.[91] Unfortunately, their requests seem to have fallen on deaf ears as the issue of compensation has languished on the agenda of the Security Council for over three years, with little if any public discussion. The lack of enthusiasm to address this issue stems, almost certainly, from the unwillingness of many within the Security Council to provide additional funding to the courts.[92] This position, however, is unfortunate given that one of the cornerstones of the work of the *ad hoc* Tribunals is to fully respect internationally recognised standards regarding the rights of the accused. The acknowledgment of errors made during the prosecution of accused persons through the payment of compensation would not only ensure that these human rights standards are satisfied, but would also increase the legitimacy of the judicial institution. It would be seen to symbolise the desire for the organisation to 'square the account' between itself and wrongly detained, prosecuted or convicted persons.[93]

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89 See S Beresford, 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted or Convicted by the ad hoc Tribunals', (2002) 96 *American Journal of International Law* 628 at 629.

90 *Letter Dated 19 September 2000 from the President of the International Criminal Tribunal for the former Yugoslavia Addressed to the Secretary-General*, annexed to *Letter Dated 26 September 2000 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2000/904 available at <http://www.un.org/Docs/sc/letters/2000>.

91 *Letter Dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda Addressed to the Secretary-General*, annexed to *Letter Dated 28 September 2000 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2000/904, available at <http://www.un.org/Docs/sc/letters/2000>.

92 See Beresford, *supra* note 89, at 644.

93 In this regard, the *ad hoc* Tribunals have already adopted procedures to reimburse, albeit to a limited degree, one group of participants in the trial process, namely witnesses, for the losses they incur. ICTY Directive on Allowances for Witnesses and Expert Witnesses, UN Doc IT/200 (5 December 2001).

Delays to the Trial Proceedings

The fourth and final factor that has diluted the fair trial rights of accused persons relates to the unacceptable delays that have resulted from the legal, factual and operational complexities of the cases that are being heard by the *ad hoc* Tribunals. It is true that the main reasons for the excessive length of time trials have taken are the lack of courtroom space and the limited number of Judges available to hear cases. The *ad hoc* Tribunals have attempted to address this issue by building extra courtrooms and increasing the pool of available Judges.[94] They have also commenced discussions with the relevant authorities to have the trials of minor accused – so-called 'small fish' – transferred to domestic courts.[95] But there are other causes for the delays, many of which cannot be resolved. For instance, the distance in time and place between the criminal conduct committed by accused persons and their prosecution has resulted in numerous delays caused by the need to amend or join indictments as new evidence comes to light.[96]

The way in which the various offences over which the *ad hoc* Tribunals have jurisdiction are defined has also contributed to delays in the proceedings. There are no fine lines between these offences and, consequently, a crime may be prosecuted under two or more headings. For instance, rape is prohibited under the Geneva Conventions and is a violation of the laws and customs of war. It is also a form of torture and, therefore, can be prosecuted as a crime against humanity. Furthermore, if the intention of the perpetrator is to forcibly impregnate the female population of an ethnic or religious group to dilute the purity of that group, such acts of rape can be considered genocide.[97]

To increase the chances of obtaining a conviction, the Prosecutor has indicted accused persons on a cumulative basis[98] and, therefore, has been required to intro-

94 D Mundis, 'Improving the Operations and Functioning of the International Criminal Tribunals', (2000) 94 *American Journal of International Law* 759. On 30 November 2000, the Security Council adopted resolution 1329 in which it established a pool of 27 *ad litem* judges for the ICTY and increased the number of judges in the ICTY and ICTR Appeals Chambers 'in order to enable the courts to expedite the conclusion of their work at the earliest possible date' UN Doc S/RES/1329 (2000). A pool of eighteen *ad litem* judges was also established for the ICTR on 16 August 2002. UN Doc S/RES/1431 (2002).

95 See M Bohlander, 'Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts', (2003) 14 *Criminal Law Forum* 59.

96 Lahiouel, *supra* note 37, at 203-204.

97 See, amongst other authorities, P Fisher, 'Occupation of the Womb: Forced Impregnation as Genocide', (1996) 46 *Duke Law Journal* 91; and K Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', (1999) 93 *American Journal of International Law* 97.

98 The ICTY has held that the Prosecutor is 'justified in bringing cumulative charges when the Articles of the Statute referred to are designed to protect different values and when each Article requires proof of a legal element not required by the others.' Prosecutor v Kupreskic et al, *Decision on Defence Challenges to Form of the Indictment*, Case No IT-95-16-I (15 May 1998).

duce as much evidence and as many witnesses as appear necessary to establish guilt beyond reasonable doubt for each of the counts.[99] The tendency to prepare cumulative indictments has complicated and prolonged pre-trial and trial proceedings thereby affecting the right of the accused to an expeditious trial.

The author notes that the right to a speedy trial – which is recognised by all international and regional human rights instruments – has traditionally been perceived as protecting two basic interests of the accused. First, the accused should not for any unduly long period remain in a state of uncertainty about his fate or be subjected to the various disabilities that are associated with criminal proceedings.[100] Secondly, expeditious proceedings safeguard the ability of the accused to mount an effective defence, especially as the discovery of exculpatory evidence is susceptible to the passage of time.[101]

In nine years of existence, the ICTY has so far concluded fourteen cases. Eleven cases are currently at the appellate stage and ten are at the trial phase. The results of the ICTR make poorer reading as final judgements have only been rendered in seven cases, and three of these resulted from guilty pleas. A detailed examination of all these cases demonstrates that each stage of the proceedings – namely the pre-trial, trial and appellate phases – lasts between one and two years. Therefore, an accused person arrested today should expect to remain in detention for up to six years before they are subject to a final decision. This is poor especially in comparison with the pace of the Nuremberg proceedings, which lasted a mere ten months.[102]

Procedural Sanctions and Other Forms of Redress Available to Suspects and Accused Persons Whose Rights Have Been Violated

So what procedural sanctions and other forms of redress are available to suspects and accused persons whose rights have been breached? The Rome Statute and those of other international criminal tribunals contain no express provision about remedies. In the author's opinion, this is of little consequence. The due process rights set out in the tribunals' constituent documents have been affirmed as part of the fabric of international human rights law. This means that the ordinary range of procedural sanctions and other remedies will be available for their enforcement and protection. Secondly, in affirming the rights set out in ICCPR Article 14, the creators of the tribunals recognised that the courts would develop customary international law in the area of human rights where necessary. Such a measure is not to be approached as if it did no more than preserve the *status quo*.

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99 On the practice of cumulative charging see H Wills, *Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR,* (2003) 17 Emory International Law Review 341.

100 Lahiouel, *supra* note 37, at 198.

101 Ibid.

102 R Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, (1949) 35 *American Bar Association Journal* 83 at 881.

The *ad hoc* Tribunals agree and have recognised a wide array of remedies for an unjustified infringement of the guaranteed rights of the accused. These remedies range from the exclusion of evidence to the payment of compensation and from the re-opening of the proceedings to the dismissal of the indictment. When deciding what specific remedy should be imposed, the Tribunals – since the remedy should provide an effective but proportionate form of redress to the violation in question – have taken into account several factors. These include the nature of the right and the particular infringement, the presence of extenuating circumstances and the impact of the infringement on the integrity of the court. The Tribunals have also considered the purpose to be served by imposing the remedy and whether it should be imposed promptly or delayed until the end of the trial. Most importantly, the Tribunals have given consideratiion to what is the least severe form of remedy that will accomplish the intended purpose.

The main remedy granted thus far has been the exclusion of evidence.[103] For instance, in the *Bagilishema* case the prosecution failed to disclose the testimonies of four accused to the Defence within sixty days of the start of the trial. Since its failure seriously affected the accused's right to prepare an adequate and effective defence, the prosecution was ordered to remove the four witnesses from its witness list.[104] However, in the *Furundžija* case the Judges went further and ordered the re-opening of certain aspects of the proceedings as the prosecution has deprived the accused of a fair trial by knowingly and intentionally failing to disclose evidence that cast doubt on the reliability of prosecution witnesses.[105]

In the most extreme cases, the *ad hoc* Tribunals have been prepared to dismiss an indictment. This remedy was recognised in the *Barayagwiza* case, where the ICTR Appeals Chamber held that the court may decline, as a matter of discretion, to exercise its jurisdiction in cases 'where to exercise that jurisdiction in light of serious and egregious violations of the accused's right would prove detrimental to the court's integrity.'[106] In that case, the Chamber found that the length of time that the accused was detained by the authorities of Cameroon at the behest of the prosecution with-

103 See S Beresford, 'Non-Compliance with the Rules of Procedure and Evidence', in R May et al. *supra* note 33 at 411.

104 Reported on the web-site of Foundation Hirondelle at <http://www.wcw.org> *on 2 February 2000.* Since the prosecution had already commenced, this ruling can be distinguished from a similar incident that occurred in the Bagosora case. In that case, the Trial Chamber found that the pendency of a motion for protective measures for its witnesses did not exonerate the Prosecution of its discovery obligations and, accordingly, directed the Prosecution to fulfil its obligations and disclose the statements in question to the Defence within two weeks. Further relief was not granted as the Trial Chamber did not consider that the defence had been overly prejudiced by the failure to disclose, especially as the trial date had been postponed and that the defence would, consequently, have sufficient time to prepare for trial. Prosecutor v Bagosora, *Decision on the Motion by the Defence Counsel for Disclosure*, Case No. ICTR-96-7-PT (27 November 1997).

105 Prosecutor v Furundzija, *Decision*, Case No IT-95-17/1-T (16 July 1998).

106 Prosecutor v Barayagwiza, *Decision*, Case No ICTR-97-19-AR72, A Ch (3 November 1999) at para 74.

out being indicted violated the limitation on the detention of suspects.[107] Moreover, the Chamber held that the prosecution had failed to ensure that the accused was promptly brought before a judicial authority and formally charged.[108]

In the Appeals Chamber's opinion, the failure to prosecute the case against the accused was tantamount to negligence. The Chamber therefore concluded the only remedy available for such prosecutorial inaction and the resultant denial of his rights was to release the accused and dismiss the charges against him. Believing that to proceed with the accused's trial when such violations have been committed, would amount to a travesty of justice and result in 'loss of public confidence in the [Rwanda] Tribunal',[109] it further ordered that the dismissal of the indictment be with prejudice to the prosecution. In its view, this was the only effective remedy for the cumulative breaches of the rights of the accused.[110]

However, after reviewing its decision in light of new facts presented by the Prosecution,[111] a differently constituted Appeals Chamber concluded that these facts diminished 'the role played by the failings of the Prosecutor as well as the intensity of the violation of the right of the [accused].'[112] Since the cumulative nature of violations had been thus reduced, the Chamber considered that the reparation ordered appeared 'disproportionate in relation to the events'.[113] It, therefore, dismissed the accused's claim to be released and ordered that, should he subsequently be found not guilty, the accused should receive financial compensation. In the event that he is found guilty, the eventual sentence of the accused should be reduced to take account of the infringements of his rights.[114]

With the jurisdictional immunity of international criminal tribunals preventing the accused from instituting legal proceedings against them in a domestic court to seek private law damages,[115] the recognition of the remedy of financial compen-

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107 In the Appeal Chamber's opinion, such a limitation was consistent with established human rights jurisprudence governing the detention of suspects. Id., at para 67.

108 Id., para 72.

109 Id., para 112.

110 Id., para 108.

111 See Prosecutor v Barayagwiza, *Motion for Review*, Case No ICTR-97-19-AR72 (1 December 1999).

112 Prosecutor v Barayagwiza, *Decision (Prosecutor's Request for Review or Reconsideration)*, Case No ICTR-97-19-AR72, A Ch (31 March 2000), at para 71.

113 Ibid.

114 Id., para 75. Commentators are divided over whether the ICTR Appeals Chamber should have revised its earlier decision, see W Schabas, *Barayagwiza v Prosecutor*, (2000) 94 *American Journal of International Law* 563 (supporting the decision to revise) and M Momeni, 'Why Barayawiza is boycotting his trial at the ICTR: Lessons in Balancing Due Process and Politics', (2001) 7 *ILSA Journal of International & Comparative Law* 315 (criticising the decision to revise).

115 Caflisch suggests, however, that individuals claiming to have suffered violations of the rights guaranteed by the ECHR in the course of investigations by an international criminal tribunal may be able to seek redress from the EurCourtHR against State Parties. L Caflisch, 'The Rome Statute and the European Convention on Human Rights', (2002) 23 *Human Rights Law Journal* 1 at 12.

sation is a contentious issue. The powers and functions of the tribunals are determined by the terms of their Statutes and these instruments do not contain any provision giving them the authority to award damages. Such authority is a significant power that raises legitimate budgetary considerations, and, in the case of the *ad hoc* Tribunals, it is doubtful whether they can – as subsidiary organs of the United Nations – unilaterally create financial liability for the Organisation as a whole. While the constituent instruments of international criminal tribunals may be interpreted liberally in many respects, they contain no language implying that their creators intended to allow them to make such awards. More importantly, by unilaterally deciding to award damages, the tribunals may be seen by some as overstepping their authority and violating their Statutes.[116]

Despite these concerns, the reasons justifying the payment of damages are compelling. First, the international community has a moral obligation to compensate an individual for losses incurred as a result of the application of its coercive powers.[117] Second, if the international community is truly interested in due process, it must also concern itself with the detrimental consequences of breaches thereof committed by the international criminal justice system.[118] Third, although payment of damages cannot undo the harm already done, it can serve a restorative and therapeutic function by contributing to a feeling of vindication.[119] Finally, damages are warranted by the need to maintain the public's perception of the international criminal justice system at a high level. The acknowledgement of mistakes through the payment of damages will enhance the credibility and, ultimately, the legitimacy of the tribunals by demonstrating that they take their errors seriously. Conversely, the absence of a mechanism by which accused persons are appropriately acknowledged indicates the low priority that the international criminal justice system currently gives to the plight of such persons.[120]

As to the level of damages, it is premature at this stage to speculate on the sums that may be awarded. However, in the author's view the following factors should be taken into account. In addition to lost earnings and other economic losses, intangible harm such as distress, humiliation and injured feelings should be compensated for. The gravity of the breach and the need to emphasise the importance of the guaranteed rights and to deter future violations are also proper considerations. Accused persons who have had their rights vindicated through remedies such as

116 See Beresford, *supra* note 89, at 641.

117 See E Borchard, 'State Indemnity for Errors of Criminal Justice', (1941) 21 *Boston University Law Review* 201 at 208 (observing that 'we have recognised, in certain spheres of activity, that it is unfair to the individual injured that they alone should bear the entire loss resulting from the accident, and therefore society distributes the loss among its members. Where the common interest is joined for a common end – maintaining the public peace by the prosecution of crime – each individual member being subject to the same danger [violation of their rights], the loss when it occurs should be borne by the community as a whole and not by the injured individual alone').

118 See Beresford, *supra* note 89, at 634.

119 Id., at 635.

120 Ibid.

exclusion of evidence or a stay of prosecution should be prohibited from obtaining the further remedy of compensation. Finally, extravagant awards of damages should be avoided.

In the author's opinion, given the array of procedural sanctions and other remedies that are available for breaches of fundamental rights and the discretionary manner in which they are applied, the lack of specific provisions dealing with the consequences of such violations is concerning. It is true that one of the 'positive' features of the international criminal justice system is that it contains fewer formalities and rituals than domestic systems. However, when the expectations of the accused and the interests of the international community (as well as those of victims) are in conflict, it seems inappropriate to leave it to the Judges to strike the proper balance between conflicting interests.[121] This burden is disproportionate to their competence: a fact clearly illustrated in the *Barayagwiza* case, where the ICTR Appeals Chamber decided to review its earlier decision following adverse reaction from the international community and the Rwandan government, in particular, which threatened to cease all forms of co-operation with the court.[122] Decisions as to the most appropriate form of redress (e.g. exclusion of evidence, withdrawal of the indictment or the payment of compensation) should not be left to the judges to decide on a case-by-case basis. Only by having pre-established remedies specifying the consequence of the breach of fundamental rights can international criminal tribunals ensure that they will continue to be perceived as organs of justice.

The adoption of specific provisions dealing with procedural sanctions and other remedies available for breaches of the fair trial guarantees would have a positive effect. It would demonstrate the commitment that international criminal tribunals have to the protection of human rights for all individuals, 'in that disregard for procedural rules entailing a violation of the rights of [suspects and accused persons] will be duly compensated.'[123] By putting them on notice that procedural violations will not be tolerated, the prosecution will not be tempted to act in violation of the rights

121 Zappala, *supra* note 11, at 256.

122 See S de Bertodano, 'Judicial Independence in the International Criminal Court', (2002) 15 *Leiden Journal of International Law* 409 at 415 (noting that the ICTR Prosecutor stated during the oral hearing on the matter that 'The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999. It was a politically motivated decision, which is understandable. It can only be understood if one is cognisant of the situation, if one is aware of what happened in Rwanda in 1994. I also notice that, well, it was the Prosecutor that had no visa to travel to Rwanda. It was the Prosecutor who could not be received by Rwandan authorities. In November, after your decision, there was no co-operation, no collaboration with the Office of the Prosecutor. In other words, justice, as dispensed by this tribunal, was paralysed. It was the trial of Bagilishema which had to be adjourned because the Rwandan government did not allow 16 witnesses to appear before the court. […] Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality we face. […] In other words we can as well put the key in the door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner.')

123 Zappala, *supra* note 11, at 258.

of suspects and accused persons as the consequences of such behaviour will be more detrimental than beneficial.[124]

Conclusion

As the international criminal justice system becomes more established, it is crucial that international criminal tribunals comply with the fair trial guarantees of suspects and accused persons and adequately redress breaches of human rights when they arise. But in endeavouring to hold persons accountable for violations of humanitarian law, there is a high risk that the right to a fair trial will become a casualty of this pursuit. The experiences of the *ad hoc* Tribunals have demonstrated that the ability of an international criminal court to guarantee due process can be easily frustrated by the actions of uncooperative states, the need to protect vulnerable witnesses, the lack of adequate finances and resources, and unacceptable delays resulting from the legal, factual and operational complexities of the cases. For this reason, it is imperative that there is strict compliance with the rights set out in the constituent instruments of international criminal tribunals. Failure to guarantee the minimum standards for a fair trial and to appropriately redress violations may result in loss of public confidence in the tribunals, as courts valuing human rights of all individuals – including those charged with the most egregious crimes known to humankind. As Justice Robert Jackson stressed during the Nuremberg trial: 'If you are determined to execute a man in any case, there is no occasion for trial. The world yields no respect to courts that are merely organised to convict.'[125] These words are as relevant today as they were fifty-eight years ago, if not more so.

124 Ibid.

125 R Conot, *Justice at Nuremberg* (1983) at 14.

The War on Terror: Self-defence or Aggression?

Alex Conte

Introduction

The tragic events of September 11, 2001 have prompted much recent action and debate on the issue of preventing and dealing with terrorism. The "War on Terror" has evidenced itself in two main ways. The first might be loosely labelled "counter-terrorism", in terms of initiating, consolidating and improving upon measures that can detect, deter and deal with terrorists and associated entities. The second strategy forming part of the War on Terror, and the focus of this Chapter, is of more concern to inter- rather than intra-state conduct and relations: the policy of using pre-emptive strikes against States harbouring or assisting terrorists.

The Rhetoric of Pre-Emptive Strikes in the War on Terror

To place this matter in its proper context, and thereby draw out issues to be considered, it is useful to have regard to various statements made concerning the War on Terror. Pre-emptive action was signalled by President Bush as early as 1 June 2002 when he said:[1]

> We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. … our security will require all Americans to be forward-looking and resolute, to be ready for pre-emptive action when necessary.

Referring to the President's remarks, Vice-President Cheney[2] soon after said this:

1 Remarks by United States President George W. Bush at the 2002 Graduation Exercise of the United States Military Academy, Washington, 1 June 2002.

2 Remarks by United States Vice-President's Richard Cheney to the National Association of Home Builders, Washington, 6 June 2002. Commenting on this speech, the BBC noted that it "was the latest in a series by top administration officials promoting what is emerging as a new doctrine of the Bush administration – that the US must be prepared to take pre-emptive action against new security threats": BBC News, 7 June 2002.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 393-411.*
 ISBN 90 04 14599 0.

> Wars are not won on the defensive. We must take the battle to the enemy – and, where necessary, pre-empt grave threats to our country before they materialize.

These expressions of policy, in what has come to be known as The Bush Doctrine on the pre-emptive use of force, were relatively shortly followed by similar statements by the Prime Minister of Australia, John Howard:[3]

> it stands to reason that if you believed that somebody was going to launch an attack against your country, either of a conventional kind or of a terrorist kind, and you had a capacity to stop it and there was no alternative other than to use that capacity, then of course you would have to use it.

Australia's position on the War on Terror was, not surprisingly, received well by the United States, Ari Fleischer (White House Spokesperson), saying this:[4]

> The President did announce a new doctrine that recognises that the threats we face are no longer from known enemies, nations that have fleets or missiles or bombers that we can see come to the United States, nations that can be deterred through previous notions such as mutually assured destruction or any other previous defence notions. It requires a fresh approach to protect the country. Other nations think it through as well, and come to similar conclusions. Australia has been a stalwart ally of the United States in the war on terror.

In contrast, New Zealand's Prime Minister was more vague in her reaction to Prime Minister Howard's remarks,[5] stating in an interview the day after his comments:

> We don't read Mr Howard's comments as indicative of Australia wanting to be in breach of international law … I haven't inferred from anything that I've read that Australia is about to go off and attack anybody.

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3 This statement was made by Prime Minister Howard on Sunday 1 December 2002, as reported by Catherine McGrath, 'ALP, Greens Question Howard Pre-emptive Strike Comments', *The World Today on ABC Radio*, Australia, 2 December 2002, transcript <http://www.abs.net.au/worldtoday/s738997.htm> at 9 February 2004.

4 John Shovelan, 'Bush Backs Howard's Pre-emptive Strike Approach, *The World Today on ABC Radio*, Australia, 3 December 2002, transcript <http://www.abs.net.au/worldtoday/s739439.htm> at 9 February 2004.

5 New Zealand Press Association, 'NZ Supports Howard Terror Doctrine', *The Sydney Morning Herald*, Sydney, Australia, 2 December 2002, through <http://www.smh.com.au/articles/2002/12/02/1038712877389.html> at 9 February 2004. It should be noted that the title of that article is misleading. Prime Minister Clark said, in interview, that she did not believe Australia had committed to any intervention, nor to any desire to breach of international law. The statements of the Prime Minister do not appear to support a pre-emptive strike policy in the War on Terror.

It has to be recognized that the statements considered above were made, more or less, within a year of the September 11 attacks. It should also be borne in mind that there has been no subsequent use of force against a State in express (or at least *sole*) reliance upon what might be termed the anti-terror pre-emptive strike policy. The question nevertheless needs answering: can pre-emptive strikes be used against States that harbour or assist terrorists and associated entities? Indeed, the issue remains alive. A substantial basis of the US justifications for intervention in Iraq in 2003, under *Operation Iraqi Freedom*, was intervention for the purpose of self-defence.[6] Within that, as could be seen in the address of the US Secretary of State Colin Powell to the Security Council, was reliance not just upon threats posed by Iraq through weapons of mass destruction, but also upon purported links between the State of Iraq and terrorist groups and facilities.[7] President Bush had himself identified that link in his earlier address to the United Nations General Assembly, when he singled out Iraq and said this:[8]

> In the attacks against America a year ago, we saw the destructive intentions of our enemies … [Our] greatest fear is that terrorists will find a shortcut to their mad ambitions when an outlaw regime supplies them with the technologies to kill on a massive scale … In one place – in one regime – we find all these dangers, in their most lethal and aggressive forms, exactly the kind of aggressive threat the United Nations was born to confront.

The policy of pre-emption was further confirmed within the Bush Administration's National Security Strategy of September 2002.[9]

What should be noted at this stage is that there appears to be a difference between the policies of the United States and Australia. The US has tended to express a relatively broad and imprecise policy of 'confronting threats before they emerge', 'pre-empting grave threats' and 'fresh approaches' to self-defence. Prime Minister Howard's statement on 1 December 2002 seems to be more limited, envisaging the pre-emptive use of force only where there is evidence of an impending terrorist attack[10] and no alternative other than the use of force is available or appropriate in response.[11]

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6 The National Security Strategy of the United States, September 2002, <http://www.whitehouse.government/nsc/nss.html> at 9 February 2004.

7 Remarks of US Secretary of State Colin Powell to the United Nations Security Council on 5 February 2003.

8 Remarks of United States President George W. Bush at the United Nations General Assembly, New York, 12 September 2002, transcript <http://www.whitehouse.government/news/releases/2002/09/20020912-1.html> at 9 February 2004.

9 Above n 6.

10 The Prime Minister referred to belief "… that somebody was going to launch an attack against your country, either of a conventional kind or of a terrorist kind", above n 3.

11 The Prime Minister continued "… and you had a capacity to stop it and there was no alternative other than to use that capacity, then of course you would have to use it", above n 3.

From all this emerge the following issues to be considered: first, this paper will consider the post-1945 prohibition against the use of force between States and the potential arguments for and against, and restrictions upon, the pre-emptive use of force *per se*. Second, consideration will then be given to the particular context of anticipatory self-defence in the War on Terror, having regard to particular difficulties posed by such a war and the fact that terrorist conduct is generally perpetrated by non-State actors.

Self-Defence and the United Nations Charter

In very brief terms, the international law on the use of force can be summarized as follows. The use of force between States, or threat of such, is prohibited by the United Nations Charter, except in two situations. First, where authorized by a decision of the Security Council, acting under Chapter VII of the Charter, in response to a threat to or breach of peace. Second, where a State is acting by way of individual and collective self-defence, within the terms of article 51. It is the latter exception that requires further examination in the context of pre-emptive strikes.

Article 51 of the UN Charter

The operative part of the article 51 right of individual and collective self defence provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

What should be recognized at the outset is that article 51 stands as the only exception to the prohibition against the use of force whereby States can themselves, without any need to obtain prior consent or authority from the UN Security Council,[12] use force against an aggressor in defence of themselves, or a State requesting assistance.[13] It is the only instance where a State may unilaterally use force. There are questions concerning the activation and scope of article 51 that require consideration: what is meant by *inherent* self-defence; does this mean that there is a parallel customary

12 The only recourse required is that the State(s) that are to act under article 51 must give notice to the Security Council, as set out within the wording of that article and confirmed by the International Court of Justice in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits Phase [1986] ICJ Reports 4, 121.

13 Defence of another falls within the concept of "collective self-defence" within article 51, as discussed within the *Nicaragua v US*, ibid, 536 (Judge Jennings).

law right to act in self-defence that might be somehow different to the right under article 51; and when is an *armed attack* deemed to have occurred?[14]

The only judgment of the International Court of Justice in which the substance and meaning of article 51 was considered by the Court, is to be found in *Nicaragua v US*.[15] It was recognized in that decision that article 51 codified an existing "inherent" customary right of self-defence, although largely replacing that right with another, more developed, norm of customary law.[16] Significantly, however, the Court took the view that the two expressions of self-defence (inherent and codified) did not overlap exactly, while at the same time emphasising that customary law may continue to exist alongside codifications of the customary law.[17] As Shaw points out, for example, the customary rule of proportionality within *jus in bello*[18] was not set out within article 51 but has clearly continued to exist.[19] Although this fact was recognized by the Court in *Nicaragua*, no majority agreement was reached on whether the customary norm permitted a wider authority to use force than the provisions of the United Nations Charter.[20] It is thus not surprising that two views have arisen and continue to be debated concerning the scope of self-defence.

The Opposing Views in Brief

The broad view of self-defence rests on two main arguments. The first, as advocated by Bowett for example, holds that article 51 was not intended to limit the pre-1945 customary international law right to self-defence.[21] This relies on evidence in the *travaux préparatoires* that the intention of article 51 was to reassure regional organizations (such as the Organization of American States) that the Security Council would not prejudice their arrangements for collective security, rather than being drafted for the purpose of defining the full limits of self-defence.[22] The

14 Also attached to article 51 is the issue of whether there is a time limitation on the exercise of article 51 (i.e. linked to the last part of the first sentence of article 51 which qualifies the right by adding "until the Security Council has taken measures necessary to maintain international peace and security")? The latter is a very interesting question, but one that does not pertain to the subject of this paper – whether pre-emptive action can be taken in the War on Terror.

15 Above n 12.

16 Ibid. See, in particular, the judgment of Judge Jennings, 518-536, where he discusses the view that article 51 extended the 1945 customary norms on self-defence to "collective self-defence" and, thereby, potentially replaced the former.

17 Ibid, 176.

18 Customary international law rules pertaining to the *conduct* of war, rather than the ability to use force (*jus ad bellum*).

19 Shaw M., *International Law*, 5th Ed (Cambridge University Press, 2003), 1030-31.

20 As discussed by Dixon M. and McCorquodale R. in *Cases and Materials on International Law* (Australian Supplement, Thomson Law Book Co, 1991), 561.

21 Bowett D.W., *Self-Defence in International Law* (Manchester University Press, 1958) 185.

22 See Harris D.J., *Cases and Materials on International Law*, 4th Ed (Sweet & Maxwell, 1991), 849-850.

second argument in favour of a broad approach rests on developments in customary international law since the Charter, pointing to events such as the 1962 Cuban Missile Crisis, the Six Day War of 1967 and the attack on the Osirak reactor by Israel in 1981.[23]

Adopting a restrictive view on self-defence, commentators such as Kelsen read article 51 as meaning that, for United Nations members, the right of self-defence has no other content than the one defined by article 51.[24] A further argument is that the prohibition against the use of force, enunciated in article 2(4) of the Charter, is a norm of *jus cogens*: a peremptory norm of customary international law from which no derogation is permitted.[25] If that is correct, then inconsistent pre-1945 norms were extinguished when the Charter was adopted, and subsequent inconsistent State practice cannot be seen as establishing a new customary norm unless itself a *jus cogens* norm.

Assessing those views, there is indeed evidence in the records of the San Francisco Conference on the adoption of the United Nations Charter that the term "inherent" was inserted into draft article 51 to clarify that regional security measures should be allowed to continue. It is a stretch, however, to say that this was *the* purpose of the inclusion of article 51. The Charter regime was clearly intended by the drafters, against the backdrop of two World Wars, to prohibit the use of force between States and be very clear about the permissible exceptions to that prohibition. What is more, Chapter VIII of the UN Charter specifically provides for the continued existence of regional arrangements for the maintenance of international peace and security. Likewise, it is far from clear that post-Charter events amount to developments in, or the continuation of, anticipatory self-defence as a doctrine that has remained alive under customary international law.[26] As stated by the International Court of Justice in *Nicaragua v US*:[27]

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given *rule should generally have been treated as breaches of that rule not as indications of the recognition of a new rule*. [emphasis added]

Turning to an evaluation of the restrictive approach, it seems unlikely that Kelsen's approach (limiting self-defence to the words of article 51 by virtue of States' membership of the United Nations) can be correct in view of the ICJ's ruling in

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23 As discussed by Arend A.C., in "International Law and the Preemptive Use of Military Force", *The Washington Quarterly*, 2003 Vol 26(2), 89, 93-96.

24 Kelsen, *The Law of the United Nations* (Stevens, 1950), 914.

25 See, for example, the judgment of Sir Ivor Jennings in *Nicaragua v US*, above n 12, 518-524.

26 The adverse comments of the Security Council concerning the bombing of the Osirak reactor are considered, by way of example, in the paragraphs that follow.

27 Above n 12.

Nicaragua v US that the right of self-defence under the Charter does not overlap exactly with customary self-defence, and that treaty and custom can lie side-by-side.[28] Perhaps the most persuasive argument is the one relying upon the *jus cogens* status of the prohibition against the use of force. If article 2(4) of the Charter is indeed a reflection of a *jus cogens* prohibition, to be read in conjunction with the balance of the Charter, then any pre-1945 custom allowing for the use of force became extinguished, since *jus cogens* does not permit derogation. Adopting the same argument, any purported development of customary law since 1945 to allow for the use of force would require the unanimous acceptance of States to permit variation of the *jus cogens* prohibition.[29] Since the doctrine of anticipatory self-defence is one of considerable controversy, it cannot be said that it has attained that level of acceptance.

It is also relevant to note, in that regard, the guidelines of the Council of Europe on the fight against terrorism:[30]

> In their fight against terrorism, States may never act in breach of peremptory norms of international law nor breach international humanitarian law, where applicable.

Actual Versus Imminent Attack

If a restrictive approach is taken, one is left with the words of article 51 as the extent to which self-defence measures are permitted. One must then determine whether the words of that provision permit anticipatory self-defence. Brownlie and Henkin focus on the phrase "if an armed attack occurs" within article 51 and conclude that the ordinary meaning of the phrase precludes action which is in anticipation of future aggressive conduct on the part of another State.[31] Bowett, on the other hand, argues that no State should be expected to wait for an actual attack to occur before it can take defensive measures, particularly when the state of armaments is such that an initial attack may well destroy the State's capacity for further resistance and so jeopardize its very existence.[32] Indeed, in his dissenting judgment in the *Nicaragua*

28 Ibid.

29 This requirement for unanimity in the amendment of peremptory norms is taken from the definition of *jus cogens* provided in the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), article 53, which reads in part "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

30 "Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism, Appendix 3 to the Report of the 53rd Meeting of the Steering Committee for Human Rights (CDDH), Strasbourg, 25-28 June 2002, part XVI.

31 Brownlie I, *International Law and the Use of Force by States* (1963) 275; Henkin L., *How Nations Behave* (Columbia University Press, 1979) 141-142.

32 Above n 21, 192.

Case, Judge Schwebel noted that article 51 does not say "if, and only if, an armed attack occurs".[33]

Which begs the question, *when does an armed attack begin to "occur"*?[34] There is, again, a divergence of views. The permissive view, known as the "cumulation of events" theory of self-defence, argues that a series of attacks should be viewed as a whole, so that action taken to prevent future attacks in the series can be seen as self-defence against a continuing attack, rather than as anticipatory self-defence. This theory has been advocated by the United Kingdom, Israel, the United States and South Africa in incidents such as the 1964 British bombing of Harib Fort in the Yemen,[35] the 1968 Israeli raid on Beirut airport,[36] the 1986 US raid on Lybia,[37] and numerous cross-border raids by South Africa into neighbouring African States to attack ANC bases.[38] The Security Council, however, has consistently rejected the cumulation of events theory.[39]

Does a Restrictive Approach Lead to an Absurd Result?

One of the already noted criticisms of a restrictive approach to self-defence is that no State should be expected to await an initial attack before it may take defensive measures. To paraphrase, a restrictive approach is absurd. It might be plausible, however, to respond by arguing that anticipatory self-defence is not a necessary vehicle through which UN member States can and should defend themselves. In the absence of an actual armed attack that activates article 51 of the Charter, the appropriate means of resolving imminent or perceived threats to the security of a State is through the United Nations Security Council. By providing the mechanisms under Chapter VII, the Charter effectively replaced the need for the former *Caroline Case* norms. By consenting to be bound by such mechanisms, member States limited themselves to acting only when authorized by the Security Council or within the narrow terms of article 51.

Support for such an approach can be found in the recent declaration on the use of force, by the Institut de Droit International, where it said:[40]

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33 Above n 12, 347. The Judge was alone in expressing a view on anticipatory self-defence in the *Nicaragua Case*. Indeed, the majority specifically refused to express a view on the issue because it had not been raised: para 194.

34 As framed by Professor Harris: above n 22, 851.

35 Ibid, 870.

36 Ibid.

37 Ibid, 868.

38 Ibid, 851, n 23.

39 As noted by Bowett D.W., "Reprisals Involving Recourse to Armed Force", (1972) *American Journal of International Law* 66.

40 Institut de Droit International, Bruges Declaration on the Use of Force, 2 September 2003.

> Only the Security Council, or the General Assembly acting under the more limited framework of the "Uniting for Peace" Resolution of 1950, may, depending on the particular circumstances at hand, decide that a given situation constitutes a threat to international peace and security, without this necessarily meaning that the recourse to force is the only possible adequate response.

In other words, if an imminent threat exists, it is for the Security Council, not individual States, to determine whether the use of force is called for (by way of action under Chapter VII of the United Nations Charter).

The response to such an approach, and that advocated by various States including the United States, is that the process by which the Security Council makes its decisions (the power of veto in particular) is insufficient to properly deal with such threats.[41] By way of example, the permanent members' power of veto plagued the Council with difficulties throughout the Cold War[42] and was the subject of much debate during the Iraq crisis of 2002/2003. Having said that, it should be noted that the Security Council and its Counter-Terrorism Committee have dedicated considerable time and resources to establishing an international regime to combat terrorism.[43] It might equally be argued, therefore, that the Security Council is cognizant of the issue of terrorist threats such that it will respond appropriately to any petition seeking measures against a particular threat of terrorist conduct.

Summary

To the writer's mind, the arguments in favour of a restrictive approach (one that excludes the existence of parallel customary norms permitting anticipatory self-defence) outweigh those in support of a broader approach. The adoption of the United Nations Charter saw the creation of a peremptory norm of customary international law, excluding the unilateral use of force except where a State is actually attacked, and establishing compensatory mechanisms through the UN Security Council to deal with imminent or other threats to the peace. Having said that, it must be acknowledged that alternative arguments exist. It would therefore be improper to entirely dismiss pre-emptive strikes, without further discussion. Consideration

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41 See, for example, the statement of US Secretary of State Colin Powell concerning intervention in Iraq, in which he said that "if the UN does not act, then it would be necessary for the United States to act with a willing coalition": see News Release 16 March 2003, "Legal basis for use of force against Iraq", British High Commission in Canada News, URL <http://www.britainincanada.org/News/Release/2003/mar03/nr1617.htm> at 1 September 2003.

42 From 1945 to 1992, by way of illustration, the use of the veto was as follows: Soviet Union 114; USA 69; UK 30; France 18; China 3: Murphy SD, "The Security Council Legitimacy, and the Concept of Collective Security After the Cold War", (1994) 31 *Columbia Journal of Transnational Law* 201.

43 See Conte A., *Security in the 21st Century: the United Nations, Afghanistan and Iraq*, (Ashgate Publishing Ltd, 2005), 23-29.

should be given to the scope of anticipatory self-defence, as it might exist, and whether the anti-terror pre-emptive strike policies fit within its parameters.

The Scope of Anticipatory Self-Defence

Proponents of anticipatory self-defence would argue that this is an aspect of inherent self-defence that has continued to lie alongside the codified Charter right of self-defence. If correct, it is then necessary to examine what the content of such law is. Proponents point to the existence, well before the United Nations Charter, of a customary rule of anticipatory self-defence as articulated in the *Caroline Case*[44] and later confirmed by the International Military Tribunal at Nuremberg.[45]

The *Caroline Case* arose out of the Canadian Rebellion of 1837. Rebel leaders secured assistance from a large number of American nationals (despite steps by US authorities to prevent assistance being given). The resulting rebel force established itself on Navy Island in Canadian waters and supplies were provided to it from America by an American ship, the *Caroline*. On the night of 29-30 December 1837, the *Caroline* was seized by the British in the American port of Schlosser, set alight and sent over the Niagara Falls. A British subject, McLeod was arrested by United States authorities on charges of murder and arson following the death of two American nationals on board the *Caroline*. In correspondence between Great Britain and the United States, Mr Webster on behalf of the United States wrote:[46]

> It will be for … [Her Majesty's] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the person on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of night, while moored to the shore …

44 29 British Forces and State Papers (BFSP) 1137-1138; 30 BFSP 195-196; see also Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 *American Journal of International Law* 82.

45 'International Military Tribunal (Nuremberg), Judgment and Sentences October 1, 1946' (1947) 41 *American Journal of International Law* 172, 204, where it had been argued that the German invasion of Norway in 1940 was an act of self-defence in the face of an imminent Allied landing there. The Tribunal said that preventive action in foreign territory is justified only in the circumstances cited by Mr Webster in the *Caroline Case*.

46 Letter from Mr Webster to Mr Fox, 24 April 1841; see Harris, above n 22, 848.

In his response to this, Lord Ashburton accepted that the applicable principles of international law were accurately reflected in Mr Webster's letter.[47] Throughout the pre-UN Charter period, scholars appear to have agreed that anticipatory self-defence could therefore be used if a State could demonstrate necessity (imminent engagement by another State in an armed attack) and proportionality (in the defensive measures employed).[48]

Preventive Versus Pre-emptive Strikes

What must next be considered is whether any norm of "anticipatory" self-defence permits pre-emptive measures, or merely preventive ones.

The bombing of the Osirak atomic reactor, located in the vicinity of Baghdad, Iraq, by the Israeli Air Force warrants consideration. In lodging its article 51 notification with the Security Council,[49] Israel advised that the bombing was undertaken on the grounds that the reactor was designed to produce atomic bombs to be used against Israel and, on the basis that the reactor was expected to become operational within a short period of time, the Government of Israel has decided to act "to ensure its people's existence".[50] Israel was thus relying on the notion of pre-empting a threat to the life of the Israeli State by eliminating that threat. During subsequent Security Council deliberations, it argued that this was an exercise of self-defence as provided for under the Charter and as "understood in general international law".[51] To the contrary, Iraq argued that the attack was an unprovoked and illegal act of aggression.[52]

In its Resolution 487, the Security Council provided that it:[53]

> 1. *Strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.

This might be seen as evidence of the rejection of the doctrine of anticipatory self-defence by the Security Council and, on the face of the Resolution that does appear to be a valid inference. Equally, however, the United Nations Repertory of Practice refers to the fact that in the deliberations leading up to the adoption of the Resolution, a number of Council members took the view that the bombing was unlawful because it constituted a "preventive", rather than "pre-emptive", action. In other words, they

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47 Letter from Lord Ashburton to Mr Webster, 28 July 1842; see Harris, above n 22, 848.

48 Arend, above n 23, 91.

49 This being a requirement of the exercise of action reliant upon article 51: see Conte, above n 43, 42-44.

50 Letter from the Permanent Representative of Israel to the President of the United Nations Security Council dated 8 June 1981, S/14510.

51 United Nations, *Repertory of Practice of United Nations Organs Supplement No 6*, Volume III (1979-1984) Article 51, para 32.

52 Ibid, para 33.

53 United Nations Security Council Resolution 487 of 19 June 1981, S/RES/487 (1981).

took the view that to *pre-empt* threats (by taking steps to avoid the threat arising) was not permitted at international law, whereas action could be justified as being in self-defence if the reason for it was "instant, overwhelming, leaving no choice of means and no moment for deliberation" (*preventing* the execution of the threat).[54]

Anticipatory Self-defence in the War on Terror

The result of the above discussion is, regrettably, unclear. There are meritorious arguments for both the restrictive and broad approaches. What can be said is this: if the restrictive approach is correct, then self-defence is limited to conduct in response to an actual armed attack and in reliance upon article 51. Adoption of the restrictive approach rules out any pre-emptive action, and means that the Bush and Howard administrations' policies on the War on Terror do not comply with international law.[55]

If, on the other hand, one concludes that anticipatory self-defence remains alive under customary international law, and parallel to the UN Charter, the next step is to ask if the expressions of an anti-terror pre-emptive strike policy are consistent with those customary norms. Do the policies comply with the requirements of necessity and proportionality, as set out in the *Caroline Case*? One further question arises, not out of the *Caroline Case*, but through the particularities of the War on Terror: how does one deal with the fact that terrorist conduct is generally perpetrated by non-State actors?

Necessity and Proportionality

As discussed, anticipatory self-defence has been recognized as requiring necessity (through the imminent threat of engagement by another State in an armed attack) and proportionality (in the defensive measures employed). The latter requirement, proportionality, is a matter that falls for analysis on a case-by-case basis and cannot, therefore, be fairly assessed within this Chapter. Consideration of whether the Bush and Howard policies might satisfy necessity can be considered.

The Bush Doctrine, as contained within his administration's National Security Strategy (NSS), urges that the United States "must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries".[56] To do so, the NSS advises that:

54 Above n 51, para 33.

55 Professor Tony Arend, of the Department of Government and School of Foreign Service at the University of Georgetown, accepts that the Bush Administration's approach to pre-emption is clearly unlawful under the UN Charter, although he argues that one must look beyond the Charter to the parallel customary international law norms: ibid, 91.

56 Above n 6.

> The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.

It is here that an important distinction should be drawn between the policies of the United States and Australia. The Bush Doctrine seeks to go beyond the notion of imminent danger, and into the realm of *pre-emptive* rather than *preventive* measures. As discussed, however, pre-emptive measures aimed at eliminating the emergence of a threat do not fall within the necessity requirement of the *Caroline Case*, and have been forcefully rebutted by the Security Council in its consideration of anticipatory self-defence measures.[57] In the case of Prime Minister Howard's statements, although imprecise, they might nevertheless be construed as taking a more restrictive and *preventive* approach, the Prime Minister referring to action where there is a belief "… that somebody was going to launch an attack against your country" and if "… there was no alternative other than to use that capacity [force]".[58]

Focussing on the Bush Doctrine, then, commentators such as McLain have criticised the National Security Strategy as far from falling within any accepted view of anticipatory self-defence.[59] That criticism is, in the author's view, valid and thereby fatal to the US anti-terror pre-emptive strike policy. The Strategy claims a right to pre-emptive self-defence where there is "uncertainty"[60] about the time or place of the attack. It therefore takes a step beyond the already controversial concept of anticipatory self-defence. In the *Caroline Case*, the United States required Britain to justify its conduct by showing that it acted out of "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation";[61] whereas the US now seeks to justify pre-emptive action "even if uncertainty remains".[62]

Furthermore, although the Bush Administration has characterized the War on Terror as a unique and unprecedented challenge, that is not in fact the case. The Security Council itself gave consideration to the notion of pre-emptive strikes in anticipation of terrorist acts in 1979, concerning the situation in Southern Lebanon. During the Security Council's consideration of the issue, the Permanent Representative of Israel argued that it, like every other State, had the right to take measures in order to halt and foil terrorist activities emanating from across its

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57 See the discussion above concerning the bombing of the Osirak reactor.

58 Ibid.

59 P McLain, "Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq" (2003) 13 *Duke Journal of Comparative and International Law* 233, 268. See also United Nations Foundation, 'Chomsky Says Bush Doctrine Lowers the Bar for Aggression', *UN Wire*, <http://www.unwire.org/UNWire>, 4 February 2004.

60 As stated within the quote above.

61 As expressed by Mr Webster in his letter of 24 April 1841, above n 46.

62 As expressed in the US National Security Strategy of September 2002, above n 6.

boundaries in order to protect the lives and safety of its citizens.[63] Israel argued that the Lebanese Government had failed to prevent the use of its territory as the base from which the Palestine Liberation Organization (PLO) conducted terrorist attacks against Israel. Israel's response was characterized by Lebanon as retaliatory and unlawful, whereas Israel mooted that it acted within the bounds of the inherent right of self-defence.

The majority of the Security Council rejected this broad definition of inherent self-defence and emphasized that self-defence was permitted only against armed attacks and subject to the limits of necessity and proportionality.[64] Reprisals against terrorist attacks were considered unjustified under article 51 and contrary to General Assembly Resolution 2625.[65] The Council adopted Resolution 450, deploring the attacks by Israel and calling upon it to cease its retaliatory acts.[66]

Although this discussion helps to inform the issue at hand, it should be noted that a distinguishing feature between the subject matter then considered by the Security Council and the NSS is that the 1979 crisis involved retaliatory conduct.

Attributing Responsibility to States

Much debate on the question of anticipatory self-defence arose during the Cold War, at a time when considerable tension existed between the US and the USSR.[67] The fear then was that weapons of mass destruction (nuclear weapons in particular) might be deployed by one against another and the question was whether one State might – in anticipation of such an attack – launch a protective strike. Ultimately, and fortunately for all, the psychological threat of "mutually assured destruction" was great enough to prevent armed attacks and pre-emptive strikes by either side.[68]

What differs considerably between the Cold War and the War on Terror is the question of attribution of responsibility. During the Cold War it was clear who the parties to the conflict were and who held "responsibility" in terms of the threat of and the ability to use weapons of mass destruction. Thus, during the Cold War, the argument of anticipatory self-defence was clear: 'Russia/America poses an imminent

63 Above n 51, para 16.

64 Ibid, para 17.

65 United Nations General Assembly Resolution 2626 (XXV) of 24 October 1970 (1883rd Plenary Meeting, during the Twenty-Fifth Session), the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, A/RES/25/2625.

66 United Nations Security Council Resolution 450 of 14 June 1979, S/RES/450 (1979), paras 1 and 2.

67 See, for example: Professor Edward McWhinney, *"Peaceful Coexistence" and Soviet-Western International Law*, (Leyden, 1964); and Ronald Powaski, *The Cold War: The United States and the Soviet Union, 1917-1991*, (Oxford University Press, 1998).

68 Much has been written on the subject of mutually assured destruction: by way of example, contrast Stephen Del Rosso, "The Insecure State", Daedalus, Vol 124, 1995 with James Ewing, "The 1972 US-Soviet ABM Treaty: Conerstone of Stability or Relic of the Cold War?", (2001) 43 *William and Mary Law Review* 787.

threat to use nuclear weapons against us, and we must – in anticipation of and to prevent such an attack – strike against Russia/America'.

The question of attribution in the War on Terror is much more complex. While terrorist conduct often contains elements of warfare, politics and propaganda,[69] terrorist organizations (for security reasons and due to lack of popular support) are usually small, making detection and infiltration difficult. As recognized by the United Nations Office for Drug Control and Crime Prevention (ODCCP), although the goals of terrorists are sometimes shared by wider constituencies, their methods are generally abhorred.[70] It is proposed that it will be rare, if ever, that a State will accept responsibility for conduct of a terrorist organization.

This being the case, the anti-terror pre-emptive strike policy faces a considerable final hurdle in the analysis undertaken in this Chapter: that of attributing responsibility for terrorist conduct to a State, in order to justify pre-emptive action against the State.[71] There appear to be two ways in which responsibility might be attributed, each to be discussed.

The "But For" Test

Although not formulated in these precise words, the attribution of responsibility for the September 11 bombings rests on the view that the terrorist attacks against America could not have occurred, but for the assistance of the Afghani State. Through various resolutions, the UN Security Council expressed the view that al-Qaida was responsible for the terrorist attacks of September 11, 2001 and that it could not have perpetrated those attacks but for the assistance of the Taliban regime in Afghanistan.[72]

Within Resolution 1378 of 14 November 2001, the Council attributed responsibility to the Taliban regime for allowing Afghanistan to be used as a base of operations by al-Qaida.[73] It later noted, within Resolution 1390,[74] that the Taliban had failed to comply with earlier resolutions of the Security Council, requiring it to stop providing sanctuary and training for international terrorists;[75] to turn over Osama bin Laden;[76] and to close all camps where terrorists were trained within the territory under the Taliban's control.[77] This attribution of responsibility finds similar

69 United Nations Office for Drug Control and Crime Prevention, "UN Action Against Terrorism", web site <www.odccp.org/terrorism.html>, at 19/06/02.

70 Ibid.

71 Assuming, of course, that pre-emptive action is permissible under international law, as discussed already.

72 See Conte, above n 43, 46-51.

73 United Nations Security Council Resolution 1378 (2001).

74 Under United Nations Security Council Resolution 1390 (2002).

75 See United Nations Security Council Resolutions 1214 (1998) and 1333 (2000).

76 See United Nations Security Council Resolutions 1267 (1999) and 1333 (2000).

77 See United Nations Security Council Resolution 1333 (2000).

support within the British report, "Responsibility for the Terrorist Atrocities in the United States", tabled before the English Parliament.[78]

Although some might criticize the attribution of responsibility to the Taliban on the particular facts of that case as lacking sufficiently cogent evidence, the writer is open to the view that a "but for" test in attributing responsibility for terrorist conduct may be appropriate. Even if it is, however, this does not further the argument in favour of the US anti-terror pre-emptive strike policy. A "but for" test, as applied against the Taliban, is reflective. The test involves consideration of conduct that has actually occurred. It therefore does not fall within the ambit of anticipatory self-defence, but rather within the restrictive notion of self-defence in response to an actual armed attack.

Attributing a Responsibility upon States to Combat Terrorism

The second means by which attribution might be made is by arguing that a State has breached, or is breaching, a common duty to combat terrorism within its borders. In this regard, consideration of three documents is called for.

1. *Declaration on Measures to Eliminate International Terrorism*. The first document from which a general responsibility to combat terrorism might be drawn is the General Assembly's Declaration on Measures to Eliminate International Terrorism.[79] The Declaration describes terrorism as a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, and jeopardize friendly relations among States.[80] It expresses the view that States must refrain from organising, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of terrorist acts.[81] More particularly, it maintains that States have obligations under the UN Charter and other provisions of international law to combat international terrorism, in particular:[82]

> To refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens;
>
> To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law;

78 Her Majesty's Government, 4 October 2001.

79 Adopted under United Nations General Assembly Resolution 49/60, "Measures to Eliminate International Terrorism", A/RES/49/60, 84th Plenary Meeting of the UNGA, 9 December 1994.

80 Ibid, para 2.

81 Ibid, para 4.

82 Ibid, para 5.

> To endeavour to conclude special agreements to that effect on a bilateral, regional and multilateral basis, and to prepare, to that effect, model agreements on cooperation;
> To cooperate with one another in exchanging relevant information concerning the prevention and combating of terrorism;
> To take promptly all steps necessary to implement the existing international conventions on this subject to which they are parties, including the harmonization of their domestic legislation with those conventions;
> To take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in subparagraph (a) above;

These "obligations" (as they are referred to within the Declaration) might be argued to establish an attribution of responsibility upon States to combat terrorism, the breach of which could be used to justify pre-emptive strikes.[83] That position might hold merit, at face value, but fails in the author's view for two main reasons. Firstly, the Declaration does not define the ambit of "terrorism" or "terrorist activities". Indeed, there is no internationally agreed upon definition of terrorism.[84]

Secondly, and more importantly, the Declaration is not law. Although compelling and strongly worded, the Measures to Eliminate International Terrorism is a Declaration only and therefore does not have the same weight as a treaty, nor does it have signatories that are bound by its content. Indeed, article 10 of the UN Charter specifically provides that resolutions and declarations of the United Nations General Assembly are recommendatory only. Accordingly, its provisions could not form the basis upon which to attribute responsibility to a State for breach of its provisions.

2. *Security Council Resolution 1373*. In contrast to a resolution of the General Assembly, resolutions of the UN Security Council are binding upon members of the United Nations by application of article 25 of the Charter. Accordingly, the obligations pertaining to counter-terrorism set out within Security Council Resolution 1373[85] might form the basis for the attribution of responsibility.[86] As with the General Assembly's Declaration on Measures to Eliminate International Terrorism, the problem with relying upon Resolution 1373 is the failure of the Resolution to define the term "terrorism". Criticizing an earlier resolution of the Security Council pertaining to terrorism, the Executive Director of the International Policy Institute for Counter-Terrorism, Boaz Ganor, has emphasized the point that resolutions on

83 Provided that any breach is of a specified "obligation" within paragraph 5 of the declaration, as quoted.

84 See Conte, above n 43, 11-20.

85 United Nations Security Council Resolution 1373 of 28 September 2001, S/RES/1373 (2001), paras 1 and 2.

86 For a discussion of those obligations, see Conte, above n 43, 23-25.

counter-terrorism can only have an effective impact once all States agree upon what type of acts constitute terrorism and if the resolutions set out that definition.[87]

3. *The Draft Comprehensive Convention on International Terrorism*. A potential avenue for the attribution of responsibility in the future could rest with the proposed Comprehensive Convention on International Terrorism.[88] The draft does set out a definition of terrorism and contains various articles creating obligations upon States parties. It needs to be borne in mind, however, that the working party tasked with finalizing the Comprehensive Convention has been unable to agree upon a definition of the term and, for that reason, there is doubt that the Convention will come to fruition.

The writer therefore concludes that, unless responsibility can be attributed to a State by way of a "but for" or higher test (which is unlikely in any anticipatory action), any use of force would be unlawful.

Conclusion

What might be described as the "anti-terror pre-emptive strike" policies of the United States and Australia face many considerable hurdles on the track to justification under international law. First, it is debateable whether a doctrine of anticipatory self-defence has survived the advent of the United Nations Charter. The adoption of the Charter saw the creation of a peremptory norm of customary international law, excluding the use of force except where a State is attacked, and establishing compensatory mechanisms through the UN Security Council to deal with imminent threats to the peace.

Even if the doctrine of anticipatory self-defence did survive the Charter, it requires a State to demonstrate necessity and proportionality. While proportionality cannot be prospectively assessed, it can be said that the Bush Doctrine falls outside the requirement of necessity, the Security Council having rejected (at the very least) the concept of *pre-emptive* as opposed to *preventive* action. The US National Security Strategy claims a right to pre-emptive self-defence where there is "uncertainty" about the time or place of an attack and therefore takes a step beyond the already controversial concept of anticipatory self-defence. In contrast, Prime Minister Howard's statements, although imprecise, might be construed as taking a more restrictive approach, within the ambit of *Caroline* necessity.

Finally, the policies face the considerable problem of attributing responsibility to States for conduct of terrorist, non-State, actors. While a "but for" test to attribute responsibility seems appropriate, it does not advance the argument in favour of the anti-terror pre-emptive strike policies. The test involves reflection upon conduct that has actually occurred, which is unlikely to assist in justifying any anticipatory action. Although strongly worded, neither the General Assembly's Declaration on

87 Ganor B, "Security Council Resolution 1269: What it Leaves Out", 25 October 1999, web site of the International Policy Institute for Counter-Terrorism, <www.ict.org.il/articles/articledet.cfm?articleid=93>, 01/06/02.

88 For a more detailed discussion of the draft convention, see Conte, above n 43, 18-20.

Measures to Eliminate International Terrorism, nor Security Council Resolution 1373, can be seen as adequate bases for attribution of responsibility upon States to justify pre-emptive strikes.

When the Law Breaker Becomes the Law Maker

Susan Anderson

> Does a norm cease to exist as one of general international law when, after a period of general acceptance, it is challenged by some states while others insist on its continued and universal validity? And what is the significance of discrepancies between words and deeds? A state may verbally reject a norm while actually conforming to it; conversely, its acts may be at variance with a norm which it purports to accept. Are deeds always more important than words?[1]

When Professor Lissitzyn wrote these words nearly 40 years ago he no doubt hoped that they would serve as a call to action for international lawyers to develop more fully the theoretical basis for customary international law formation. This paper is largely in response to those authors, particularly Michael Byers,[2] who suggest that the way that law is formed by the community of States has changed. Byers suggests this change allows the powerful among us to create or vary rules of international law to suit their purposes without reference to the rest of the community.[3] This paper will identify the difficulties with the evidence and arguments in support of these changes.

The first and most fundamental difficulty with the argument is that there is no universal agreement about the content of customary international law and how it is formed. To suggest that the process has changed becomes difficult to support in that circumstance. There is no reason why the way that customary international law is formed cannot change. This paper is an argument that the point of origin for such change is unclear.

The questions arising from Dr Byers line of argument are legion. Are rules of custom developed more quickly, or even instantly, when large and powerful States are acting? International custom develops through having regard to State practice combined with *opinio juris,* but what does this mean today? Some academics maintain

1 O J Lissitzyn, *International Law Today and Tomorrow* (Oceana, Dodds Ferry, New York, 1965).

2 Michael Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq' (2002) 13 *European Journal of International Law* 21.

3 Ibid 41.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 413–435.*
 ISBN 90 04 14599 0.

that only action and not words are relevant to establish State practice.[4] What does this mean for States that object to the actions of other States, but take no physical action to respond to it? What amounts to acquiescence and what is its role?

And finally, Dr Byers suggests that the answers to these questions may well be that smaller and less powerful nations have no choice but to allow the United States to reshape international law essentially to suit the goals of its government of the day. If this is true, it means a return to the days of non-regulation of the use of force and a virtual abdication of the international rule of law. This paper will explore the answers to these questions with a view to demonstrating that this suggestion is simply a way of excusing lawlessness and not a justification for the development of new rules of law.

The Formation of Customary International Law

The starting point for discussion of whether changes to customary international law have occurred is the basis upon which rules of law are created in the international sphere. The Statute of the International Court of Justice provides the basis upon which the Court makes its decisions. Article 38(1)(b) provides the court shall apply '… International custom as evidence of a general practice accepted as law'.

In the North Sea Continental Shelf Cases[5] the International Court of Justice referred to the requirements for the creation of international customary law saying that when concerned with the creation of a rule on the basis of what was originally a conventional rule, when only a short time has passed, 'an indispensable requirement would be that within the period in question, …State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform'.[6] The Court explained that:

> not only must acts amount to settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitates. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[7]

4 Anthony A D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971).

5 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3.

6 Ibid 43, [74].

7 Ibid 44, [77].

Thus the development of a rule of international customary law requires State practice accompanied by *opinio juris.* It is the details of this practice; its content, required consistency, frequency and duration, which pose the difficulty when determining whether a practice is capable of forming a rule of law. Likewise, how one goes about determining whether *opinio juris* is present is not altogether clear. The most often posed question is, 'if the State practice is accompanied by the belief that the action is required by law, then how do new rules of law develop through State practice?'.

The New Haven School considers many norms of international law have originated by "the process of reciprocal claims and mutual tolerances".[8] Professor Lissitzyn suggested in his 1965 treatise that it would be more appropriate to read Article 38 1(b) as: "The practice of states as evidence of a general consensus or expectations accepted as law".[9] That view has not prevailed in either judicial decisions or in the writings of the most eminent publicists.

State Practice

International law academics have long debated whether 'practice' includes statements or only acts.[10] Michael Akehurst relied on a very broad conception of State practice which includes statements, references to *travaux préparatoire* in treaties, and decisions of national courts.[11] His reason for this wide definition is that if a state wishes to change a rule of custom – and that may be done only by creating a new rule of custom – a statement which amounts to State practice will not require the State to take physical action to change the rule, thereby breaking the rule.[12] This was a significant concern for Dr Akehurst as he believed that the rule of law would suffer if the accepted method of changing a rule involved breaking it. Dr Akehurst did not consider that if State practice includes statements, then some statements against a rule, such as the threat to use force in a conflict situation, could also be considered 'breaking the law.'

In any event, as Sir Arthur Watts points out, '[v]iolations of international law are not … a denial of the international rule of law, unless they involve a general breakdown in law and order in the international community as a whole'.[13] He points out that even major regional conflicts have not threatened such a general breakdown in international law and order.[14]

8 Lissitzyn, above n 1, 34-5.

9 Lissitzyn, above n 1, 36.

10 See Hilary Charlesworth, 'Customary International Law and the Nicaragua Case' (1991) 11 *Australian Year Book of International Law* 1, 4-8.

11 Michael Akehurst, 'Custom as a Source of International Law' (1974-75) 47 *British Year Book of International* Law 1.

12 Ibid 8.

13 Sir Arthur Watts, 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15, 42.

14 Ibid 43.

Professor Brownlie believes that the 'evidence of State practice consists of a variety of material sources'.[15] He is willing to include virtually any act or statement of a State as evidence of practice. Professor Brownlie does not limit his definition of practice to conflict situations. He reasons that statements made at conferences are much more carefully prepared and therefore more valuable than hurriedly made statements in the midst of a conflict.[16]

Professor D'Amato has long been an advocate of the position that statements cannot constitute State practice; only actions can.[17] This is based on the idea that a state may speak with many voices and say many things; but can only act in one way at a time.[18] Professor D'Amato draws the analogy with a legislature. Its statutes have legal effect, but its committee hearings and deliberations do not.[19] His theory does allow, however, for a commitment to act to be considered State practice. He says that 'when a state makes a commitment to act under a treaty, the commitment, rather than the subsequent act, is significant in terms of customary law.'[20] These commitments which result in treaties either written or not, are distinguished from unilateral declarations which have no law creating effect so far as Professor D'Amato is concerned.[21] Professor D'Amato also believes that omissions, meaning the failure to act, should be considered State practice.[22] In a conflict situation a threat of forcible action is also considered to be State practice.[23]

Villiger explains in detail his reason for accepting statements by States to be State practice. One of them being that verbal statements may shed light on the *opinio juris* of States.[24] He goes on to say that one of the functions of a verbal statement is to reveal a State's *opinio juris* with respect to a customary rule.[25] This would appear to effectively fuse the two concepts of State practice and *opinio juris* contrary to traditional and more favoured views.

Professor Wolfke is cited alongside Professor D'Amato as a proponent of the theory that acts alone can constitute State practice for the purposes of customary law creation. It is true that in 1993 Professor Wolfke believed that 'customs arise from acts of conduct and not from promises of such acts.'[26] However, Professor Wolfke goes on to say that 'repeated verbal acts are also acts of conduct in their broad meaning and

15 Ian Brownlie, *The Rule Of Law In International Affairs* (Martinus Nijhoff, 1998) 19-21.
16 Ibid 20.
17 D'Amato, above n 4, 88-9.
18 Ibid 88.
19 Ibid 51.
20 Ibid 89-90.
21 Ibid 90-1.
22 Ibid 88-9.
23 Ibid 88.
24 Mark E Villiger, *Customary International Law and Treaties* (Martinus Nijhoff, 1985) 7.
25 Ibid 8.
26 Karol Wolfke, Custom in Present International Law (Martinus Nijhoff, 2nd ed, 1993) 42.

can give rise to international custom', but only to customs of making such declarations – not to the conduct described therein.[27]

Professor Wolfke points out that the confusion of considering statements as acts arose from 'confounding such practice with its evidence' or with the evidence of acceptance of the practice as law.[28] For example, the Truman Proclamation,[29] while only a claim, was a case where the likelihood that the verbal act was to be followed by deeds was nearly absolute. For simplification in case like that, the statement may be considered as evidence for as well as elements of, custom-creating practice.[30] Wolfke warns not to generalise this acceptance, but to consider carefully the circumstances of each case. Wolfke asserts that while statements are not custom-forming practice, they do contribute in various ways to the development of the law.[31] It is of note here that Professor Brownlie uses the terms 'State practice' and 'Evidence of State practice' as if they are synonyms.[32] This may reflect some of the confusion described by Professor Wolfke. Wolfke's caution to treat each instance on its own merits would seem to have value.

Nicaragua and State Practice

The decision of the International Court of Justice in *Nicaragua v The United States* case has added to the uncertainty about the process by which customary international law is formed.[33] Professor Charlesworth examined the case and concluded that the court expanded the category of activities that can constitute State practice.[34] She notes that the Court seemed to accept as State practice resolutions of international organisations without discriminating between resolutions based on *lex lata* and *lex ferenda;* and considered statements of the International Law Commission to be instances of State practice.[35] The distinction between law as it is and the law as it should be is important, because, as Michael Akehurst pointed out, a state's assertion that something ought

27 Ibid.

28 Ibid. This is presumably *opinio juris*.

29 See (1940) 40 *American Journal of International Law Supplement of Documents* 46-8.

30 Wolfke, above n 26.

31 Wolfke, above n 26, citing Villiger, above n 24, 6-12.

32 Brownlie, above n 15.

33 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 ('*Nicaragua*').

34 Charlesworth, above n 10, 18.

35 Ibid, citing *Nicaragua* [1986] ICJ Rep 14, 100, [190]. When deciding whether there is a rule of law with respect to intervention, the Court said at 101, [191] that '… as regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United nations. As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question.'

to be the law may be interpreted as evidence that that is not the law.[36] Villiger asserts that statements that are *lex ferenda*, while possibly trading ploys, should be considered State practice.[37] His argument is that if other States do not agree that the statement represents the law then the practice will be deprived of the necessary consistency to harden into a customary rule.[38]

Professor D'Amato argues that there are only two sources of international law; conventional and customary.[39] The act of referring to resolutions and judgments of courts as sources of law, as the court in *Nicaragua* did, is to misname them.[40] It is somewhat surprising that the court in *Nicaragua* spent a considerable length of time listing all the resolutions of international organisations which addressed the issue of intervention in the affairs of another state – even noting the reservations to them and the declarations about the non-law creating nature of those resolutions, – and then said: [41]

> Notwithstanding the multiplicity of declarations by States *accepting* the principle of non-intervention, there remain two questions: first what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this be a rule of customary international law?[42]

The court appears to have found that all of the declarations represented law-creating practice by the participating States, even those who registered reservations to the prohibition on intervention in the affairs of another State.[43] This appears to be part of the court's confusion of State Practice and *opinio juris*. This confusion is apparent also in the views of Villiger.[44] How is it possible that a statement against a proposition being law can be taken to be a statement of a belief in its lawfulness? This is the confusion referred to by Professor Wolfke in his 1993 book.[45] This is not the same as Villiger's point that statements *lex ferenda* should be considered to be State practice. Those are statements about what the law should be. Here we are referring to States' declarations about what the law is not.

The Court in *Nicaragua* next considered whether State practice justifies its 'conclusion on the nature of prohibited intervention…'.[46] The court specifically excluded

36 Akehurst, above n 11, 5.

37 Villiger, above n 24, 8.

38 Ibid.

39 Anthony A D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (1995-96) 25 *Georgia Journal of International and Comparative Law* 47, 52.

40 Ibid.

41 *Nicaragua* [1986] ICJ Rep 14, 106-7, [202-4].

42 Ibid, emphasis added.

43 Ibid, 107-8, [205].

44 Villiger, above n 24.

45 Wolfke, above n 26, 41-4.

46 *Nicaragua* [1986] ICJ Rep 14, 108, [206].

consideration of the State practice of using force during the process of de-colonisation[47] and then proceeded to determine whether there is a:

> general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of a political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.[48]

Professor D'Amato points out that the court's reasoning in this case is the opposite of what one might expect to see.[49] The court begins with the 'disembodied rule' of non-intervention and then attempts to support it by pointing to resolutions which are said to indicate *opinio juris*.[50] By refusing to consider the use of force in decolonisation, the court ignored what may have been a developing rule allowing intervention in some circumstances.[51]

Professor Weisburd's study on the use of force since World War II indicates that force aimed at decolonisation is most likely of all international uses of force to garner international approval.[52] However, as *Nicaragua* was not a case of decolonisation, the court likely realised that examining the use of force in cases of decolonisation would not be helpful to the resolution of the case before them.[53] In any event, the decision in *Nicaragua* created more controversy than it settled and cannot be cited here as authority for the proposition that State practice, or evidence of state practice now consists of more than acts, commitments, omissions, threats and possibly statements *lex lata*. It is difficult to conceive of a statement against a rule being taken to be practice in support of the same rule. A statement of this type may be the starting point of the development of a new rule but should not be taken to be illegal for that reason.

Treaties as State Practice

Some authors suggest that participation in a treaty should be considered State practice.[54] According to Thirlway, the risk of accepting this position is that one cannot be sure whether when a provision is repeated in a subsequent treaty it is repeti-

47 Ibid.

48 Ibid.

49 Anthony A D'Amato, 'Trashing Customary International Law' (1987) 81 *American Journal of International Law* 101, 102.

50 Ibid.

51 A Mark Weisburd, *Use of Force: the Practice of States since World War II* (Pennsylvania State University Press, 1987) 309.

52 Ibid.

53 The Court makes no explanation at all for its failure to consider this type of intervention.

54 Akehurst, above n 11, 43.

tion of an existing rule or whether it is confirmation that a rule does not exist and a treaty is therefore required.[55] Interestingly, Professor Wolfke specifically rejects promises, such as signing treaties, as State practice because some treaties are not implemented.[56] This position can be contrasted with D'Amato's assertion that a commitment to act can be considered State practice.[57] Villiger's definition of State practice includes statements and votes on draft rules at conferences. However, on the text of a convention he says:

> For written rules to have any value in the formative process of customary law, *further* instances of material practice in conjunction with the written rules, are required.[58]

The references he cites for this proposition contradict his earlier assertion that statements can constitute State practice.[59] This idea appears to be similar to Professor D'Amato's earlier suggestion that what is required to create a rule of custom is an act by a state and an "articulation" of the rule in support of which the act was completed.[60] It would seem that the majority of jurists would consider that signing a treaty is State practice, or at least evidence of it. The role of treaties in law creation other than as State practice is considered below.

Is the Practice of Some States More Important Than That of Others?

This question develops particular importance in view of the United States current seeming unrivalled international power.[61] The World Court in the *North Sea Continental Shelf* cases said that practice must include States whose interests are specially affected by the developing rule, but that absence of practice by these States would not prevent the creation of a rule.[62] Dr Akehurst points out that some States exercise a greater influence on the development of customary law than other States, but that is because their practice is more frequent or better publicised, not because one state's practice is inherently more valuable than another.[63] This would appear to be a belief widely held among international law academics.[64]

55 Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989 Part Two' (1990) 61 *British Year Book of International Law* 1, 40.

56 Wolfke, above n 26, 44.

57 D'Amato, above n 4, 88-9.

58 Villiger, above n 24, 10. Emphasis was contained in the original text.

59 Ibid, note 73.

60 D'Amato, above n 4, 88.

61 Byers, above n 2, 21-41.

62 *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 42, [73].

63 Akehurst, above n 11, 22-3.

64 See discussion following.

Professor D'Amato stresses the difference between 'general' custom and 'special' custom in international law.[65] A special custom is one which creates a local rule of law.[66] In the development of this type of custom, the practice of the affected States would appear to have more law creating impact than that of other States.[67] This is, of course, distinct from placing one State on a higher level than other States for the purpose of law creation.

Villiger addresses the suggestion that unanimously adopted United Nations General Assembly resolutions can be considered to reflect a *communis opinio juris* which will suffice for the formation of customary law by asserting that it is not safe to make assumptions about the reason States vote for resolutions because other non-legal considerations could be at play.[68] Professor D'Amato's theory allows for the possibility that the actions of one State can create a new customary law in circumstances where there is no existing rule and there is no opposition from other States.[69] The theory does not imply that any particular State is required for this type of rule creation.

The basis of the belief that no one State has greater law creating capacity than any other is that all States are equal.[70] Strangely, this is not necessarily a universally held belief. Professor Myres McDougal suggested that General Assembly Resolutions are binding if they are accepted by the major powers.[71] Charles De Visscher believed that major powers carry more weight in the formation of international custom.[72] He said:

> The slow growth of custom has been compared to the gradual formation of a road across vacant land. To begin with, the tracks are many and uncertain, scarcely visible on the ground. Then most users, for some reason of common utility, follow the same line; a single path becomes clear, which in turn gives place to a road henceforth recognised as the only regular way, though it is impossible to say at what precise moment the latter change took place.[73]

65 Anthony A D'Amato, 'The Concept of Special Custom in International Law' (1969) 63 *American Journal of International Law* 211.

66 Ibid 212.

67 Ibid 222.

68 Villiger, above n 24, 29.

69 D'Amato, above n 4, 89-95.

70 Watts, above n 13, 23, 30.

71 See 'Contemporary Views on the Sources of International Law: The Effect of UN Resolutions on Emerging Legal Norms' (1979) 73 *American Society of International Law Proceedings* 300, 327-32.

72 Charles de Visscher, Theory and Reality in Public International Law (P E Corbett trans, Princeton University Press, Princeton, 2nd ed, trans of 3rd French ed first published 1960, 1968) 154-5 [trans of: Théories et Réalités en Droit International Public].

73 Ibid. The original comment is in Pitt Cobbett, *Leading Cases on International Law* (Sweet and Maxwell, 4th ed, 1922) vol 1, 5.

De Visscher's position is the 'great powers' will have a greater impact on the creation of custom 'either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.'[74]

Professor D'Amato allows that while all nations are equal, it is possible for one state to 'play a bigger role in the formation of custom' because they are more active.[75] It is worthy of note that in his earlier work, *The Concept of Custom in International Law*, Professor D'Amato suggested that there may be some truth in the idea that major powers exert more weight in the formation of custom, but that would largely be due to their being more sophisticated.[76] He came to the conclusion there that because the formation of custom depends upon the persuasiveness of a claim, its formation would depend in part upon the identities of the claimant and respondent.[77] However in 1995, Professor D'Amato rejected the idea that some States matter more than others in the creation of customary rules and said that:

> A related view is that some states have sovereignty over international law in the sense that they are exempt from some or all of its rules. This position has been taken by the Ayatollah Khomeni and by Professor McDougal, both invoking a higher morality which when followed allows a nation to depart from international rules that are binding on other nations. Khomeni derives his binding moral precepts from Allah; McDougal derives his from Harold Lasswell.[78]

Professor Lowe argues that it is inevitable that some States participate more in international rule creation and therefore have a greater impact upon the development of customary international law than will others.[79] Like other authors he does not base this belief on any inequality among States, rather it is based on the reality of States' opportunity to act.[80] Professor Lowe believes that what really matters in creation of law is not whose acts create the rule, but that the rule is evenly applied. He points out also that it is vital to maintain the right 'motivation' in law creation:

> As motive forces for the development of customary international law there is a distinction between arguments based on generally accepted principles of morality or policy, such as the saving of life or the facilitation of legitimate diplomatic activities, and arguments based explicitly or implicitly upon sectional or national political aims. … The difference is crucial. Moral arguments can be universalised. Political arguments cannot. Rooting the development of international law in the soil of common morality is necessary in order to sustain its claim to legitimacy: the

74 De Visscher, above n 72, 155.

75 D'Amato, above n 39, 62, note 33.

76 D'Amato, above n 4, 96.

77 Ibid 97.

78 D'Amato, above n 39, 62.

79 Vaughan Lowe, 'The Iraq Crisis: What Now?' (2003) 52 *International and Comparative Law Quarterly* 859.

80 Ibid.

> rooting of international law in the exigencies of national political objectives, on the other hand, is one of the defining characteristics of imperialism. One of the central problems of the current Iraq crisis is, it seems to me, precisely this conflation of moral and political argument.[81]

Even if it were true to say that some States are more important in the formation of international law, it would still be wrong to attribute this to a change in the way that law is created. Writing in 1927, The Right Hon the Earl of Birkenhead discussed the formation of rules of law by the conclusion of treaties. He said that '[a] declaratory treaty, which is largely adopted by influential States, will hardly be resisted for long by an isolated non-signatory, and even where the treaty is avowedly formative of new law, convenience, public opinion, and the authority of its sponsors are likely insensibly to induce acceptance.' Thus there was a view in the early 20th century that some States were "influential" in law creation in the international community. This was, of course, a time when colonialism was still common and some States were considered to be 'civilised' and others not. This view is similar to that of the world court when it said that the practice of specially affected States would be important for law creation.[82]

Any argument that the acts or statements of more powerful States necessarily matter more than those of less powerful States surely must fail today as it did when the great powers attempted to dictate international agreements to other States.[83] These efforts, beginning around the middle of the 19th century, culminated in the rejection of a provision of the Vienna Convention on the Law of Treaties which would have created 'objective régimes'.[84] The opposing States argued that creation of regimes of this type was another attempt on the part of the great powers to impose their will on the members of the international community.[85] Dr Byers' argument that today the one great power inherently has more influence over the creation of rules of law ignores the history of rule creation in the international community as well as the nearly universal rejection of this idea by other States.

It also ignores the importance of the concept of equality to the international rule of law. The international rule of law requires two elements. The first is a group of States which are subject to international law and the second is the existence of

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81 Ibid.

82 *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 43, [74].

83 Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, (Oxford University Press, 2000) 33-4. See also at 36 where Raggazi discusses Judge McNair's view in the Aaland Island Case that international régimes could be created by treaty between 'a group of great powers, or a large number of States'.

84 Draft Article 63 of the *Vienna Convention on the Law of Treaties* provided third States to be bound by general obligations to which they had not adequately protested against: ibid 39.

85 *Yearbook of the International Law Commission*, 16th sess, 739th mtg, vol 1, 99, 101, [22] (Jiménez de Aréchaga), 103, [46] (Tunkin), 103, [52] (Bartos), 104, [65] (Tabibi), 105, [72] (Liu), UN Doc A/CN.4./SER.A/1964 (1964). Cited in Ragazzi, above n 83, 39.

a body of rules.[86] Sir Arthur Watts suggests that the primary requirements for an international rule of law are that '…a complete and certain system of international law, which treats all States as equal in the eyes of the law and which excludes arbitrary power should be effectively applied and enforced.'[87] It is submitted that to suggest that the actions of one state are more important in the creation of rules of law is contrary to any conception of the international rule of law. There can be no certainty in the rule of law when one state exerts arbitrary power over others.

Duration of Practice

Dr Byers has also suggested that the time for a rule of customary international law to form is being shortened.[88] There is no support for this proposition, either offered by the author, or in fact.[89] As Professor Brownlie pointed out in his Hague Academy lectures, there has never been a time requirement for the creation of a rule of customary international law.[90] He said that this assumption is 'based on cultural or national prejudices about customs or customary law.'[91] There are many examples of customary law being formed very quickly. In the *North Sea Cases* the Court found a rule of customary international law which had developed between 1945 and 1958.[92] The court said that the passage of a short time was not, in itself, a bar to the development of a rule of law.[93] It is possible, for example that the law with respect to self-defence developed from just one instance in 1835.[94]

In the ninth edition of Oppenheim the proposition is put that custom is normally a relatively slow process for evolving rules of law because the practice in question will take time to develop.[95] The authors cite no examples of this happening, but go on to cite examples of the 'exceptions' to this rule, ie where custom has developed quickly as in the case of the continental shelf and the exclusive economic zone.[96]

86 Watts, above n 13, 26.

87 Watts, above n 13, 41.

88 Byers, above n 2, 33.

89 Inexplicably, in his 1999 book (note 150 at 160) Dr Byers cites as authority for the proposition that it takes time to create a rule, Dr Akehurst's article (note 11 at 15-16). However, Dr Akehurst clearly disagrees with this proposition and agrees with Professor D'Amato that a long time is not required.

90 Brownlie, above n 15, 19. See also Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 7.

91 Brownlie, above n 15, 19.

92 *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 43, [74].

93 Ibid.

94 R Y Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82. Jennings said that with this incident self-defence changed from a political excuse to a legal doctrine.

95 Sir Richard Jennings and Sir Arthur Watts (Eds), *Oppenheim's International Law* (Longman, 9th ed, 1996) vol 1, 30.

96 Ibid 95.

In the 1967 compilation of Professor Jenks' work, his essay on 'change' included an analysis of the 'new' way in which customary law was formed.[97] He said that custom creating acts which would once have been few in number and would have been spread over a substantial period, 'follow each other in such repeated instances and quick succession that regularity of conduct can be established in a brief period.'[98] He argued that a presumption of general acquiescence no longer presupposes a 'considerable effluxion of time.'[99]

In the *Right of Passage* case the ICJ held that a practice of 125 years' duration had given rise to a customary rule.[100] The statement contained no implication that practice of a shorter duration would not have provided evidence of a rule as well.[101] It is not, therefore, correct to say that more time was once required for the creation of a customary rule of law than is now required. As Dr Akehurst suggested, it seems the requirement of time is 'bound up with' the requirement of repetition.[102] If many acts are required to create a rule of law, then more time will likely be required. If, as it is suggested, one act can be formative of custom, then very little time will be required for rule creation. Even those academics who cling to the idea that a substantial period is required for rule creation, recognise the many exceptions to this alleged rule.[103] There is no real support for substantial time requirements.

Quantity and Consistency of Practice

Professor Wolfke concludes his analysis of State practice by saying:

> One may risk saying … that in present international law there are no binding, precise, pre-established conditions for custom-creating practice, except the basic one that such practice must give sufficient foundation for at least a presumption that the states concerned have accepted it as legally binding. The decision as to whether this condition has been fulfilled must be thoroughly investigated in each case in the light of all circumstances by the organ ascertaining the existence of the custom.[104]

It would seem from his analysis that when he says 'present international law' he refers to that which has existed at least during the twentieth century.[105] Professor D'Amato noted that the ICJ in *Nicaragua* looked at State practice to support its finding the existence of a rule against intervention instead of determining whether

97 C W Jenks, *Law in the World Community* (Longmans, London, 1967) 8.

98 Ibid.

99 Ibid.

100 *Right of Passage Case (Portugal v India)* [1960] ICJ Rep 6, 40.

101 Akehurst, above n 11, 15.

102 Akehurst, above n 11, 15.

103 See eg Richard R Baxter, 'Treaty and Custom' (1970) 129 *Recueil des Cours de l'Académie de Droit International de La Haye* 25, 67; Wolfke, above n 26, 68.

104 Wolfke, above n 26, 44.

105 Wolfke, above n 26, 41-4, 46, note 207.

the rule existed by examining State practice.[106] The Court found that 'absolutely rigorous conformity' with a rule is not required and that whenever State practice conflicts with the non-intervention rule, the practice is an illegal breach of that rule.[107] This would seem to be inconsistent with the previously held view that State practice must be substantially consistent to contribute to the creation of a rule of customary international law.[108] Of course in the North Sea Cases the rule that was said to have been created by consistent virtually uniform State practice was formed over a short period of time.[109] If State practice must be action, not words, this finding also leaves no room at all for the creation of new rules of customary international law. If State practice includes statements, then statements of protest, on the test derived by the court in *Nicaragua*, would have no impact on the law because protests would simply be considered to be inconsistent State practice.[110]

Writing in 1985 before the *Nicaragua* decision, Villiger argues that inconsistent State practice can usually be explained by the fact that the rule is very general, or that there is slight variation in practice allowed within the rule.[111] He believes that divergence from the rule may point to an admissible exception.[112] But, he says, if it cannot be explained in this way, it may well be that some inconsistency is inevitable and cites the 1951 *Fisheries Case (UK/Norway)* where the court held that a few uncertainties or contradictions in practice since 1812 can be easily understood.[113] It is unclear whether Villiger is referring to the small inconsistencies considered in that case, or whether he would accept the position of the Court in *Nicaragua* where numerous cases of intervention in the affairs of another state were discounted as illegal acts.

Professor Kirgis addresses the problem of inconsistent or insufficient State practice and *opinio juris* by suggesting placing the importance of each on a sliding scale. At one end would be a finding of very consistent State practice that would not require an examination of *opinio juris*.[114] This would explain the Court's view in *The S.S. Wimbledon case*.[115] At the other end of the scale 'a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with that asserted rule.'[116]

This theory is an effort to explain how the Court in *Nicaragua* found a rule of customary international law where there was no pattern of consistent State prac-

106 D'Amato, above n 49, 102.

107 *Nicaragua* [1986] ICJ Rep 14, 98, [186].

108 *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 43, [74].

109 Ibid.

110 D'Amato, above n 4, 101 suggests support for this view.

111 Villiger, above n 24, 23.

112 Ibid.

113 Ibid.

114 Frederic L Kirgis, 'Custom on a Sliding Scale' (1987) 81 *American Journal of International Law* 146, 149.

115 [1923] PCIJ (ser A) No 1, 25.

116 Kirgis, above n 114, 149.

tice. Professor Kirgis' thesis is that international decision-makers will tend to move along the scale depending upon the importance of the rule being considered. 'When the stakes are not as high', he says, 'international decision makers have not been as quick to find restrictive customary rules.'[117] Professor Charlesworth points out that the analysis of custom in the *Nicaragua* case can be explained by the importance of the norms being considered by the Court.[118] While she finds Professor Kirgis' sliding scale interesting and perhaps useful, Professor Charlesworth points out that the theory is not supported by the actual terms of the majority judgment in *Nicaragua.*[119] Villiger appears to have developed a theory similar to that of Professor Kirgis' theory when he says:

> the less conclusive the available material practice, the clearer must be the evidence of the *opinio juris*.[120]

Although Professor Kirgis does not specifically arrive at this conclusion, relying on his theory, judges of international courts would have unfettered discretion to decide whether a particular rule or type of rule requires consistent State practice or evidence of *opinio juris*. This recalls Kelsen's theory that the determination of the psychological element is a matter for the absolute arbitrary discretion of an international tribunal.[121] It does not go as far as Gugenheim who argued that consistent practice of States should be regarded as creating a rule of law, in the absence of indication that the actors did not intend the practice to be legally obligatory.[122] Dr. Akerhurst calls this looking for "*opinio non-juris*".[123]

Dr Akehurst does support the theory that States will cite as many examples of State practice as possible in support of a rule of customary international law.[124] He suggested that it is possible, but unusual, for a single act to create a rule of customary law.[125] He agreed on this point with Professor D'Amato that in a conflict situation, the State able to cite more precedents would have the stronger case.[126] He said that 'proof of customary law, like proof of title to territory, is relative, not absolute. Of course, because Dr Akehurst believed that virtually any statement or act

117 Kirgis, above n 114, 148.

118 Charlesworth, above n 10, 29.

119 Ibid.

120 Villiger, above n 24, 28.

121 Hans Kelsen, 'Théorie du droit international coutumier' (1939) 1 *Revue International de la Théorie du Droit* (New Series) 253, 264-6 cited in D'Amato, above n 4, 51-2 ; Brownlie, above n 90, 8, note 5.

122 Paul Guggenheim, *Traité de droit international public: avec mention de la pratique internationale en suisse* (2nd ed, 1967) cited in Akehurst, above n 11, 32-4. Note that both Kelson and Guggenheim later changed their minds. See Wolfke, above n 26, 49 note 218.

123 Akehurst, above n 11, 34.

124 Akehurst, above n 11, 13.

125 Ibid.

126 Ibid citing D'Amato, above n 4, 91-8.

of a state could constitute State practice, he believes that 'an act' can be widespread participation in a multilateral treaty and can result in the creation of a new rule of law. Presumably a statement of *opinio juris* in the treaty would be required as well to qualify the treaty as rule creating.[127]

Opinio Juris

The psychological element of customary international law[128] is no less controversial than State practice. Its content and necessity have been debated for years.[129] Dr Akehurst explained *opinio juris* as being necessary for the creation of customary rules.[130] He argued that State practice, 'to create a customary rule, must be accompanied by (or consist of) statements that certain conduct is permitted, required or forbidden by international law.'[131] It is interesting that Dr Akehurst argued in the same article that *opinio juris* could not be inferred from practice. Certainly Dr Akehurst asserted that State practice consists of both what States do and of what States say.[132] But it is not clear whether a statement, the same statement, can be both State practice and *opinio juris*. If it cannot and, say, two statements are required, how does one know which is considered practice and which *opinio juris*?

And what if those statements are inconsistent? A recent example of this inconsistency occurred before the United States invaded Iraq. The US government claimed the right to pre-emptive self-defence and created a sophisticated 'implied authorisation' argument based on interpretation of UN Security Council Resolutions.[133] This type of example would tend to lead one to differentiate between statements and actions. It is difficult to understand in a case like this how statements could be considered State practice.

Charles De Visscher argues that *opinio juris* can simply be inferred from State practice.[134] He argues that the decision in the *Asylum case* (*Columbia v Peru*)[135] supports his view. However, as Professor D'Amato points out, the court in that case stopped its analysis with the finding of inconsistent State practice and so did not need to consider the existence of *opinio juris*.[136] Professor Wolfke's position is slightly different. He argues that the subjective element of customary international law does

127 Akehurst, above n 11, 13.

128 D'Amato, above n 4, 49.

129 See Thirlway, above n 55 where he refers to the comments of Akehurst, above n 11 at 50 and D'Amato, above n 4 at 50-6.

130 Akehurst, above n 11, 53.

131 Ibid.

132 'Correspondence and Reply: Michael Akehurst and Anthony D'Amato (1986) 80 *American Journal of International Law* 147.

133 William H Taft IV and Todd F Buchwald, 'Preemption, Iraq and International Law' (2003) 97 *American Journal of International Law* 557.

134 De Visscher, above n 72, 154 note 23.

135 [1950] ICJ Rep 266, 277.

136 D'Amato, above n 4, 54.

not consist of any feeling or conviction on the part of the acting States.[137] It is simply an express, or most often presumed, acceptance of the practice as law by all interested States.[138]

Professor D'Amato proposed in 1971 referring to *opinio juris* as the 'articulation of the legal rule'.[139] However, in a 1998 article, Professor D'Amato admitted that his idea was not 'radical' enough and that he should have abandoned the concept of *opinio juris* entirely. His new thesis is summarised there as:

> the governing rule that results from an international controversy is the birth of a rule of CIL. It joins other rules of CIL precisely because it has led to the resolution of a controversy. The international system adopts controversy-resolving rules because, with each adoption, the chances of further interstate controversy and war are reduced …[140]

I cannot pretend to have absorbed entirely D'Amato's thesis, but the idea encompasses a previously held idea that rules of customary international law can only be created out of conflict.[141] This thesis would seem to explain situations such as the development of the law of self-defence where a single event, *The Caroline* incident, is said to form the basis of the customary rule of self-defence.[142] To disprove the theory would require some investigation to discover if any rules have developed in the absence of a conflict. The definition of 'conflict' will also need to be clarified as one could say that the development of the rules with respect to exclusive economic zones were without conflict.

Acquiescence

Professor Wolfke represents a traditional viewpoint when he asserts that the way that State practice develops into a rule of customary international law is through States acceptance of it as such.[143] This acceptance can be express or implied; and it is rarely express.[144] Professor Wolfke believes that because the acceptance by States is presumed in the absence of protest, it is hardly possible to describe the process.[145] MacGibbon asserts that there are no rules as to the method a State must

137 Wolfke, above n 26, 51.

138 Ibid.

139 D'Amato, above n 4, 75.

140 Anthony A D'Amato, 'Customary International Law: A Reformulation' (1998) 4 *International Legal Theory* 1, 3.

141 Hugh Thirlway, 'International Customary Law and Codification' (AW Sijthoff, 1972) 58; D'Amato, above n 4, 18-9; Thirlway, above n55, 54-6.

142 Jennings, above n 94.

143 Wolfke, above n 26, 62.

144 Ibid.

145 Ibid.

use to lodge a valid protest.[146] MacGibbon's theory is that a protest that has led to modification of the offending behaviour settles the dispute and is of no further legal interest beyond the fact that the exchange may be cited in future legal disputes.[147] It would seem that evidence of this exchange may contribute to the formation of customary law. MacGibbon believes that the protest, to be effective, must be repeated each time the offending behaviour is repeated.[148]

Professor Wolfke indicates that today it is increasingly acceptable to rest content with the absence of protest because States affected by practice will not have an excuse for failure to protest.[149] This view that consent is required, but can be inferred is derived from the idea that no state can be bound by a rule to which it has not consented.[150] Michael Akehurst maintained this view and said that the number and vehemence of the protests needed to create a customary rule will vary according to the extent to which other States are affected.[151] The idea that States are presumed to consent to a rule of law if they do not protest against it seems to be contrary to the idea that a State cannot be bound without its consent.[152]

The alternative view is that all States, by accepting some rules of customary international law, are necessarily accepting rules about how those rules are developed.[153] This view is adopted and adapted by Professor D'Amato. His view is that States have universally accepted the secondary, procedural rules of international law by consensus.[154] Therefore consent to any one rule is not required. Professor D'Amato's view seems more appropriate given the reality of the international system. For example, a new state is simply bound by the customary international law rules when it emerges. There is no opportunity for a new state to have participated in the law-creation process at all.[155] Therefore, if individual consent to each rule is required and inferred where it is missing, new States are simply forced to accept rules that emerged before they did. The view that failure to protest is equivalent to consent may coincide with Professor D' Amato's view that an omission should be considered State practice.

Thus, if state A invades state B and no other state responds with a physical or even a verbal act, that omission is an act of State practice in support of the invasion. If state A invades state B and other States protest verbally, that statement is taken to be practice contrary to a potential rule allowing invasion. If state A invades state

146 C MacGibbon, 'Some Observations on the Part of Protest in International Law', (1953) 30 *British Year Book of International Law* 293, 297.

147 Ibid, 299.

148 Ibid, 306.

149 Wolfke, above n 26, 62.

150 Michael Byers, *Custom, Power and the Power of Rules* (Cambridge University Press, 1999) 142; Akehurst, above n 11, 39.

151 Akehurst, above n 11, 40.

152 Byers, above n 150, 143.

153 Byers, above n 150, 144 citing a range of writers including D'Amato, above n 4, 41-4; Lowe; Sur; Raz ; and Allott.

154 D'Amato, above n 4, 41-4.

155 Byers, above n 150, 145.

B and other States use military force to repel state A, after condemning verbally the acts of state A, two new rules are forming. One is a rule against invasion and the other is a rule allowing collective self-defence. What role does the verbal act play in the formation of the law? Professor D'Amato's position that it is dangerous to view a failure to protest as consent must be correct.[156] It seems that all States do consent to the way that customary rules are formed. But it would be difficult to ignore the role that protest has played in formation of rules of custom. For example, small States may lack the financial resources to do more than make a verbal protest. They may be willing, but not able to join a military expedition. It is difficult to agree with the view that a protest could simply highlight the correctness of the rule protested against.[157]

Interaction of Treaties and Custom

It is well established that 'by the conclusion of a bilateral or plurilateral treaty a State may be affecting an act of practice capable of contribution to the formation of a rule of international customary law in the domain to which the treaty relates.'[158] It is precisely what that effect is that creates controversy among international jurists.

Treaties Codifying Customary Law

The International Court of Justice has found in many cases that a treaty codifies a specific rule of law.[159] In the *Namibia* case the Court demonstrated that the rule on the rights of termination of a treaty on account of breach contained in the *Vienna Convention on the Law of Treaties* encapsulated an existing rule of customary law.[160] Hugh Thirlway regards the formulation of the courts statement including the use of the phrase *in many respects* as a 'cautious formulation'.[161] The court said:

> The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without dissent-

156 D'Amato, above n 4, 85 note 20.

157 D'Amato, above n 4, 101.

158 Thirlway, above n 55, 86.

159 *Fisheries Jurisdiction Case (United Kingdom of Great Britain v Iceland) (Jurisdiction)* [1973] ICJ Rep 3, 25, 70; *Fisheries Jurisdiction Case (United Kingdom of Great Britain v Iceland) (Merits)* [1974] ICJ Rep 3, 22, [50], 191, [42]. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16, 47, [94]; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, 31, [62]; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* [1984] ICJ Rep 246, 300, [112]; *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* [1982] ICJ Rep 18, 66, [84]; *Nicaragua*[1986] ICJ Rep 14, 111, [214].

160 *Namibia Case* [1971] ICJ Rep 16, 47, [94].

161 Thirlway, above n 55, 88.

> ing vote) may in many respects be considered as a codification of existing customary law on the subject.[162]

Similarly, in the case of *United States Diplomatic and Consular Staff in Tehran*[163] the court found that the Vienna Conventions on Diplomatic and Consular Relations were codifications of pre-existing obligations under customary international law.[164]

Treaties Stating a New or Changed Law.

Professor D'Amato argues that the multilateral conventions containing prohibitions against human rights violations, such as genocide, constitute evidence of customary law binding upon all States.[165] This theory applies in fact to all 'generalisable' treaty provisions, but not to those which are subject to a reservation.[166] Dr Akehurst took the position that his wide definition of 'State practice' means that participation in treaties is accepted as State practice.[167] However, he argued that 'treaties, like other forms of State practice, must be accompanied by *opinio juris* in order to create customary law.'[168] For Dr Akehurst, statements about customary law in the text of a treaty or in the *travaux préparatoires* would suffice as indication of the *opinio juris* of the act of signing the treaty.[169] Not surprisingly, Professor D'Amato argues that there will not be many instances of *travaux* that manifest any intent other than to declare existing customary law thus rendering Dr Akehurst's argument the same as Professor D'Amato's.[170]

In the context of human rights law, Theodor Meron argues that the permissibility of reservations to treaty clauses is not determinative of whether that clause is normative or not.[171] One reason for this is that it is not permissible for the nature of a reservation to be incompatible with the object and purpose of a convention.[172] This view is consistent with the decision of the International Court of Justice in the *Reservations to the Convention on Genocide* case.[173] But it would also appear to be consistent with Professor D'Amato's view. Meron asserts that it is important to closely examine each reservation to determine its compatibility with the purpose of the treaty. It seems if that process is undergone, then a reservation which was fun-

162 *Namibia Case* [1971] ICJ Rep 16, 47, [94].

163 [1980] ICJ Rep 3.

164 Ibid 31, [62].

165 Anthony A D'Amato, *International Law: Process and Prospect* (Transnational, 1987) 124.

166 D'Amato, above n 140, 5.

167 Akehurst, above n 11, 42-3.

168 Ibid 44.

169 Ibid 45.

170 D'Amato, above n 165, 133-5.

171 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, 1989) 24.

172 Ibid 11.

173 [1951] ICJ Rep 15, 24.

damentally opposed to a treaty provision would not be allowed. This would remove Professor D'Amato's objection which is based upon the universality of rules of customary law.[174]

In the *North Sea Continental Shelf Cases* it was submitted to the Court that even if the rule in Article 6 of the 1958 Continental Shelf Convention was not reflective of a 'crystallization' of a rule of law, such a rule has come into being since the convention was created.[175] The court held that although this type of rule creation was possible, certain requirements needed to be fulfilled for this to be so in the present case.[176] The court said that treaty provisions, to create rules, should be of a fundamentally norm-creating character and that participation in the treaty which is wide-spread and representative might be enough to create a rule of law without the passage of any considerable period of time.[177]

The Court went on to say that within the context of the rule, 'State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'[178]

In his 1972 book Thirlway expressed his view that the *North Sea* judgment demonstrates the court's opinion that 'in appropriate cases "widespread and representative" participation in a convention may suffice both as evidence of *opinio juris* and as sufficient State practice.'[179] Michael Akehurst disagreed with this point, arguing that the fact that the court said there was a need to show 'a general recognition that a rule of law or legal obligation is involved' means that *opinio juris* is not something which can be inferred from practice.[180]

Hugh Thirlway indicates that a key feature of the 'crystallization' process is the existence of a text which sets out the rule.[181] This text could be any text which was 'widely known in the community of States and emanated from a source worthy of respect.'[182] Even though he believes that in theory a resolution of the *Institut de Droit International* could serve this purpose, he doubts that it would have the 'focusing effect' required.[183]

The argument that States will say that they are codifying customary law more often when treaty provisions are 'generalisable' is convincing. It seems likely that States will sign treaties to codify the most important rules of international society

174 A state may not reserve itself from a rule of customary international law: D'Amato, above n 165, 124.

175 *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 41, [70].

176 Ibid 41, [71].

177 Ibid 41-2, [72-3].

178 Ibid 43, [74].

179 Thirlway, above n 141, 86, quoted in Thirlway, above n 55.

180 Akehurst, above n 11, 50.

181 Thirlway, above n 55, 94.

182 Ibid.

183 Ibid.

rather than leave to chance whether another State will recognise the existence of a customary rule with no treaty to base the claim upon.

Conclusion

An examination of the method of customary international law formation is necessary before an attempt can be made to apply those methods to any specific rule of international law. The prohibition on the use of force in international relations is recognised as such a rule.[184] If there has been a change in the way that customary law is formed it may mean that the United States' uses of force during the past decade would have been illegal, but for a change in the way rules of law are created. This paper attempts to demonstrate that a change in the way rules are made has not occurred. The question of whether the actions of the United States and its allies toward Iraq and Afghanistan are legal remains uncertain.

Some of the uncertainty about the lawfulness of the actions taken is caused by claims that all of the actions taken have been consistent with international law in different ways. It is generally argued by academics that States' claims to be operating consistently with international law should be considered as evidence in support of the international rule of law. However, Professor D'Amato argues that what governments say about why they performed an act is not nearly as important as what the government actually did.[185] He asserts that inferences about the reason for acts must be drawn from the practice itself instead of simply accepting the statements of States at face value.[186]

Professor Lowe's concern is not what action was or should be taken in the circumstances that exist today between the US and Iraq or Afghanistan, but who should take that action. His view is that:

> the coherence of the substance of the rule with legal and moral principles is only half of the matter. Dealing in crack cocaine is a crime, and we applaud the police and courts for apprehending offenders and punishing them. But we do not applaud vigilantes, or rival drug dealers, when they do the same. Are the USA and the UK acting as the world's policemen in Iraq, or as vigilantes? How do we draw the line?[187]

Writing in 1993, Sir Arthur Watts expressed a similar view.[188] He said that a "self-appointed 'police-man' State, acting to uphold its own assessment of the law and of the interests of the community (especially where the community, as represented in the United Nations, has failed to agree on what the community interest requires), is

184 *Nicaragua* [1986] ICJ Rep 14, 101, [190].
185 D'Amato, above n 165, 230–2.
186 D'Amato, above n 165, 231.
187 Lowe, above n 79.
188 Watts, above n 13, 43.

a dangerous instrument for upholding international law and is in principle antithetical to the international rule of law."[189]

Both of these statements would appear to accurately reflect the current issues before the world community. The international rule of law requires that a set of rules which is certain, be applied equally to all States. It is unlikely that in the long-term one State or even a group of States operating as 'first among equals' can wield the type of power being demonstrated today without doing serious damage to the international rule of law. In those circumstances the question of a change in the way rules are created and changed as raised by Dr Byers becomes an academic one.

189 Ibid.

What Price Justice? Prosecuting Crimes Post-Conflict

Geoff Gilbert[1]

> "There are times when we are told that justice must be set aside in the interests of peace. It is true that justice can only be dispensed when the peaceful order of society is secure. But we have come to understand that the reverse is also true: without justice, there can be no lasting peace." Kofi Annan, United Nations Secretary-General, addressing the judges of the International Criminal Court at their inauguration, 11 March 2003, Press Release SG/SM/8628 L/3027

Introduction

In the aftermath of conflict, there will inevitably have been war crimes and crimes against humanity that now need to be addressed. The newly instituted government is faced with a list of competing pressures, some internal and some external. At one level, the new government may well include members of a previous regime associated with crimes during its period of office, while the period of conflict may have given rise to crimes perpetrated by both sides. On the other hand, the need to achieve peace and engage in post-conflict restoration means that there is compelling pressure to turn a blind eye. Those who favour realpolitik even point to Article 6.5 of the 1977 Second Additional Protocol to the Geneva Conventions of 1949[2] that seems to encourage impunity through the grant of the 'broadest possible amnesty' at the end of hostilities.[3] Additional problems arise where the international commu-

1 Attendance at the Challenge of Conflict conference would not have been possible without the generous support of the British Academy

2 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, 16 ILM 1442 (1977).

3 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, 16 ILM 1442 (1977). There is no equivalent in the four Geneva Conventions of 1949 or the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 UNTS 85; Geneva Convention relative to the

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nity forms the new "government" post-conflict before an intended transfer of power to the local politicians. On the other hand, any trials that are conducted must be fair if the prosecution is to play any part in restoring faith in the State's system of justice. The focus of this paper is how international law has approached bringing alleged international criminals to justice post-conflict. To that end, it reviews the activities of the various tribunals established since 1990 to prosecute the crimes committed in the former Yugoslavia, Rwanda, Sierra Leone, Kosovo, East Timor, Cambodia and Iraq, as well as considering the future role of the International Criminal Court.

While some conflict crimes will inevitably escape censure for lack of evidence and political will, the international law of armed conflict, international criminal law and international human rights law demand prosecution in certain heinous cases – grave breaches of the Geneva Conventions and Protocol I, genocide and torture. Should it be different if a UN administration is in charge post-conflict? Should there be more than one 'line' drawn, with some crimes demanding international condemnation rather than simply trial in the domestic courts?

At the outset, it is worth noting that international criminal law and international human rights law are related but are very different. International human rights law is an obligation of States that only the State can breach and where the liability is civil. International criminal law applies to individuals and liability is criminal. The confusion arises because one and the same set of events can leave the State in breach of its international human rights law obligations and an individual guilty of an international crime, such as torture by a State official. In addition, such international crimes and breaches of international human rights law will ordinarily have occurred within the framework of the international law of armed conflict.[4] The international law of

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Treatment of Prisoners of War, 1949, 75 UNTS 135; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287. All entered into force Oct. 21, 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 UNTS 3, entered into force Dec. 7, 1978.). Indeed, for grave breaches there is a duty to search for and prosecute alleged offenders. It was the intention of the drafters of Protocol II that Article 6.5 would only deal with the crime of taking up arms against the State and not war crimes, although unlike the Geneva Conventions 1949 and Additional Protocol I, Protocol II did not provide for individual criminal responsibility for any breach of its provisions. Cf. *Dusko Tadic, a.k.a. 'Dule', Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY*, Case No.IT-94-1-AR72 (1995) at paragraph 134: 'these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.'

4 The international law of armed conflict encompasses both international and non-international armed conflicts. The term "international law of armed conflict", used throughout this paper, is preferred to international humanitarian law because the latter is vague and imprecise whereas the former is understood by the military and by international lawyers to refer to the *ius in bello*, that is, Hague law (see the Conventions on the laws of war 1899 and 1907, especially Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on

armed conflict imposes obligations on parties to the conflict although it only rarely accords rights to the individual; breach of some of its provisions can give rise to individual criminal responsibility. These three areas of international law overlap, but all events have to be analysed separately in the light of the requirements and constraints of each. Achieving justice, that is, bringing to trial those who have violated international criminal law, requires an understanding of all three areas of international law.

The Responses to Crimes Committed during Conflicts Since 1990

The last decade of the twentieth century saw a renewed effort to bring perpetrators of heinous crimes committed during certain conflicts to justice. Equally, the practice of establishing truth and reconciliation commissions continued. Whatever the success or failure of such attempts might be, the issue to be considered below, what is clear is that once certain crimes come to the knowledge of the international community, what happens to those who have perpetrated them can no longer be left as a simple matter of domestic jurisdiction. Certain crimes are matters of international concern.[5] The principle of universal jurisdiction, especially in its mandatory form in relation to grave breaches of the Geneva Conventions and Additional Protocol I thereto, has always allowed the international community to exercise jurisdiction over certain crimes through domestic trials.[6] However, the final decade of the twentieth century saw international criminal tribunals being established for the first time since

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Land, 1907, 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol TS 227, entered into force Jan. 26, 1910) and Geneva law (above, note 3); see generally, UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004); D. Schindler & J. Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* (Martinus Nijhoff, 1988). Note, although "international humanitarian law" is used in the title and some of the provisions of the *ad hoc* tribunals for Rwanda and the former Yugoslavia, it is not used in any of the Articles defining crimes. Nor is the term used in the crimes listed in the Rome Statute of the International Criminal Court (below, note 73).'

5 For instance, see Amnesty International's criticism of the failure by the UN and the international community to address serious conflict crimes in Afghanistan – *Afghanistan: Re-establishing the rule of law*, ASA 11/021/2003, 14 August 2003, at pp.48 *et seq*. International human rights law imposes a duty to investigate and prosecute certain crimes even where they would not amount to grave breaches of the Geneva Conventions (above, note 3). See *Nachova v Bulgaria* European Court of Human Rights (Grand Chamber), 26 February 2004.

Equally, however, one ought not to ignore the domestic courts martial that have been held to deal with crimes committed by the State's own military, see, for example, the discharge of three U.S. soldiers for abusing prisoners of war, BBC News Website (UK Edition) 5 January 2004, <http://news.bbc.co.uk/1/hi/world/middle_east/3370979.stm>; see also, French investigation of four soldiers taking part in a peacekeeping operation in Côte d'Ivoire, *The Guardian* p.13, 3 January 2004.

6 Universal jurisdiction permits any State to prosecute certain crimes committed anywhere in the world by anyone. Usually universal jurisdiction is permissive, but in the case of grave breaches of the Geneva Conventions and Additional Protocol I, States are obliged to search for perpetrators and bring them before their courts regardless of their nationality.

the end of the Second World War. The establishment of international criminal tribunals ought to have led to a more co-ordinated response by the international community to international crime than States acting individually through the exercise of universal jurisdiction. It is trite fact that the Security Council established the *ad hoc* tribunals for the former Yugoslavia and Rwanda, but what is often overlooked is that various other war crimes tribunals have been set up at the domestic level, sometimes with international involvement, sometimes without. If the period since 1990 has seen war crimes prosecuted with a greater consistency, the types of tribunal dealing with those cases have been many and varied.

The *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda

In response to the crimes committed in the former Yugoslavia and Rwanda, the Security Council, acting under Chapter VII, established the two *ad hoc* tribunals in 1993 and 1994, respectively.[7] While the *ad hoc* tribunals are spoken of as if they were mirror images of each other, there are significant differences in terms of their jurisdiction *ratione materiae*. It is not part of this paper to compare and contrast the definitions of crimes in the two Statutes, but when one notes that the jurisprudence of the tribunals is likely to have a profound effect on the decision-making process in the newly established International Criminal Court, which has its own definition of crimes within its jurisdiction, then it highlights one general problem with the response of the international community since 1990 – the singular absence to date of any grand, systematic or integrated design. That is not to say that the work of the *ad hoc* tribunals was lacking, far from it, but that there has been little or no evaluation of the success or failure of the various judicial responses to armed conflict by the international community before yet another variation on the theme of post-conflict justice was attempted. While both *ad hoc* tribunals were created by the Security Council under Chapter VII of the United Nations Charter, the differences between the nature of the conflict in the former Yugoslavia and Rwanda, amongst other reasons, dictated that the Statutes would have to be different.[8] Nevertheless, that does little to explain the two completely different approaches to crimes against

7 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UNSC Res.827 (1993) which may be found in 32 *ILM* 1192 (1993); the Statute of the 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), is to be found in UNSC Res.935 and 955 (1994), reprinted in 5 *Crim LF* 695 (1994).

8 The former Yugoslavia saw international armed conflicts and non-international armed conflicts, whereas Rwanda was deemed to be solely non-international. As such, grave breaches of the Geneva Conventions (but not Additional Protocol I, even although ratified by the former Yugoslavia) can be prosecuted before the ICTY, while the ICTR

humanity – the Statute of the ICTY requires, wrongly, that there be an armed conflict,[9] but has no requirement of persecution, nor that the crimes against humanity be widespread or systematic, while the Statute of the ICTR does not need there to be an armed conflict, but the crimes must be widespread or systematic and there has to be a persecutory element. It is not without significance that the tribunals are labelled '*ad hoc*'.

More pertinently for this examination, one question that needs much deeper analysis is whether the Security Council had the power to create the tribunals and, even if it did, whether it was the most appropriate organ of the United Nations for this purpose.[10] The *ad hoc* tribunals were established under Chapter VII of the United Nations Charter that had the advantage that member States of the United Nations were bound to comply with their requests. Given that they were established with primacy over national jurisdictions under their Statutes, the *ad hoc* tribunals had great authority to obtain the surrender of alleged perpetrators, something that was certainly seen as necessary with the war in the former Yugoslavia still continuing in 1993 and with the *genocidaires* at large in 1994 in neighbouring States, particularly what was then Zaire. However, the Security Council only has those powers granted to it by the United Nations Charter.[11] Assuming that an international criminal tribunal can be seen as part of a process to maintain or restore international peace and security, the powers are to be found in Articles 41 and 42. Since Article 42 authorizes the use of force,[12] it is Article 41 that is pertinent:

> Article 41
> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

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expressly had jurisdiction over violations of common Article 3 and Additional Protocol II.

9 See *Tadic*, above note 3, at paragraphs 140-41: 'It is by now a settled rule of customary international law that crimes against humanity do not require a connection to … any conflict at all.' (paragraph 41).

10 I am indebted to my colleague, Elizabeth Griffin, for sharing her thoughts with me on this issue. But for her insights, this paper would have been much the poorer. Needless to add, any errors are mine alone. See also, D. Sarooshi, 'The Legal Framework Governing UN Subsidiary Organs', (1996) 67 *British Yearbook of International Law* 413.

11 See also, paragraphs 31 *et seq*. of the *Tadic* case, above, note 3.

12 Article 42: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'

While the list of Article 41 responses is not exhaustive, establishing international tribunals to prosecute crimes does not automatically resonate as a method for maintaining or restoring international peace and security under Chapter VII. Such actions sit more comfortably within the functions of the General Assembly. Nevertheless, the Security Council has the power to create subsidiary organs under Article 29. However, *independent* international criminal tribunals do not necessarily fall within the definition of a *subsidiary* organ, a term more normally understood to refer to investigative bodies established for dispute settlement.[13] As such, one would have to find that the ICTY and ICTR are special sorts of subsidiary organs.[14]

If Article 41 is not the source of the Security Council's authority for establishing the ICTY and ICTR, can one find a general power so to do in order that it can properly fulfil its functions? The United Nations has international legal personality. In the *Reparations Case*,[15] the International Court of Justice, acknowledging the role the United Nations was intended to fulfil according to its founders, with its attendant duties and responsibilities, held that the attribution of international personality in large measure was indispensable. Whilst the United Nations is not a State, 'it is a subject of international law and capable of possessing international rights and duties'.

As such, while one must always start with the Charter as the source of authority for the actions of the organs of the United Nations, powers can be implied so as to enable it to carry out its necessary tasks and fulfil its role:

> Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers that are not expressly provided for in the basic instruments that govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers. As far as the United Nations is concerned, the Court has expressed itself in the following terms in this respect:
> 'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp.182-183).'[16]

Given, however, that Article 41 is not a closed list of measures Member States can be asked to take, if one cannot imply the creation of *ad hoc* tribunals into that provision,

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13 See P. Sands and P. Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell, 2001) at paragraph 2-040.

14 As the ICTY found at paragraph 15 of the *Tadic* case, above, note 3, without citing supporting authority.

15 *Reparation for Injuries Suffered in the Service of the United Nations* Case, Advisory Opinion, [1949] ICJ Rep p.174 at pp.178-79.

16 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ General List No.95, 8 July 1996 at paragraph 25.

should one be so quick to imply it under some general authority 'as being essential to the performance of [the Security Council's] duties'?

On the other hand, given that it is over a decade since the ICTY was established, the issue of whether it was *ultra vires* seems a tad moot. The Security Council did create the *ad hoc* tribunals and they have functioned.[17] Nevertheless, while they are a practical reality, it is important in relation to any future developments in this area and for academic integrity that the lawfulness of their creation does not go unchallenged. The more fruitful line of inquiry now, however, would seem to be whether they have fulfilled their expectation.

The Security Council established the ICTY in Resolution 827 (1993) 'to take effective measures to bring to justice the persons who are responsible for [widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina]', to prosecute 'persons responsible for serious violations of international humanitarian law' so as to 'contribute to the restoration and maintenance of peace', '[believing] that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed'.

The ICTR had similar aims, but also included a reference to national reconciliation.[18] How far the establishment of the ICTY led to the Dayton Accords 1995 is not susceptible of a straightforward answer, but one can more readily critique whether the ICTY, and similarly the ICTR, has prosecuted those responsible for serious violations of international humanitarian law and has effectively redressed those violations.[19] It is clear from the ICTY website[20] that not every prosecution has been of the most serious violators of international humanitarian law. Moreover, some of

17 See also, the *Lockerbie* case, where the ICJ seems to have deferred to the Security Council, so it is difficult to see how the Security Council's decision could be challenged (*Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v United Kingdom and the USA*, [1992] ICJ Rep p.3 at paras.39 *et seq*., 31 ILM 662 (1992). See generally F. Beveridge, 'The Lockerbie Affair', (1992) 41 *International and Comparative Law Quarterly* 907 at 916-919; *cf*. J. E. Alvarez, 'Judging the Security Council', (1996) 90 *American Journal of International Law* 1). See also, §IV.7 of the dissenting judgment of Judge Weeramantry in *Legality of the Threat or Use of Nuclear* Weapons, *ibid*. For the sake of completeness, it should here be pointed out that, even if the Security Council had expressly endorsed the use of such weapons, it is this Court which is the ultimate authority on questions of legality, and that such an observation, even if made, would not prevent the Court from making its independent pronouncement on this matter.

18 See UNSC Res.935 and 955 (1994).

19 Some of the information that follows comes from a paper delivered by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, United Nations, at Wilton Park in September 2003. His comments were personal and should not necessarily be read as reflecting the views of the United Nations. Equally, this paper does not make specific references to his paper.

20 <http://www.un.org/icty/index.html>.

the worst offenders are still at large, although that can hardly be the fault of the Tribunal that is dependent on co-operation from States. What can be attributed to the Tribunal, at least in part, is that the proceedings take a very long time to come to trial and that the subsequent trial is very drawn out.[21] In some of the cases, the pre-trial detention and the length of the trial itself would be in breach of international human rights law if it were taking place in a State.[22] Not only does the delay prejudice the accused, it denies redress in the form of judgment against the perpetrators to the victims of these crimes.

It would be wrong to criticize the tribunals for not doing something for which they were not designed or for which there not given the power, but judgments in the ICTY and ICTR cannot provide compensation to victims and the tribunals are never going to produce a full record of the conflict that can be agreed by all sides so as to allow the States to move on.[23] If the restoration of peace and national reconciliation was an objective, these other functions need to have been set up by the Security Council separate from the *ad hoc* tribunals. Where it is more legitimate to criticize the Security Council is in not recognizing that the remoteness of the ICTY and ICTR from the scenes of the crimes, The Hague and Arusha respectively, although essential at the time they were established, would mean that the populations would not feel part of the process. It is slightly better in the former Yugoslavia where trials are broadcast on television, but for purely logistical reasons most people in Rwanda are wholly unaware of the progress of trials in Arusha. Justice needs to be seen to be done.

Another problem with the international criminal tribunals has been their cost. Justice never comes cheap and there are problems at the opposite extreme, as will be seen, but they now cost over $200 million per year and almost $1.5 billion has been spent on them since their establishment. It is little wonder that the Security Council

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21 *The Prosecutor v Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, also known as "Vlado"*, IT-95-16 "Lasva Valley", Judgment 14 January 2000. The accused petitioned the ICTY before surrendering because they were afraid of the lengthy delays (paragraph 6). The Trial Chamber sat for 111 days beginning on 17 August 1998. Judgement was delivered on 14 January 2000. The ICTR's track record is worse. In *The Prosecutor v Théoneste Bagosora*, ICTR-96-7-DP, there was a continuation of detention on remand on 18 June 1996, the hearing of motions commenced on 30 August 2001, the trial did not start until 2 April 2002, and it is still continuing.

22 Note that Article 21.4(c) of the ICTY Statute/ Article 20.4(c) of the ICTR Statute states the accused is entitled to trial without undue delay.

23 It is noticeable that the facts on which the judgments are based are much fuller than would be the case in domestic trials, as if the judges recognize the need to report what happened and the context of these crimes. While the ICTY and ICTR cannot award compensation to victims, they can both 'order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners', Article 24.3 of the Statute of the ICTY, Article 23.3 of the Statute of the ICTR. Under Rule 106 of the Rules of Procedure and Evidence of both the ICTY and ICTR, where an accused is found guilty, the Registrar shall forward the judgment to the competent authorities of the State and the victim can seek compensation through the national courts and the judgment shall be final and binding with respect to criminal responsibility.

has started the process of bringing the tribunals to an end. UNSC Resolution 1503 (2003) has again reaffirmed the completion strategies for both *ad hoc* tribunals: that they finish investigations by the end of 2004, trials at first instance by the end of 2008, and all work in 2010 – indictments for those not yet apprehended are drafted in such a way that individual charges can readily be dropped in order of least seriousness the nearer the deadline for completion of trials approaches.

Thus, at one level the *ad hoc* tribunals can be seen as too slow for both the perpetrator and the victims, an inadequate response to all the problems of post-conflict resolution, too remote and too expensive. To leave it at that, however, would be extremely unfair. The tribunals have advanced international criminal law and the international law of armed conflict to new levels, developing their scope more quickly than could ever have been anticipated, particularly with respect to individual criminal responsibility in non-international armed conflicts. Furthermore, the understanding of genocide has progressed immeasurably.[24] The fact that the tribunals were established by the Security Council under Chapter VII gave them the authoritative status necessary to achieve these results. Moreover, the creation of these Chapter VII courts has provided the base for the subsequent development of other international criminal tribunals through more consensual means and with a more integrated approach in relation to the domestic criminal law system. Their like will never, in all probability, be seen again, as is evidenced by the refusal of the Security Council to establish similar tribunals for Sierra Leone or Cambodia, discussed below. However, the ICTY and ICTR paved the way for the acceptance of an international response to prosecuting the crimes that arise in situations of conflict. Without them, impunity would still reign.

Mixed or Hybrid Tribunals[25]

A hybrid tribunal has been established for Sierra Leone; one was originally planned for Cambodia to deal with the past history of atrocities, but that particular tribunal never came to fruition. Hybrid courts respond to two of the criticisms of the ICTY and ICTR, that is, that they were too remote and too expensive. The remoteness issue is addressed by establishing the court in Freetown, Sierra Leone, and by providing it with a mixed bench made up of Sierra Leonean and international judges, hence, in part, its hybrid nature. The costs issue was meant to be solved by giving it a fixed timeframe in which to carry out its functions and effectively making it responsible for raising its own funds. In addition, a truth and reconciliation commission was established to operate alongside the court in order to write the history of the conflict, something that no judicial body is designed to do.

24 E.g., *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 September 1998.

25 See L.A. Dickinson, 'The Promise of Hybrid Courts', (2003) 97 *American Journal of International Law* 295.

The Special Court for Sierra Leone (SCSL) is not a United Nations organ,[26] but was established by agreement between the United Nations and the then government of Sierra Leone. In June 2000, the President of Sierra Leone wrote to the Security Council asking it to establish a court for the prosecution of crimes perpetrated during the conflict in his country. The Security Council asked the Secretary-General to negotiate an agreement with the government to create a statute for an independent court.[27] The agreement was signed in January 2002 and was ratified by the Sierra Leonean government in March 2002.[28] The Statute of the SCSL was annexed to the agreement. Local and international judges, the latter forming the majority, sit in the Trial Chambers and the Appeals Chamber.[29] They apply international crimes,[30] such as crimes against humanity, violations of common Article 3 and Additional Protocol II, and other serious violations of international humanitarian law, as well as crimes under the law of Sierra Leone.[31] As such, the SCSL is much less remote than the ICTY and ICTR, both in geographic terms and because the presence of local judges on the bench gives a greater sense of national involvement in the decision-making. Furthermore, having been agreed to by the government, it should not suffer from the lack of co-operation faced by the ICTY and ICTR in their dealings with States of the former Yugoslavia and Rwanda.[32]

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26 There is an argument that re-establishing the rule of law and post-conflict justice should be part of every UN peacekeeping operation and, as such, the SCSL should have been part of UNAMSL, but this turned out to be unrealisable.

27 UNSC Res.1315 (2000) of 14 August 2000: '1. Requests the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, and expresses its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General.' See also the Secretary-General's report, S/2000/915, 4 October 2000.

28 Supplement to the Sierra Leone Gazette Vol. CXXX. No II, 7 March 2002, The Special Court Agreement, 2002, Ratification Act, 2002.

29 Article 2 of the Agreement.

30 Articles 2-4, Statute.

31 See, Article 5, Crimes under Sierra Leonean law: 'The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31): i. Abusing a girl under 13 years of age, contrary to section 6; ii. Abusing a girl between 13 and 14 years of age, contrary to section 7; iii. Abduction of a girl for immoral purposes, contrary to section 12. b Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861: i. Setting fire to dwelling – houses, any person being therein, contrary to section 2; ii. Setting fire to public buildings, contrary to sections 5 and 6; iii. Setting fire to other buildings, contrary to section 6.

32 Which is fortunate given that the SCSL is not a Chapter VII Tribunal and so cannot rely on the mandatory character of a Security Council Resolution. More pertinently, while under Article 8.1 of the Statute, the SCSL has concurrent jurisdiction with domestic Sierra Leonean courts, Article 8.2 gives the former primacy.

Nevertheless, the SCSL is not without its own problems.[33] The agreement provides in Article 6 that the expenses of the Court 'shall be borne by voluntary contributions from the international community'. As forecast by the Secretary-General, the voluntary contributions have not been as forthcoming as had been hoped and the expected costs, which anyway turned out to be a serious underestimate, have not been fully met.[34] Moreover, while it is infinitely less remote than the ICTY and ICTR, money spent on the SCSL is not going to directly help with the restoration of a functioning judiciary and legal system for Sierra Leone as a whole.

Another issue is that of complexity. This operates at several levels. The choice of offences to be within the jurisdiction of any such court or tribunal has to be specific to the crimes perpetrated during the conflict, but given that the Statutes for the ICTY, ICTR and International Criminal Court all existed when that for the SCSL was drafted, one could have hoped that common elements would be replicated. Between 1993 and 2002, four different definitions of crimes against humanity emerged. In some ways, the later versions improved on earlier errors, such as removing the link between crimes against humanity and an armed conflict that had been incorporated in Article 5 of the ICTY Statute, but in other ways the difference is inexplicable.[35] Such differences, while generally minor in effect, do not allow for a clear linear development of individual criminal responsibility in international law. Another initial cause of complexity at the SCSL arose from the amnesty granted in the Lomé Peace Agreement of 7 July 1999.[36]

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33 Including the death whilst awaiting trial of Foday Sankoh, the principal architect of the civil war.

34 The Secretary-General's Report, S/2000/915, states that a 'financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment' (paragraph 70). The Secretary-General preferred assessed contributions, see paragraph 71. See also, UNSC Res.1537 (2004) calling on those who have made pledges to fulfil their commitment and supporting the Secretary-General's request to the General Assembly to provide some finances out of the regular budget, see paragraph 9.

35 For instance, persecution is a separate crime within crimes against humanity under Article 5 of the ICTY Statute, it is an essential requirement of all crimes against humanity under Article 3 of the ICTR Statute, it is a separate crime under Article 7 of the Rome Statute, although it must be connected to one of the other crimes under the Statute, and it is again a separate and discrete crime under Article 2 of the SCSL Statute. The list of grounds of persecution does not, however, coincide with that in any other Statute. For example, why was gender dropped from the list that is found in Article 7 of the Statute of the International Criminal Court?

36 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Peace Agreement), S/1999/777, 7 July 1999, <http://www.sc-sl.org/lomeaccord.html>.

> Article IX – Pardon and Amnesty
> 1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.
> 2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
> 3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

Under Article 1, the SCSL has temporal jurisdiction for Statute crimes committed after November 1996. UNSC Resolution 1315 (2003) recognized in its preamble that while the Special Representative of the Secretary-General had put his signature to the Lomé Peace Agreement, he appended,

> [A] statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.

Furthermore, Article 10 of the Statute of the SCSL asserts that an amnesty shall not be a bar to prosecution of the crimes set out in Articles 2 to 4.[37] Given that the Lomé Peace Agreement was signed by the government of Sierra Leone, the Appeals Chamber held that the amnesty could not be binding on the SCSL.[38] The final issue in relation to which there is complexity is the interrelationship between the SCSL and the National Truth and Reconciliation Commission. Such procedural matters are beyond the scope of this paper, but the sight of the TRC joining a complaint by an accused to the SCSL about how he could give his testimony to the TRC did not give the impression of a well-thought through process.[39] International courts

37 Although, apparently, it is effective with respect to crimes under Sierra Leonean law, see Article 5.

38 *Prosecutor v Kallon and Kamara* SCSL-04-15/16-PT-060, 13 March 2004.

39 SCSL-03-08-PT-122, Norman, Decision on Appeal by TRC and accused against the decision of his Lordship Justice Bankole Thompson to deny the TRC request to hold a public hearing with Chief Norman – 28 November 2003, and the SCSL press statement

and tribunals perform one function post-conflict, while TRCs fulfil a different but related one. The experience in the *Norman* case makes it seem as if the two bodies are in competition, even if that is not the case in practice.

The final problem with the hybrid SCSL is in some ways the most fundamental. The conflict in Sierra Leone had international elements, in that the rebel movements garnered support from some neighbouring States. In March 2003, an indictment was issued against Charles Taylor, then President of Liberia, for crimes under Articles 2, 3 and 4 of the Statute. While Article 1 only provides the hybrid court with territorial jurisdiction over crimes committed in Sierra Leone, Article 6 provides for individual criminal responsibility for any 'person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4'; Article 6.2 makes official status as Head of State irrelevant. However, the ICJ in the *Arrest Warrant* case[40] has held that acting Heads of State were immune from domestic jurisdiction, only international courts could try them. Nor does the resignation of Charles Taylor render the point moot as to whether hybrid courts are sufficiently international?[41] If its domestic character predominates, then according to the ICJ the warrant should never have been issued and would have to be cancelled.

> 76. In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, *notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs*. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated. (Emphasis added)

On the other hand, given that no State is likely to be willing to take a case to the ICJ on Charles Taylor's behalf, it will be for the SCSL Appeals Chamber to determine its own jurisdiction.[42]

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of 3 December 2003 responding to statement of TRC. On the TRC in general, see W.A. Schabas, 'The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone', (2003) 25 *Human Rights Quarterly* 1035.

40 *Arrest warrant of 11 April 2000 (DRC v Belgium)*, General List No.121, ICJ 14 February 2002, paragraph 61.

41 The mere fact that the SCSL was established in an agreement with the United Nations is not sufficient given the United Nations' involvement in the establishment of the Cambodian Extraordinary Chambers, discussed below. Nor does the presence of international judges suffice, since they exist in Kosovo. The fact it is funded by the international community separately from the re-establishment of the legal system in Sierra Leone may suggest it is not domestic in the sense of the third generation courts.

42 The principle of *la compétence de la competence*, see paragraphs 18 *et seq*. of *Tadic*, above, note 3.

The Third Generation – Discrete Domestic Courts

Although they are discussed together here, there is no overarching process under which these courts have been designed as part of some common plan.[43]

Cambodia

Cambodia first asked the United Nations in 1997 about establishing a court akin to the ICTY/ICTR to try Khmer Rouge leaders for the crimes committed between 1975 and 1979.[44] After some initial planning, the UN and Cambodia eventually agreed in 2000 to establish a hybrid court with national and international judges, only for the Cambodian government in 2001 to pass a new law setting up 'Extraordinary Chambers' within the Cambodian legal system; the UN claimed these Chambers allowed for no UN involvement and that the prosecutor would not necessarily be able to take action against persons who had received an amnesty. In early 2002, the Secretary-General withdrew from negotiations with the Cambodian Prime Minister on the basis that it was not certain that the Extraordinary Chambers would be independent and impartial. However, UN General Assembly Resolution 57/228 of 18 December 2002 urged the Secretary-General to reconsider and, following further discussions, a draft agreement was signed on 17 March 2003.[45] It provides for international judges to be appointed to the Extraordinary Chambers, but they are in a minority, and the Chambers will have jurisdiction under Article 1 to bring 'to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979'. The crimes are set out in Article 9:

> The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the

43 The somewhat haphazard nature of the evolution of third generation courts can be seen from the fact that bringing the work of the ICTY to an end demands a "War Crimes Chamber" in Bosnia-Herzegovina, yet its establishment is in doubt for lack of funding – see UNSC Res. 1503 (2003): '5. Calls on the donor community to support the work of the High Representative to Bosnia and Herzegovina in creating a special chamber, within the State Court of Bosnia and Herzegovina, to adjudicate allegations of serious violations of international humanitarian law.'

44 For the full story, see *Report of the Secretary-General on Khmer Rouge Trials*, UNGA Doc. A/57/769, 31 March 2003.

45 Approved by the Cambodian cabinet on 28 March and by the General Assembly on 13 May 2003, UNGA Res.57/228B.

> Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.[46]

The agreement has, nevertheless, been heavily criticised by Human Rights Watch and Amnesty International, and even the Secretary-General's own Report of 31 March 2003 contained doubts about its effective implementation.[47]

> 30. Doubts might therefore still remain as to whether the provisions of the draft agreement relating to the structure and organization of the Extraordinary Chambers would fully ensure their credibility, given the precarious state of the judiciary in Cambodia.[48]

Human Rights Watch and Amnesty International have pointed out a series of problems.[49] The concerns of the human rights community focus on several matters: the majority granted to Cambodian judges in each Chamber given the weakness of the judiciary and the political pressure that might be brought to bear; the requirement for more than a simple majority in decision-making under Articles 4 and 7.4 that seems implicitly to assume the Cambodian judges will vote *en bloc* as opposed to deciding on the facts and law; the failure to exclude outright any prior amnesty;[50] the very confused state of Cambodian criminal procedure rules which have been applied under Article 12.1;[51] the failure to apply in full the human rights guarantees in favour of the accused under the ICCPR, surprising given that Cambodia is a party thereto; and the very real fear that funds for the Extraordinary Chambers will be diverted

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46 It is good to see that no new definitions of crimes have been created, particularly that it incorporates the International Criminal Court's definition of crimes against humanity.

47 It is noteworthy that Article 2.2 of the Agreement expressly provides that the Vienna Convention on the Law of Treaties, 1969, particularly Articles 26 and 27 dealing with *pacta sunt servanda* and the non-invocability of domestic law to justify failure to perform, shall apply. See also, R. Williams, 'The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?', (2004) 53 *International & Comparative Law Quarterly* 227.

48 §IV.F deals with the UN's withdrawal if Cambodia fails to perform, incorporated in Article 28 of the Agreement.

49 HRW, *Serious Flaws: Why the UN General Assembly should require changes to the Draft Khmer Rouge Tribunal Agreement*, http://hrw.org/asia/cambodia.php, 30 April 2003; Amnesty International, *Kingdom of Cambodia Amnesty International's position and concerns regarding the proposed "Khmer Rouge" tribunal*, AI Index: ASA 23/005/2003, April 2003. On the positive side, they do note that the death penalty is no longer available (Article 10).

50 See Article 11.2: 'The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers.'

51 Article 12.1 hardly reflects a model of clarity: 'The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.'

from monies available to rebuild the Cambodian legal system in general. If one of the criticisms of the ICTY and ICTR was that the Security Council imposed its will on States such that they had to co-operate with the *ad hoc* tribunals although they had not participated in their creation, then the Cambodian Extraordinary Chambers give too much weight to the State. However, the General Assembly will only have itself to blame if, in line with all the warnings of the Secretary-General, the trials turn out to be flawed and the United Nations is tainted through its participation in the process.

East Timor

East Timor, or Timor-Leste as it now is, presents a completely different scenario, since the Special Panels were created when the United Nations was running the Transitional Administration after Indonesian withdrawal. The United Nations Transitional Administration in East Timor (UNTAET) was established by UNSC Resolution 1272 (1999) and its mandate included:

> 2(a) To provide security and maintain law and order throughout the territory of East Timor;
> (b) To establish an effective administration;
> (c) To assist in the development of civil and social services;

By UNTAET Regulation 2000/15,[52] the Special Panels were set up in the Dili District Court. Given that the entire East Timorese judicial structure was being established at the same time,[53] the interplay between the ordinary courts and the Special Panels was less than clear and the panels undoubtedly diverted resources from the ordinary courts at a time when the rule of law in general should probably have been to the fore.[54] The Special Panels were appointed with a majority of international judges.[55] They were established with jurisdiction over a mix of international and domestic crimes:[56] genocide, crimes against humanity, war crimes and torture;[57]

52 6 June 2000.

53 See especially UNTAET Reg 2000/11.

54 The budget for the UN mission was set by the General Assembly and capped the resources available Inevitably, the Special Panels used monies that would otherwise have been available for justice and the rule of law in general. The question is whether incorporating jurisdiction over the crimes within the purview of the Special Panels into the remit of the ordinary courts would have been a better use of resources. International judges could still have been used for such trials. See the Reports of the Secretary-General, S/2000/738; S/2001/983; S/2002/1223; S/2003/944; and S/2004/669 at paragraph 13. There is also a parallel Truth, Reception and Reconciliation Commission, see <http://www.easttimor-reconciliation.org>.

55 Article 22, 2000/15.

56 Sections 4 to 9.

57 The definitions of genocide, crimes against humanity and war crimes are taken from Articles 6 to 8 of the Statute of the International Criminal Court. The definition of tor-

murder and sexual offences under the applicable Penal Code.[58] By February 2002, twenty-one people had been convicted of such crimes.[59]

While East Timor gained total independence on 20 May 2002, much of the work of UNTAET was passed on to its successor, the United Nations Mission in Support of East Timor (UNMISET).[60] However, while prosecuting the serious crimes that occurred in East Timor remained a priority,[61] a number of problems have arisen. Amongst the most problematic is that the Court of Appeal in *Public Prosecutor v Armando dos Santos* decided that the applicable law prior to 25 October 1999 was Portuguese, not Indonesian as had been believed, and that the prosecution of serious crimes under UNTAET Regulation 2000/15 was unconstitutional because it violated the *nullem crimen* principle.[62] Further appeals from these rulings as well as new legislation before Parliament are seeking to bring clarity to this situation, but it does reveal yet again that there are problems in exercising post-conflict justice through domestic trials, even if there is international involvement through the judiciary and some of the laws prosecuted.[63] More serious, however, than the decisions of the Court of Appeal, is the innate problems of the Special Panels caused by the lack of enough qualified judges, delays in the hearings such that serious crimes trials will need to continue after the end of UNMISET's mandate, let alone any appeals, and the fact that many of the accused are outside the jurisdiction.[64] The delays are

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ture is taken from Article 1 of the UN Convention Against Torture, 23 ILM 1027 (1984) and 24 ILM 535 (1985), except that the perpetrator does not have to be a public official or someone acting in an official capacity. The Special Panels are deemed to have universal jurisdiction over these crimes, see the definition of universal jurisdiction in Section 2.2 of Regulation 2000/15 is as follows: '2.2 For the purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether: (a) the serious criminal offence at issue was committed within the territory of East Timor [territorial jurisdiction]; (b) the serious criminal offence was committed by an East Timorese citizen [active personality principle]; or (c) the victim of the serious criminal offence was an East Timorese citizen [passive personality principle]. Universal jurisdiction is usually established by giving a court jurisdiction whenever an offender is found in the territory of the State, *viz*. Article 5.2 Convention Against Torture.'

58 By Section 2.3 of 2000/15, the Special panels only have exclusive jurisdiction over crimes in Sections 8 and 9 with respect to the period 1 January to 25 October 1999.

59 As at 13 August 2004, it was 55, see paragraph 16, Secretary-General's Progress Report, S/2004/669.

60 See UNSC Res.1410 (2002). UNSC Res.1480 (2003) extended UNMISET's mandate to 20 May 2004.

61 See UNSC Res. 1272 (1999) and paragraph 8 of Res. 1338 (2001), reiterated in the Secretary-General's Report of 6 October 2003, S/2003/944, Annex 1.

62 See Secretary-General Report of 6 October 2003, S/2003/944, paragraph 26.

63 Note the Cambodian Extraordinary Chambers are subject to amendment by the Cambodian Parliament, although such action might breach the agreement negotiated by the Secretary-General. The Parliament in Timor Leste reversed the ruling in *dos Santos* that prior law was Portuguese and provided that it was, and had always been, Indonesian.

64 To put it in perspective, of the 23 cases before the Special Panels, 22 are affected by the fact that the accused (228 persons) are outside Timor Leste. See Secretary-General Report

so bad that the Secretary-General has admitted that they render detentions illegal.[65] If there is one constant in post-conflict justice since the inception of the ICTY, it is that the bureaucrats seriously underestimate the time necessary to carry out the prosecutions and any appeals there from, and the concomitant expenses for which they ought to budget with respect to those trials and appeals.

Kosovo

The position in Kosovo is slightly different. Like East Timor, the United Nations established a transitional administration following the withdrawal of the forces of the then Federal Republic of Yugoslavia.[66] However, Kosovo is still a UN transitional administration (UNMIK) and the Security Council asserted that its decision did not affect the sovereignty and territorial integrity of FRY. Moreover, as part of the former Yugoslavia, crimes committed within Kosovo are prosecutable before the ICTY.[67] Unlike UNTAET in East Timor, UNMIK did not create specialised chambers,[68] but international judges are involved in the general court structure.[69] They are integrated into the Kosovo judicial process at all levels and, when sitting in panels, will sit alongside Kosovar colleagues. Given that the international judges are part of the normal court structures, funding for them has not been a drain on the general re-establishment of the rule of law and justice in Kosovo. Problems to do with the administration by the United Nations of Kosovo in general necessarily impact upon the work of the international judges and prosecutors, but there is nothing intrinsic in their role that would be improved by the creation of special chambers.

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of 6 October 2003, S/2003/944, paragraphs 26-29 and Annex 1 (p.14). The corresponding trials in Jakarta before the domestic *Ad Hoc* Human Rights Tribunal of Indonesia have been heavily criticised by independent commentators, see, Human Rights Watch, *Indonesia: Courts Sanction Impunity for East Timor Abuses*, 6 August 2004; see also, the Secretary-General's Progress Report, S/2004/669, at paragraph 20.

65 S/2003/944, Annex 1, p.13.

66 UNSC Res. 1244 (1999).

67 See *The Prosecutor v Milosevic*, IT-02-54, second amended indictment of 29 October 2001, and *The Prosecutor v Limaj, Bala and Musliu*, IT-03-66, amended indictment of 7 March 2003 (the KLA case).

68 There was a proposal to create a Kosovo War Crimes Court, but it never came to fruition, see BBC News Online, 26 April 2000, <http://news.bbc.co.uk/1/hi/world/europe/727531.stm>.

69 See UNMIK Regulation 2000/6, as amended by Regulation 2000/34. According to the UNMIK Pillar 1, Police and Justice Report of November 2002, 'the problem of ethnic bias, both actual and perceived, is deeply rooted in Kosovo and is one of the main reasons for the presence of international judges and prosecutors. They are also indispensable to fight organised crime, as Kosovo local judges are vulnerable and susceptible to undue pressures' (§2.1.4, p.13).

Summary

The third generation courts bring international judges into a domestic legal system to prosecute the most serious crimes that occurred in a preceding conflict. However, in terms of structure, they have little in common, principally because of the different contexts in which they are located. Beyond structure, though, the courts all indicate that justice at this level does not come cheap.

Post-Conflict Iraq

Although a charge that could be levelled against the Nuremberg and Tokyo trials post-WWII, one might have thought that since the 1990s, post-conflict courts based on victor's justice should have had both feet firmly planted in the grave. On the other hand, the Iraqi Special Tribunal for Crimes Against Humanity established on 10 December 2003 by the Iraqi Governing Council,[70] but drafted by experts from the coalition governments, has more than a faint odour of mildew associated with such an outdated idea. The Tribunal has no express provision for international judges, although there shall be non-Iraqi advisers and observers, the authority of whom is, however, less than clear (Article 6.b and c). It has jurisdiction over genocide, crimes against humanity, war crimes and certain Iraqi laws (Articles 10-14); the first three crimes are nearly verbatim copies of the same crimes under the Statute of the International Criminal Court.[71] Some of the international human rights law standards applicable to arrest, detention and trial are incorporated in Article 20, but it is only once the Rules of Procedure and Elements of Crime have been drafted will one have a better idea about whether the accused will face a fair trial.[72] Jurisdiction is limited under Article 1.b of the Statute of the Special Tribunal to Iraqi nationals and those ordinarily resident:

> The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or

70 The Governing Council was appointed by Coalition Provisional Authority Administrator L. Paul Bremer on July 13, 2003. See also, UNSC Res. 1500 (2003) and 1511 (2003).

71 Article 14 contains crimes very specific to the history of Iraq under Saddam Hussein:

> The Tribunal shall have the power to prosecute persons who have committed the following crimes under Iraqi law: a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, *inter alia*, of the Iraqi interim constitution of 1970, as amended; b) The wastage of national resources and the squandering of public assets and funds, pursuant to, *inter alia,* Article 2(g) of Law Number 7 of 1958, as amended; and c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.

72 Note, some of those arrested by coalition forces will also be entitled to the guarantees afforded to prisoners of war under the third Geneva Convention, 1949, see Articles 82 *et seq*., especially Article 85.

> elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi'ites and Sunnis) whether or not committed in armed conflict.

Undoubtedly, those members of the coalition forces who committed war crimes during the armed conflict or do so during the occupation shall be open to prosecution under their own military codes, but for some of those due to appear before the Special Tribunal, an international or, preferably, hybrid court for the trial would seem more appropriate so as to answer for all their crimes before the international community. If Saddam Hussein's failure to comply with the rulings of the Security Council and international law was sufficient to justify the use of force by the international community, surely the international community has some interest in his prosecution beyond the jurisdiction of the Iraqi Special Tribunal for Crimes Against Humanity. It is not that the jurisdiction of this domestic tribunal is not legitimate; it is that the international community in prosecuting the war has already asserted an interest in bringing Saddam Hussein to justice for acting contrary to international law and that should be reflected in the tribunal that hears the case against him.

International Criminal Court[73]

It may seem strange to have left the International Criminal Court to the last, but in one sense it is not solely a post-conflict court – rather, it is a permanent court that could be utilized post-conflict, even by the Security Council if the latter so wished. The International Criminal Court was established by the Rome Statute of 17 July 1998 and has jurisdiction over 'the most serious crimes of concern to the international community as a whole' committed after 1 July 2002:[74] the listed crimes are genocide, crimes against humanity and war crimes under Articles 6 to 8, respectively. As might be expected of a court the Statute of which has been negotiated in international conclave, it defers to domestic jurisdiction. It is a court of last resort and its jurisdiction is severely limited under Articles 12-15: while the Security Council can refer any case under Chapter VII that falls within the list of crimes in Article 5, a State Party and the Prosecutor *proprio motu* can only initiate investigations if the State in which the crime took place or of which the accused is a national is party to the Rome Statute. Even if the Court does have jurisdiction, the principle of com-

73 Done at Rome, 17 July 1998, 37 ILM 999 (1998), as corrected by the *procés-verbaux* of 10 November 1998 and 12 July 1999. See A. Cassese, P. Gaeta and J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002).

74 Article 5. While aggression is listed under Article 5, it proved impossible to agree on a definition and it has been left in abeyance until some future meeting of the States parties (Article 5.2). No cases have yet commenced, but the Prosecutor is investigating the grave crimes committed in the Democratic Republic of Congo since 1 July 2002 and the situation in Northern Uganda arising out of the presence of the Lord's Resistance Army, see <http://www.icc-cpi.int/situations.html>.

plementarity shall prevail and the case shall be declared inadmissible where a State with jurisdiction is, for instance, investigating or prosecuting unless the State is unwilling or unable genuinely to investigate or prosecute (Article 17). Under Article 18, if any case is referred by a State party or investigated *proprio motu*, the Prosecutor has to inform all States parties and any other State that might be presumed to have jurisdiction and those States might then take over the investigation of nationals or others within its jurisdiction. As such, the International Criminal Court might well turn out to be the biggest white elephant of all the international criminal tribunals, dealing only with cases referred by the Security Council. In practice, as well as Security Council cases, some States may be more willing to surrender a fugitive to the International Criminal Court rather than to some other State asserting universal jurisdiction rather than jurisdiction based on the territorial or active personality principle. Other problems that the International Criminal Court will need to address have already been raised in relation to the ICTY and ICTR – remoteness from the crime and the victim;[75] costs;[76] that it will not produce a history of the situation that gave rise to the crimes; and, despite the effort taken to create it, the lack of State support to give it priority. On the other hand, in the long term, the existence of an international criminal tribunal with broad and general jurisdiction to prosecute the listed crimes may well reduce the number of violations of the international law of armed conflict and international human rights law.[77] Thus, the jury is still out on the International Criminal Court.

Conclusion

Some conflict crimes will never be prosecuted because the accused vanishes or there is insufficient evidence. Nevertheless, States must pursue those accused of grave breaches under the Geneva Conventions and Additional Protocol I. Furthermore, the victims of crimes are entitled to an effective remedy under international human rights law, part of which obliges the State to investigate and prosecute.[78] International human rights standards continue to apply throughout conflict subject only to dero-

75 Although Article 75 provides for reparations for victims and Article 79 establishes a trust fund for victims. Under Article 75.3, the victim has the right to make representations to the Court (Rules 94 *et seq*. of the Rules of Procedure and Evidence, ICC-ASP/1/3, 2002). See also, S. Garkawe, 'Victims and the International Criminal Court: Three Major Issues', (2003) 3 *International Criminal Law Review* 345.

76 Under Article 115, expenses will be met by assessed contributions from States parties and UN funds if agreed by the General Assembly, particularly where they relate to an Security Council referral.

77 Note, while not every human rights violation is an international crime, and *vice versa*, there will often be areas of overlap, for instance, there is no right in international human rights law not to be the object of genocide, but the right not to be arbitrarily deprived of one's life is fundamental.

78 See *Aytekin v Turkey*, 22880/93, European Commission of Human Rights, 18 September 1997, at paragraph 106; *Kaya v Turkey*, 22729/93, European Court of Human Rights, 19 February 1998, paragraph 92; *Mahmut Kaya v Turkey*, 22535/93, European Court of Human Rights (First Section), 28 March 2000, paragraphs 102-09.

gations where applicable – post-conflict, this remains a continuing obligation in the light of the circumstances then pertaining.[79] Part of resolving the conflict is to provide victims with remedies, a fact recognized in some of the bodies that have been more recently established, notably the International Criminal Court.[80] Another element in resolving the conflict is to provide an agreed history, so that everyone can acknowledge its history and the violations that have usually been perpetrated by both sides. That can best be achieved through a Truth and Reconciliation Commission – it is not a role for a court.[81] However, TRCs, while an essential part of the post-conflict process, are not part of post-conflict *justice* – that is, they do not attribute individual guilt with respect to specific crimes. It would not be an adequate response to serious violations of international criminal law unless a system were to be instituted whereby perpetrators can be prosecuted. The question is what form should the post-conflict tribunal take?

It is clear that the likes of the ICTY and ICTR will never be seen again. Similar *ad hoc* tribunals were suggested for Cambodia and East Timor and in neither case was the Security Council prepared to act. They were right for their time, but several of their failings can be avoided through either hybrid courts or third generation courts. The SCSL has many advantages. It is much less remote than the *ad hoc* tribunals, but it incorporates a majority of international judges and a format that can only be altered with the agreement of the United Nations. If it had secure funding through assessed contributions or if justice was recognised as an essential component of peacekeeping and so within the DPKO budget, then many of the problems of the SCSL would no longer arise. Third generation courts, on the other hand, can more directly contribute to the restoration of the legal system of the State rather than draw resources into one specific court structure – third generation courts could be best placed to restore justice as a whole, but they do rely on an independent judiciary and a political will to let the investigation and prosecution proceed. Moreover, for the serious crimes that shock the conscience of the international community, especially where there are doubts about the fairness of any domestic trial, there is the International Criminal Court that, under Article 13.b, can hear cases referred by the Security Council if it has the political will.[82]

In sum, post-conflict justice is still at a formative stage. What is clear is that there is less chance now of impunity ruling the day.

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79 Although the United Nations has not ratified international human rights treaties, where it establishes a transitional administration, as in Kosovo or East Timor, the various treaties are imposed at an internal level. Failure by the administration to implement them presents questions beyond the scope of this paper.

80 On victims, see generally J. Doak, 'The victim and the criminal process: an analysis of recent trends in regional and international tribunals', (2003) 23 *Legal Studies* 1.

81 Although how the two institutions are to interact needs careful thought as the Sierra Leone experience has shown.

82 The ICC can ignore claims to priority by a State where it finds that the State is unwilling or unable genuinely to carry out the investigation or prosecution, Article 17 ICC Statute.

Strengthening Enforcement of International Criminal Law

Grant Niemann

Introduction

The regulation of control of society by means of the criminal law is more effectively achieved by ensuring that the criminal law is administered fairly and enforced evenly across the community. Respect for the criminal law diminishes in circumstances where the law is rigorously applied to one part of the community but not to another. In democratic societies, there would be a public outcry if special privileges were extended to one group in the State but not to the rest of the community.

It is difficult to imagine a situation where very serious crimes such as murder, rape and torture committed on a regular basis would be tolerated by the government. This is especially so if the government allowed the perpetrators of these crimes to go unpunished. Why then has the breach of international criminal laws which prohibit murder, rape and torture when committed by the State or persons in authority, been treated so differently by the community?

In this paper I will discuss the poor performance of States when it comes to the enforcement of international criminal law. I will illustrate how States have failed to uphold this important area of the criminal law. I argue that the permanent International Criminal Court (ICC) is a weak prosecutorial instrument and easily circumvented by States determined to frustrate its efforts. I then argue the need for international civil society to support the ICC in order to allow it to perform its prosecutorial role. I propose a means whereby international civil society might achieve this objective by using a modified international people's court.

Why the Standard of Enforcement of International Criminal Law Is Different

At the heart of this issue is State sovereignty. International criminal law poses a threat to the sovereign authority of the State. States will not tolerate interference in how they conduct their internal affairs. Similarly other States are reluctant to interfere in the affairs of another State, lest they themselves be interfered with. This practice of States is not new. It goes back at least as far as the 1648 Treaty of Westphalia.[1]

The history of nations is replete with examples of the implementation of this practice. The infamous 'Bloody Sunday Massacre' of unarmed civilians at Derry

1 I.A. Shearer, *Starke's International Law* (Butterworths, 11th Ed, 1994) p 11.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 459-474.*
 ISBN 90 04 14599 0.

in Northern Ireland in 1972 by the British Army was viewed by the international community as an 'internal matter' not requiring an international response. Nor was it viewed by the majority of the British public as a criminal offence. However, if this massacre was carried out without the sanction of the sovereign State there is no question that the criminal law would have been rigorously applied. Similarly, if the massacre had occurred during an international armed conflict, it would have undoubtedly been labelled a 'war crime'.

In the *Tadic* interlocutory appeal decision[2] the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, (ICTY) described the different standards in the application and enforcement of national and international criminal law as being 'sovereignty oriented'.[3] The Tribunal described this double standard as being 'based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands'.[4] However their Honours noted that since the 1930s there has been a gradual change in attitude and that States have now become more and more inclined to get involved in human rights abuses in other countries.[5] The Court offered a number of explanations for this namely (1) the greater frequency of civil wars; (2) internal armed conflicts have become more and more cruel and protracted; (3) the large-scale nature of civil strife and the increasing inter-dependence of States; (4) the development of human rights doctrines, especially those contained in conventions such as the Universal Declaration of Human Rights of 1948 (one could add the International Covenant on Civil and Political Rights); a fifth category might also be the greater enforcement of international criminal law since the 1930s.

Apart from some notable moments in history such as at the Nuremberg and Tokyo trials and more recently The Hague and Arusha trials, international criminal law has for the most part been enforced by States using their domestic courts and or tribunals. International criminal law is not however the creation of any one particular State. It is the product of the international community of States. International crimes are those crimes which are so serious that the international community of States have set aside the traditional respect for the sovereign rights of individual States in favour of the broader interests of preserving humanity itself.[6] In view of this, it is perhaps not surprising that individual States have not been very active in enforcing international criminal law.[7]

This lack of enforcement activity is not the result of jurisdictional constraints because universal jurisdiction, conferred by both international conventions and customary law, has permitted individual States to prosecute these international crimes

2 *Prosecutor v Tadic* – Interlocutory Appeal. Appeals Chamber IT-94-1- A72. 2 October 1999.

3 Ibid par 96.

4 Above (Tadic Appeal) par 96.

5 Above (Tadic Appeal) par 97- 98.

6 Above (Tadic Appeal) par 58.

7 Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish, 2nd Ed, 2003) p 9.

at least since 1949.[8] Unfortunately the international community has maintained the position that individual States have an obligation to share the burden of enforcing international criminal law, while at the same time individual States have taken the view that the responsibility for enforcement lies with the international community. In a sense the responsibility for the enforcement of international criminal law has often 'fallen between the two stools' of States and the international community[9].

Unfortunately on the few occasions when States have taken on the role of enforcing international criminal law they have not done a very good job. After World War I the international community shrugged off its responsibility to deal with war crimes committed by Germany during the war. Germany was permitted to conduct its own prosecutions and the Leipzig trials that followed were regarded as a complete failure.[10] The prosecution of Lieutenant Calley in the United States for the My Lai massacre during the Vietnam war was never regarded as a resounding success especially when President Nixon gave him a presidential pardon resulting in him spending only a few days in custody under house arrest.[11] The failure of the French perpetrators of the 'Rainbow Warrior' bombing in Auckland Harbour to serve their minimum sentence,[12] and General Pinochet's 'on again, off again' prosecution by the Chilean Government are both examples of failed justice.[13] In all these cases the failure of the particular States may be attributed to the fact that the respective governments were reluctant to prosecute those who were in varying degrees "serving the interests of their country".

The Australian Experience

In the case of Australia, even where the offenders were not 'serving the interests of Australia' but were in fact one-time enemies of Australia, the domestic prosecution of international crimes was less than satisfactory. In the immediate post World War II era, the Government's enthusiasm to prosecute Japanese war criminals exhibited

8 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 1949, (1950) 75 UNTS 287-417 Article 146.

9 Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Thompson Sweet and Maxwell, 2003) pp 41-44.

10 Following World War I the victorious allies inserted in the Versailles Treaty a provision that allowed for the Kaiser of Germany to be prosecuted for war crimes. In addition, a commission of inquiry identified over 900 potential offenders who allegedly committed war crimes. These were mostly German soldiers. The United States opposed the international prosecution of the Kaiser, who had secured sanctuary in the Netherlands. The British and French were more interested in extracting war reparations from Germany than having potential war criminals prosecuted. As a consequence the defeated Germany secured the right to conduct these prosecutions themselves. The whole process was a farce because of the 888 potential defendants a mere 13 were convicted, a number of these escaped and most failed to serve their sentence (see Geoffrey Robertson, C*rimes Against Humanity – The Struggle for Global Justice* (Penguin Press, 1999) p 197.

11 Ibid (Robertson) p 167.

12 *Rainbow Warrior Arbitration (NZ v France)* (1990) 82 ILR 499.

13 *R v Bow Street Stipendiary Magistrate ex p Pinochet Ugarte (no.3)* [2000] 1 AC 147.

zealotry to an embarrassing level. Hundreds of prosecutions were pushed through at an alarming rate, not so much out of an interest in achieving justice, but as a means of satisfying revenge. Many of these cases, which resulted in the death penalty, were rushed through military tribunals in a matter of hours.[14]

On the other hand when it came to the prosecution of alleged Nazi war criminals who had entered Australia as part of the displaced persons program the Government turned a 'blind eye' to their presence.[15] This failure by Australia to prosecute these war criminals was clearly in breach of Australia's international obligations to bring war criminals to justice. In many respects this failure to take action occurred because of the Government's preference for having Nazi war criminals in the Australian community than communists.[16] At least in one case, the trial or extradition of an alleged Nazi war criminal meant dealing with the Soviet Union, which at that time was politically unthinkable.[17]

When the political climate changed, the Government of the day bowed to community pressure to prosecute these Nazi war crimes cases.[18] As a consequence the Government introduced legislation to amend the War Crimes Act to permit the prosecution of these alleged offenders. By this time however (1989) the evidence was so stale and the witnesses were so old and infirm that it became difficult for the court to regard their evidence as reliable. Many of the potential witnesses could not testify and those who did, encountered difficulty in remembering various aspects of their evidence such that the prosecutions proved unsuccessful.[19]

These few examples demonstrate how vulnerable the enforcement of international criminal law is to political pressure when prosecutions are conducted internally within a sovereign State. While not all prosecutions are unsuccessful or unsatisfactory,[20] there is no reason to be complacent about the lack of willingness of sovereign States to allow the prosecution of international crimes to proceed on their territory untroubled by political interference. Australia was quick to ratify the 1948 Genocide Convention[21] but very slow to make this international crime part

14 David Sissons, 'Sources on Australian Investigations into Japanese War Crimes in the Pacific' (1997) 30 *Journal of the Australian War Memorial* 1.

15 Mark Aarons *War Criminals Welcome – Australia, a Sanctuary for Fugitive War Criminals Since 1945* (Black, 2001) p 244.

16 Ibid p 259.

17 Ibid p 442 (Ervin Viks case).

18 Ibid p 465 – Menzies Report and the amendment to the War Crimes Act.

19 The three cases where the accused were indicted were: Polyukhovic, Berezovsky and Wagner. Only Polyukhovic went to trial. See also David Bevan, *A Case to Answer* (Wakefield Press, 1994) p 257.

20 Persons accused of committing war crimes during the 1990 Yugoslav conflict were successfully brought to trial in Germany and Denmark.

21 *Convention on the Prosecution and Punishment of the Crime of Genocide 1948*, 78 UNTS 277. The Genocide Convention was opened for signature on 9 December 1948. Australia signed the Convention on 11 December 1948 and ratified the Convention on 8 July 1949. At the time of ratification Australia extended the application of the Convention to all territories for the conduct of whose foreign relations Australia was responsible.

of its domestic law.[22] It is easy for a country like Australia to represent itself as a responsible member of the international community readily ratifying human rights conventions here and there,[23] if at all times it does not have the slightest intention of being bound by these conventions under domestic law.[24]

Ironically, when Australia first considered the ratification of the Rome Statute of the Permanent International Criminal Court, it faced for the first time the possibility (albeit remote) of having one of its citizens (or soldiers) removed to the Permanent Court to be tried for international crimes because Australia lacked the capacity to prosecute these crimes under its own domestic law. Accordingly in order to protect its sovereign right to deal with its own citizens, Australia amended the Federal Criminal Code to incorporate these crimes as part of domestic law. The introduction of these amendments to the Criminal Code was not motivated by some belated altruistic desire for Australia to fulfil its international obligations, but to be in a position whereby it could prevent international scrutiny of its domestic affairs in the International Criminal Court. This is clearly spelt out under the heading 'Purpose of Division' in the Criminal Code.[25]

There are of course many other examples that one could draw upon in order to further illustrate the unsatisfactory track record of sovereign States in enforcing international criminal law at the domestic level. There is no question that the domestic enforcement of international criminal law is largely dependent upon the political will of the government of the day. Sovereign States manage to get away with this behaviour because it is 'international criminal law' and not 'national criminal law'. Clearly this level of political interference and uncertainty would be intolerable if national crimes were enforced according to this level of political subjectivity.

The enforcement of international criminal law at the domestic level should not be totally discouraged because there is still hope that in the fullness of time States may resist the temptation to politically interfere with the enforcement of international criminal law. However it is not desirable for States to be the principal means of enforcement of international criminal law without having in place some 'check or balance'.

The Permanent International Criminal Court

The Rome Statute of the International Criminal Court (ICC) is profoundly flawed because the enforcement of international criminal law has been primarily left to individual State parties. The fact that jurisdiction over these crimes is founded on the

22 Section 268 of the *Criminal Code Act 1995* (Cth) that makes Genocide a domestic crime in Australia was not inserted into the Code until 2002.

23 *Genocide Convention,* above.

24 See generally *Kruger v Commonwealth of Australia* (1997) 146 ALR 126 and *Nulyarimma v Thompson (*1999) 165 ALR 621.

25 See Section 268.1 (2) & (3) of the Criminal Code above.

principle of complementarity[26] rather than international primacy[27] and because the Statute of the ICC is so heavily weighted in favour of State parties, means that the ICC will be a weak instrument when it comes to the enforcement of international criminal law. In these circumstances international prosecutions will be the exception rather than the rule. The point is that the ICC as it presently stands cannot be seen as a means by which it can assert much influence over individual States in order to achieve a more balanced and less politicised environment for the domestic enforcement of international crimes.

The Rome Statute is perhaps, more than any other international instrument of this kind,[28] defective by clearly imposing responsibility in first instance to prosecute international crime on nation States. This is a retrograde step because individual sovereign States have been shy about prosecuting international crimes in their domestic courts in the past and there is no reason to believe that anything has changed significantly to ensure that they will be any more enthusiastic about conducting these prosecutions in the future.

As I have argued, States are reluctant to take an aggressive stand in relation to the prosecution of international crimes committed on the territory of another State, especially when the State involved has no political social or historical connection with the offending State. A single State gains little by holding itself out as the world's international police force. Because of trade and other considerations it is often preferable for a State to turn a blind eye to human rights abuses occurring on the territory of another country, taking the view that this is the other country's business.[29]

The enforcement of international criminal law for a crime committed on the territory of one State by another State, or where the accused is located in another State generally only occurs where the enforcing State is fundamentally and politically committed to this course. [30] Alternatively it only happens where the enforcing State has military and or economic ascendancy over the offending State.[31] Further the enforcement of the law in relation to crimes, such as crimes against humanity, can

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26 *Rome Statute of the International Criminal; Court* 1998 – Preamble <http://www.un.org/law/icc/statute>.

27 *Statute of the International Criminal Tribunal for the former Yugoslavia* Article 9(2) (1993).

28 For example Article 146 of the *1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* and Article VI of the *1948 UN Convention on the Prevention and Punishment of the Crime of Genocide* also imposes primary responsibility upon States to prosecute breaches of international criminal law, but these Conventions were drafted at a time when there was no permanent International Criminal Court and the principle of "universal jurisdiction" was in its infancy.

29 Successive Australian Governments did nothing about Indonesia's human rights abuses in East Timor because of a desire to reach agreement with Indonesia over natural gas supplies in the Timor Sea.

30 For example Israel in relation to the Eichmann Case – *Eichmann v A.G of Israel* (1962) 36 ILR 277.

31 For example NATO and Kosovo (1999) and possibly USA and Iraq (2002 – 2004).

be very expensive.[32] The investigation of such crimes becomes even more expensive if the prosecuting State has to gather evidence on the territory of the offending State. The investigation process can be difficult and dangerous where the offending State is hostile to prosecution action being taken by the other State.[33] Thus the occasions when one State is prepared to undertake a prosecution for offences committed in another State even if the accused turns up in the prosecuting State, are rare.[34]

The Rome Statute, incorporating as it does the complementarity principal, assumes that somehow States will now change their behaviour and accept responsibility for enforcing international criminal law, by utilising universal jurisdiction. However this view that States will conduct prosecutions for offences which occur on the territory of another State is naive. The strategic political and economic considerations are not going to change. In most instances States will not get involved in the internal affairs of another State.

It might then be said that if State prosecutions do not occur in these circumstances, then it is these very conditions that will trigger the Rome Statute to activate the jurisdiction of the International Criminal Court. Unfortunately this view is too simplistic. While States may not want to conduct prosecutions themselves they will not want the international community to prosecute the crimes either. The Rome Statute is so heavily weighed in favour of the preservation of State sovereignty and the means of access to the court by individual States so readily accessible, that individual States which do not want prosecutions to occur in the international court will have little difficulty in preventing this from happening.

In all probability the only effective prosecutions that will occur in the International Criminal Court in the near future will be those referred to the court either by poor States which lack the resources to prosecute or by the Security Council. Those referred by the Security Council will be authorised by Chapter VII of the UN Charter which carries the necessary enforcement authority to ensure that the criminal court can function effectively. Regrettably any such prosecution will only be referred to the International Court in those circumstances where the permanent members of the Security Council are willing to allow this to happen. The permanent members' willingness to agree to a referral will only arise in circumstances where it is in the combined political or economic interest of the members to allow this to occur. The fact that it only takes one permanent member to veto a referral means that the chances of a successful referral are not good.

In the present political climate, the attitude of the United States to the permanent International Criminal Court is so negative that is hard to imagine a political or economic circumstance where a reference to the court would be considered desirable

32 Aarons *supra* p 506.

33 The arrest in Bosnia-Herzegovina of Karadzic and Mladic did not take place initially because of the opposition by the Serbian Bosnian Republic. Subsequently both men surrounded themselves with a loyal guard of followers and no arrest took place (so it is said) due to the danger of conducting such an arrest.

34 For example Pinochet was arrested in Britain but at no stage was the British Government enthusiastic about prosecuting him for crimes against humanity. See generally *Pinochet supra*.

by the United States.[35] There are few countries in the world where the United States has no political or economic interest. There is no country which stands out as a candidate for referral by the United States. The United States would fear that a referral supported by it would be interpreted by the international community as a shift towards acceptance of the International Criminal Court. There is no suggestion that the United States is about to change its steadfast opposition to the court.[36] For example it is unlikely that the United States would permit a reference of a matter by the Security Council to the permanent court arising out of Israeli action in Palestine.

Of the permanent members of the Security Council it is not only the United States that is likely to block a referral to the permanent International Criminal Court. For example there would seem to be little or no possibility that a prosecution would be referred to the Court arising out of the events that have occurred in Chechnya. Clearly the Russians would exercise their veto to prevent such a reference. Indeed one could go on to cite examples for each permanent member of the Security Council where they would likely exercise their veto against a referral.

These fundamental weaknesses in the Rome Statute did not occur because of some oversight. The Statute is the product of nation States. All States were jealous of their sovereign authority and had no intention of allowing the Rome treaty to rob them of this power. States may have said that they wanted a permanent international criminal court, but there is no question they were going to allow this to happen at the expense of their sovereign power. The court has very little independent power. Whatever power it does have is given to it by sovereign States. Equally in relation to particular cases sovereign States can take away that power whenever they choose. The permanent Court only assumes the appearance of a 'real' criminal court when States allow it to do so. Thus the court has a very narrow function, whether or not it will succeed within these constraints remains to be seen, but there is not going to be an easy road for it to follow.

Can Non-States Play a Role in the Enforcement of International Criminal Law?

One of the root causes of this unsatisfactory state of affairs is the misconception that law enforcement is only a matter for the government of a State, or in the case of international criminal law, the international community of States. This is a misconception, because the State does not always have to be behind the enforcement and application of the law. We are all familiar with tribunals regulating the conduct of players in relation to sporting events. For example football, soccer and tennis tribunals function effectively yet they are generally not the creations of sovereign States.

35 Marties Glasius, 'Expertise in the Cause of Justice: Global Civil Society's Influence on the Statute for an International Criminal Court' Chapter 6 *Global Civil Society Year Book* 2002 p 138 <www.Ise.ac.uk/Dept/global/yearbook/outline/2003.htm>.

36 Stephen Holmes, 'Why International Justice Limps' (2002) 69 (4) *Social Research* 1056 at 1074.

Similarly the increased cost of litigation has encouraged litigants to try to resolve their disputes outside of the State created court structure. Mediation, conciliation and arbitration are occurring all the time without the need for the parties to go to a State court. There is no reason why international criminal law could not, at least, in part be enforced in a similar way.

The statement of the will of the people through the democratic process operates as a brake on the power of the State. The people of the State can inform the State that they expect the State to comply with the law.[37] Bills of rights, constitutional guarantees and the courts, often serve the individual well when it comes to the internal relationship between the sovereign State and the individual, but this is not the case when the State is operating in the international arena or when these fundamental guarantees are non existent or ignored by a sovereign State. When this occurs the individual is often left with very few means of protection.[38]

While it would be naive and not necessarily a good thing for the sovereign State to have no role in the enforcement of international criminal law, the principle that the sovereign State is all powerful and the only player on the international landscape is not a good thing either. The sovereign State either alone or in combination with other States can no longer fully service all aspects of international affairs. The reality is that sovereign States are simply not able to dominate all things in the way that they once could.[39] The global economy and multi-national organisations now have a life outside the sovereign State.

In the past economic activities took place within the context of the sovereign State. Today the sovereign State is only a 'player' in economic activity; much occurs outside the traditional borders of the sovereign State.[40] In the past governments could control their State's economy. Today the economy of one State may be significantly influenced by what happens in another State. Thus the government of a State may be powerless to do anything about what is happening to their economy.[41]

Similarly the traditional restraint by the State over its citizens is beginning to weaken. The individual has begun to assume 'self determination'. No longer is it for the sovereign State alone to decide individual 'self determination' and choose how this will be manifested.[42] With rapid communications and travel international intercourse is becoming common place. Many individuals see themselves less and less as a citizen of a particular sovereign State. They are citizens of the world. Dual nationality is becoming far more prevalent. Multi-national organisations and their staff function throughout the world, with individual States having very little impact

37 T.M. Franck, *Democracy* (1994) p 367; A. D'Amato (ed) *International Law Anthology* (Anderson, 1994); J. Rawls, *Political Liberalism* (Columbia University Press, 1996).

38 In Guantanamo Bay, Cuba Australian citizen, David Hicks, was held without charge for two years and deprived of all rights of due process usually available under US Law.

39 A.M. Slaughter, *A New World Order* (Princeton University Press, 2003).

40 K. Ohmae, *The End of the Nation State* (Harper Collins, 1995) p 41.

41 Ibid p 42.

42 J. Rawls, *Law of Peoples* (Harvard University Press, 1999).

on their operations. The internet has allowed the citizen to go beyond the national boundaries of the State in search of information.

The individual is finding ways in which he/she can protect and enforce their rights on the international stage without having to rely on the nation State to act supposedly on their behalf. No-where is the challenge to sovereignty more pronounced that in today's Europe. Germany, France and Britain have now conceded large slabs of their sovereign authority to the European Union and its European Court of Justice. In addition, the Council of Europe and the European Court of Human Rights have brought about a 'fundamental shift in the relationship between the individual and the State'.[43]

The Role of Civil Society

This void left by the retreating sovereign State in international affairs is being rapidly filled by what Kaldor[44] describes as 'global civil society'. Kaldor argues that humanitarian law, the International Criminal Court and peacekeeping operations constitute the structure of 'global governance'.[45] Kaldor suggests that much of the work of 'global civil society' is carried out by (international) non-government organisations (NGOs).[46] These NGOs undertake a wide variety of work from the provision of services (e.g. OXFAM), to advocacy, public mobilisation and campaigning (e.g. Amnesty International), some become involved in a little of both (e.g. International Committee of the Red Cross).[47] Kaldor argues that 'global civil society' is a new form of 'global politics' which provides a means whereby individuals (as opposed to States) can have their views represented at the international level.[48] She defines civil society as the 'medium through which social contracts or bargains are negotiated between the individual and the centres of political and economic authority'.[49]

The governments of States should have nothing to fear from 'global civil society' committed to the maintenance of international peace and security, they should seek to work with it.[50] Sovereign States and their international creations such as the United Nations, the International Court of Justice and the International Criminal Court will continue to function and operate to the maximum of their capability thus ensuring some measure of protection for the individual. However, the mono-political structure of sovereign States has been replaced by a dual structure, not

43 D. Jacobson & G.B. Ruffer 'Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy' (2003) 25 *Human Rights Quarterly* 88.

44 M. Kaldor, '*Global Civil Society – An Answer to War*' (Polity 2003).

45 Ibid p 7.

46 Ibid p 87.

47 Ibid pp 90-91.

48 Ibid p 107.

49 Ibid p 142.

50 N. Chandhoke, 'The Limits of Global Civil Society' Chapter 2, *Yearbook of Global Civil Society* p 43 <www.Ise.ac.uk/Dept/global/yearbook/outline/2002.htm>.

in competition, but complementary. Multi-national corporations have discovered the need for duopoly and hence have moved outside the traditional monopolistic sovereign State structure, similarly individuals have done the same thing. This does not mean that the sovereign State or international organisations should be abandoned. It really means formalising a structure that sits side by side with the sovereign State, so that the sovereign State is not the only 'player on the field', at least so far as individual human beings are concerned. It is a question of 'checks and balances' on the international stage. In fact 'global civil society' strengthens these international organisations created by the international community of States.

It is this machinery of 'global civil society' which I argue is required to strengthen the International Criminal Court. What is required is the location of a suitable vehicle to carry out this supporting role. What is needed is an alternative means by which the grievances of the victims of international crimes can be heard. In my view a world people's court, separate from the sovereign State or the international creations of sovereign States could perform this function. A world people's court might be dismissed as being without authority because without the support of the sovereign State, it has no sanction. It would have the authority and sanction of 'global civil society' which is arguably a higher authority than the sovereign State itself. A world people's court would promote 'the rule of law' and apply humanitarian law. A world people's court would have as much strength as any organisation supported by people. In any event the sanction following the judgement is less important than the judgement itself. A court does not have to be an organ of a State or international organisation. As mentioned above sporting clubs throughout the world have tribunals which hear cases concerning the infringement of the rules of a game of sport. Their decisions are respected and authoritative.

World People's Court

The idea of a world people's court is not new. In 1966 the British anti-war campaigner Bertrand Russell established a people's tribunal in Paris in order to hear allegations of war crimes and crimes against humanity against the governments of United States of America, Australia, New Zealand and South Korea committed during the course of the Vietnam War. The Russell Vietnam War crimes tribunal had no clear precedent at that time. The tribunal did not represent any State power nor did it have the power to compel accused persons to appear before the tribunal for trial.

The tribunal was composed of eminent men and women who had authority, not by virtue of the power of their position but through their intellectual and moral contribution to humanity.[51] Bertrand Russell described the tribunal as preventing the 'crime of silence'. The tribunal was to determine whether the respective governments of the United States, Australia, New Zealand and South Korea had committed acts

51 B. Russell, *Speech at the first meeting of members of the War Crimes Tribunal*, (1969) vol 3, p 216 also referred to at <http:/www.infotrad.clara.co.uk/warcrimes/Vietnam_intro_russ.htm>.

of aggression; whether the United States had used weapons forbidden by the laws of war; bombed civilian targets; mistreated prisoners of war; and created concentration camps for the deportation of the population.[52]

The tribunal heard evidence put before it in documentary and testamentary form. The Russell tribunal had legitimacy because it heard the evidence from the victims of the Vietnam War who had no other forum in which to voice their grievance. The tribunal was a bold initiative for its time. It heard a great deal of evidence concerning atrocities committed by the United States and its allies against individuals and upon civilian targets that had no reasonable connection to military activities. The Governments of the United States, Australia, New Zealand and South Korea were invited to participate in the Russell Tribunal hearings but they refused to take part. The Tribunal did hear evidence from the Democratic Republic of Vietnam.

The Russell tribunal was followed in 1976 by the Algiers Declaration on the Rights of People. This Declaration identified the sovereignty of the 'people'. It also called for the establishment of a permanent people's tribunal. Like the Russell Tribunal the legitimacy of the permanent people's tribunal was neither sanctioned by international law or by the domestic law of States. While the permanent people's tribunal was created in the context of post colonial struggle,[53] the concept of a permanent people's tribunal is not limited to the struggle of minority groups against imperialist violence. The work of the permanent people's tribunal included investigations and deliberations on a wide range of international issues including the persecution of minority groups in the Philippines under the Marcos regime (1980); the Soviet invasion of Afghanistan (1981/82); Indonesian persecution in East Timor (1981); genocide committed by Turkey against the Armenian people (1984) and the US intervention in Nicaragua (1984).

Nayar[54] describes the role of the people's tribunal as a forum for 'the voicing and discovery of the truths of violations, for providing a means of judging the commission of wrongs; to challenge the silence of dominant imperialist legality and to create instead a public memory of peoples struggle against violence; to extend the scope of truth and judgment in order that exploitation in all its forms is denied the status of normalcy in human relations'.

Resort to a people's tribunal generally occurs in circumstances where serious crimes against people have been committed but no action is taken to deal with those crimes by individual sovereign States or the international community. In many cases it is the very States which have the responsibility to render justice that are the perpetrator of these crimes against their own people.

People's tribunals have been used to address past injustices that have not been given judicial recognition. In 1984 a permanent people's tribunal examined the genocide committed against the Armenian people by the government of Turkey

52 Ibid p 216.

53 J. Nayar 'A People's Tribunal Against the Crime of Silence? – The People's Judgments and an Agenda for People's Law' (2001) *Law of Social Justice and Global Development* also at <http://elj.warwick.ac.uk/global/issue/2001-2/nayar.html>.

54 Ibid.

during the course of the First World War. Following the war and particularly at the Treaty of Versailles Conference, calls were made for the Armenian genocide to be investigated. At that time it was pointed out that over 600,000 Armenian people had been slaughtered by the Turkish Government during the course of the war. Clearly this was one of the most egregious acts of genocide committed at the beginning of the 20th Century. Notwithstanding the fact that an investigation was made into this genocide no prosecutions ever followed. The Government of Turkey was called upon on numerous occasions to prosecute these crimes, but it persistently refused to recognise that it had committed genocide against the Armenian people. Accordingly the permanent people's tribunal heard this case and found that genocide had been perpetrated against the Armenian people. The Government of Turkey was held responsible for this international crime.[55]

One of the most credible and successful people's tribunals was the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery that sat in Tokyo, Japan in December 2000. The permanent people's tribunal that I propose would be like the Tokyo Women's Tribunal,[56] except that in order for it to be complementary to the International Criminal Court it would only find a *prima facie case* and not proceed to a final determination of the matter before it. However, it would be the same in that it would be supported and funded by a non-State organisation which is committed to the protection of individual human rights. The findings of a 'prima facie case' would be a powerful force in demonstrating to particular sovereign States that they are out of step with internationally recognised standards of human conduct.

A legitimate question that might be asked is: *Well what has been the affect of these People's Tribunals? Has anyone been punished for the Turkish genocide of the Armenians? Have any of the Japanese perpetrators of the 'comfort women' atrocity been put behind bars?* The answer of course is 'No', but that is not the end of the argument. With respect to these old crimes, identifying the perpetrators is only part of the purpose of the trials. The Turkish and Japanese Governments have persistently refused to either recognise or accept responsibility for these crimes. Once these trials have occurred, they at least have to explain why a seemingly legitimate process has produced this finding. Even if these States continue to refuse to accept responsibility, other States are slower to side with the offending States on this issue because the victims have spoken in a coherent, organised and compelling way. The people of the offending States often find out for the first time the crimes that are alleged against their Government or former Governments. This may in turn bring about a demand for an explanation. The legitimacy of the people's court process is the exposure of that which has been denied or that which has been suppressed. If the responsible Governments or perpetrators are called upon for an explanation that may in itself be sufficient justification for the process.

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55 Gérard Chaliand, 'The Crime of Silence' in Permanent Peoples' Tribunal, *A Crime of Silence: The Armenian Genocide* (Zed Books, 1985) pp. 243-246.

56 *The Prosecutors of the Peoples of the Asia- Pacific Region v Hirohito Emperor Showa et al* Judgement (2001) PT-2000-I-T.

The process of hearing evidence, making findings and then passing these findings on to the authorities is a common feature of people's tribunals. This process is not all that different to the role of the ancient jury of England which heard the evidence, made the allegations and then passed these findings onto the court of assizes. International criminal law is still in its infancy. As we have seen above the application and or enforcement of this law is *ad hoc*, uneven and politically motivated. The ancient jury was, at least initially an instrument of civil society. It was not an official instrument of the State. Even now, as it is the representative of the people in the criminal justice system, it is arguably still not an instrument of the State. What has happened is that it has been officially recognised and accepted as *de jure* by the State. In a similar way a people's tribunal is not a *de jure* organ of the international community, although in time it may again by convention achieve *de jure* status. A people's tribunal, like the ancient jury, is a mechanism for drawing to the attention of those who possess power the need for them to use that power in the interest of the community.

Could Universities Play a Role?

People's tribunals also rely heavily (although not exclusively) on the assistance of the academic community. In many instances the academic community is very active in speaking out against human rights abuses and can cogently argue against political "spin" generated by governments in an attempt to disguise their real motives.[57] There are some advantages in having the world people's court sponsored by a world association of universities. In each university around the world a chapter of the world people's court could be located. Universities generally exist in each country and a large number of them are independent of government, at least as far as their activities are concerned. In most cases they enjoy the trust and respect of the community. Generally they are relied upon to provide an alternative view to the voice of government. In varying degrees they have access to money and the means of global communication. The student body can provide a readily available inexpensive source of intelligent labour to investigate issues and assist with preparation of the litigation. The academic staff can be a readily available source of judges. They have infrastructure such as information technology, buildings and accommodation.

If the universities house the world people's court, they are more readily accessible by members of the public of a nation State. While the university of the State where the breach of human rights has occurred may not always be the best choice of venue, it would be an ideal first point of contact and would be a location from which an investigation could be launched. It would however be desirable if academics from the subject State university could sit on the bench as some of the judges of the court.

57 *Refuse and Resist,* at <http://www.refuseandresist.org/mumia/1997/111597tribunal.html>.

The Rights of People vs the Rights of the State

By severing the link to sovereign States but by operating parallel with international organisations created by sovereign States which are dedicated to the protection of the individual, there one day might emerge international organisations, which are fully committed to the protection of individual rights of human beings yet strong enough to resist manipulation by sovereign States.

The seeds of this possibility already exist. There has now developed the concept of 'individual sovereignty' as articulated by the Secretary General in his speech to the UN General Assembly – the 'right of every individual to control his or her own destiny'.[58] The UN Charter recognised the concept that respect for human rights is an essential ingredient of maintaining international peace and security. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, as well as the Covenant Against Torture and other Cruel, Inhuman or Degrading Treatment all represent the development and growth of human rights, which in turn reduce the absolute power of the sovereign State.[59]

The sovereign State has failed to adequately protect the interest of the individual. The sovereign State pressed by the democratic process has paid lip service to human rights in the international forum but has not seriously been able to put aside the demands of State security in order to cater for full human rights protection. Perhaps the nature of the sovereign State is such that it simply cannot do this in any event. There is of course a clash between the rights of the majority and the rights of the minority or more particularly the individual, and this paradox cannot be avoided.

On the other hand with the expansion of democracy there is now emerging the concept of 'people power'. People power is not structured and its responses are sporadic and inconsistent. What is required is a mechanism to capture the force of 'people power' and to channel this force into a machine that is capable of effecting change. The sovereign State would continue to exist with all its trappings such as parliaments and the courts on a domestic and international level.

The 'world people's court', would harness the power of the people and truly ensure the sovereignty of the individual. It would not be an 'international' structure in the true sense of the word because it would not be there to advance the interest of the 'nation'. The world people's court could resemble the sovereign structures that we are familiar with now. It would hear evidence of crimes against humanity and decide if a *prima facie* case exists. It would then publish a judgement. Hearings could be held *in absentia*, if a defendant refused to appear before the court.

A people's court can only ever be a mechanism directed at drawing attention to the commission of international crimes by States or individuals which have been

58 J. McConvill & D. Smith 'Of War Crimes and Humanitarian Intervention' (2000) 25 (4) *Alternative Law Journal* 177, 178 quoting UN Secretary General's 1999 Speech to the General Assembly.

59 M. Kirby, 'The Impact of International Human Rights Norms: A Law Undergoing Evolution' (1995) 25 *University of Western Australia Law Review* 30.

conveniently overlooked by the responsible State because of political or economic considerations. A people's court of necessity cannot make or impose sentences or have such sentences carried out against individuals. The sovereignty of the State and its relationship to the citizens over which it purports to exercise authority must of necessity remain intact. At this stage there is no alternative mechanism available under international law to effectively replace the State when it comes to its obligations towards its citizens. An uncontrolled people's court with the power to carry out sentences could in fact be worse. Could for example a people's court exonerate or acquit a Milosevic or a Saddam Hussein? Possibly not! Accordingly a people's court would have the limited role of applying pressure that hopefully would have the effect, in appropriate circumstances, of ensuring that a prosecution followed. The prosecution could be by the State according to its domestic laws or preferably by an international criminal tribunal.

A people's court would achieve justice by hearing the evidence and conducting itself in a judicial manner. If the people's court is to achieve credibility it must be properly funded and have quality staff. It must dispense justice in a fair and open manner. It must apply internationally recognised standards of justice but the State or an international criminal tribunal would have to be the ultimate deciders of fact and law and be responsible for imposing the appropriate sanction.

Conclusion

Having regard to the constraints imposed upon the prosecutor of the permanent International Criminal Court there needs to be an international non-government body operating outside of the permanent International Criminal Court which can draw the world's attention to the commission of international crimes such as genocide and crimes against humanity. The permanent International Criminal Court being the product of States will undoubtedly be constrained in just how far it can go in criticising the conduct of States. Because of these constraints it is imperative that there be an independent and unconstrained organisation such as a permanent people's court that can hear allegations and make findings so as to encourage nation States to refer persons for prosecution to the permanent International Criminal Court.

The means are available to improve the protection of human beings from human rights abuses; it is really just a matter of having the will to do something about it. There is perhaps no better time to do this than now.

Redressing Partial Justice – A Possible Role for Civil Society

Ustinia Dolgopol

Introduction

'Justice before we die' has been the call of the 'Comfort Women'[1] for the past 14 years.[2] These women suffered some of the most horrific forms of violence that can be perpetrated against another human being. The decision they made to break their silence was spurred by the hope that the government of Japan would acknowledge the nature of the crimes committed against them.

Throughout this period the women have been supported by organisations and individuals across the Asia-Pacific region. A significant amount of time has been invested in lobbying the government of Japan and raising public awareness of the issue in Japan as well as in those countries from which the women were taken in order to be put into military sexual slavery. In addition various groups and individuals have mounted a sustained international campaign to gain recognition for the rights of the 'Comfort Women'. Whilst the international community has acknowledged the serious nature of the crimes committed against the 'Comfort Women' and called on Japan to make adequate reparations,[3] little has been done by the Japanese

1 Whilst recognising the inappropriate nature of this term to describe the horrific experiences of the women who survived the military sexual slavery system put in place by the government of Japan during World War II, the author has decided to use the phrase as the women themselves have chosen to continue to use it because it has gained widespread recognition in the international community.

2 For a description of the 'Comfort Women' system including the experiences of individual women and a legal analysis of Japan's responsibility for this system, see Ustinia Dolgopol and Snehal Paranjape, *'Comfort Women' – An Unfinished Ordeal* (International Commission of Jurists 1994) and Judgement of the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery delivered in The Hague, December 2001 at para 949 (hereinafter Judgement of the Tokyo Tribunal). A copy of the judgement is in the personal possession of the author. Copies of the Judgement may be ordered from the Violence Against Women Network, Japan; their web address is: http://www1.jca.apc.org/vaww-net-japan/english/indes.htmc.

3 Two UN Special Rapporteurs have undertaken investigative missions to Japan and elsewhere in the region, *see,* 'An analysis of the legal liability of the Government of Japan for "Comfort Women' stations' established during the Second World War', Appendix to the Final Report on Systematic Rape, Sexual Slavery, and Slavery-like Practices during Armed Conflict, submitted by Gay J Mc Dougall, Special Rapporteur, UN Doc. E/CN.4/ Sub.2/1998/13 and Report on the mission to the Democratic People's Republic

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 475-497.*
 ISBN 90 04 14599 0.

government to show its remorse. Despite the government's acknowledgement of the involvement of military and government officials in the creation and ongoing operation of the Comfort System[4] it has continued to deny legal responsibility to pay compensation. Although bland apologies for the impact of the Comfort System on the people of South Korea and the Philippines were given before the Parliaments of those two countries, no official apology has ever been made directly to the women themselves.

The question then arises, should we conclude that the 'Comfort Women' have not received justice? In one sense that might be a logical conclusion. However in the following pages an alternative vision of justice is explored, one that argues for the efforts of civil society as being a form of justice.

In the majority of what those working on this issue have called 'victimised' countries a range of women's organisations and concerned individuals have come together to work with and on behalf of the "Comfort Women'.'[5] The Korean Council for the Women Drafted into Sexual Slavery by Japan was formed in 1990 in an effort to have the Japanese and Korean governments acknowledge the nature of the crimes committed against Korean women and to have the Japanese government apologise and pay compensation.[6] The impetus for its formation was research conducted by

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of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, Addendum to the Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, UN Doc. E/CN.4/1996/53, Add.1, 4 January 1996.

4 In a statement to the press dated 6 July 1992 the Chief Cabinet Secretary described an official study being undertaken by various government ministries to locate relevant documents and to determine if there was government involvement in the Comfort System as it pertained to the Korean peninsula. The press release stated: 'In sum, the study confirmed that there was government involvement in the establishment of comfort stations, the control of those engaged in the recruitment of the "Comfort Women",' the construction and support of the facilities, the operation and supervision of comfort stations, sanitary control of the comfort stations and "Comfort Women", the issuance of such documents as certificates of identification to the personnel involved with the comfort stations, and in other areas.' The press release was accompanied by a list of government ministries that were asked to search for documents. These included, the National Police Agency, the Defence Agency, Ministry of Foreign Affairs, the Ministry of Education, the Ministry of Health and Welfare and the Ministry of Labor. See FPC Press Release No 044B-09, FPC, Translation of Government Release dated July 6, 1992. The press release is in the personal possession of the author. A further official report was issued in August 1993. Later research by Professor Yoshimi Yoshiaki demonstrated that there were in fact more documents in the archives of a number of these ministries than had been reported by the government. See Yoshimi Yoshiaki, *'Comfort Women': Sexual Slavery in the Japanese Military During World War II* (Translated by Suzanne O'Brien) (Columbia University Press 2000).

5 The following paragraphs are based on the description of NGO activities contained in Ustinia Dolgopol and Snehal Paranjape *supra* as well as the author's personnel experience of meetings held in Japan, The Philippines, Washington DC and Rome.

6 Information about the Korean Council can be obtained from the following web address: <http://www.womenandwar.net/english/index.php>.

academics in both South Korea and Japan.[7] This research indicated that women had been taken from the Korean peninsula as a result of orders given and carried out by the Japanese military as well as the Japanese colonial government. The initial reaction of the Japanese government was to deny that the military had had any involvement in the establishment or operation of the Comfort System.[8] This prompted Kim Hak Sun, a former 'Comfort Women', to come forward and speak of her experiences.[9] Following her public revelations about the treatment she had received other women began to tell their stories.

Women's organisations in the Philippines became aware through the publication of documents in newspaper articles that Filipino women had also lived through the horrors of the Comfort Stations and that Korean and Taiwanese women had been held in Comfort Stations in The Philippines. Radio broadcasts urged women to overcome their fear and to speak out about their experiences during WW II. It was again the denials of responsibility by the Japanese government that led to Rosa Luna Henson to agree to speak in public about the indignities that had been inflicted on her by members of the Japanese military.

Simultaneously a range of groups was formed in Japan to raise public awareness of this issue and to seek an apology and compensation from the government.[10] They held public meetings, visited members of the Japanese parliament, organised phone-ins and stood on street corners distributing material for the general public. Some groups put their energy into raising money in order to assist with medical bills and living expenses.[11]

Throughout the 1990's numerous groups in these three countries worked together to obtain international recognition for the rights of the 'Comfort Women' as well as to gain the support of the international community in putting pressure on Japan to apologise and to undertake other forms of reparations such as the payment of compensation and the creation of memorials. An outgrowth of these efforts was the formation of organisations in other countries to research their own history and to gather evidence about what had happened to women during the Japanese

7 Information about the research undertaken by Korean scholars and activists can be obtained from the Korean Council at their web address, *supra*.

8 A description of the Japanese response to the assertions of the various women's organisations working on this issue is contained in Dolgopol and Paranjape, *supra*.

9 The Korean Council had begun a publicity campaign about the issue and had been urging women to come forward and speak about their experiences. Kim Hak Sun contacted the Council and they arranged for her to speak in public.

10 Another aspect of the efforts to vindicate the rights of the 'Comfort Women' has been the commencement of lawsuits in various courts in Japan; thus far none of them have been successful, most having been dismissed either for lack of jurisdiction or as being barred by the statute of limitations. In some cases judges have called upon the government to do more to recognise the suffering of the women.

11 Many of the women taken into the Comfort System have needed regular medical treatment for gynaecological complaints as well as for the lasting impact of other injuries they suffered such as knife wounds, burns and broken bones that had been left untreated. Information about the efforts in Japan to raise money for the 'Comfort Women' is contained in Dolgopol and Paranjape, *supra*.

occupation of their countries. Lawyers in Indonesia and academics in China collected documentary and oral evidence. Government agencies were set up in North Korea to collect documentation and to take the evidence of women who may have been subjected to the Comfort System. In Taiwan women's organisations as well as legal aid groups collected evidence about the plight of Taiwanese women. Lawyers and academics in the Netherlands focussed on the treatment of Dutch women living in Indonesia. More recently Japanese researchers have focussed on events in Malaysia, lawyers in East Timor have collected statements from survivors and located relevant documents and women's groups in Papua New Guinea have begun to collect evidence about events in their country. Individual researchers also have perused records held by the United States, the United Kingdom and Australia.[12]

Whilst recognising that it would be virtually impossible to bring to trial those who were responsible for establishing and maintaining the Comfort System, many of the individuals and organisations working on this issue wanted to ensure that it was clearly recognised that what had happened to women subjected to the Comfort System was both a war crime and a crime against humanity.[13] It was important to all concerned that the analytical framework surrounding this issue be one that focused on the responsibility of those who created and sustained the system as well as the devastating impact the Comfort System had on the lives of the women subjected to it. Perhaps spurred on by the negotiations for the International Criminal Court and aware of the struggles that had surrounded recognition of gender crimes in the Tribunals for the Former Yugoslavia and Rwanda,[14] three of the non-government organisations working in this field developed the idea of holding a women's tribunal that would follow the procedures of a trial and bring together the documentary, oral and expert evidence that had been gathered for more than a decade. Those organisations were: The Korean Council for Women drafted into Military Sexual Slavery,[15] ASCENT[16] and VAW-Net Japan.[17] Their efforts culminated in the

12 Some of the information gathered by these various groups is in the personal possession of the author. Material presented to the Women's International Tribunal is held in the Philippines; information about this material can be obtained from the Violence Against Women Network, Japan. The web address for the organisation is: http://www1.jca.apc.org/vaww-net-japan/english/indes.htmc.

13 For those countries that were at war with Japan the acts could be considered either a war crime or a crime against humanity. With respect to those populations subject to Japan's colonial rule, Korea and Taiwan, only crimes against humanity come into play.

14 Kelly D. Askin, 'The Quest for Post-Conflict Gender Justice', (2003) 41 *Columbia Journal of Transnat. Law* 509.

15 A South Korean based organisation. The principal representative to the steering committee for the Tribunal was Professor Yun Sun Ok.

16 A women's human rights organisation based in the Philippines. The principal representative to the steering committee for the Tribunal was Indai Sajor.

17 The headquarters of this group are in Tokyo but it has networks throughout Japan. The principal representative to the steering committee for the Tribunal was the late Yayori Matsui.

holding of the Women's International War Crimes Tribunal in Tokyo from 8 to 10 December 2000.[18]

The evidence placed before the judges of the Tribunal[19] included the statements of survivors of the Comfort System, the testimony of expert witnesses such as historians and international lawyers, statements from former Japanese soldiers and several thousands of pages of documentary evidence obtained from archives and the personal diaries of Japanese soldiers. A preliminary decision was issued on 12 December 2000 and a final comprehensive judgment was issued in December 2001.[20]

The significance of the Tribunal lies not in its format but in the effort of international civil society to find some means of affording 'justice' to the victims and survivors of a system that enslaved, brought about the mass rape and led to the torture of more than 200,000 human beings. We have come to think of civil society as part of the conscience of humankind.[21] Descriptions of civil society are replete with references to its importance in making governments more accountable and in putting pressure on governments to admit past wrongdoings in particular through the gathering and dissemination of information.[22]

But not all governments are willing to face the painful truths of past violations of human rights and not all crimes will come before international Tribunals. The question must then be asked is there more we can do to recognise the harms suffered by men and women around the globe and to find a means for offering a credible determination of the violations of international law, both human rights law and international criminal law, that have taken place. This is not to suggest that all such

18 A discussion of the judgement issued by the Tribunal can be found in Ustinia Dolgopol, 'The Judgement of the Tokyo Women's Tribunal' (2003) 28 (5) *Alternative Law Journal* 242.

19 The names and affiliations of the judges are set out in Part II *infra*.

20 Documentation about the Tribunal can be obtained from the Violence Against Women Network, Japan at the web address set out *supra*; the documents available include a transcript of the Judgment delivered on 4 December 2001. A copy of the final judgement can be ordered from the organisation.

21 See, e.g., Benjamin Ferencz, 'A Prosecutor's Personal Account: from Nuremberg to Rome', (Spring 1999) *Journal of International Affairs* 455, accessed through Expanded Academic, ASAP Plus on 21 July 2003. 'When I think of those who have unrelentingly pursued peaceful justice, I also think of all the religious groups, nongovernmental organisations, human rights activists and student organizations that have dared to challenge existing inequities. They are the unsung heroes in the forefront of an emerging world democracy where the human rights of all people will increasingly be respected.'

22 Michelle Sieff and Leslie Vinjamuri Wright, 'Reconciling Order and Justice? New Institutional Solutions in Post Conflict States (Spring 1999) *Journal of International Affairs* 757, accessed through Expanded Academic ASAP Plus 31 July 2003. See also, Howard Tolley, *The International Commission of Jurists, Global Advocates for Human Rights,* (University of Pennsylvania Press 1994) and Hilary Charlesworth and Christine Chinkin, *The boundaries of international law, A feminist analysis*, (Manchester University Press 2000) at 87-93 and 99-102.

efforts should be in the form of a Tribunal,[23] rather it is to suggest that instead of perceiving of justice as something that can only be done by states we should come to accept that justice is served by the work of civil society.

There is little doubt that the premises of this chapter will be controversial. To some extent the debates that may ensue will mirror those that compare the efficacy of truth commissions with the holding of criminal trials. It is important to state at the outset that the author accepts that criminal trials are necessary and that neither truth commissions nor the work of civil society are being espoused as alternatives to trials. Rather they are supplements to them. Too much of the literature on transitional justice focuses on what Stephen Marks has called the 'Faustian bargain of trading peace for justice.'[24] This chapter is not about tradeoffs, rather it is an attempt to focus on the reality of the narrowness and limitations of criminal trials and to encourage a debate about what further steps we can take. Our experience of criminal trials is that they will inevitably have to be limited in number whether they are brought by the prosecutor of the ICC or by domestic prosecutors.[25] This must then cause us to reflect upon the reactions of the survivors and the families of the victims who have been harmed by perpetrators not brought to trial who are likely to feel further marginalised and isolated by a process that has ignored them.

As demonstrated by all of those who gave tirelessly of their time to bring the Tokyo Tribunal to fruition, civil society is capable of harnessing the efforts of researchers and academics to obtain historical documents and other forms of 'evidence.'[26] One of the major accomplishments of the Tokyo Tribunal was the amount of material that was collected and will now be available for future generations. This material can be read, questioned, added to and utilised by anyone with an interest in the history of women's rights or of WW II.

It is the view of the author that this and similar efforts by civil society should be given recognition by the international community, not only the United Nations and its constitutive bodies and organs but also by scholars, commentators and domestic government institutions. Both the material utilised and the conclusions reached by the Tokyo Tribunal should be considered worthy of reflection and study. Whilst it is true that the information supplied by non-government organisations already has a certain legitimacy because it is perceived as being able to influence government

23 The author is aware that the Tokyo Tribunal was criticised by some because it mirrored so closely the process of a criminal trial.

24 Stephen P Marks, 'Elusive Justice for the Victims of the Khmer Rouge,' (Spring 1999) 52 (2) *Journal of International Affairs* 691, accessed through Expanded Academic ASAP Plus on 31 July 2003.

25 The expense of such trials is a major limitation as the resources available internationally and domestically will always be limited. By late 2003, the cost of trying 40 defendants at the Yugoslav tribunal was US $ 700 million and that of tyring 19 defendants at the Rwanda Tribunal was US $ 500 million. See Samantha Power, 'Iraqis should see tyrant's trial up close,' The Australian, 1 January 2004 at 11.

26 This term is being used to denote the reliability of material and not as a reference to what can be introduced in a court of law.

policy or the decision-making of UN bodies,[27] this places a value on the material for its utility rather on its intrinsic worth as evidence of what occurred in a particular time and place.[28] Material gathered by civil society can help to put a conflict into context and assist in ensuring that the peace process takes into account the full impact of the devastation brought about by war or massive civil unrest. It can also assist in identifying the underlying causes of the conflict so that the transitional period includes specific measures to deal with these underlying issues.

Bertrand Russell observed that '[t]he dilemma is the same in every country. There are great injustices and laws fail.'[29] The lack of an effective process to address demands for justice must inevitably undermine faith in both the domestic and the international legal order. The international community cannot allow survivors and victims' families to die without recognition of the harms inflicted on them.

This chapter is divided into two parts, the first explores the concept of justice as it applies to mass atrocities[30] and the second gives a brief description of the process that culminated in the Tokyo Tribunal and finally an analysis of its achievements.

Obtaining and Providing Justice

Justice is an elusive concept. As Tom Campbell has noted it has a political dimension, in that acts taken by those in power can be viewed as just or unjust, it has philosophical overtones in that we must define the criteria by which we will judge an act to be just or unjust and it has legal ramifications, both in terms of procedure and the substance of the law.[31]

For the victims and survivors of acts of mass atrocities justice has all of these connotations. For them justice is about the restoration of their dignity, receiving a reaffirmation of their value as human beings, obtaining assurances that the larger community understands the impact these acts have had on their lives, and knowing that the perpetrators have been punished. It is also about being part of a process that empowers rather than dehumanises them.[32]

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27 See, e.g., Julie Mertus, 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transitional Civil Society,' [1999] 14 *Am. U. Int'l Rev.* 1335 and Oscar Schacter, 'The Decline of the Nation-State and its Implications for International Law,' [1997] 36 *Colum. J. Transnat'l L.* 7.

28 The author recognises that not all material supplied by non-government organisations has been fully tested or subjected to rigorous analysis. This issue goes to the legitimacy of particular pieces of work not the possibility that such documents should be considered a valuable contribution to the literature about a particular country.

29 Quoted in Martha Minow, *Between Vengeance and Forgiveness, Facing History after Genocide and Mass Violence* (Beacon Press 1998) at 51.

30 This phrase has been adopted as it covers both mass violations of human rights as well as those acts that would come under the rubrics of war crimes and crimes against humanity.

31 Tom Campbell, *Justice* (part of Issues in Political Theory, Series Edited by Peter Jones and Albert Weale) (Edward MacMillan Press Ltd 2nd Ed 2001), pps 1-13.

32 Allison Morris and Warren Young, 'Reforming Criminal Justice: The Potential of Restorative Justice' in Heather Strang and John Braithwaite (eds) *Restorative Justice* –

In contrast calls for justice by the international community are most often a reference to justice in its legal sense. They are demands for accountability through the trial process.[33] Justice is equated with retribution, that is the punishment of wrongdoers in direct proportion to the harm inflicted.'[34] Omitted from this image of justice, are its philosophical (or moral) and political dimensions.

The commission of mass atrocities is often part of a series of 'unjust' political acts committed by agents of the state and/or the military and involves the acquiescence of large numbers people.[35] Trials alone do not allow us to understand the 'larger patterns of atrocity and complex lines of responsibility and complicity'[36] that are necessarily involved in the commission of such acts.[37] In order for justice to be achieved in a political sense, the process by which a society disintegrated to the point where such heinous acts could occur must be understood and discussed. There is a need for the larger society to confront its collective responsibility. A failure to engage in this type of exercise is likely to undermine the process of reconstruction and democratisation,[38] whereas undergoing the painful documentation of the commission of and responsibility for mass atrocities can assist in rebuilding the structures vital to the protection of human rights in the future.

Philosophical justice is also important to societal transformation. A process is necessary that both admits the absence of moral values and allows the community to re-assert them. Minow and others have argued that truth commissions and similar methods of inquiry allow for the development of an historical record that is necessary to the reaffirmation of moral values.[39]

At this juncture it is important to note that the purpose of this chapter is not to juxtapose the effectiveness of truth commissions with that of trials, rather it is an attempt to explore some of the ideas about justice that emerge from each process. Underlying this exploration is the premise, as set out in the introductory section, that there will be innumerable situations in which neither an officially sanctioned trial nor a truth commission will take place and that we need to search for viable

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Philosophy to Practice (Dartmouth 2000).

33 Minow, *supra*.

34 *Id.*

35 This is not to suggest that those who acquiesce always support the commission of such acts. In many cases they may feel themselves powerless to stop the atrocities and this may leave them with a sense of guilt and shame. See generally Minow *supra* and Ballengee *infra*.

36 Minow *supra* at 12.

37 Minow has observed that trials are 'slow, partial and narrow'; Minow *supra* at 9. She returns to this theme at page 47 where she notes that some historians have criticised the record left by the Nuremberg trials as the 'emphasis at those trials was on crimes against peace, rather than crimes against humanity, making war, rather than anti-Semitism and racism the central explanation for the Holocaust.'

38 Chris Cunneen, 'Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights', in Heather Strang and John Braithwaite (eds) *supra*.

39 Minow *supra* and Mark Osiel, *Mass Atrocities, Collective Memory and the Law* (Transaction Press 1997).

civil society alternatives when this occurs. In our search for justice we must always be mindful of the effect of 'partial justice'[40] on the families of victims and survivors. The disjuncture between the rhetoric of the importance of criminal trials and the reality of what can be achieved has the potential to aggravate the pain, marginalisation and alienation already experienced by these groups.[41] If we do not address honestly the limits of trials large numbers of people will be left to wonder why the acts committed against them were not considered important enough to be put before a court. Interviews with women who have experienced sexual violence during armed conflict have consistently revealed the devastating impact the lack of action by their own governments and the international community has had on their lives.[42]

Further, and perhaps even more controversially, it has to be asked whether or not the effect of 'partial justice' is to perpetuate discrimination and ultimately to render the holding of trials unjust. To return to Tom Campbell's theme of determining what is just or unjust he argues that in defining justice we must start with two essential criteria, a commitment to equality 'according to which every person ought to enjoy essentially the same or equivalent circumstances …'[43] The second criteria is that the presumption of equality can be overridden if there are questions of desert or merit, a criteria that he also refers to as individual worthiness. 'This develops into the general contention that a state of affairs is just if and only if it is one which accurately reflects the equal worth and unequal worthiness of sentient and responsible persons.'[44]

By this measure, the failure of the international community to deal adequately with the crimes committed against the 'Comfort Women' is unjust, as there are no grounds upon which their cases could be distinguished from other cases of war crimes and crimes against humanity that were tried by the International Military Tribunal

40 This phrase is taken from Gerry J. Simpson, 'War Crimes: A Critical Introduction' in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International 1997). Simpson also explored this issue in Gerry J. Simpson, 'Didactic and dissident histories in war crimes trials' (1997) 60(3) *Albany Law Review* 801 accessed through Expanded Academic, ASAP Plus 31 July 2003.

41 Minow makes the following observations: 'Expansive claims may be tempting in order to convince international and national audiences to fund and support trial efforts, but exaggerated assertions are bound to yield critical and even hostile disappointment.' (Minow at 49) She does not suggest that we should not try individuals but rather that we should make more modest claims for what a trial can achieve – 'The challenge is to combine honest modesty about the promise of trials with a willingness to be inspired – and to combine inspiration with the hard, grubby work of gathering evidence and weaving legal sources into judgments.' Minow *supra* at 51. See also, The Hon Mr Justice Fulford, Foreword to Ilias Bantekas and Susan Nash, *International Criminal Law (2nd ed)* (Cavendish Publishing 2003).

42 See Kelly D. Askin, *supra*, Dolgopol and Paranjape, *supra* and Judgement of the Tokyo Tribunal, *supra*.

43 Campbell *supra* at 12.

44 *Id.* at 13.

for the Far East.[45] No explanation was provided at the time of those trials as to why Japanese government and military officials would not be tried for the establishment and operation of the Comfort Stations and for the rapes and various forms of torture that were committed against women being held at the Comfort Stations.[46] The years of silence surrounding this issue left women wondering about their own value as human beings.[47] Many lived with an almost overwhelming sense of shame, a shame compounded by the knowledge that no one had been held accountable for what had happened to them. They felt isolated from their own communities and were unable to share their feelings of grief at having been robbed of their dreams and innocence. Although many have felt a measure of relief as a result of the international attention their cause has received, there remains an ever-present sense of loss and sorrow.

Those commentators and scholars who believe that 'justice' will not be done unless criminal trials are held [48] argue that societies in transition have to assert their values and say to those who have committed atrocities that they stepped outside the bounds of permissible conduct. The message that must be sent is that no one can commit these acts: torture, extermination, rape, sexual enslavement, and believe that they will be able to return to their ordinary life. The proponents of this approach also assert that victims will not feel that their human dignity has been restored unless they know that those responsible for the crimes committed against them have been punished. They also assert that not punishing the offenders creates a climate of impunity and that this will undermine people's confidence in the new government because the powerful elites and military officers that were behind the atrocities will remain connected to the new government and will have no fear of committing similar acts in the future.

These are valid points but as stated earlier we do not have to make a choice between trials and truth commissions and the efforts of civil society. They may all compliment each other or one may operate when others do not.[49] It is incumbent on all those working in this area to face the reality that the objectives claimed for criminal trials may not always be achieved and if they cannot be we must find alternative ways of meeting the rights and needs of those victims and survivors who will either experience 'partial justice' or no justice in the criminal law sense of that term.[50]

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45 It also leads to the conclusion that the acts of the Japanese government are unjust in that they do not give sufficient weight to the equal value these women possess in relation to the Japanese people in general and former Japanese soldiers in particular.

46 See Part II *infra* for a brief description of the knowledge held by the Allied Nations.

47 Dolgopol and Paranjape, *supra* and Judgement of the Tokyo Tribunal, *supra*.

48 See, e.g., Matthew Draper, 'Note: Justice as a Building Block of Democracy in Transitional Societies: The Case of Indonesia, [2002] 40 *Columbia J Transnat'l L* 391. Even he recognises that it would not be possible to try all those responsible for abuses given scale of violations that were committed under the Suharto regime. Draper at 412.

49 This point is explored by Christine Chinkin in her editorial comment, 'Women's International Tribunal on Japanese Military Sexual Slavery, (2001) 95 *A.J.I.L.* 335.

50 For a discussion of this issue in the context of the South African Truth and Reconciliation Commission, see Sam Garkawe, 'The South African Truth and Reconciliation

Another consideration that is often overlooked is that the narrowness of the trial process may in fact encourage the general population to distance themselves from the core issues and allow themselves to believe that the crimes and the problems were the fault of a few, when in fact mass atrocities occur when significant numbers of people are involved in their commission. Societies cannot be allowed to avoid asking themselves how and why these events came about. Minow observes that a trial's focus on select individuals 'cannot tell the complex connections among people that make massacres and genocides possible.'[51]

Part of the message we want to send when we hold criminal trials is that you are a sentient being capable of making moral choices and you made a choice that was so brutal and so outrageous even in a time of war that it is beyond the bounds of what we will tolerate. But this does not tell us how the perpetrators came to be in a position where they believed that they had a choice to engage in barbarous acts. Nor does it allow us to think about how we reconstruct a society so that others do not believe that such choices will be tolerated.

In her examination of the utility of trials and truth commissions Martha Minow suggested that truth commissions may be a more useful vehicle for the creation of an historical record as a part of their mandate is to put the crimes committed by individuals into a larger historical context that examines the extent of societal upheaval and disarray, whereas a criminal trial is ultimately about the guilt or innocence of a particular defendant. Whilst it is possible that some of the evidence introduced at trial may include materials about the racism, unjust social policies and intolerance that were at the root of the conflict, and that a judgement might contain an historical section wherein the judges decry the decisions made by government and military officials to carry out policies of genocide, mass rape or murder, ultimately the trial process is not about gaining a deeper understanding of a country's history or its political processes.

During periods of mass violations of human rights or times of war military officials, police and government agents commit acts that may later be categorised as war crimes or crimes against humanity.[52] At the time of their commission, these individuals often claim to be acting on behalf of the nation. Truth Commissions by focussing on context try to explain how the nation could have disintegrated to this point, how it was possible that this scale of human rights violations could have taken place and how this level of torture, disappearances, murder and rape was allowed

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Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?' (2003) *MULR* 14.

51 Minow *supra* at 46-47.

52 The literature in this field of transnational justice covers areas that have traditionally been considered by human rights bodies such as the UN Commission on Human Rights to be mass violations of human rights but now because of the creation of the International Criminal Court are also discussed by more commentators as war crimes and crimes against humanity. Prior to the creation of the ICC, UN bodies and international as well as national non-government organisations addressing these matters would call on national governments to bring the perpetrators of these acts to justice.

to occur and what effect these acts have had on the general population.[53] They also allow the voices and memories of those touched by violence to be included in the history of the nation and thus assist with the moral reconstruction of a society and the establishment of a durable peace.

Melissa Ballengee provides an insight into the methodology by which civil society can assist in the creation of an historical record in her description of the Catholic Church's Recuperation of Historical Memory project in Guatemala.[54] This undertaking focussed on 'rural communities whose physical inaccessibility and linguistic diversity'[55] would make it unlikely that they would participate in the United Nations sponsored Historical Clarification Commission.[56] Two main goals permeated the work of the Historical Memory Project: the ending of impunity for the military and a compilation of materials. The report, Guatemala: Nunca Mas, issued by the project, names 'the most egregious perpetrators.'[57] The view of those preparing the report was that publicly naming the responsible individuals would bring shame upon them and would serve to diminish their power. The report brought together the stories of 6,500 people and 'analyzed more than 55,000 cases of human rights violations.'[58]

The project also sought to empower the participants. Not only did it provide an opportunity for them to describe the events that so horrifically affected their lives but also it assisted people to understand that they were doing this for the good of the nation.[59] As time has passed it has become evident that the efforts of both the Catholic Church and of the United Nations have contributed to the peace process.[60]

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53 Minow points to the importance of making sure that the national silence that accompanied these periods of atrocity does not continue as silence forces both the population and the international community to be complicit in the acts of horror. Minow *supra* at 5. Referring to the work of Mark Osiel she describes the difficulty of prosecuting appropriate individuals when large-scale violations are coordinated by the central state against its own citizens. To prosecute some 'foot soldiers' may give you an insight into how "ordinary people [became] swept up in complex and well-orchestrated campaigns of fear and violence." However the reality is that most of those are not tried or those trials that do proceed then 'seem arbitrary and grossly incomplete.' Minow at pages 41-42.

54 Melissa Ballengee, 'Comment: The Critical Role of Non-Governmental Organizations in Transitional Justice: A Case Study of Guatemala,' [1999/2000] 4 *UCLA J. Int' L. & For. Aff.* 477.

55 *Id.* at 491.

56 This Commission is also described in Ballengee's article.

57 Ballengee *supra* at 503. In contrast the UN report does not name individuals, although it does explore the issue of institutional responsibility.

58 *Id.* at 492.

59 *Id* at 492-493. The Church continues to provide people with legal assistance and mental health services.

60 Worryingly those opposed to fundamental changes in Guatemalan society resorted to acts of violence immediately after the release of the report. 'Bishop Geradi, the guiding light behind the … project, was bludgeoned to death' two days after the report was released and many other officials involved with the report have received death threats. A number of those left the country as a result.

Initial attempts by government officials to continue the cycle of impunity have been resisted and slowly those connected to the government of Rios Montt have been moved aside.[61] The pressure on the government to respond to the report was maintained by the public education campaigns that followed the reports release that included easily accessible printed summaries of the report as well as radio broadcasts about the report's findings.[62] Although no one would suggest that the peace process in Guatemala is complete, the importance of having a well-researched and publicly supported set of documents to inform that process has been vital to the country's gradual transformation.

The centrality of healing and empowerment to the workings of official and non-government truth commissions may be a crucial factor in the eventual restoration of peace and the long-term promotion of human rights as those efforts help to create a class of people who are committed to preventing further violations of fundamental human rights.[63]

The importance of this commitment to the long-term process of building a human rights framework should not be underestimated. To bring about the range of necessary changes groups and individuals will have to continue to lobby both the public and the government. The drive required to keep issues on the national agenda is enormous and the greater the number of individuals who are wiling to devote some of their time and energy to the process the more likely it is that change will occur. One of the tasks sometimes undertaken by commissions is making recommendations to governments with respect to reparations and restitution, that is the payment of monetary compensation (the amounts are often symbolic) in recognition of the harm suffered as well as ideas for commemorating the suffering of victims and survivors such as memorials, national days of remembrance and reburials.[64] Turning these recommendations into reality also requires a sustained effort on the part of individuals and civil society. Empowering the survivors and the families of victims enables them to continue to speak about their needs and the strategies necessary to make them feel secure, lessen their isolation and help the psychological healing process. This information is important if the peace-building process is to succeed whether the conflict that brought about their suffering was internal or international in nature. With respect to non-international armed conflicts it is particularly necessary to both the reintegration of victims and to societal reconciliation.

Thus far state and internationally sponsored efforts at truth commissions have focussed on non-international armed conflicts. But this limited view needs to be

61 Ballengee *supra* at 497. She does note that there continues to be a high level of frustration among the population that many of the recommendations made in the two reports have not been implemented and that a significant number of those responsible for human rights abuses have not been tried. Rios Montt held dictatorial powers in Guatemala during the period when many of the worst human rights abuses were committed.

62 Ballengee *supra* at 500.

63 *Id* at 500 – 505.

64 The Final Report of the Special Rapporteur on 'The Right to restitution, compensation and rehabilitation for the victims of gross violations of human rights and fundamental freedoms,' E/CN.4/Sub.2/ 1993/8.

questioned. International armed conflicts also result from racism or ethnocentrism, social and economic disadvantage and power-seeking behaviour. Societies whose governments took them into war also need to understand the process by which they were led into upheaval and to consider the internal factors that may have contributed to their government's decision to go to war. Furthermore internal opponents of the war may have been killed or tortured or have had their families subjected to various forms of brutality. The survivors and families of victims will have the same concerns and needs as those who experienced domestic upheaval. There will also be numerous individuals within countries that were the target of an international armed conflict who will have experienced horrendous levels of brutality and may feel themselves isolated from their communities because of the acts perpetrated against them. This was the experience of the 'Comfort Women' and reports issued by the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and academic commentators suggest that this is a universal phenomenon.[65]

Having highlighted the need for a broader conception of justice, one that gives meaningful consideration to the methods by which we can restore dignity to the survivors and families of the victims and gain an insight into both the historical, economic and social context of the events they experienced and the responsibility of individuals as well as state structures for those events, it is time to turn to the Tokyo Women's Tribunal to consider whether its processes and findings can be considered a form of justice.

Justice and The Tokyo Women's Tribunal

An Idea Is Born

The possibility of holding a tribunal was first mooted at a seminar on violence against women[66] held in Tokyo during November 1997. Some of those present at the seminar had been working on the 'Comfort Women' issue for a number of years. Others had extensive experience in working for the promotion of women's rights through international organisations. Everyone agreed that any major new effort should be designed to have a significant impact on the lives of the women as well as the Japanese government. The participants also agreed that the format should differ markedly from the seminars and 'public hearings' that had taken place in Tokyo,

65 See generally The ICRC's series of publications under the rubric of 'People on War,' John Stremlau, People in Peril, Human Rights, Humanitarian Action, and Preventing Deadly Conflict, May 1998 paper prepared for the Carnegie Commission on Preventing Deadly Conflict, Judy El Bushra, 'Social Differentiation between Men and Women in Humanitarian Interventions' in Claire Pirotte, Bernard Husson and François Grunewald (eds), *Responding to Emergencies and Fostering Development – The Dilemmas of Humanitarian Aid* (translated by Julia Monod-Robinson) (Zed Books 1999) and Rebecca Grant and Kathleen Newland, *Gender and International Relations*, (Indiana University Press 1991).

66 International Conference on Violence Against Women in War and Armed Conflict Situations, Tokyo November 1997.

Seoul and Manila throughout the 1990s. These prior efforts had improved public awareness of and community support for the issue. However it was recognised that the Japanese government was not going to set up a government funded commission of inquiry to fully investigate the matter nor was it going to admit to the full extent of the wrongdoing committed by military and government officials. Those present took the view that if the Japanese government were not going to take seriously its obligations to restore the women's sense of dignity by publishing full and frank accounts of the Comfort System, then it was up to civil society to take extraordinary measures to ensure that history accurately reflected the lives of these women as well as the responsibility of the Japanese government.

Also influencing the thought process of those present was the possibility of again directing the attention of international human rights bodies and the global media to this issue. Both the Subcommission on the Prevention of Discrimination and the Commission on Human Rights had considered material related to the Comfort System and had called on Japan to make adequate reparations.[67] It was hoped that further attention by these bodies would convince the government that the issue would not disappear and that its international reputation would be enhanced if it did offer adequate reparations and restitution.

A number of delegates were determined to raise the profile of the issue once again in Japan. Public support for the 'Comfort Women' had existed since the early 1990s but as is the case with the majority of human rights issues, people's attention is diverted and public interest wanes. For many of the participants, both from Japan and outside of Japan, there was a continuing concern that Japanese history textbooks did not adequately discuss this period of Japanese history. There was also some dismay at the fact that a few high profile individuals continued to deny that there was anything wrong with the creation and operation of the Comfort System.[68] Another motivating factor was the desire of many in the Asia-Pacific region to have Japan face the reality of its colonial past. They believed Japan had to develop a better understanding of the profound effect its policies had had on the populations of other countries in the region.

Following extensive discussions it was agreed that an organising committee would be formed from representatives in South Korea, The Philippines and Japan and that other organisations and individuals would be approached to enlist their support for the endeavour. As a result of these efforts representatives from China, Indonesia, North Korea and Taiwan agreed to work toward the holding of the Tribunal.[69] In mid-2000 lawyers from East Timor joined this regional effort.

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67 See references to reports contained in footnote 3 *supra*.

68 See Judgement at paras 987-88.

69 In order to include the experiences of Dutch women in Indonesia, Grant Niemann (former prosecutor with the International Tribunal for the Former Yugoslavia and now a Lecturer at Flinders University in South Australia) was asked to present evidence on their behalf at the Tribunal, in particular the evidence of Jan Ruff O'Herne who had told her story at public hearings held in Tokyo during the early 1990s and had published a book of her experiences entitled: 50 Years of Silence. Mr Niemann did not participate

The Process of Organising the Tribunal[70]

At an early stage of the discussions a decision was made to hold a Tribunal that would resemble an actual court proceeding to the greatest extent possible. This was done for several reasons, but primarily to respond to the women's description of what would constitute justice for them.

Discussions held with women in several of the affected countries made clear that they wanted the proceedings to address both the criminal responsibility of those involved and the responsibility of the government of Japan to make restitution in its fullest sense, that is the issuance of a formal apology, the payment of reparations, the publication of historical records and the creation of memorials. The inclusion of both civil and criminal issues in the proceedings of the Tribunal made it somewhat controversial.[71] Although aware of this, the organisers could not keep faith with the women and at the same time omit the criminal aspects of the proceedings. It was vital that a message be sent to them that the international community recognised that they were not responsible for what had been done to them and that the perpetrators of the 'Comfort Women' system were criminals.

In order not to raise false expectations in the women, grassroots organisations that worked with them were encouraged to explain the purpose of the Tribunal and the fact that it did not have official status. That is, its judgement would not be binding on the government of Japan. On the other hand, it was hoped that the solemnity of the proceedings and the amount of evidence introduced would lend credence to the findings of the Tribunal and allow the international community to understand the nature of the crimes.

Inclusiveness was an overarching goal of the organising committee. This meant that representatives from all countries that had experienced the horrors of the 'Comfort Women' system would be represented on the legal team for the Tribunal. Within many of the countries volunteers with specialised skills came forward to conduct historical research, undertake interviews with former 'Comfort Women', former soldiers and expert witnesses. Hundreds of hours of work were put into these efforts by each of the country teams. Representatives from each of the countries met periodically to establish a Charter for the operation of the Tribunal, to agree on the legal framework for conduct of the proceedings and to make decisions about all the important administrative matters.[72] To assist in the coordination of the work of the country legal teams the organising committee in consultation with the country

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in the various meetings of legal and research teams described in this and the following section.

70 An overview of the steps taken to organise the Tribunal as well as the Charter adopted by the organisers can be accessed at the web address of the Violence Against Women Network, Japan, *supra*.

71 See Chinkin, *supra*.

72 During the Tribunal hearings representatives put forward information about events in Malaysia and Papua New Guinea as well.

prosecutors appointed two 'Chief Prosecutors', Patricia Visseur Sellers[73] and the author.

It was agreed that the 'indictment' would name, with the exception of the Emperor, high-ranking government and military officials who had been tried at the International Military Tribunal for the Far East (hereinafter IMTFE) and who had been found guilty of condoning the commission of atrocities. A factor in the decision making process was the desire to utilise the law as it stood in 1945 in order to demonstrate that the crimes committed against the 'Comfort Women' could and should have been tried before the IMTFE.

After considerable debate it was decided that the indictment should be brought in the name of all of the country teams and should concentrate on crimes against humanity in order to avoid sensitive arguments about the colonial status of the various countries. As crimes against humanity are crimes that can be committed against a state's own population as well as a belligerent population, the status of a particular territory was irrelevant to the legal determination of whether or not such a crime had been committed.

The application for reparations was brought in the name of the Peoples' of the Asia-Pacific region in order to emphasise both the solidarity of the group and the nature of the Tribunal as one organised by civil society. This application was modelled on cases brought before the International Court of Justice and sought to hold the State of Japan responsible for the wrongful conduct of its military and government officials.

In keeping with the view that this was an event of major international significance and that the proceedings had to be and had to be seen to be conducted in a manner that came as close as possible to approximating a judicial hearing, leadings jurists and international scholars were approached to sit as judges. They were guaranteed their independence. It was agreed that any judgement issued by the Tribunal would be the intellectual work of the judges and their assistants. Further their determinations as to the weight to be accorded any piece of evidence or the acceptance or rejection of legal arguments was to be for the judges alone. This agreement was strictly adhered to by all of those involved.

The judges of the Tribunal were: Gabrielle Kirk McDonald (Presiding Judge),[74] Carmen Arguibay,[75] Christine Chinkin[76] and Willy Mutunga.[77] The assistants to the Judges were: Rhonda Copelon, a professor at The City University of New York,

73 Prosecutor and Gender Advisor to the International Tribunal for the Former Yugoslavia.

74 Her Honour served as Presiding Judge at the Tribunal for the former Yugoslavia and was a sitting judge in the United States prior to her appointment to the Yugoslav Tribunal.

75 Now an *Ad Litem* Judge at the Tribunal for the former Yugoslavia and a sitting judge in Argentina.

76 Professor of Law, London School of Economics.

77 Chair, Human Rights Commission of Kenya (a non-government organisation).

Queens, Law School and Kelly Dawn Askin, a noted scholar on war crimes against women.[78]

The Holding of the Tribunal

During the trial 35 survivors testified either in person or through video interviews. For those whose testimony was given by video, the majority were present to swear to the truthfulness of their statements. The country prosecutors had encouraged many survivors to give videotaped testimony in order to avoid the emotional anguish of re-living their experiences before a large group of people.[79]

The documentary evidence consisted of both Japanese and Allied archival material such as communications between the War Ministry and field commanders[80] and interrogation reports compiled by the Allies,[81] memoirs of Japanese military personnel, recent government reports containing official acknowledgement of Japan's involvement in the Comfort System, extracts from the IMTFE judgement and reports of the UN Special Rapporteur on Sexual Slavery.

Among the expert witnesses were noted Japanese scholars who testified about the organisation and operation of the Japanese military, the documentary material available in Japan demonstrating the involvement of the military and government in the Comfort System and the role of the Emperor in directing the conduct of the war. Other experts testified about the rules of international law applicable during the war including the right to compensation for victims of violations of international humanitarian law and the psychological impact of rape and enslavement on the victims and survivors.

Preliminary findings were issued on the 12th of December 2000. These concentrated on the responsibility of the Emperor for the establishment of the Comfort System, citing both his actual knowledge of the system as well as the facts that would allow the judges of the Tribunal to conclude that he had reason to know of its existence and had the power to bring it to an end.[82]

78 Barbara Bedont of Canada and Betty Murungui of Kenya provided additional research and technical assistance.

79 There were approximately 1500 people present in the hall where the Tribunal took place.

80 An example of this was a memorandum entitled 'Matters Concerning the Recruitment of Women' sent on March 4, 1938 by an Adjutant General in the Japanese War Ministry to the Chiefs of Staff of the North China Area Army and the Central China Expeditionary Forces. See Judgement at para 90.

81 See, e.g., 'US Office of War Interrogation Report no. 49' discussed in para 98 of the Judgement.

82 A copy of the Judges' Preliminary Findings is in the personal possession of the author. A copy of these findings can be access through the web address of the Violence Against Women Network, Japan, *supra*.

The final judgment of the Tribunal was handed down on 4 December 2001 at a ceremony in The Hague.[83] It is 243 pages in length and contains both factual findings and a discussion of the applicable law.[84]

An Analysis of the Achievements of the Tokyo Women's Tribunal

An overarching goal of the organisers was to assist the survivors in finding a sense of peace in themselves. They like many survivors of mass atrocities had a need to have some outside body recognise their harm and sanction their ability to speak about it.[85]

A sad phenomenon of many situations of mass atrocities is that the victims/survivors become outsiders in their own societies. This is due in part to the embarrassment many people feel with respect to the trauma of the survivors and victims' families. This may arise because of an inability to respond to the pain of families of victims and survivors and a lack of understanding of what can or should be done to assist them. In the case of the 'Comfort Women', this phenomenon was made worse because of the nature of the crimes. It is a universal reality that women tend to be blamed for the sexual crimes committed against them.[86] Due to the conservative nature of the societies these women came from, they felt unable to talk about what happened and were discouraged from doing so by family members. The Organising Committee wanted to counter this silence and isolation with a process that would empower the women.

The women in each country were aware that teams of people across the region as well as from the United States and Europe were working on their behalf. The communications received from national organisations indicated that many women felt inspired and empowered because of the attention being given to their cause. The survivors were encouraged to assert themselves and to perceive of themselves as actors who could influence the direction of their own lives as well as our understanding the history of WW II and the development of international law with respect to the treatment of crimes against women.

Also of significance to the women was the message they were receiving from the international community. They were aware that individuals and groups from around the world had contributed to publicising the Tribunal. They watched as people from all regions of the world filled the hall each day in order to be a part of this historic occasion. Representatives of numerous media outlets were also present and this served as a further reminder that their cause had worldwide sympathy.

The Tribunal provided the women with an opportunity to be with one another. Over the years it has become obvious that the women found some solace in being with each other. Several of them have expressed the view that only another woman

83 A copy of the Final Judgement is in the personal possession of the author.

84 A description of the judgement is contained in Dolgopol, *supra*. A copy of the judgement can be obtained from the Violence Against Women Network, Japan.

85 Ballengee *supra* at 483

86 Askin, *supra*.

who has had to endure a similar experience could appreciate the emotional pain that each of the survivors has had to endure.

Several cultural and artistic events took place during the holding of the Tribunal. The significance of this may have gone unnoticed at the time, but deserves attention. One of the problems that those working in the field of human rights can face is how to avoid treating people who have suffered severe violations of their human rights as if they are the trauma they have suffered. The events outside the Tribunal gave recognition to the women as artists, members of their community, friends, mothers and people who enjoyed singing and laughing. These activities allowed them to be appreciated as multi-faceted human beings.

An unintended but important outcome of the Tribunal may be the restoration of the Japanese people into the Asian community. This is not to suggest that this is complete, but it is something that requires further thought and research. As noted in Part I the literature in the field of transitional justice has highlighted the importance of creating an accurate historical record, so that atrocities are known for what they are and to ensure that countries cannot avoid their own past.[87] Despite the passage of time, there is little doubt that resentment of Japan remains among people throughout the Asia-Pacific region.[88] There is a sense in the region that Japan has not come to the point of 'owning' its past. The crimes committed during the Japanese occupation of many of the countries of this region have not been forgotten nor have they been forgiven. The Tribunal was a chance for a group of Japanese people to reach out to others and to try to create a form of peace. They worked to gain the trust of organisations and individuals from other countries in the Asia–Pacific region.

The sense of purpose, the bonds of trust that flourished and the friendships that resulted from the organising and holding of the Tribunal will continue to affect all of those who participated or witnessed these events. At a grassroots level this was a meaningful form of reconciliation. It was particularly meaningful because all of those involved were aware that the many women and men from Japan who worked to organise the Tribunal and who supported it in other ways were committed to ensuring that Japan did not forget its past. This was something they were doing for others, but they were also doing it for themselves, because they believed their society would be better off if it acknowledged its past.

For a variety of reasons that remain to be explored there is a dearth of published historical material on this subject.[89] To some extent this might be explained by a

87 See, e.g., Ballengee at 482 and Eleanor Taylor-Nicholson, 'Justice and restoration: East Timor's Transition (Honour's Thesis submitted for the award of the LLB, Flinders University 2002).

88 Onuma Yasuaki, Japan's War Guilt and Post War Responsibilities of Japan (2002) 20 Berkeley J. Int. L. 600.

89 Materials placed before the Tribunal, documents uncovered by Professor Yoshemi and others all demonstrate that documentary evidence existed about the Comfort System. Allied interrogation reports from 1941 onwards routinely contain references to questions being asked about 'military brothels.' See U. Dolgopol, 'Rape as a War Crime – Mythology and History,' in Indai Sajor (ed) *Common Grounds, violence against women in war and armed conflict situations (*ASCENT 1998). Novels written immediately after

lack of interest on the part of academic and other writers until recently to explore this aspect of warfare. It may be that the knowledge that the Japanese government had destroyed many of its documents led people to believe that there was little to be gained from searching Japanese archives. The holding of the Tribunal has allowed much of the known material to be gathered together so that future researchers may continue to explore this aspect of the history of WW II. As a result of the efforts of all of those involved in the preparations for the Tribunal a body of knowledge now exists that was missing from our collective memories. This compilation of materials acts as its own testament to the women.

It may be that some commentators will criticise the Tribunal because it did not stringently follow court procedures, in particular because it did not allow for cross-examination of the survivors. However it is not the veracity of minor details of the survivors' stories that is of importance to history but rather the fact that such an horrendous event took place. The volume of material, both documentary and oral, makes it impossible to avoid taking notice of this historical event. It will be left to future scholars to further research and to make the record more complete.

One difficulty that does arise from the decision to follow a trial court process is that the Judgement of the Tokyo Women's Tribunal suffers from some of the same deficiencies that exist in judgments of international war crimes tribunals. They do not tell the full story of why events occurred and do not explore the complex interplay of events and personalities that led to mass atrocities.[90] Although the Judgement of the Tokyo Women's Tribunal provides an excellent overview of the impact of these events on the lives of the 'Comfort Women', it does not offer a detailed historical or political analysis of pre-war Japan nor of the position of women in Japanese society. This is not a criticism of the judges as they completed the task they were asked to do. Rather it emphasises the limited nature of the trial process.

This leads to the question, where to from here? Organisations across the region continue to work on this issue. One matter that has not been resolved is the creation of an archive for the information placed before the Tribunal. Suggestions have been made for the creation of a museum that focuses on the issue of women and war.[91] The location of such a museum or the possibility of having multiple copies of the documents and testimonies made available at several locations is still being discussed. The importance of having at least one location where the entire set of documents

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the war about events in Singapore contain references to Chinese women being taken by Japanese soldiers.

90 Gary Bass, 'Book Review, Mass Atrocity, Collective Memory, and the Law by Mark Osiel,' [1997] 97(6) *Mich. L. Rev.* 2103 accessed through Expanded Academic, ASAP Plus on 31 July 2003.

91 Yayori Matsui, one of the organisers of the Tribunal, died in December 2002. A bequest was made in her will to assist in the creation of such a museum in Tokyo. Further information about the museum can be obtained from the Violence Against Women Network, Japan web address *supra*. Some of the documents will also be included in the War and Women's Human Rights Centre in Seoul, which is part of the Korean Council for Women Drafted into Military Sexual Slavery. Information about the Centre can be obtained from the Korean Council's web address *supra*.

can be easily accessed by future researchers cannot be overstated. It is to be hoped that funding can be secured for such a project.

A further task awaits those who continue to work on this issue. The process of organising and holding the Tribunal assisted in the empowerment of the 'Comfort Women'. This effort at empowerment should continue. It is important that the Judgement of the Tokyo Women's Tribunal is put into simple language and that it be used to inform public opinion in countries throughout the region. The women should be encouraged to understand that they 'own' the Judgement as well as their own stories. If this process is to be successful it also means that those who worked on the Tribunal must constantly remind themselves that they have achieved one form of justice. Their efforts have gone a long way in restoring the survivors' sense of self-respect, dignity and feeling of control over their lives.[92] This accomplishment should be published more widely.

Conclusion

The aim of this chapter is to begin a dialogue about the aspects of justice that can be achieved by civil society. It is a call for those engaged in the process of transitional justice to think more imaginatively about the manner in which justice can be achieved. As noted in Part I there is a need to continually refine our conception of justice and to ensure that we include the political and moral aspects of justice in our responses to mass atrocities. It is also necessary to be conscious of the effects of justice that is partial and narrow on the victims and survivors as well as on society as a whole.

Civil society cannot offer strict 'legal' justice, as it cannot punish. But it can, through its willingness to be involved and to work with those affected by heinous crimes, assist in the restoration of dignity and the empowerment of families of victims and survivors. It can also aid in the restoration of political justice by detailing events, naming those responsible and creating an historical record that identifies societal fault lines. Such efforts will also foster 'moral' or philosophical justice, as they will encourage a reaffirmation of a society's values.

'Justice means constant revision of justice, expectation of a better justice.'[93] The 'Comfort Women' today have a better justice than they did when Kim Hak Sun first spoke about her experiences as a 'Comfort Women' in the early 1990s. Civil society has ensured that the experiences of the victims and survivors will not be forgotten and that our understanding of the experiences of women during times of armed conflict has been enriched by their courage in coming forward to tell their stories. The historical record created by the Tokyo Women's Tribunal will allow for a further revision of justice as activists, researchers and survivors continue to utilise that material to inform public debate and to encourage further work in this field.

92 This is based on the observations of John Braithwaite and Heather Strang in the introduction to their book, *Restorative Justice, Philosophy to Practice* (Dartmouth 2000).

93 Emmanuel Levinas as quoted in Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000) at 352-353.

The process of searching for justice is not at an end because civil society will not let it end. Perhaps that is the greatest testament to the 'Comfort Women', that their bravery has inspired a new generation of activists who will in turn motive academics and researchers to continue the story so that women around the globe will receive an even 'better justice.'

Could Systematic Sexual Violence against Women during War Time Have Been Prevented? – Lessons from the Japanese Case of "Comfort Women"

Etsuro Totsuka

Introduction

The author wishes to stress the importance of his recent findings to be made public at this conference for the first time relating to whether the Japanese Empire in 1930s could have reversed its practice of military sexual slavery.[1]

General Background to the Issue of the "Comfort Women"

Despite the criticisms and actions of the United Nations (UN), the International Labour Organisation (ILO) as well as non-governmental organisations (NGOs), the Japanese Government has refused to take the necessary steps towards reconciliation with the victims of military sexual slavery, namely the "comfort women".[2]

The term "comfort women" was first used by the military of the Japanese Empire before and during World War II. It is a euphemism for the enslaved women victims of sexual slavery by the Japanese military.

The author delivered an oral statement on "comfort women" as "sex slaves" to the 48th Session of the UN Commission on Human Rights on 17th February 1992 that included the following observation:[3]

> One example was the situation of Korean girls and women abducted by Japanese forces during the Second World War for use as sex slaves. … The former Vice-

1 The authors' two articles in Japanese on these judgments were published after the International Law Conference in Adelaide: See Totsuka, Etsuro, Senji jyosei ni taisuru boryoku eno nihon shiho no taiou, sono seika to genkai (jyou), Sensou-Sekinin-Kenkyu Quaterly – The Report on Japan's War Responsibility, published in Japan, no. 43, March 2004, pp. 35-45, 67; and Totsuka, Etsuro, Senji jyosei ni taisuru boryoku eno nihon shiho no taiou, sono seika to genkai (ge), Sensou-Sekinin-Kenkyu Quaterly – The Report on Japan's War Responsibility, published in Japan, no. 4.4, June 2004, pp. 50-63. The publication of these articles was reported by the mass media in Japan based on the news articles circulated by Kyodo News Agency on 15 June 2004. They include Wartime 'comfort women' rulings uncovered The Japan Times, Wednesday, June 16, 2004: <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040616a8.htm>.

2 This represents the situation as of February 2004.

3 UN Doc. E/CN.4/1992/SR.30/Add1, para. 14-18.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 499-513.*
 ISBN 90 04 14599 0.

> Chairman of the Japanese House of Representatives had alleged that 57.9 per cent, [totalling] 143,000 young girls and women, had died in enslavement. In January 1992 the Government of Japan had made an apology to the Korean People but had offered no compensation or other effective remedy to the victims as required by article 8 of the Universal Declaration of Human Rights. …"

Since then, this issue has been widely discussed by international lawyers. Not only the International Commission of Jurists[4] but also two UN Special Rapporteurs,[5] the ILO Committee of Experts[6] and the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery[7](WIWCT) have recommended that the Japanese Government take concrete action, including fact-finding, admission of responsibility and the payment of compensation to the women victims. The UN special rapporteurs as well as the WIWCT pointed out that Japan still has a duty to punish perpetrators of war crimes and crimes against humanity including wartime military violence against women.

Let me briefly summarize the current situation.

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4 DOLGOPOL, Ustinia & PARANJAPE, Snehal, *Comfort Women: An Unfinished Ordeal, Report of a Mission by the International Commission of Jurists* (1994): <http://www.comfort-women.org/Unfinished.htm>, visited on 8 February 2004.

5 The Addendum (UN Doc. E/CN.4/1996/53/Add.1) of the first report in 1996 to the Commission on Human Rights made by Ms. Radhika Coomaraswamy the Special Rapporteur on Violence Against Women, focused on military sexual slavery by Japan. In the appendix to the Final Report on systematic rape, sexual slavery and slavery-like practices during armed conflict (UN Doc. E/CN.4/Sub.2/1998/13.) submitted by the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict to the UN Sub-Commission of Human Rights, Ms. Gay McDougall found that the acts committed by the Japanese military against the "comfort women", constituted violations of international law, war crimes and crimes against humanity. She recommended the following actions by the Japanese Government: investigation of the facts, punishment of the perpetrators, admission of the facts, a formal apology, direct compensation to the individual victims and other measures. <http://www.comfort-women.org/resources.htm> visited on 8 February 2004.

6 The ILO Committee of Experts on the Application of Conventions and Recommendations, which found violations of ILO No. 29 Forced Labor Convention, in its observations in 1996, 1997, 1999, 2001, 2002 and 2003, recommended that the Japanese Government pay compensation to the victims irrespective of the Japanese Government's treaty defense. <http://www.ilo.org/ilolex/english/newcountryframeE.htm> visited on 8 February 2004.

7 WIWCT was a people's tribunal organized by Asian women and human rights organizations and supported by international NGOs. The WIWCT was held in Tokyo on 8-12 December 2000. On 12 December 2000, the Tribunal issued its preliminary judgment, which found Emperor Hirohito guilty, and the State of Japan responsible, for the crimes of rape and sexual slavery as crimes against humanity. <http://www1.jca.apc.org/vaww-net-japan/english/> visited on 8 February 2004.

- First, the Japanese Government continues to refuse State compensation and to opt for payment from private funds such as the "Asian Women's Fund"[8] on unjustifiable grounds such as the "treaty defense".[9]
- Second, the Japanese courts, with one exception, the famous judgment of the Yamaguchi District Court,[10] have refused all demands for compensation that have been filed by the victims. The single exceptional victory was reversed by the Hiroshima High Court,[11] the judgment of which was then upheld by the Supreme Court on 25th March 2003. The offers of Korean women victims to settle the dispute through international arbitration, an initiative strongly supported by United Nations human rights bodies, were refused by the Japanese Government.[12]

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8 As for critical views of the Asian Women's Fund, see the web site of the Korean Council for the Women Drafted into Military Sexual Slavery by Japan, <http://www.k-comfort-women.com> visited on 10 February 2004 (English page as yet unavailable). As for the views of the leading Japanese historian, see: YOSHIMI, Yoshiaki, *The Emergence of the Issue*, in: YOSHIMI, Yoshiaki, translated by O'BRIEN, Suzanne, *Comfort Women Sexual Slavery in the Japanese Military During WW II* (Colombia University Press, 2000) pp. 23-40. As for the claim of the AWF, see <http://www.awf.or.jp/english/index.html> visited on 10 February 2004.

9 Since 1992 the author has been criticizing the attitude of the Japanese Government as follows: 1. As for the private fund policy, see: TOTSUKA, Etsuro, 'Military Sexual Slavery by Japan and Issues in Law' in: Keith Howard (ed.), *True Stories of the Korean Comfort Women* (Cassell, London & New York, 1995), pp. 193-200; 2. As for the victims from the Republic of Korea, see: TOTSUKA, Etsuro, 'International Legal Issues between ROK and Japan concerning Comfort Women', In: Lee, Jang-Hie (ed.), *International Legal Issues between the Republic of Korea and Japan*, (ASRI Press, Seoul, 1998), pp. 65-88; 3. As for the victims in China, see: TOTSUKA, Etsuro, 'Peace Treaty and Japan's Wartime Responsibility: Breaking the Treaty Defense', *Humaniares Volkerrecht Informationsschriften*, 1/2002, pp. 43-46.

10 TOTSUKA, Etsuro, 'Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery', (1999) 8 *Pacific Rim Law & Policy Journal* pp.47-61.

11 Reuters=CNN.Com.news, Japan court rules against 'comfort women', March 29, 2001, Web posted at: 10:36 AM EST (1536 GMT) visited on 14 February 2004.

12 The author, representing NGOs such as the International Fellowship of Reconciliation, requested the United Nations to recommend that the Japanese Government and the victims agree to international arbitration. For example, the author submitted a written statement on behalf of IFOR to the Fiftieth session of the UN Commission on Human Rights. See: E/CN.4/1994/NGO/19, 4 February 1994, Written statement submitted by the International Fellowship of Reconciliation, a non-governmental organization in consultative status (category II), "Comfort women": a case of impunity, which stated "IFOR wishes to point out the existence of the Permanent Court of Arbitration which can offer its services in cases where one party is not a State." This was taken up by the UNWGCFS. See: E/CN.4/Sub.2/1994/3313 June 1994, the Report of the Working Group on Contemporary Forms of Slavery on its nineteenth session, Chairman-Rapporteur: Mr. Ioan Maxim, that recommended: "Noting the information received concerning the sexual exploitation of women, as well as other forms of forced labour, during wartime, Taking note of Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1993/24 of 25 August 1993 on slavery and slavery-

– Third, the proposals made by Diet Members of the opposition parties for a state apology by legislation and for state payment were successfully submitted to the House of Councilors. The accompanying documents established that such legislation would not violate international law or the Constitution. They have been, however, blocked by the conservative Diet Members supporting the Government.[13]

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like practices during wartime, 1. Decides to transmit the information received concerning the sexual exploitation of women and other forms of forced labour during wartime to the Special Rapporteurs on the question of the impunity of perpetrators of violations of human rights; 2. Recommends the Special Rapporteurs on the question of the impunity of perpetrators of violations of human rights to take into consideration the information received by the Working Group during its nineteenth session; 3. Welcomes the information that the Permanent Court of Arbitration is available to victims of violations of human rights, including various forms of slavery, and to States, should the parties wish to submit any matters to arbitration; 4. Draws the attention of the parties concerned to the possibilities of making agreements on voluntary submission to the jurisdiction of the Permanent Court of Arbitration as a way of assisting victims of violations of human rights, in particular practices akin to slavery." This was supported by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in August of that year. See: E/CN.4/Sub.2/1996/26, 16 July 1996, Preliminary report of the Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict, Ms. Linda Chavez, pointing out the role of the Permanent Court of Arbitration was as follows: "The Permanent Court of Arbitration was established in 1899 at The Hague by the International Convention for the Pacific Settlement of International Disputes. Originally created for arbitration between States, the Permanent Court of Arbitration enlarged its capacity of arbitration in 1962 to conflicts between individuals and States. Victims of violations of human rights, as well as States, may now submit matters to arbitration." NGOs, however, reported the subsequent refusal by the Japanese Government, to accept the UN recommendations, although the victims in the ROK agreed to do so. See: E/CN.4/Sub.2/1996/24, 19 July 1996, Report of the Working Group on Contemporary Forms of Slavery on its twenty-first session, Chairperson-Rapporteur: Mrs. Halima Embarek Warzazi as follows: "88. The observer for the World Council of Churches denounced what he described as manoeuvres on the part of certain members of the Japanese Government. They had knowingly misled the members of the Japanese Parliament by asserting that the Commission on Human Rights had rejected the report submitted by the Special Rapporteur after his visits. Speaking also on behalf of other non-governmental organizations in the Philippines, Indonesia and Japan, he expressed his opposition to the establishment of the Asian Women's Fund financed out of private capital so as to allow the Japanese Government to evade its legal obligations. He launched an appeal for no contributions to be made to that Fund. Lastly he regretted that the Japanese Government was persisting in its refusal to attend the Permanent Court of Arbitration and to grant compensation to the victims individually."

13 The author, on behalf of the Japan Fellowship of Reconciliation, has been reporting to the UN on the slow but steady development of the legislative movement as follows. In 2001: see E/CN.4/Sub.2/2001/NGO/24, 24 July 2001, written statement submitted by Japan Fellowship of Reconciliation, a non-governmental organization with consultative status (Special), "Comfort women": Current negative reactions and positive developments, to Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, stating: "Three opposition parties succeeded, for the first time, in submitting to the House of Councilors a united Bill for "Promotion of Resolution for Issues concerning Victims of Wartime Sexual Coercion Act". In 2002: see E/CN.4/Sub.2/2002/NGO/23,

- Fourth, the legislative proposals submitted by the Diet Members of the opposition parties to the House of Representatives for state investigation of the sufferings during wartime also have been blocked by the conservative Diet Members supporting the Government.[14]
- Fifth, the government has not admitted that the Japanese Imperial Military committed any crimes under Japanese domestic law.[15]
- Sixth, no admission of any violation of international law was offered by the Government.[16]
- Seventh, no further investigation by the Government is being conducted.[17]

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25 July 2002, Written statement submitted by Japan Fellowship of Reconciliation, to Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fourth session, which stated 'For the first time in history, on 18 July 2002, the Committee on Cabinet Affaires of the House of Councilors of the Diet of Japan started its substantial deliberation on a Bill, "Promotion of Resolution for Issues concerning Victims of Wartime Sexual Coercion Act".' In 2003: see E/CN.4/Sub.2/2003/NGO/46, 30 July 2003, Written statement submitted by Japan Fellowship of Reconciliation: Systematic rape, sexual slavery and slavery-like practices, to the Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, which stated 'Members of the House of Councilors of the Japanese National Diet, Ms. OKAZAKI, Tomiko; Ms. MADOKA, Yoriko; Ms. CHIBA, Keiko; Ms. KAWAHASHI, Yukiko; Ms. YOSHIKAWA, Haruko; Ms. HATTA, Hiroko; Mr. YOSHIOKA, Yoshinori; Ms. OWAKI; Masako; Ms. FUKUSHIMA, Mizuho; Mr. KUROIWA Takahiro; Mr. SHIMABUKURO Soko; Ms. TAJIMA, Yoko; and Ms. TAKAHASHI, Kiseko with support of other 73 Members of the House, on 31 January 2003, re-introduced a Bill, "Promotion of Resolution for Issues concerning Victims of Wartime Sexual Coersion Act" to the House at the 2003 Ordinary Diet Session. The Bill is the same as the previous bill, see E/CN.4/Sub.2/2001/NGO/24 and E/CN.4/Sub.2/2002/NGO/23, which was abolished at the end of the last Diet session in December 2002. The National Diet of the Republic of Korea, a major victimized nation, passed a resolution supporting the Bill mentioned above on 26 February 2003 at the opening of President ROH Moo-hyn's era

14 Information in relation to the movement to pass the legislation for the fact-finding is available in Japanese at the web site of "Senso-Higai-Chosakai-Ho wo Jitsugensuru Shimin-Kaigi" <http://www.geocities.co.jp/HeartLand-Keyaki/5481> visited on 10 February 2004.

15 As for the Japanese Government attitude in relation to an apology and the fact-finding conducted by it, see: O'BRIEN, Suzanne, Translator's introduction, YOSHIMI, op. cit. pp. 1-21. See: YOSHIMI, Yoshiaki, The Emergence of the Issue, YOSHIMI, op. cit. pp. 23-40. As for the attitude of the Japanese Government at the Diet, see: (In Japanese) MOTOOKA, Shoji, "Ianhu" Mondai to Watashi no Kokkai-Shingi, Shoji Motooka's Tokyo Office (April 2002), pp. 1-194. As for the attitude of the Japanese Government and the UN activities, see: TOTSUKA, op. cit.

16 Ibid.

17 Ibid.

This stagnation may delay achieving not only women's human rights, as it will slow down the prevention of further systematic violence against women, but also peace in the world.[18]

The author of this paper wishes to review the history of the Japanese case of military "comfort women" and to discuss whether Japan could have prevented such systematic violence against women by relying on legal measures.

Development of International Law in the 20th Century

In the early stage of the Meiji Era, namely in the second half of the 19th Century, Japan showed strong willingness[19] to abide by international law and ratified or acceded to some important treaties.

The three following international instruments are relevant for the purpose of this paper. All were major multilateral treaties that the international community devised to suppress the slave trade in women and children, specifically the use of white slaves for prostitution, after having made some progress in suppressing international trade in black slaves:

(1) *The International Agreement for the Suppression of the White Slave Trade*, signed at Paris, on 18th May 1904.

(2) *The International Convention for the Suppression of the White Slave Trade*, signed at Paris on 4th May 1910. Article 1 of the Convention is explicit that those who solicited, enticed or abducted juvenile women with the purpose of prostitution should be punished, even if the consent of the women was obtained. Article 2 is explicit that those who solicited, enticed or abducted adult women using deception or any means of violence, coercion, abuse of authority or any other coercive measures, should be punished. Article 3 obliges the state parties to take necessary measures in order to ensure punishment of the perpetrators of the crimes defined by Articles 1 and 2.

(3) *The International Convention for the Suppression of the Traffic in Women and Children*, concluded at Geneva on 30th September 1921.

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18 This author, being invited to give opinions concerning the bill for apology to the victims of sexual coercion during war time on 12 December 2002 by the Committee of the Cabinet Affairs of the House of Councilors, supported the purpose of this bill, which was to achieve friendly relationship with Asian countries. <http://www.jca.apc.org/~fsaito/sexslave.html>.

19 One of the examples is the firm response of the Japanese Meiji Government, that liberated all the Chinese slave trade victims of a Peruvian vessel, the Maria Luz at Edo Bay or Port of Yokohama in 1872. See the following web sites, visited on 11 February 2004: Bill Mihalopoulos, What is a Contract?: Law Meets the Doctor, the Migrant, and the Prostitute. <http://www.aasianst.org/absts/1999abst/inter/i-173.htm>. Juan del Campo, Treaties with Japan and China. <http://members.lycos.co.uk/Juan39/Japan_China.html>.

Japan ratified or acceded to these instruments in 1925.[20] Although Japan has not ratified the Slavery Convention, adopted at Geneva on 25th September 1926, the author believes that the prohibition against slavery and the slave trade was a norm of international customary law at the time this Convention was adopted.

The Convention concerning Forced or Compulsory Labour was adopted by the General Assembly of the ILO on 28th June 1930. Japan ratified this Convention on 15 October 1932.[21] The first sentence of Article 2 prohibits any forced labour of women.[22] Article 24 stipulates: 'the illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.'

On 11th March 1933, the Cabinet of the Japanese Empire decided to withdraw from the League of Nations.[23] This was a symbolic decision that inevitably isolated Japan from the international community and followed a series of undeclared wars waged against China by the Japanese Imperial Government and Military. Through these actions, Japan seemed to have substantially abandoned its willingness to respect international law.

The author's view is that Japan has not as yet regained a willingness to abide by international law, a view reinforced by its attitude to UN attempts to deal with the current issue of military sexual slavery.

Creation of Military Sexual Slavery by Japan

The leading historian, Professor Yoshiaki Yoshhimi wrote:[24]

> When were the first military comfort stations established, and how did the system expand? As noted above, since the materials that remain are only the tip of the documentary iceberg, it is very difficult to give a definitive answer.
>
> According to the recollection of Okamura Yasuji, Vice Chief of Staff of the Shanghai Expeditionary Force (commanded by General Shirakawa Yoshinori), the army was schooled in the military comfort women system by the Japanese navy in

20 The 1904 Agreement was acceded to by Japan on 21st October 1925 and promulgated on 21st December 1925. As for the 1910 Convention, the instrument of accession was deposited by Japan on 21st October 1925 and it was promulgated on 21st December 1925. The 1921 Convention was ratified by Japan on 28th September 1925; its deposition was registered on 15th December 1925; and it was promulgated on 21st December 1925.

21 Ratification was made by Japan on 15th October 1932. Its deposition was registered on 21st November 1932 and it was promulgated on 7th December 1932.

22 The Japanese Government acknowledged that coercion was, in general, employed in recruitment and/or treatment of the comfort women.

23 Naikaku-Seido Hyakunen-Shi Iinkai, Naikaku-Seido Hyakunen-Shi ge, Naikaku-Kanbo (1985), p. 201.

24 YOSHIMI, op. cit., pp. 43-44.

> Shanghai. It appears, then, that the first comfort stations were constructed by the navy.
>
> The naval comfort stations established at this time were large enough to occupy several buildings. A document from a slightly later period reveals that at the end of 1936, there were ten restaurants employing serving women (102 of those women were Japanese, while 29 were Korean). Of these ten establishments, seven were reserved exclusively for naval personnel.

The lack of official documents, that otherwise might provide the facts surrounding the birth of the military "comfort stations" and its criminality, allowed many conservative observers room to argue that the military's behavior against the women victims constituted "no crime", since the state regulated prostitution system "lawfully" existed. This has been one of the major reasons why the Japanese Government has been able to ignore the pressure for a state apology from the international community.

Responses of the Japanese Legal System against Military Sexual Slavery by Japan

The author has had the good fortune to locate the earliest District Court and Appeal Court judgments[25] of the Japanese criminal court against ten private entrepreneurs, who deceived and trafficked 15 Japanese women from Nagasaki to a Japanese Naval "comfort station" in Shanghai, China. It was already known as early as 1997 that in 1937 the then Supreme Court had endorsed the judgments of the District Court and the Appeal Court.[26] The lower Courts' judgments, however, had not been found.

As it was assumed by the researchers, including myself, that the judgments must have been destroyed by the atomic bomb dropped in August 1945 by the United States onto Nagasaki City, nobody attempted to find them. They, however, had survived.

The Nagasaki District Court Judgment[27] clearly shows the following facts, which, except for some information contained in the Supreme Court judgment, were not previously known.

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25 These 1936 lower court judgments were in the exclusive possession of the Japanese Government, which neither submitted them to the Diet nor to the Korean government, although they publicly promised to make a thorough investigation in relation to both of them.

26 According to the leading front page article of the Mainichi Shimbun (Osaka) on 6 August 1997, a Korean resident researcher in Japan learned that the Supreme Court ruled on 5 March 1937 that the abduction by deception of and trafficking in 15 Japanese women from Nagasaki to a Navy comfort station in Shanghai was a violation of Art. 226 of the Penal Code. This judgment was published in the 1937 selected judgments of the Supreme Court. It is available in the Osaka Prefectural Public Library.

27 Nagasaki Chiho Saiban-sho Keiji-bu Hanketsu, Showa 11 nen, 2 gatsu, 14 nichi, Kokugai Iso Jiken, Hikoku-nin F., Minoru hoka 8 mei.

The indictment against the defendants was issued by a prosecutor[28] of the Nagasaki District Court. The defendants were ten Japanese, consisting of seven men and two women from Nagasaki and one man from Shanghai. The name of the defendants' legal counsel was not included in the judgment. The decision was issued on 14th February 1936 by a panel of three judges[29] of the Criminal Division of the Nagasaki District Court.

The Court found that all defendants under a series of conspiracies deceived and trafficked 15 Japanese women in Nagasaki to a Japanese Naval "comfort station" in Shanghai, China and that they were guilty of committing crimes defined by Article 226 (1) and (2) of the Penal Code.[30]

The defendants in this case were sentenced to penal servitude for periods up to three years and six months.[31] It is important to note the date, 7th March 1932,[32] when the initial conspiracy was entered into by three male defendants at an Inn in Shanghai. The defendants discussed how they could abduct by deception and traffic women from Nagasaki, Japan to a "comfort station" designated by the Japanese Imperial Navy to be newly set up in Shanghai, China. They agreed on the methods to recruit women to a Naval "comfort station", pretending that the women would be well paid for work in an ordinary workplace such as a restaurant or cafe, without telling them the truth that they were to be forced to give sexual services to the Japanese officers and soldiers. They approached the fifteen women victims during the period from 10th March to the beginning of May. The date of the first shipment of the three women victims from Nagasaki to Shanghai was 14th March 1932.

This finding, which accords with the findings[33] of the historian, Professor Yoshimi, strongly suggests that the Nagasaki District Court judgment was probably made in relation to one of the first cases of abductions of military "comfort women" recruited to the first Naval "comfort stations". According to Professor Yoshimi: 'It was around this time [in March 1932] that the Japanese army and navy units dis-

28 A male Prosecutor, Mr. KAWAKAMI. Isamu.

29 All were male Justices, Mr. HONGO, Masahiro, Mr. NARAHASHI, Yoshio and TAKASHIGE, Hisato.

30 Art. 226 of the current Penal Code, which is essentially the same as it was in 1936 (Kei-ho, Meiji 40 nen Ho 45). One of the minor differences is that the current provision is written in hiragana, whereas the previous one was written in katakana. Both can be translated into English as follows: 'A person who kidnaps or abducts another for the purpose of transporting the same to a foreign country shall be punished with penal servitude for a limited period of not less than two years. 2. The same shall apply to a person who buys or sells another for the purpose of transporting the same to a foreign country or who transports a person kidnapped, abducted, or sold to a foreign country.' The penal code of Japan 2002, originally translated by NAKANE, Fukio, published by EIBUN-HOREI-SHA, Japan (2002), pp. 68-69.

31 Three men were sentenced to three years and six months. Two women were sentenced to two years and six months. Two men were sentenced to two years. Three men were sentenced to a year and six months with suspension of three years.

32 It was just 40 days after the outbreak of the military attacks waged by the Japanese Forces against China in Shanghai.

33 YOSHIMI, op. cit., pp. 43-47.

patched to Shanghai established the first military comfort stations. … It appears, then, that the first comfort stations were constructed by the navy.'[34]

The fifteen women victims were recruited from Nagasaki and appear to have been Japanese homeland citizens. As the former known "comfort women" (with a few exceptions) are not Japanese homeland citizens, this judgment adds a fresh aspect for the researchers in this area.

The pattern of recruitment is strikingly similar to the many Korean cases of the abduction of women.[35]

The legal basis of the judgment was Article 226 (1) and (2) of the Penal Code.[36] This Article substantially implements the provisions of international law, mentioned above, namely the three instruments against trafficking in women for prostitution.[37]

The judgment successfully punished the perpetrators of abductions of and trafficking in the women to a Naval "comfort station" by enforcing the Penal Code. This meant that the Japanese domestic judicial system effectively achieved realization of the rule of law and that Japan abided by international obligations in these instances. This success story of the then administration of justice surprised the author, as this happened at the time of rising Fascism and Militarism in Japan.[38] Just two weeks after this judgment, the February 26 Incident, an attempted *coup d'état* took place.

Limitations of the Judicial System

Significant limitations on this success story should be noted which may have impeded the prevention of recurrences of similar crimes. The judgment strongly suggests that the Japanese police and prosecutors already knew that the conduct of the defendants conspiring with the military against those fifteen women victims were criminal in nature and constituted unlawful cross border abductions.[39] They failed, however, to

34 Ibid., p. 43. As evidence of this claim, he submits the diary that was written by OKABE, Naosaburo, a Senior Staff Officer in the Shanghai Expeditionary Force, who worked with OKAMURA, Yasuji, Vice Chief of Staff of the Shanghai Expeditionary Force. Ibid., p. 45 & p. 217. In OKABE's diary dated 14th March 1932, he wrote 'I have considered many policy options for resolving the troops' sexual problems and have set to work on realizing that goal. Lieutenant Colonel Nagami [Toshinori] will bear primary responsibility in this matter.'

35 Keith Howard (ed.), op. cit.

36 Art. 226, op. cit.

37 The author could not find any provision of the Penal Code criminalizing a person, who trafficked in a juvenile without using deception or violence, as required by Art. 1 of the 1910 Treaty, as provided in its Art. 1.

38 The Japanese military commenced the forceful occupation of Manchuria in 1931 "the Manchurian Incident". The First Shanghai Incident was undertaken by Japan in January 1932. In that year military extremists killed senior politicians and occupied the centre of Tokyo.

39 It is interesting to note that the author has no knowledge of any "admission of guilt" made by current Japanese Government officials of the criminal nature of the involvement of the Japanese Armed Forces in the abductions of the women, despite the fact

punish any military personnel, although they clearly knew about the involvement of the Japanese Navy in Shanghai, who must have initiated a series of actions to abduct the women victims. This must have been the starting point of the *de facto* impunity in relation to the enormously large-scale later crimes accorded to the military.

These limitations on judicial power, which should be examined by researchers, suggest that domestic laws and the adoption of international treaties are not enough to prevent further violations of human rights.

If the Japanese law that incorporated international law had been more effectively implemented, it would have been possible for Japan to prevent the further recurrence of violations of women's human rights. Not only the Japanese domestic legal system but also the international law system, however, lacked the mechanisms for effective implementation.

The judgment dated 28th September 1936 of the Nagasaki Appeal Court basically supported the Nagasaki District Court Judgment, although it reduced the periods of penal servitude for five of the eight appellants. The Supreme Court judgment dated 5th March 1937 turned down the further appeal made by the seven appellants (defendants).

There is no other known case of punishment by the Japanese justice system of the crimes against the "comfort women". The only other known precedent of the punishment of perpetrators was for crimes against Dutch victims of military sexual slavery by Japan in a judgment delivered by a military war crimes tribunal constituted by The Netherlands in 1946. The Dutch military tribunals were largely indifferent towards non-Dutch Asian victims.[40]

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that the Government officially admitted that the Japanese Forces were involved in the abductions.

40 UN. Doc. E/CN.4/1995/NGO/40, Written statement drafted by Attorney Mr. JUNSLAGER, Geraldin, then legal advisor to the Foundation of Japanese Honorary Debts, submitted by the International Fellowship of Reconciliation, a non-governmental organization in consultative status (category II) Slavery during wartime, submitted on 14th February 1995 to the UN Commission on Human Rights. It contains a summary of the judgment. UN. Doc. E/CN.4/Sub.2/1998/13, para. 62, which states: '62. Following the Second World War, a Netherlands court in Batavia found Japanese military defendants who had participated in enslaving 35 Dutch women and girls in "comfort stations" during the Second World War guilty of war crimes for acts including rape, coercion to prostitution, abduction of women and girls for forced prostitution, and ill-treatment of prisoners.' [DOLGOPOL and PARANJAPE, *Comfort Women: An Unfinished Ordeal, International Commission of Jurists*, op. cit., pp. 135-36.]. See also: YOSHIMI, op. cit., pp. 173-176.

See also: TANAKA, Yuki, *Japan's Comfort Women* (Routledge 2001), pp. 73-77. Prof. TANAKA is critical of "the Dutch military authorities' indifference towards Indonesian comfort women." Ibid., pp. 77-83. He also argues "Why did the US forces ignore the comfort women issue?" Ibid., pp. 84-100.

Administrative Power and *De Facto* Impunity

How did the state of perfect *de facto* impunity arise? If the Japanese Government had seriously tried to abide by international obligations and to implement the provisions of the Penal Code in order to prevent further recurrence of the crimes against the "comfort women", the cross border trafficking in such women would have been suppressed.

The Supreme Court judgment was followed by a series of administrative measures taken by the government. Instead of suppressing the trafficking in such women, the Home Ministry, which controlled the police decided to tolerate it, as it was regarded as a necessary evil. The Home Ministry was first involved in the issue of "comfort women" in February 1938. It issued a notice entitled 'Matters Regarding the Treatment of Women Sailing to China' (dated February 23, 1938). Orders were made tacitly approving the transport of 'women whose purpose [for going abroad] was the "shameful calling" (such as comfort women), but only in cases where their destinations were northern and central China'.[41] It is clear from this notice that the Home Ministry was aware of the international legal position. The notice ordered that any involvement by the Imperial Forces had to be suppressed in order to maintain their honour. It was cleverly formulated, however, so that any persons who were ordered by the military to transport such women to China could do so as long as they concealed the fact that they were working for the military and that the destination was military "comfort stations".[42] Thus, all women recruited to military "comfort stations" had to be deceived. As a result, all cases of trafficking in women to military "comfort station" inevitably constituted crimes of abduction by way of deception, in violation of Article 226 of the Penal Code.

These events were soon followed by one of the key military documents, a notice entitled "Matters Concerning the Recruitment of Women to Work in Military Comfort Stations," issued on March 4, 1938 by an adjutant in the Ministry of War'.[43] The Ministry of War, learning from the lesson of 'people who kidnap women and are arrested by the police', instead of banning the recruitment of women to "comfort stations", ordered that 'In the future, armies in the field will control the recruiting of women and will use scrupulous care in selecting people to carry out this task. This task will be performed in close cooperation with the military police or local police force of the area.'[44] This was ordered 'for preserving the honor of the army and avoiding social problems.'[45]

There must have been many meetings for "close cooperation" in the ensuing period. 'According to the records of the Consulate of Nanking, in April 1938 there was a gathering of relevant officials from the army, navy, and Foreign Ministry at

41 YOSHIMI, op. cit., p. 63.

42 (In Japanese) NAGAI, Kazu, 'A Study of Japanese "Military Sexual Slavery" under the Sino-Japanese War', *Twentieth Century Studies*, No. 1 (2000), pp. 79-111.

43 YOSHIMI, op. cit., pp. 58-59.

44 Ibid.

45 Ibid.

the Nanking Consulate. They jointly agreed on matters concerning the authority to license and regulate imperial subjects engaged in various businesses. It was decided in regard to the army's exclusive "store" (*shuho*) and comfort stations that "consulates will not interfere with establishments managed and supervised directly by the army"'[46] Thus, the system for *de facto* impunity was complete.

Were "Loopholes" in International Law Responsible?

There is consensus that 'Korean women became the primary targets of efforts to round up comfort women'.[47] Professor Yoshimi attributes this to 'the loopholes in international law', namely the exemption clauses in relation to colonies in three international treaties including the 1910 treaty (Article 11) and the 1921 treaty (Article 14) for suppression of trafficking in white slaves. He writes: 'Thus the government and the military considered the rounding up women in Korea and Taiwan exempt from the restrictions imposed by international law and turned Korea and Taiwan into supply depots for military comfort women.'[48]

This author is not convinced by Professor Yoshimi's argument for the following reasons:

- First, despite the provisions exempting application to colonies in the three treaties mentioned above, the treaties could be applied to trafficking in "comfort women", where the victims were transported by a Japanese ship or via any port in Japan.
- Second, Japan had ratified the 1930 ILO Convention No. 29 concerning forced labour, which prohibited any forced labour of women. The ILO convention was applicable in not only the home territory but also in Japanese colonies.
- Third, the author believes that trafficking in men and women was also prohibited at that time under customary international law prohibiting the slave trade.
- Fourth, as the Nagasaki District Court judgment proved, the provisions in Chapter 33 of the Penal Code including Article 226 that prohibited abductions of and trafficking in women and children were applicable to the cases of "comfort women". As the Penal Code of Japan was introduced into colonies of Japan, such as Korea and Taiwan, the same provisions were effective there as well.[49] There should be no doubt that this was common knowledge amongst all officials in colonies such as Korea and Taiwan.

Consequently, the author believes that there existed in colonies such as Korea and Taiwan, provisions of both domestic and international law, under which the abductions of and trafficking in the women victims to military "comfort stations" could

46 YOSHIMI, op. cit., p. 64.

47 YOSHIMI, op. cit., p. 157.

48 Ibid.

49 Chosen Keiji-rei (Meiji 45 nen 3 gatsu seirei dai 11 go) introduced the Japanese Penal Code into Korea in 1912. See also: Taiwan Keiji-rei (Meiji 41 nen 8 gatsu 28 nichi ritsurei dai 9 go).

have been suppressed. As a result, one may conclude that what was responsible for *de facto* impunity was not lack of legal provisions or the exemption clauses, but a lack of willingness of the Japanese Government to enforce the law.

Further research needs to be conducted to discover the reasons why the law was not effectively enforced in Japanese colonies, particularly in Korea.[50] The author wishes to raise a hypothesis that the major cause of *de facto* impunity in the colonies, particularly in Korea, was not deficiencies in international law but the lack of political will to apply the law. The colonization process did not go smoothly. The author believes there was personally directed coercion by the Japanese military against the ministers of the then Korean Emperor and that the 1905 Treaty between Korea and Japan did not take effect.[51] It was followed by a period of violent suppression by Japan, when all Governors' General of Korea were appointed from the Japanese military.[52] In such circumstances there would have been little political will to punish the perpetrators, who committed crimes against Korean military "comfort women". In such a situation no law could be applied, as the legal systems for effective implementation were not part of the colonial structure.

In Japan, we have a proverb: 'A thief cannot be made to twist a rope to catch a thief.'[53] How can we effectively enforce law to punish the perpetrators of any crimes, where those responsible for the maintenance of the legal system are directly or indirectly responsible for the crimes?

Conclusions

The measures that could have dealt effectively with military sexual slavery were not taken by the Japanese Government. Instead, the defects in Imperial Japan's legal system resulted in a failure to effectively confront the military's demands for *de facto* impunity as regards military sexual slavery. This is one of the most probable explanations of the failure of the Japanese legal system, which allowed the rapid growth of this monstrous system of inhuman, degrading and torturous treatment of women. It is essential for research to be conducted into comprehensive legal systems that could

50 See the criticisms of many Japanese researchers and organisations made by Korean NGOs such as the Korean Council for the Women Drafted into Military Sexual Slavery by Japan, emphasizing the importance of considering the impact of colonial rule in this context. See: (In Japanese) YUN, Chung-Ok, Shokuminchi-shihai, Sengo-sekinin, Senji-seibouryoku, 'Jyosei-Kokusai-Senpan-Hotei' wo tomoni tsukutte, Women's Asia 21, No. 34 (2003), pp. 39-41.

51 See: UN. Doc. E/CN.4/1993/NGO/36, statement submitted by the International Fellowship of Reconciliation, written by the author on behalf of IFOR, and submitted on 15 February 1993 to the UN Commission on Human Rights.

52 In colonial Taiwan the Governor Generals appointed by Japan were civilians. The author, however, does not mean that the Japanese colonial rule in Taiwan was harmless.

53 In Japanese, "Dorobo ni nawa wo nawaseru koto wa dekinai."

effectively be implemented to cope with *de facto* impunity in order to prevent any recurrence of violations of women's human rights during any military conflict.[54]

The finding of the Nagasaki District Court judgment symbolizes the Japanese Government's failure in fact-finding concerning the issue of "comfort women". Despite its repeated promises before the Diet, the Government did not make public the documents it possessed, such as those in the Ministry of Justice.[55] This failure constitutes a substantial cover-up, although most governments wish to hide their failures. It is essential to ensure accountability of governments through freedom of information in order to protect the human rights not only of a State's own citizens but also all peoples in the world.

Finally, it also should be asked, if women had been equally represented in the judicial system as well as in the military and other governmental offices, would the result have been different?

54 The areas of concern in relation to impunity and violence against women during war time are as follows: Defects in Administration of Justice, Human Rights Law and Constitution; Gender and Law; Colonialism and Dictatorship; Control of Military; Violence against Women and International Human Rights and Humanitarian Law; and Peace Studies.

55 The relevant information that was not made public must be in the possession of not only the Ministry of Justice (Homu-sho) but also the National Police Agency (Keisatsu-cho), the Ministry of Public Management, Home Affairs, Posts and Telecommunications (somu-sho) as well as the Ministry of Defense (Bouei-cho).

Part IV

The Role of the UN, Humanitarian Organisations and Peacekeepers in Post Conflict Situations

The Role of the United Nations High Commissioner for Refugees

Susan Harris Rimmer[1]

Introduction

In the mind of the general public the United Nations High Commissioner for Refugees (UNHCR) is closely, even wholly, associated with armed conflict. Yet the Refugee Convention was not designed to deal with people fleeing generalized violence. UNHCR has confronted the challenges posed by the global scale of conflict and has been unable to provide solutions for many protracted caseloads in camps around the world.

To commemorate the 50th anniversary of the 1951 Refugee Convention, UNHCR asked the States Parties to the Refugee Convention, NGO partners and experts through a two-year Global Consultation process to assist in developing better policies and legal guidelines to deal with a range of current challenges to the protection of refugees. The outcome of the consultation process is the "Agenda for Protection". Key issues from that document include the proper interpretation of exclusion clauses, the need for complementary protection, and security issues within camps.

This paper is presented in three parts – the first is a brief description of the history, and function of UNHCR. The second gives an overview of operational issues faced by UNHCR in armed conflict situations; and the third section deals with challenges posed to the UNHCR mandate that have been identified by the Agenda for Protection.

The Role and Functions Of UNHCR

Brief History

The Office of the United Nations High Commissioner for Refugees was established by the UN General Assembly in 1950.[2] This was one of several attempts by the international community in the 20th century to provide protection and assistance to refugees. The League of Nations, the forerunner of the UN, named Fridtjof Nansen, a Norwegian scientist and explorer, to the post of High Commissioner as early as 1921.

1 The views expressed in this paper are the personal views of the Author and do not necessarily reflect the views of the organization.

2 Resolution 428(v) of 14 December 1950.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 517-527.*
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World War II then provided the impetus for several new organizations, such as the United Nations Relief and Rehabilitation Agency and the International Refugee Organization and subsequently, UNHCR.

The Statute

Under its mandate, UNHCR is established to provide international protection to refugees and to seek permanent (durable) solutions to refugee problems.[3] These solutions are voluntary repatriation, local integration and resettlement. UNHCR is a humanitarian and non-political organization. UNHCR has a supervisory role with regards to the implementation of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, to which there are currently 145 States Parties.[4] Initially, it was given a limited three-year mandate to help resettle 1.2 million European refugees. In the intervening decades, as the problem of the displaced persons became more complex and took on a global dimension, UNHCR changed to accommodate the problem. Its mandate has been altered to that of being extended every five years.

Basic Facts about UNHCR

The UNHCR expanded from a relatively small specialized agency to an organization with more than 6,235 staff and 251 offices in more than 115 countries and a $1.16 billion dollar budget (as of 1 January 2003).[5] Other relevant statistics are:

- Staff members in the field: 5,325 (85% of total)
- Ratio of staff members to people of concern to UNHCR: 1 per 3,300
- Number of non-governmental organizations (NGOs) working as implementing partners in 2003: 514
- Total number of NGOs as implementing partners in 2002: 573

Persons of Concern to UNHCR

In support of its core activities on behalf of refugees, UNHCR's Executive Committee and the UN General Assembly have authorized the organization's involvement with other groups. These include asylum seekers, former refugees who have returned to their homeland, internally displaced persons (IDPS) and people who are stateless or whose nationality is disputed.

At the start of the year 2003, the number of persons of concern to UNHCR was 20.6 million. They included 10.4 million refugees (51%), 1.0 million asylum seekers (5%), 2.4 million returned refugees (12%), 5.8 million internally displaced per-

3 *General Assembly resolution* 54/146 Office of the United Nations High Commissioner for Refugees

4 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' as of 1 December 2004. Available from UNHCR website <www.unhcr.ch>.

5 'Basic Facts about UNHCR.' Available from UNHCR website <www.unhcr.ch>, accessed 22 December 2004.

sons (28%) and 951,000 others of concern (4%).[6] There were 293,000 new refugees registered in 2002, a drop of 69% compared with the previous year. Major exoduses occurred from Liberia (105,000), the Democratic Republic of Congo (39,000), Burundi (29,000), Somalia (24,000) Côte d'Ivoire (22,000) and the Central African Republic (20,000). Asia hosted nearly half of all the people of concern to UNHCR, 9.4 million people or 46%, followed by Africa 4.6 million (22%), Europe 4.4 million (21%), North America and Latin America 1 million each (10%) and Oceania 69,200 (0.3%).

The number of asylum applications submitted during 2002 or still pending totalled 1.0 million compared with 940,000 in 2001. Reflecting new global political and military realities, Iraqi nationals were the largest single group of claimants while the number of Afghans seeking asylum dropped by more than 50 percent.

Overall, major refugee hosting countries in 2003 were: Iran (UNHCR estimate: 1.3 million), Pakistan (UNHCR estimate: 1.2 million), Germany (980,000), Tanzania (690,000), United States (UNHCR estimate: 485,000), Serbia and Montenegro (350,000), Democratic Republic of Congo (330,000), Sudan (330,000), China (300,000) and Armenia (250,000).

Refugee Definition

As defined by Article 1A(2) of the 1951 Convention, refugees are people who are outside their countries of origin because of a well-founded fear of persecution based on their race, religion, nationality, political opinion or membership in a particular social group and who are unable or, owing to such fear, are unwilling to return home. As clearly stated in its mandate, UNHCR has a responsibility to provide refugees with international protection and to seek long term or durable solutions by helping them to repatriate to their homeland if conditions warrant, by helping them to integrate in their countries of asylum or to resettle them in third countries.

Definition of Internally Displaced Persons (IDPs)

IDPs are defined as people who have fled their homes, generally during a civil war, but have stayed in their home countries rather than seeking asylum abroad.

Parameters of UNHCR Involvement with IDPs

In relation to IDPs, UNHCR responds more on an *ad hoc* basis, as they are not generally covered by its mandate. There are about 20-25 million IDPs and UNHCR only assists 6.3 million of them. UNHCR can only assist IDPs if the Secretary General, the General Assembly or other UN principal organs request its assistance and there is consent of the host country. There has been an ongoing international debate for the last decade about how the humanitarian community could provide more sustained and comprehensive assistance to IDPs.

6 All figures taken from *Refugees by Numbers 2003* (UNHCR, 2003).

International Protection – UNHCR's Watching Brief

As stated, international protection is the cornerstone of the agency's work. In normal situations, protection refers to the reasonable guarantee of human rights and physical security that most people can receive from their own governments, either at home or abroad (through embassies). Because refugees lack the option of relying upon their own government for protection, recourse to an alternate agent is needed. This is the basis on which the notion of international protection was founded. It must be noted that the primary responsibility for protecting refugees rests upon host States. Thus, the 145 States Parties to the 1951 Refugee Convention and/or the 1967 Protocol are obliged to carry out its provisions. UNHCR maintains a "watching brief" over refugee situations, intervening, if necessary, to ensure that the human rights and physical security of the individual are respected and that the person will be not be returned involuntarily to a country where he or she has reason to fear persecution – a process known as *refoulement*.

International protection is intended to be a temporary substitute, until such time as the benefit of national protection can again be extended to the individual, e.g. through voluntary return, when the individual re-avails herself or himself of the protection of her or his own government or through the extension of the protection of a different government through the acquisition of a different nationality.[7]

Examples of UNHCR Activities

UNHCR can only offer effective protection if a person's basic needs – for example shelter, food, water, medical care, and sanitation are met. This is especially the case in emergency situations. Recognising this, the basic provisions of its mandate with regards to the assistance activities of UNHCR were expanded by the General Assembly in its resolution 832 (IX).

Thus, the agency coordinates the provision of humanitarian items, such as food, tents and clothing. UNHCR blue plastic sheeting became a recognizable symbol in major emergencies that in the last decade have included the Balkans, Kosovo, East Timor and the Great Lakes in Africa.

Moreover, during a crisis and immediately after a conflict is resolved, UNHCR is also engaged in activities such as the design of projects for vulnerable women, children and the elderly, who comprise 80% of a normal refugee population caseload. In order to bridge the gap between emergency assistance provided to refugees and people returning home and longer term development aid that should be undertaken by other development agencies, such as UNDP, the UNHCR has also developed quick impact projects such as small scale programs to rebuild schools, clinics, roads, wells and bridges.

Further, in order to reduce situations of forced displacement, UNHCR encourages States and other institutions to create conditions that are conducive to the protection of human rights and the peaceful resolution of disputes. These conditions

7 See Article 33 of the 1951 Convention.

could also pave the way for the voluntary return of refugees. In pursuit of the same objective UNHCR also seeks actively to consolidate the re-integration of returning refugees in their country of origin, thereby averting the recurrence of refugee producing situations. In its efforts to protect refugees and to promote solutions to their problems, UNHCR works in partnership with governments, regional organizations and international and non-governmental organizations.

Operational Challenges for UNHCR in Conflicts

The UN integrated operations, such as peacekeeping, are responses to crisis situations that threaten international peace and security. These events inevitably endanger civilian populations, which may in turn spark a massive population movement. Hence, such a crisis could produce refugees and IDPs or other persons of concern. For example, the local population may be dependent upon external assistance for basic subsistence needs, therefore, a humanitarian response is required.

In such a crisis situation, the integrated UN operations usually have political, military and humanitarian components. Each component operates within its own sphere of competence, although their goals will be intertwined. For example, the mandates of peacekeeping forces or military components will include direct or indirect support for humanitarian activities.

With regard to the humanitarian component, UNHCR has been frequently called upon to provide protection and assistance to persons displaced or affected as a result of a crisis. For example, UNHCR was involved in UN Integrated Operations in Cambodia (UNTAC) in 1991, Northern Iraq (UN Guard Contingent Iraq) in 1992, in Rwanda (UN Assistance Mission Rwanda) in 1993 and East Timor in 1998 (UNAMET/UNTAET). On some occasions, the UN Secretary General has called upon UNHCR to act as the "lead agency", such as in the Former Yugoslavia and Somalia, to co-ordinate humanitarian assistance on behalf of all United Nations Agencies. This coordinating function would also include the activities of Government humanitarian agencies and NGOs. On other occasions, the co-ordination is undertaken by the Department of Humanitarian Affairs, currently renamed as the Office for the Coordination of Humanitarian Affairs (OCHA). As the lead agency, such as in the Former Yugoslavia and Somalia, UNHCR's coordination function included:
At the operational level: Taking the lead in policy making, planning and information sharing; acting as the main point of contact for other UN agencies, the military and political component of the UN effort, for NGOs and for parties of the conflict; allocating tasks according to the sectoral interest or target beneficiary population of each agency; coordinating the funding efforts and consolidated appeals to donors.
At the field level: Providing guidance, policy advice and information; coordinating field activities to avoid duplication of efforts; providing administrative and logistical support to humanitarian actors; acting as an interface between the political or military components of the UN operations and NGOs.

UNHCR Activities Linked with the Military

Whether as a lead agency or as part of the integrated UN operations, UNHCR activities may be linked with the military in two ways. Firstly, in providing security to humanitarian operations. In this type of situation, law and order are usually lacking. Thus, humanitarian activities are carried out in an insecure environment. In such situations, peacekeepers or other international armed forces may be mandated by the Security Council to ensure the secure delivery of assistance to the victims of the conflict. Secondly, military resources may be used to augment the capacity of UNHCR to implement the High Commissioner's mandate of providing protection to refugees, IDPs or persons of concern.

Security of Humanitarian Operations

This has become even more important as an issue within UNHCR since the attack on the UN in Iraq in 2003. It must be noted that the primary responsibility of the well-being of a population rests with the lawful Government or de facto authorities of the affected State. However, there are occasions when the Government or authorities are unable or unwilling to protect and support their populations with appropriate assistance. In this scenario, an international humanitarian response may take place. This may take the form of the consensual humanitarian assistance to a functioning civil infrastructure, usually with the concurrence of the government or State concerned or may take the form of humanitarian action, in a civil war situation; for example where consent to the humanitarian operations is fluid or incomplete.

In principle, when a Government (lawful or de facto) or parties to the conflict concerned give consent to the presence of UN personnel, they are responsible for the security of all United Nations activities. However, even with their consent, there are occasions when parties to a conflict will be unable or unwilling to control all threats to the safety of personnel or operations. Thus, peacekeeping forces always have a mandate to use force in self-defense and in defense of United Nations and associated personnel. Peacekeeping mandates may also include specific duties relating to the defense of personnel or the use of force under Chapter VII of the Charter of the United Nations. One task of a peacekeeping force in joint missions will be, therefore, to create the conditions in which operations, both humanitarian and military, can be carried out in reasonable safety and security.

A clear example of this is the United Nations military protection of personnel, convoys and premises, which include UNHCR staff and its humanitarian convoys. For instance, UN military personnel have provided security to UNHCR staff by means of extraction/evacuation from tense or volatile situations; general security awareness training for UNHCR staff (the best guarantee that personnel will not come to harm); information on the military activities of the parties to the conflict, which may not always be available to UNHCR staff members; and, provision of advice about security and safety precautions specific to the conflict.

The UN military, on many occasions, has provided escorts to UNHCR convoys, which obviously provides deterrence against potential aggressors. Where armored

vehicles are used as convoy escorts, greater physical security (not to mention psychological security) is offered. In the event of an actual attack, escorts provide a self-defence capability. If escorts are not warranted or available, the UN military has assisted UNHCR with alternative techniques for the protection of convoys. These include advance notice to warring parties of convoy movements and route condition negotiations, alternate route selection, static and mobile patrols and the employment of local police escorts.

Augmenting UNHCR's Mandate to Provide International Protection

The activities to provide protection are generally performed by international organizations such as UNHCR and the ICRC. Thus, as a general rule, the military should be requested to defer to UNHCR (or ICRC, as appropriate) in protection matters, unless, of course, lives are in imminent danger.

For example, the recent emergencies in which the UN was involved were armed conflicts that were ethnically based. Such conflicts are likely to be founded on ethnic hatred where one of the objectives of the parties is to wipe out the other ethnic group by threatening or displacing them. In this type of conflict scenario, the minority populations are vulnerable. They are usually being threatened for purposes of displacing them. The threats come either from the ordinary population of the ethnic majority or sometimes, their own authorities. If they flee, the threats against them continue. In some situations, the agents of the authorities pursue them. It may even be possible that if they cross the territory their own ethnic groups would victimize them, such as, by being forcibly recruited to join the ranks of armed elements. The mere presence of international armed forces serves as a stabilizing influence and provides witnesses to the events. For example, patrolling in vulnerable communities reduces the opportunities for anonymous acts of aggression against minorities. This can lend significant passive protection to endangered civilians.

Policy Challenges Faced by UNHCR

The Agenda for Protection

The 2002 Agenda for Protection Programme of Action has six goals agreed to by the international community:

1. Strengthening implementation of the 1951 Convention and 1967 Protocol;
2. Protecting refugees within broader migration movements;
3. Sharing of burdens and responsibilities more equitably and building of capacities to receive and protect refugees;
4. Addressing security-related concerns more effectively;
5. Redoubling the search for durable solutions; and
6. Meeting the protection needs of refugee women and refugee children.

The goals basically reflected the key message of the then High Commissioner, Mr Ruud Lubbers, that 'protection in exile is not enough'. In other words, refu-

gees need both protection and solutions which can only be addressed by UNHCR becoming more involved in what the High Commissioner calls the "4Rs" approach – reconstruction, rehabilitation, reintegration and return. In other words, due to the protracted nature of much of UNHCR's caseload around the world, UNHCR is seeking to place its activities into the long-term development paradigm rather than the current emergency paradigm. As the High Commissioner explained in a recent speech:

> Millions of refugees in the world today still live in the most degrading conditions of abject poverty. They are often accommodated in remote, economically marginalized and insecure areas, where they are given few opportunities for self-sufficiency. Many of the children do not have access to education, and many of the adults have no employment opportunities. Many of these refugees have been in camps for years and years, and have been all but forgotten by the international community. In Africa alone, there are over three million people in protracted refugee situations, including refugees from Angola, the Democratic Republic of the Congo, Eritrea, Burundi, Liberia, Western Sahara, Sierra Leone, Somalia and the Sudan.
>
> These forgotten refugees, like the camps in Europe that remained in existence for up to twenty years after the end of the Second World War, are a scar on the map of the world. They, too, should burn holes in our consciences. For how can we live in a world without crime, and how can we live in a world without terrorism, if we do not find ways to give new hope to those whose lives have been torn apart by violence, conflict, and persecution? We live in a globalized world, and we cannot afford to turn our backs on these people. On the contrary, we have a collective responsibility to address the conditions that lead to despair, and breed hatred and violence.[8]

The High Commissioner pointed to the example of Afghanistan, where UNHCR has worked for more than 20 years. For much of the past decade, UNHCR struggled to find solutions for millions of Afghans, largely out of sight and out of mind of the rest of the world. At one point in the early 1990s, there were over six million Afghan refugees in neighbouring countries, making them by far the largest refugee population in the world. After many years of conflict and deprivation in Afghanistan, we saw five years of disastrous Taliban rule. At the same time, we saw the international community lose interest, funding for refugee programs plummet, local economies decline, a prolonged drought settle over the region, and the welcome mat wear thin in neighbouring asylum countries. In desperation, many Afghans left the region in search of a future in other parts of the world. They made a simple choice. Since they could not find adequate protection, assistance and solutions in the region, they set off to find help elsewhere.

It was not until 2001 that the international community was finally forced to turn its attention to Afghanistan, and today the country is on the mend. More than two million Afghans, including some 1.8 million refugees, have returned home since

8 Mandeville Lecture by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees Rotterdam, 9 April 2003.

the UNHCR-assisted repatriation operation began in March 2002. We are planning to assist some 1.5 million more returnees in 2003, provided that donors come forward with the necessary funding. The challenge now is to ensure the security and effective reintegration of these people. It is vital that the international community continues to invest in the rehabilitation and reconstruction of the country, if those who have gone home are to stay, and if more are to follow. As noted by the High Commissioner it is a worthwhile investment. The effects of the return operation are being felt in many parts of the world, including Europe. Statistics for 2002 show a sharp plunge in Afghan asylum seekers. In Europe, they were down by 50 percent. Outlined below are some of the key elements from the Agenda for Protection dealing with the current challenges of armed conflict.

Complementary Protection

Goal 1 Objective 3 requests States to provide complementary protection where required under international human rights law rather than refugee law. Complementary protection recognises that the 1951Refugee Convention definition does not cover fleeing from war, generalised violence or even high-level human rights violations where the persecution is random rather than targeted at a particular person on a Convention ground. For example, UNHCR has advised States that all Iraqis, even failed asylum-seekers should be given this type of protection all over the globe. It basically means that a person cannot be returned for the foreseeable future and so their status should be regularised with some sort of visa, even if temporary. The type of protection offered is left to the State in question but should meet basic human rights standards.

A very difficult aspect of complementary protection is where a mass influx of people over a border is given prima facie refugee status in the absence of the logistical ability of UNHCR to go through individual refugee status determination procedures. Secondary movements from these caseloads are often problematic for State asylum systems, and complementary protection is a useful policy method for making sure that cases are not subjected to human rights violations upon return.

It is useful to note that several regional refugee conventions such as those in Africa and South America have changed the grounds for refugee status to include fleeing generalised violence.[9]

Exclusion clauses

Goal 1 Objective 4 provides for the 'exclusion of those undeserving of international refugee protection, including those guilty of terrorist acts'. Pursuant to this Goal, the Department of International Protection of UNHCR released in September 2003 the 'GUIDELINES ON INTERNATIONAL PROTECTION: Application of

9 See the Convention Governing the Specific Aspects of Refugee Problems in Africa of the Organization of African Unity (1969), the Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (1984), and the San José Declaration on Refugees and Displaced Persons (1994).

the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees'.[10]

Article 1F of the 1951 Convention states that the provisions of that Convention 'shall not apply to any person with respect to whom there are serious reasons for considering' that:

> (a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; or
> (c) he [or she] has been guilty of acts contrary to the purposes and principles of the United Nations.

Amongst the various international instruments which offer guidance on the scope of these international crimes are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the 1945 Charter of the International Military Tribunal (the London Charter), and most recently the 1998 Statute of the International Criminal Court which entered into force on 1 July 2002. A keen area of interest for UNHCR is how UNHCR's exclusion assessments might be dovetailed into the processes of the ICC.

The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts and serious common crimes of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.

The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner. The exclusion clauses in the 1951 Convention are exhaustive. However, developments in international law relating to definitions of terrorist acts will be very relevant to the practice of UNHCR in the interpretation of Article 1(F).

Security of refugees

Goal 4 of the Agenda for Protection deals squarely with the phenomenon of military personnel operating out of refugee camps in Africa, a practice that UNHCR was powerless to prevent. The objectives include proper resourcing of host States

10 Available from <http://www.unhcr.ch/>.

to separate armed elements from refugee populations, the prevention of military recruitment of refugees, especially refugee children; and the prevention of aged-based and sexual and gender-based violence.

These measures should assist international adherence to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, [11] and should also promote prevention, documentation and prosecution of gender-persecution as war crimes, torture and crimes against humanity in tribunals.

UNHCR has released the following important policy documents in support of this goal:

- *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response*. May 2003
- *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. 7 May 2002
- *Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. 7 May 2002

Conclusion

UNHCR is facing the challenge of conflict with every means at its disposal, including all the benefits of better understanding that can be gained through academic research and our many invaluable NGO partners. The Agenda for Protection is an important step in meeting the challenges.

UNHCR has a global mandate, given to it by governments, to provide international protection to the world's refugees, and to search for durable solutions to their plight. It must be supported and adequately funded, so that it can do its work in the interests of refugees, in the interests of governments, and in the interests of international peace and stability. UNHCR must meet the challenges of displacement due to armed conflict with the full force of the international community behind it. If not, to repeat the words of the first High Commissioner for Refugees, Gerrit Jan van Heuven Goedhart, it risks being reduced to a largely irrelevant humanitarian organization that simply administers human misery.

11 Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002

Peacekeepers in Post-Conflict Situations – Upholding the Rule of Law

David Letts [1]

The focus of this paper is to assess some of the rule of law issues that affect peacekeepers in post-conflict situations. Many others have written on what may be termed the 'traditional legal aspects' of peacekeeping operations, and the works produced are undoubtedly extremely useful.[2] This paper will take a different direction and concentrate on the practical issues that surround deployments at the tactical level – that is, it will provide some insights into the military and legal issues that confront peacekeepers when deployed.

The first section of the paper examines some definitional aspects relevant to peacekeeping operations. It then gives a context for the distinct military capabilities that can be applied by a military force during a peacekeeping operation. The main body of the text provides a detailed discussion of the variety of legal issues that arise for a peacekeeping force prior to, and during, a peacekeeping operation. The paper concludes with a brief observation regarding how the combination of these issues can lead to the success of a peacekeeping mission from the military perspective.

Throughout the paper, practical examples are provided of issues that have been confronted during recent Australian peacekeeping operations, drawing primarily on the author's personal experience as Chief Legal Adviser to the United Nations Peacekeeping Force Commander in East Timor from January to July 2002.[3]

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1 The views expressed in this paper are solely those of the author, and in no way represent any official endorsement by, or policy of, the Australian Government, the Royal Australian Navy or the Centre for Defence and Strategic Studies.

2 For example, see Kelly, M.J. *Peace Operations: Tackling the Legal and Policy Challenges* (Australian Government Publishing Service, 1997).

3 During the period from late January until 20 May 2002, the author was the Chief Legal Adviser to Lieutenant General Winai Phattiyakul, Force Commander of the United Nations Transitional Administration in East Timor (UNTAET) Peacekeeping Force. On 20 May 2002, following the granting of Independence to East Timor, the UNTAET mandate expired and the United Nations Mission of Support in East Timor (UNMISET) was established. While the cessation of UNTAET and commencement of UNMISET was marked by a large turnover of civilian personnel in the United Nations Mission in East Timor (including the Special Representative of the United Nations Secretary-General) the peacekeeping force remained largely unchanged. Accordingly, the author continued serving as the Chief Legal Adviser to Lieutenant General Winai,

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The Rule of Law

As a precursor to the main theme of this paper, it is perhaps useful to reflect on why the emphasis of the paper should be placed on 'upholding the rule of law'. In many ways the answer to this question could be considered as being somewhat self-evident, but the consequences of ensuring that respect for the rule of law permeates through any given peacekeeping force can be quite profound. Indeed, it can be legitimately considered that a peacekeeping force that is deployed without an underlying belief in, and understanding of, the rule of law will be fatally flawed from the outset.

Former Chief Justice of the High Court, The Hon. Sir Gerard Brennan, recently addressed the importance of adherence to the rule of law.[4] The key theme that Sir Gerard addressed in this speech was the need to consider the consequences of a breakdown in the rule of law, and in particular to question the excesses that an Executive Government may attempt to impose on those subject to its jurisdiction. Although the context in which Sir Gerard was placing his remarks is somewhat wider than that being addressed in this paper, the text of his speech nevertheless provides a powerful insight into why adherence to the rule of law is of such fundamental importance for all involved in civil society.

Perhaps nowhere is this importance more obvious than in those circumstances where civil society has broken down, thus necessitating the deployment of a peacekeeping force. In essence, the strategic level outcomes that can flow from a lack of respect for the rule of law at the lowest level of a peacekeeping force, can effectively stifle any otherwise beneficial actions that are being taken to address the problem that the force has been deployed to deal with. If even one member of a peacekeeping force is unable to comprehend this vital fact, then the value of the entire force will be greatly diminished.

Therefore, as a starting point for this paper, it is considered that some commonality of purpose and shared understanding of the rule of law is a necessary pre-condition for the successful deployment of a peacekeeping force. This does not mean that a peacekeeping force should be comprised only of forces that come from a similar jurisprudential background. However, it does place an onus on those charged with assembling a peacekeeping force to ensure that certain common legal (and perhaps moral and ethical) principles or standards are observed across the entire force.

Peacekeeping Operations or Combat Readiness

Before considering specific rule of law issues, it is appropriate to reflect on some of the core principles, and key definitions, that underpin peacekeeping operations.

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who remained in East Timor as the Force Commander of the UNMISET Peacekeeping Force, until the end of July 2002.

4 Brennan, The Hon Sir Gerard, *Australia and the Rule of Law*, address given on 4 December 2003 at the International Law Association (Australia Branch) Annual General Meeting and reported in International Law Association (Australian Branch) Incorporated, *Bulletin*, January 2004 at 2-6.

In relation to the potential involvement of the Australian Defence Force (ADF) in future peacekeeping operations, it is noted that the ADF Future Warfighting Concept states:

> The ADF will need to continue to prepare for operations against a broad range of actors: from irregular or transnational threats, to the organised forces of traditional states, through to hybrid wars involving both types of actors. In some cases, we will act as the peacekeeper or the peace enforcer. In others, we could be fighting to defend the nation or our allies. In all cases, the ADF will be the only element that the Australian Government can employ as an organised, armed force to protect Australia and its interests against external threats.[5]

The importance of the above statement lies in the explicit recognition that peacekeeping operations are part of the core set of military roles in which the ADF might be employed by the government. This recognition signifies a distinct shift, at least in so far as the ADF and the Australian Government are concerned, in the restrictive doctrinal approach to peacekeeping operations that had formerly been such a dominant factor of military thinking.[6] There is not necessarily full support in Australia or its close allies, either among military or government authorities, for the 'new' emphasis that has been placed on peacekeeping operations. However, increasingly there is little option but to move on with what can clearly be considered a use of military capability that is not likely to diminish in the short term.[7]

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5 The Australian Defence Force's *Future Warfighting Concept,* Australian Defence Doctrine Publication ADDP-D.3 (2003) at 14: <http://www.defence.gov.au/strategy/22/3113_2.pdf> (accessed 25 April 2004).

6 It is suggested that much of the early Australian involvement in peacekeeping operations could legitimately be viewed as a peripheral activity that occupied niche elements of the ADF (usually army). However, the deployment of a large integrated force to East Timor, comprising substantial elements of all three Services, has irrevocably changed any such notions. *Future Warfighting Concept*, with its clear reference to the role played by the ADF in a wide variety of non-warfighting operations, is evidence of the doctrinal shift that has accompanied the change in operational focus.

7 An example of comments supporting the narrow view of the utility of peacekeeping operations in the wider context of military operations can be found in: Jane's Defence Weekly Special Report *Peacekeeping Undermines US Combat Readiness*, 28 July 1999 where it was stated that '... many senior [US] officials are voicing concern that ... peacekeeping deployments seriously degrade combat readiness.' It should be noted, however, that the article also quotes some senior retired US military officers as supporting the usefulness of peacekeeping operations in contributing to the maintenance of combat readiness as a result of participation in peacekeeping operations. The views expressed in the above article can be contrasted with those promoted at the 4th UN-ASEAN Conference in Jakarta in February 2004 where the proposal to build a regional peacekeeping force was tabled by Indonesia: see *The Jakarta Post* 26 February 2004, National News 'UN Welcomes ASEAN Peacekeeping Force, promises help'. The point to note is that there are competing views regarding the effect upon combat readiness of participation in peacekeeping operations, but ultimately governments, and the international community as a whole, will expect the military to be able to effectively conduct both combat

The conclusion to be drawn from this is that involvement in peacekeeping operations is not likely to diminish in the short term. Therefore it is incumbent upon military forces to adapt training methods, weapons systems and inventories so that the two types of operations can complement, not contradict each other.

Peacekeeping Operations – Definitions

Critical to understanding the complexities of preparing a military force for a peacekeeping operation is an appreciation of the definitional (or doctrinal) framework in which such operations are placed. If one considers that combat operations, or warfighting[8], are at the high end of the spectrum, then it can be somewhat surprising to discover the plethora of 'other' operations that military forces are likely to be involved in apart from such operations. The umbrella term that is used to cover this range of other tasks is 'Military Support Operations'[9]. These types of operations are typically further broken down into:

– 'internal' operations such as bushfire support, disaster relief, security tasks and support to law enforcement agencies; and
– 'external' operations such as disaster relief, humanitarian relief operations, evacuation of Australian personnel, search and rescue and peace operations.

'Peace operations' is a general term used to describe what can be a wide variety of the use of military forces, and, if necessary, military force, to restore peace in any particular operating environment. For example, the ADF definition of 'peace operations' is 'all types of operations designed to assist a diplomatic peace process'.[10] There are then a number of different types of peace operations that ADF doctrine recognises depending on the nature of the environment in which forces will be operating:

– 'peace enforcement' – the coercive use of civil and military sanctions and collective security actions, by legitimate international intervention forces, to assist diplomatic efforts to restore peace between belligerents, who may not consent to that intervention;
– 'peacekeeping' – a non-coercive instrument of diplomacy, where a legitimate, international civil and/or military coalition is employed with the consent of the belligerent parties, in an impartial, non-combatant manner, to implement conflict resolution arrangements or assist humanitarian aid operations;

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operations and peacekeeping operations – with substantially the same inventory and personnel for both.

8 *Future Warfighting Concept* defines warfighting as 'the application of organised force in combat' ADDP-D.3 at 5.

9 A more detailed description of this terminology can be found at the ADF Peacekeeping Centre's website: <http://www.defence.gov.au/adfwc/peacekeeping/terminology.htm> (accessed 25 April 2004).

10 See *Peace Operations: An Australian Perspective* (2002) at: <http://www.defence.gov.au/adfwc/peacekeeping/index.htm> (accessed 25 June 2004).

- 'peacemaking' – diplomatic action to bring hostile parties to a negotiated agreement through such peaceful means as those foreseen under Chapter VI of the United Nations Charter; and
- 'peace-building' – a set of strategies which aim to ensure that disputes, armed conflicts and other major crises do not arise in the first place – or if they do arise that they do not subsequently recur. It includes:
  - pre-conflict peace building – longer term economic, social and political measures which can help States deal with emerging threats and disputes; and
  - post-conflict peace building – rehabilitation and construction assistance generally, support for various kinds of institution building and specific practical programs like de-mining.[11]

In many respects, the above definitions may provide confusion for the individual serviceman or woman that is charged with implementing the wishes of the government as a member of a peacekeeping force. However, at the higher levels in government where decisions are made, and among senior military leaders where advice is given, regarding whether or not a military force will be sent to a particular region for a 'peace' mission, it is necessary to have a very clear understanding of the different nuances that are implicit in each type of operation. If such an understanding is not held then there could be undesirable consequences for the force that is deployed due to such factors as inappropriate force mix, inadequate training and wrong capabilities. The ultimate result could be the deployment of a force that escalates the very situation that it has been deployed to help.

Additionally, commanders of forces that are sent on peacekeeping missions must have a clear understanding of the mandate that they are given for the operation. It is not usually necessary for each individual serviceman or woman to have this detailed understanding, but some appreciation of the nature of the mission will be required by all involved if the mission is to be a success. As noted above, the consequences of failure to understand the mandate could result in the ultimate failure of a peacekeeping mission.[12]

Military Capabilities

Another vital issue that must be considered is the type of tasks integral to peacekeeping operations that might benefit from execution by a military force rather than any other type of intervention. Put simply, what are the particular characteristics or capabilities that a military force can bring to a peacekeeping operation that other agencies are unable to provide?

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11 *Peace Operations: An Australian Perspective*, above n 10 at 1.

12 For ease, and in attempting a level of consistency with the theme of the Conference for which this paper has been produced, 'peacekeeping' operation or mission will be used in this paper as a general term that, unless specifically noted otherwise, is intended to include reference to all types of peace operations.

One of the main advantages of deploying a military force on a peacekeeping operation is that the force will bring with it selected aspects of its warfighting skills, while at the same time demonstrating a certain resolve (or intent) on the part of those that sent the force, to see the situation stabilised as soon as possible. This capability should not be under-estimated. For example, an unarmed peace-monitoring group was successfully deployed in 1998 with forces from Australia and other regional countries to bring to an end the violence that had been a hallmark of life on Bougainville for a period of many years. This force achieved its mission without the overt presence of weapons as the Agreement that established the mission specified that the peace-monitoring group would be unarmed.[13] This may be contrasted with the very different situation facing INTERFET[14] when that force deployed to East Timor in September 1999. In that context, where there had been widespread destruction of property and loss of life, it was necessary to deploy with a full range of combat capability from all three services as the situation in East Timor required clear demonstration of resolve in order to deal with the militia threat.

An issue that requires highlighting is the *internal* character of conflicts that have typically lead to the deployment of peacekeeping forces in recent years.[15] The nature of the conflict as well as the fact that peacekeeping forces are not ordinarily deployed for the purpose of delivering a military outcome for any particular side to a conflict will both play a role in shaping the force structure and capability mix.

Logistics is another capability that a military force can bring to a peacekeeping operation. The art of rapidly deploying large forces, able to sustain themselves from organic assets is one that is regularly practiced by military forces in peacetime. Often the area that a peacekeeping force is deployed to, will be devoid of infrastructure as a result of the conflict that the peacekeeping force has been tasked to deal with. Therefore, some form of self-containment will usually be an essential part of the force mix that is required – at least in the early part of a deployment. The advantage for military forces deploying with a full logistics chain in place is that the skill sets that are needed for such a deployment are analogous to those that would be needed for combat operations in a remote location. Therefore, an element of force preparation that is a necessary part of preparing for combat can be carried out as a detailed, real time operation, as one aspect of a peacekeeping deployment.

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13 Agreement between Australia, Papua New Guinea, New Zealand, Fiji and Vanuatu concerning the Neutral Truce Monitoring Group for Bougainville ATS 1997 No. 30. The ADF's involvement in the Bougainville peace process began with transport and logistics support in September 1997, participation in the Truce Monitoring Group from November 1997 and then leadership of the Peace Monitoring Group from 1 May 1998 until completion of the mission on 30 June 2003: <http://www.defence.gov.au/minister/Mooretpl.cfm?CurrentId=237> and <http://www.defence.gov.au/media/download/300603/300603a.htm> (both accessed 20 April 2004).

14 INTERFET is the name that was given to the Australian-led multinational force that was established pursuant to UN Security Council Resolution 1264 of 15 Sep 1999. UN Doc S/RES/1264 (1999).

15 For example, if one considers operations where Australian forces have been deployed since 1990, only two (Iraq in 1990-91/2003-04 and Afghanistan in 2002) can be characterised as resulting from events other than internal conflict or a State 'collapsing'.

During the UNTAET[16] and UNMISET[17] missions in East Timor, engineering Battalions comprised a large part of the peacekeeping force. Clearly, the level of destruction that had occurred during September 1999 needed to be addressed quickly, but it could not occur without an adequate security environment. The deployment of a large intervention (and subsequent peacekeeping) force was critical in providing the necessary construction and rehabilitation tasks that were so necessary for the restoration of peace and security in East Timor. The types of tasks that the military engineer battalions undertook included: ordnance clearance and disposal, restoration of sanitation services, water supply, provision of electrical power, road and bridge construction, operation of airfields and construction of port facilities[18]. It is possible that civilian engineering contractors could have undertaken each of these tasks, and as the security situation stabilised, civilian contractors were increasingly engaged to perform them. However, the initial security environment was not conducive to anything other than military forces being used to carry out these essential construction tasks.

The East Timor example is illustrative of the situation that has occurred in many other peacekeeping operations. The poor security environment will initially lead to a military response being adopted as the most practical and efficient means of undertaking tasks to restore the basic infrastructure to a level that will allow the local civilian population to begin to re-build their lives. From this initial state, it should then be possible to pass the vast majority of such tasks to civilian operators (either foreign or local contractors as they re-establish themselves) thus freeing the military to concentrate on security issues – and re-deployment to their homelands.

One of the most crucial aspects of military capability that was brought to the mission in East Timor was the assistance provided by the peacekeeping force to the tasks being performed by the United Nations High Commission for Refugees (UNHCR). Despite being part of the United Nations structure, operational and funding arrangements for each United Nations agency in the mission, such as the UNHCR, are provided on an individual agency basis. This leads to inevitable budgetary constraints being placed on the operations of each agency in trying to fulfil their mission. The result is that assistance will be sought from other parts of the

16 The United Nations Transitional Administration in East Timor (UNTAET) was established pursuant to UN Security Council Resolution 1272 of 25 October 1999: UN Doc S/RES/1272 (1999). UNTAET concluded, pursuant to UN Security Council Resolution 1392 of 31 January 2002, with the end of its mandate on 20 May 2002: UN Doc S/RES/1392 (2002).

17 The United Nations Mission of Support in East Timor (UNMISET) was established pursuant to UN Security Council Resolution 1410 of 17 May 2002: UN Doc S/RES/1410 (2002) and has recently been further extended pursuant to UN Security Council Resolution 1543 of 14 May 04: UN Doc S/RES/1543 (2004).

18 Engineer battalions deployed to East Timor came from Pakistan, Bangladesh and Japan. Additionally, the Australian and New Zealand contingents each deployed with a considerable amount of organic construction capacity, as did some of the smaller contingents to a more limited extent. Smaller construction tasks were also carried out by contingents from each troop-contributing nation as part of their local civil-military cooperation activities.

mission, such as the peacekeeping force, to perform aspects of any particular agency's mission, so that the result is cost-neutral for the agency. While such assistance helps to achieve the overall mission objectives, it distorts the basis upon which the mission is funded. In the case of the military, assistance to agencies such as UNHCR in returning refugees to their former place of residence can be categorised as supporting the security function that is properly the province of the military. However, the line of responsibility can quickly become distorted and ultimately will be a matter of discussion, persuasion and decision by the relevant authorities in each part of the mission.

The above comment regarding assistance to United Nations agencies presents an obvious conundrum for a peacekeeping force. There is a need to find a balance between military specific tasks such as the maintenance of security, and the achievement of overall mission objectives to enable the entire mission to fulfil its mandate and return the region to a state of normalcy. When considering the military capabilities that are brought to a mission, it is therefore necessary to remember that the military will usually be only one part of the overall construct of the mission. Accordingly, the peacekeeping force must ensure that its operations are consistent with the mandate of the mission and are seen as an effective part of the political and military package.

Legal Issues

Once a decision is made that it would be preferable, or in many cases essential, to use a military force in any given peacekeeping operation, there are a multitude of legal issues that must be addressed with respect to the deployment of any military force into the sovereign territory of another State on a peacekeeping mission.

Pre-deployment legal preparations are crucial to the success of any peacekeeping mission. One of the obvious issues that must be addressed is the legal basis upon which the peacekeeping force will deploy on a peacekeeping mission. In some instances, deployment will be as a result of the invitation of the responsible government for assistance to restore security. The Australian-led Regional Assistance Mission to the Solomon Islands (RAMSI) is an example of such a deployment.[19] Other deployments might be as a result of a combination of host state invitation (or at least acquiescence) accompanied by a UN Security Council Resolution. This situation preceded the INTERFET deployment into East Timor in September 1999. UN Security Council Resolution 1264 specifically addressed both the readiness of Indonesia to accept an international peacekeeping force in East Timor, and the

19 For more detail regarding the necessary legal requirements being addressed by the Solomon Islands Parliament prior to deployment of RAMSI see the comments in Prime Minister Howard's announcement of the deployment of Australian forces to the Solomon Islands in July 2003: <http://www.pm.gov.au/news/interviews/Interview382.html> (accessed 20 April 2004) and the statement by Solomon Islands Minister for Foreign Affairs at the 58th Session of the UN General Assembly on 1 October 2003: <http://www.un.org/webcast/ga/58/statements/soloeng031001.htm> (accessed 20 April 2004).

ultimate decision of the UN Security Council to use its power under Chapter VII of the UN Charter to authorise the deployment of INTERFET.[20] In either of the above two cases, there is agreement to the peacekeeping force's deployment from the receiving State.

However, agreement to the deployment of a peacekeeping force may not always be the case. There have been numerous examples of UN peace operations, particularly since the early 1990s, where there has been no such agreement and the force has deployed into a hostile environment where security has been almost non-existent. For example the United Nations Operation in Cote d'Ivoire (UNOCI) and the United Nations Mission in Liberia (UNMIL) are both recent operations where there was very little, if any, host State support for the peacekeeping operation. Hence a sizeable peacekeeping force was deployed for both of these missions under the authority of the UN Security Council, acting under Chapter VII of the UN Charter, into a hostile environment where pre-deployment legal arrangements with the host state would be very difficult to achieve.[21]

Coupled with the strategic or political level pre-deployment legal issues surrounding the decision to deploy a peacekeeping force are those legal issues that directly affect the peacekeeping force and its ability to operate whilst deployed. Examples of the latter include:

- the effect, if any, of host State laws on the peacekeeping force;
- existence of any Status of Forces Agreement (SOFA);
- applicable Rules of Engagement (ROE);
- conduct of investigations involving members of the peacekeeping force;
- procedures for dealing with claims against the peacekeeping force lodged by members of the local population; and
- maintenance of force discipline.

Each of the above issues can have significant consequences for a peacekeeping force and each will be discussed in further detail below.

Host State Laws

Some knowledge of host State laws will ordinarily be one of the first matters that the legal officer(s) supporting a peacekeeping force will try to obtain. The reason for this is clear – these are the laws, however ineffective they may be, that the local population have been living under and these are therefore the laws that they have the most familiarity with. In East Timor, where there was a complete absence of State authority following the militia rampage of September 1999, the INTERFET Commander found it most useful to have available the laws that had existed immediately prior to the deployment of INTERFET as these provided a basis upon which he could commence to reintroduce law and order in East Timor.

20 UN Doc S/RES/1264 (1999) of 15 September 1999.

21 For UNOCI see UN Doc S/RES/1528 (2004) of 27 February 2004 and for UNMIL see UN Doc S/RES/1509 (2003) of 19 September 2003.

In relation to the peacekeeping force itself, particularly if deployed under a UN mandate, the ordinary situation is that the sending State will seek agreement that its force be exempt from the application of host State laws. The reason for this exemption is clear, at least to a military mind. If one considers the sorts of places that a peacekeeping force might be deployed and the vast range of legal regimes that might exist in such places the explanation becomes obvious. Additionally, it can be expected that there may be a range of situations where members of the local population are less than happy with the action taken by members of the peacekeeping force in restoring peace and security. In some circumstances, this may lead to an attempt to compel peacekeeping force members to be subject to local jurisdiction but one can readily understand the reluctance of sending State governments for this practice to become the norm. Accordingly, the UN Model Status of Forces Agreement ('the UN Model SOFA') expressly excludes military members of a peacekeeping operation from the criminal jurisdiction of the host country by providing that they shall be subject 'to the exclusive jurisdiction of their respective participating States'[22]. The UN Model SOFA also contains clear guidance in relation to civil proceedings that may arise out of actions that took place during the course of official duties.

The issue of subjecting peacekeeping forces to local jurisdiction did occur during the author's deployment to East Timor on several occasions. One example that required intervention from the peacekeeping force legal office occurred when a summons was served on a member of one contingent by the East Timorese Prosecutor, purporting to require the peacekeeper to attend an East Timorese court at a specified time and location. While the nature (criminal or civil) of the summons was unclear, compliance was nevertheless refused on the basis of either military immunity from local criminal judicial process or the necessity to deal with civil matters under the established claims regime recognised by the SOFA between the United Nations and East Timor.[23]

Status of Forces Agreement

The development of the SOFA during the period immediately preceding East Timor's formal declaration of independence proved interesting. Soon after the author's arrival in East Timor in late January 2002, a meeting was held with legal colleagues from other elements of UNTAET; this was part of a process that included informal discussions and negotiation with East Timorese officials regarding the SOFA for the follow-on mission. However in March 2002 a team from the Department of Peacekeeping Operations (DPKO) at UN Headquarters (UN HQ) in New York visited East Timor to conduct research and planning for the new mission. The DPKO team was somewhat disturbed that SOFA negotiations of any type were occurring on the ground in East Timor. Direction was given that the SOFA

22 UN Doc A/45/594 of 9 October 1990.

23 Agreement Between the Democratic Republic of East Timor and the United Nations concerning the Status of the United Nations Mission of Support in East Timor dated 20 May 2002 (hereafter 'the SOFA').

would follow established precedent and only deal with issues that were critical to the status of the UN force. Effectively, this meant that the SOFA would be drafted and agreed at the HQ level, and input from those on the ground in East Timor was not needed, other than to suggest inclusions for the SOFA based on the specific circumstances prevailing in East Timor.

The belief that UN HQ had taken responsibility for any SOFA negotiations led to the cessation of discussions between UNTAET and the East Timorese Transitional Administration[24] on this issue. While it may be considered that such an approach was logical, and in many ways quite sensible, the end result was a rather frantic series of communications between UNTAET and UN HQ in early May 2002 after it was realised by UN HQ and UNTAET that all SOFA discussions between UNTAET and ETTA had in fact ceased. The lesson for those deployed was that a certain amount of 'ignorance' on the part of those that were many thousands of miles away was required if the task was to be achieved. Additionally, it became very obvious that the ultimate result of SOFA 'negotiations' between UN HQ and the East Timorese authorities, regardless of who was assigned primary carriage for the negotiations, would amount to little more than window dressing of a document that the East Timorese would be expected to sign largely unchanged.

From a military perspective this apparent breakdown in communication between those in East Timor and those in New York did not present any great problem, as the peacekeeping force was able to provide input to the SOFA process whenever required. However vigilance was the key, as it would have been entirely unpalatable for the SOFA to be agreed without appropriate input from the peacekeeping force. The ultimate result saw the inclusion of several key elements into the final SOFA document that was eventually signed by the Special Representative of the Secretary General and the Prime Minister of the Democratic Republic of East Timor.

The lesson for deployed legal officers out of all of the above is that there is no certain manner in which the issues that will fundamentally affect a peacekeeping force can be addressed. SOFA negotiations/discussions are to be expected and it is incumbent upon the Chief Legal Adviser to insert him or herself into these discussions at an early stage. The methodology for doing this will vary depending upon the circumstances, but the experience of this author is that there is no substitute for personal relations and constant interaction to achieve the desired result.

Rules of Engagement

Once a peacekeeping force has been deployed it is crucial that appropriate limits be placed upon the force's ability to use force. Clearly, the reason for deploying a peacekeeping force might suggest that a certain amount of the force's offensive power could be called upon to quell whatever situation might develop. However, the expectation among political masters is that the peacekeeping force will be able to achieve

24 The East Timorese Transitional Administration (ETTA) was the interim administrative body established during the period of UNTAET's control of East Timor. ETTA ceased with the formal transfer of sovereignty to East Timor on 20 May 2002.

fully all aspects of the mission with the use of minimal force. The means through which this expectation is conveyed is through the issuance of Rules of Engagement (ROE) that are (ultimately) signed off at the highest political levels. The reason is simple, as the ROE ultimately reflect a government's (or in this case the United Nations') expectation of how their policies are to be implemented.

In the case of the transition from UNTAET to UNMISET, there were some ROE issues that provided a number of unusual hurdles that needed to be resolved. First, during the UNTAET phase of the Mission, there had been a marked reluctance to alter the ROE at any stage.[25] This position is, perhaps, readily understood when one considers the number of Troop Contributing Nations (TCNs) that comprised the Mission and the need for acceptance of any change to the ROE by all of these TCNs. Nevertheless, any reluctance to change the ROE when circumstances on the ground in East Timor were held to warrant change could signify a potential limiting factor in achieving force objectives.[26] Second, and for reasons that are still not understood by the author, there had been a failure on the part of UN HQ to disseminate the Guidelines for the Development of Rules of Engagement for United Nations Peacekeeping Operations to UNTAET.[27] Accordingly, although there were ROE drafted by UNTAET (in concert with one section of the DPKO) for UNMISET, the ultimate result of the request for approval of these ROE was advice from UN HQ that the draft ROE did not sufficiently accord with the Guidelines and therefore the UNTAET ROE would remain extant until such time as the draft

25 It should be noted that for many TCNs, both UN and their own national ROE were extant during the UNTAET and UNMISET missions. UN ROE were supposed to be the 'superior' ROE that all other 'national' ROE would draw from. However, in practice it became obvious that some contingents knew little if anything about how ROE should be applied, and much time was spent by the peacekeeping force legal office instructing on this issue.

26 It is the author's experience that seeking changes to ROE are always problematic.

27 The draft version of these Guidelines was referred to by Under-Secretary General for Peacekeeping Operations Guehenno in a press release following the 168th/169th meetings of the Special Committee on Peacekeeping Operations: <http://www.un.org/News/Press/docs/2002/GAPK175.doc.htm> (accessed 25 April 2004). Interestingly, Guehenno commented that the draft was '… a guide for planning and for assisting troop-contributing countries in training their troops for peacekeeping assignments. Some legal implications required study. *The final result would always have to be tailored to the needs of each specific mission* (my emphasis).' However, as noted in the text above, when this matter was put to the test in East Timor, the response from UN HQ indicated that a perceived lack of close adherence to the Guidelines in drafting the ROE should outweigh any operational benefits that would be obtained from approval of a hybrid set of ROE that permitted the peacekeeping force to continue to use ROE that they were entirely familiar with. The folly of this situation is that while UNTAET and UNMISET represented separate missions for UN HQ, the peacekeepers on the ground saw little difference in their role and no difference in the level of force that they were permitted to use to achieve the mission. The question of how ROE should be developed for each peacekeeping mission remains a vexed one for the Special Committee on Peacekeeping Operations as evidenced at its recent 179th meeting: <http://www.un.org/News/Press/docs/2004/gapk182.doc.htm>. For completeness it should be noted that the final version of the Guidelines is a UN classified document and cannot be referenced in this paper.

ROE could be re-written so that it was more closely aligned with the Guidelines. With the greatest respect to those that made these decisions in New York, it is submitted that the end result was a nonsense. In many ways the maintenance of the *status quo ante* allowed the peacekeeping force greater latitude in the use of force than had been requested as being necessary for achieving the UNMISET mandate and this situation had the potential to cause unnecessary conflict between the force and the East Timorese authorities. It may be noted that during the lead-up to Independence, the command element of the peacekeeping force had been vitally interested in avoiding any potential conflict between the East Timor government and the peacekeeping force that might be caused by the amount of force authorised by the ROE.

There are myriad lower-level legal considerations that accompany successful adherence to the applicable ROE by a peacekeeping force. For example, even if there is complete agreement between TCNs on interpretation of the ROE, there may nevertheless be differences in understanding among the TCNs as to what each rule actually means. Training is another issue that varies widely among TCNs. It is obvious that some take the issue extremely seriously while others pay scant regard to the necessity for training. Also, the difficulties of describing concepts in the English language and then translating these concepts across a number of languages should not be under estimated.

Finally, when considering ROE for peacekeeping operations, it is necessary to be mindful of the Bulletin released by the UN Secretary General in 1999 regarding the observance by United Nations forces of international humanitarian law.[28] This Bulletin sets out the fundamental principles and rules of international humanitarian law that are applicable to UN forces conducting operations under UN command and control. For many States, the Bulletin merely summarises elements of existing obligations that armed forces from these States are subject to. Nevertheless, the Bulletin is a powerful statement of the expectations of the international community, annunciated through the Secretary General of the UN, of how combatants are to conduct themselves when engaged in armed conflict.

Claims

One of the unfortunate aspects of deploying any military force, even during times of peace within the force's own sovereign territory, is that instances of damage caused by the force's activities will inevitably arise. For a peacekeeping operation, the ability to deal swiftly and fairly with claims from the local population can be vital in ensuring that the force's reputation as impartial maintainers of peace is upheld. Failure to institute an adequate claim regime can adversely impact on the peacekeeping force's

28 Secretary General's Bulletin: Observance by United Nations forces of international humanitarian law. UN DOC ST/SGB/199/13 of 6 August 1999.

legitimacy in the eyes of the local population, and it is one of the reasons that the SOFA expressly addresses such regimes within its provisions.[29]

The claims regime that operated in East Timor required that all incidents that could potentially result in a claim for damage being made against the UN be reported to the peacekeeping force headquarters. After receipt of an incident report, the peacekeeping force legal office, in conjunction with the UN Claims Office, would determine whether adequate investigation of the incident had occurred. If necessary, further investigation would be required, and from a HQ peacekeeping force perspective it would be preferable for such investigation to be carried out under the UN's Board of Inquiry regime. However many TCNs (including Australia) conducted their own investigations under their applicable national regulations.[30] This had the potential to lead to considerable delay in obtaining adequate information to pass to the UN Claims Office for adjudication of the merits of a particular claim.

While adhering strictly to the claims regime specified under the applicable SOFA may be desirable from a policy perspective, it may nevertheless be necessary to adopt a sufficiently flexible approach from the perspective of those on the ground – both local population and the peacekeeping force. The procedure briefly outlined above could take many months from the date of the incident until completion of the investigation, during which time the aggrieved local inhabitants would be unable to receive any compensation for the loss.

For example, in late March 2002, a member of one of the TCNs in East Timor was undertaking a routine truck driving task in a remote area in the period just prior to when his battalion was due to rotate home. Unfortunately, a collision occurred between this truck and a motorcycle being ridden by an off-duty member of the East Timor Police Service (ETPS), resulting in the death of the motorcyclist. As can be readily imagined, the death of the motorcyclist in this manner caused considerable distress among his family, particularly as they now found that the head of the family, and the primary source of income, was no longer with them. Similarly, the peacekeeper involved in the accident suffered considerable distress as a result of the incident, but it was just as important for him that the matter be resolved as quickly as possible so that his return home would not be delayed. Close consultation occurred between the peacekeeping force HQ, the UN Claims Office, UN Police (who had operational responsibility for the ETPS) and the battalion. The result enabled an interim solution to be reached whereby the family of the deceased was assured that adequate compensation for their loss would be made in both the short and long term. However, without the intervention of key personnel from all

29 The Field Administration and Logistics Division (FALD) of the Department of Peacekeeping Operations produces a Manual that deals in detail with reporting, investigation and resolution of claims lodged against the UN during a peacekeeping operation, including the UN Board of Inquiry (BOI) process.

30 Investigations of incidents involving the Australian Defence Force are governed by the arrangements set out in the ADF's Administrative Inquiries Manual. Importantly, any investigation conducted under the provisions of the *Defence (Inquiry) Regulations* (1985) must have Ministerial approval prior to being disclosed to any person or made available to the public: *Defence (Inquiry) Regulation* 63.

agencies concerned, including travel from Dili to hold discussions with the family, an appropriate solution would not have been reached.

The key issue in relation to claims is to understand that the issue will arise on a peacekeeping mission, and to be prepared to offer constructive solutions, and not necessarily be hampered by blind obedience to legal process when dealing with the claims that are lodged by the local population.

Force Discipline

The final legal issue that will be examined concerns the difficulties that are encountered in the maintenance of discipline among a diverse peacekeeping force. The UN Model SOFA[31] provides that force discipline remains the exclusive province of each national contingent, which can present a limiting factor for a force commander in discharging responsibility for the activities of the entire force. However, it is highly unlikely that any other arrangement, including (for example) submission of jurisdiction to some type of UN military disciplinary tribunal would be acceptable to the governments of TCNs.[32] Deployment of military forces, even in what may appear to be a relatively benign peacekeeping operation, is exercised cautiously by States. Any suggestion that States might subject their military forces to the disciplinary control of some other body is likely to be met with considerable challenge.[33]

How then, might a force commander deal with discipline infractions when it is clear that the commander has no direct disciplinary authority over the TCNs under the commander's operational control? There are a number of answers to this apparent conundrum, and perhaps the simplest one is to note that the ultimate responsibility that a force commander has for the conduct of the military operation brings with it a certain level of authority regardless of any lacuna in actual (or legal) authority. In this sense, it would be most unusual for the commander of a national contingent to ignore the force commander's direction in the context of a serious disciplinary matter – noting that it would only be serious matters that attracted the force commander's attention in any event.

However, if such a situation did develop, the force commander (and the head of mission) are not entirely impotent in taking action to maintain force discipline.

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31 UN Doc A/45/594 of 9 October 1990: paragraphs 41, 42 and 47.

32 In the case of Australian military forces, the *Defence Force Discipline Act* applies extra-territorially and therefore ADF personnel are subject to this piece of legislation regardless of where in the world they are serving.

33 By way of example, the United States' principal objection to the International Criminal Court treaty '… that it subjects U.S. nationals – in particular, the risk is great for our armed forces – to prosecution by prosecutors and in a court that are not accountable to any kind of authority that we could hold accountable as a country …'. <http://www.defenselink.mil/transcripts/2002/to7022002_to702icc.html> (accessed 25 April 2004) provides clear indication of why there is little prospect of international agreement that would subject peacekeepers on a UN mission to any form of discipline other than that specified by their own national legislation.

While serving in East Timor, the author gave legal advice in relation to a number of instances where the action taken by individual TCNs to deal with discipline issues was viewed as somewhat lax. In the most extreme example, the commander of one battalion was suspected of being less than helpful in assisting with the investigation of a disciplinary incident alleged to have involved one of his soldiers. The matter was investigated and eventually the Special Representative of the Secretary General decided to request that the matter be brought to the attention of the battalion commander's Permanent Representative in UN HQ. Of course, this outcome was less than ideal from any perspective, but it does illustrate the seriousness with which UN leadership view the sorts of incidents that are likely to discredit a peacekeeping force and mission.

The converse side of the situation described above was brought to the author's attention in an anecdotal manner when a contingent commander advised that a member of his contingent would be returned home and serve a 'year's hard labour' as a result of an incident that had occurred while on leave in Australia. Despite there being no evidence to support any charge that could have been brought under applicable Australian discipline legislation (if an Australian service member had been involved in the alleged conduct), the contingent commander considered that he had sufficient basis upon which to take action under his country's discipline code – with the resultant consequence.

These two examples contrast the treatment given to discipline issues among TCNs. However, while dealing with force discipline remains an individual contingent matter, there is a strong focus for the peacekeeping force HQ on ensuring that adequate standards are maintained across the entire force. It is essential that appropriate senior officers in the force HQ become actively seized of serious discipline issues that affect individual contingents, and offer advice as necessary – whether or not that advice is always sought.

Conclusion

This paper canvassed some of the military considerations, particularly legal issues, that might surround the deployment of a peacekeeping force. Upholding the rule of law when deployed on a peacekeeping operation is not an easy task and there is no universal template that can be applied to all peacekeeping operations. It is not suggested that the issues covered in this paper will represent the sum total of matters that a legal adviser will need to cover while deployed. The diversity of legal issues that are likely to arise during deployment will undoubtedly keep legal advisers busy, and the matters raised in this paper are but a small element of the overall construct of legal issues that will have to be dealt with.

Nevertheless, failure to adequately address legal issues at the tactical level can have an undue influence on mission success. Similarly, failure at the strategic level to provide a force with sufficient ability to achieve its mission is likely to have disastrous consequences for the entire mission. Not surprisingly, it is the application of the correct mix of military capability within an appropriate legal framework that will do most to ensure that any peacekeeping deployment is successful.

Finally, the experiences that any one legal officer has when deployed will vary enormously depending on the nature of the deployment and the legal officer's own background. While the scope of this paper is necessarily limited, it is hoped it has provided some useful guidance about the legal issues that are likely to be encountered by those deployed on peacekeeping operations.

The Role of Non-State Actors in International Conflict: Legal Identity, Delinquency and Political Representation

Christopher Harding

Participation in International Conflict

This discussion is concerned with the legal role and identity of the range of actors participating in conflict as regulated by international law. Historically, such conflict has been perceived as something that happens between States, and indeed this view of the subject is implied in the description 'international'. The resolution of such disputes, forcible or otherwise, has therefore had, at least in formal terms, a predominantly intergovernmental character. However, during the course of the twentieth century, and more especially the period since the end of the Second World War, the range of players on the international stage has become both more numerous and more diverse, so that by the end of the century the reality of international life no longer corresponds with a textbook account based on the idea of a 'law of nations'. But the formal structure of the system of international law and relations maintains the constitutional dominance of the sovereign State as the governing actor within that system. The theme underlying this paper concerns the way in which that formal position does not match the reality of participation in international life, and the consequent problems arising from that situation in the management and resolution of international conflict.

This is not to suggest, however, that non-State actors have been or are wholly disregarded in the practice of international law. Clearly, both individuals and intergovernmental organisations (IGOs) have been accorded an increasing, though formally derivative, role within the international legal scheme, as discussed further below. But beyond these types, the formal acceptance of other actors for purposes of international law has been hesitant and uncertain, resulting for the most part in a categorisation of 'anomalies'. Equally, there has been of course some recognition of the fact that what is conventionally described as 'international conflict' has had increasingly a more complex character, and has not just been a matter of argument between sovereign States. There is a long history of warfare involving insurgent and separatist movements, and the post-1945 period in international relations has witnessed a significant number of 'colonial' and 'proxy' wars[1] which serve to

1 For a convenient overview of insurgency, civil war, colonial wars and struggles of national liberation from the legal perspective, see Antonio Cassese, *International Law* (Oxford University Press, 2001) at p 66 *et seq.*

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 547-569.*
 ISBN 90 04 14599 0.

undermine the sovereign State paradigm of international conflict.[2] Much of this has required some legal recognition. Thus, for example, the Second 1977 Protocol[3] to the 1949 Geneva 'Red Cross' Conventions, which deals with the protection of victims of non-international armed conflict, recognised the international significance of 'civil' or internal wars, and of non-sovereign State actors involved in such conflict. Yet at the same time the Second Protocol is in formal terms a conventional treaty entered into by sovereign States. As an example, it neatly captures this dichotomy between the formal structure, admitting a limited range of actors, and the substance of the formal measure, involving a wider and more diverse participation.

The argument will be developed below that *empirically* not only the business of international politics but also some of the practice of international law effectively accommodates the role of a range of actors alongside the sovereign State. But the *theory and formal structure* of international law has as yet an uncertain grasp of this aspect of the subject. The formal processes for including, recognising and categorising the role and activities of these various actors remain undeveloped. Part of the problem resides in the constitution of the international legal order, as one that traditionally has been based on the primacy of sovereign States, but now appears to be evolving into something more complex and multi-layered.[4] Thus the problem is in this sense circular. The constitution of the order depends upon its subjects but the subjects are changing, and that presents a fundamental constitutional puzzle: how the order itself can and should accommodate that change. The present discussion cannot hope to answer that last question completely. Rather the intention is to map out the nature of this evolution in legal participation and its present implications for the problem of dealing with international conflict. A clearer appreciation of the typology of actors at the international level, illustrated by their role in conflict situations, may offer some idea of the direction that may be taken by the international legal order in coming to terms with this dilemma of participation.

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2 Moreover, the nature and method of warfare has changed. Civil (i.e. internal) warfare has moved to the forefront, and also become internationalised. The conventional methods of warfare of earlier periods have been supplanted by guerrilla tactics and terrorist attacks on the one hand, and high-precision, high-technology military activity on the other hand. Much of what passes for warfare in the public mind now comprises international enforcement action or policing activity. This is also generally relevant to the discussion below.

3 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol No 2, 1977), 1125 UNTS, 609.

4 As will be argued below, such a multi-layered view of the international order should entail some deconstruction of the State as well as the accommodation of actors located outside State structures. The State itself ought to be deconstructed to understand better its behaviour, or more exactly, behaviour that has been conventionally attributed to it. At the very least, it is worthwhile to pose questions regarding the distinct roles of Heads of State, governments, State officials and organisations, and proto-State organisations and bodies which assert or strive towards the description of statehood. There is a large literature on the changing structure of the contemporary international order: see, e.g., William E Connolly, *Political Theory and Modernity* (Blackwell, 1988); Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999).

A Typology of Actors

Any attempt to deconstruct the activity of States and other players requires some guiding typology of significant and relevant actors, both within and outside the structure of the State. To be included in such a typology, such actors should conform to certain criteria of structure and role in order to have a viable and meaningful identity in both a political and a legal context. *Structural criteria* of identity are necessary to supply an entity with recognisable features of shape and form for purposes of political and legal activity. Without such a recognisable and stable structure an entity will not prove effective for purposes of meaningful action. *Role criteria* are equally important, since these will provide a sense of purpose, without which the entity's identity is likely to be lost. In other words, an actor for political and legal purposes will require an established form, which itself will be shaped by a purposive role or roles for that actor, the latter being a *raison d'être* for its identity and personality. In basic terms, human individuals, corporate legal persons and States possess such criteria of structure and role. Individual human beings do so as the fundamental units of any political and legal identity. Corporate legal persons and States do so by virtue of legal and constitutional definition, which confers upon both a form and purpose for the political and legal stage. Another way of looking at this process of analysing identity and personality is to view such entities in terms of their *representative* function. Any such actor will naturally represent certain interests and this provides a more specific clue of the actor's role and consequent identity.[5] While the individual human person represents a range of personal interests, the founding constitutions of corporate persons and States will identify those interests, representation of which supplies their main *raison d'être*.

In such a typology of political and legal actors, individuals, corporate persons and States appear as the main accepted types. This fact has been translated into the conventional wisdom of international legal theory, so that textbook accounts of legal personality or the 'subjects' of international law will list those three as the *standard* categories of actor at the international level, although specifying the international (intergovernmental) organisation as the relevant kind of corporate actor for purposes of international legal activity, in place of the corporate person (company) of 'private' and 'municipal' law. However, the actuality of contemporary international life suggests a range of further actors, whose behaviour has a clear political significance, and for that reason ought also to be accorded legal significance. Generally commentators now recognise the actual complexity of this question of personality at the international level. The point has been made succinctly by Brownlie in the following terms:

5 As Cassese remarks, for instance in relation to national liberation movements, for purposes of legal personality 'it is necessary for them to have an apparatus, a representative organization that can come into contact, as it were, with other international legal persons', so emphasising this representative role in international dealings. Cassese, above n 1, p 76.

> Whilst due regard must be had to legal principle, the lawyer cannot afford to ignore entities which maintain some sort of existence on the international legal plane in spite of their anomalous character. Indeed, the role played by politically active entities such as belligerent communities indicates that, in the sphere of personality, effectiveness is an influential principle. Furthermore, as elsewhere in the law, provided that no rule of *ius cogens* is broken, acquiescence, recognition, and the incidence of voluntary bilateral relations can do much to obviate the more negative consequences of anomaly … . In view of the complex nature of international relations and the absence of a centralized law of corporations, it would be strange if the legal situation had an extreme simplicity. The number of entities with personality *for particular purposes* is considerable … . The *context* of problems remains paramount.[6]

Thus the tally of 'agencies active on the international scene'[7] is not exhaustive and will change as the conditions of international relations evolve. As Brownlie warns, categorisation and listing may have its pitfalls, yet for purposes of exposition and understanding the subject some attempted typology is necessary, provided that its content is not understood over-categorically.

But the lawyer's typology of legal persons in the international arena tends, beyond a certain point, to be tentative and to display a wariness in relation to non-State actors apart from intergovernmental organisations and non-corporate individuals, who are in any case frequently relegated to the level of 'derivative' personality, dependant for any status on the award of some legal identity by 'original' State actors. As Noortman has commented:

> While it is fairly common nowadays to acknowledge the existence of non-state actors in international law monographs and journals, the state-centred conception of international law prevails … the entire problem of non-state actors in international law is on the whole dealt with on a case-by-case and rather itemised basis. Such an approach manifestly circumvents and neglects to determine and analyse similarities between non-state actors in international law.[8]

6 Ian Brownlie, *Principles of Public International Law* (6th ed, Clarendon Press, 2003), pp 63-7. This remains a classic statement, concisely encapsulating the complexity of the subject. See also the conclusion of Martin Dixon, *Textbook on International Law* (4th ed, 2000) at p 118.

7 Brownlie, above n 6, p 65.

8 Math Noortmann, 'Non-State Actors in International Law', Ch 4 in Bas Arts, Math Noortmann and Bob Reinalda, *Non-State Actors in International Relations* (Ashgate, 2001), pp 59-60. See also the comment by Harding in the review of the above collection, concerning the greater willingness of international relations scholarship to engage with the role of non-State actors, compared to legal scholarship: 22 (2002) *Australian Yearbook of International Law,* pp 235-37.

A current survey of some leading general legal texts suggests a spectrum of treatment of the subject. This ranges from the 'atomistic' approach exemplified by Brownlie,[9] recognising complexity and so fragmenting the categories, to that of a number of writers who confine themselves to the trinity of State, organisation and individual, with space for little else;[10] but the weight of treatment falls more to the latter end of the spectrum. In this respect, Cassese provides a more idiosyncratic but thought-provoking approach,[11] consigning States to a separate chapter and then, under the heading of 'other legal subjects', giving as much weight to insurgents and national liberation movements as to organisations and individuals. This is something of a departure from the norm which encourages the view that the subject calls out for a more discriminating and imaginative effort at categorisation, bolder in its reflection of the realities of international life. Noortmann may again be quoted as indicating the poverty of traditional (positivist) international legal theory on the subject. Referring to some well-established examples of 'accepted' non-State actors (such as the Vatican, the Order of Malta and protectorates) he remarks that:

> they have been designated 'special cases' or 'selected anomalies'. The approach adopted under these headings is descriptive rather than analytical, indicating that they cannot be empirically neglected, but that analytical tools are lacking.[12]

A fresh typology of international actors is therefore offered in Table One just below. The purpose of this typology is not simply to identify those actors who typically occupy the international stage alongside States by virtue of a naturally trans-national mode of operation, but also those actors who are apparently located within States but certain of whose actions have a significant impact on the international plane ('infra-State actors' such as Heads of State and Governments). Thus part of the exercise is to deconstruct as well as supplement State identity. The idea that informs this exercise lies in the argument that to confer on the State a monopoly of international action is misleading on two counts. In the first place, as already stressed, there are a number of entities distinct from the State whose behaviour on the international scene is politically significant, and hence should be accorded legal significance. Secondly, the concept of the State may itself obscure the real site of responsibility and capacity for international political action; this is frequently exercised by more specific public entities within the State, whether constitutionally appointed or asserting power through political force. Such probing of the State infrastructure for political and legal purposes has been well exemplified by the imposition of liability for war crimes

9 Brownlie, above n 6, Ch 3.

10 See, e.g., Rosalyn Higgins, *Problems and Process* (Clarendon Press, 1994); Richard K Gardiner, *International Law* (Longman, 2003); Tim Hillier, *Sourcebook on Public International Law* (Cavendish, 1998); Malcolm D Evans (ed), *International Law* (Oxford University Press, 2003).

11 Cassese, above n 1, Chs 3 and 4.

12 Noortmann, above n 8, pp 63-64.

and crimes against humanity upon individuals holding governmental rank or official positions within the apparatus of the State.[13]

Table One
Deconstructing the State-centred Paradigm

Infra-State actors	Similar types
Heads of State	> individuals, terrorist leaders
Governments	> factions
State agencies	> corporations
Individuals Corporations	
Proto-State actors	
Insurgent groups	> governments
National liberation movements (NLMs)	> governments
Governments in exile	> governments
Factions	> governments
Supra-State actors	
States in coalition	> Intergovernmental organisations, NLMs
Intergovernmental organisations (IGOs)	
Extra-State actors	
Terrorist organisations	> criminal organisations, governments
Criminal organisations	> terrorist organisations, factions, pirates
Non-governmental organisations (NGOs)	> corporations

It may be seen that the scheme presented in Table One embodies a spectrum of actors, constructed around their relation to the existing and familiar State-centred paradigm. Thus, 'infra-State actors' comprises those actors legally recognised within the ordering of the State as either components of the governmental structure of the State or the typical subjects of the State's legal system. The list of entities categorised as 'proto-State actors' are also typically located within the physical boundaries of the State but are essentially opposed to and competing with the existing authority within the State: indeed, frequently such actors are striving to supplant that existing authority. But both infra-State actors and proto-State actors are very much associated with the existing State paradigm and do not seek to challenge that paradigm. In fact, they may well wish to support and reinforce it.

13 See generally: Cassese above n 1 and Douglas Hodgson, *Individual Duty Within a Human Rights Discourse* (Ashgate, 2003), Ch 5.

In the same way, the entities grouped together as 'supra-State actors' tend to represent collectively the official manifestation of the existing State paradigm at the supranational level (or in 'international relations'), whereas the fourth main category of 'extra-State actors' present a challenge to the representative authority of the State in international activity. This last category is diverse, in that it comprises both illegitimate or delinquent actors widely regarded as problematical in their operation (in particular, terrorist and crime organisations), but also 'benign' actors, a range of non-government organisations (NGOs) supporting interests with a wide trans-national public support (such as environmental protection or humanitarian aid). In this last sense, NGOs may also be said to be a major type of representative actor for 'civil society'.[14]

In this way the first two categories have a kind of 'national' dimension, while the last two categories have an 'international dimension'. At the same time, the first and third categories are broadly supportive of existing State authority, while the second and fourth include entities that challenge, or are at least stand apart from that existing authority. Two further specific points may be made in relation to the typology. First, the corporation as an actor within the first category could also be listed as a trans-national corporation in the fourth category, but has been located within the first since, under existing rules, such corporate entities are constituted under the law of a particular State, and in a technical legal sense are sited within that State. Secondly, although IGOs are categorised as representative of existing State authority, it is interesting to reflect on the potential 'emancipation' of some IGOs into effectively independent actors on the international stage, becoming increasingly distinct from their founding intergovernmental origins (arguably for instance, the European Union (EU),[15] the United Nations (UN) or the World Trade Organisation (WTO)). Therefore, both trans-national corporations and some international organisations could drift into the fourth category. Finally, as a general point, it is advisable to remember the fluidity of these categorisations, and this is illustrated in the second column of the Table. So, an insurgent group, an NLM or a faction (or even a terrorist organisation) may evolve into a government, while a government may have some of the character of a terrorist organisation. The typology does not, in the longer term, imply a static state of affairs.

The typology is further explained in Table Two below, which provides some actual and quite well-known examples for each category. All of these examples have some political significance in the international context and in many cases also exemplify some kind of participation in *international* legal relationships (for instance,

14 On the participation of 'civil society organisations' in policy and law-making activities in a European context, see: European Commission, *White Paper on European Governance,* COM (2001) 428 Final (27 July 2001), pp 14-15; Economic and Social Committee, *Opinion on the Role and Contribution of Civil Society Organisations in the Building of Europe,* OJ 1999, C 329/30.

15 See, in particular, the argument presented, in relation to the European Union by Christopher Harding, in 'Legal Subjectivity as a Fundamental Value: the Emergence of Non-State Actors in Europe', Ch 8 in K Economides et al (eds), *Fundamental Values* (Hart Publishing, 2000).

by the grant of diplomatic or observer status; by participating in the negotiations relating to international legal agreements; by being party to such agreements; by being subject to contractual, delictual or criminal liability or bringing legal claims; and by being subject to international enforcement action or other regulation). The content of Table Two is therefore empirical in character and demonstrates not only the range and significance of a number of non-State actors, but also leads to evidence of their actual involvement in international legal relations. The entities listed are part of the reality not only of international (political) relations, but also of international law. To phrase this conclusion in Noortmann's words:

> Are states and non-state actors prevented by international law from entering into a legal relationship which is explicitly governed by rules of international law? Of course not, empirical evidence clearly proves the opposite.[16]

The real problem for the international legal order is rather a theoretical challenge, enabling the rhetoric and theory of the subject to overcome the 'straightjacket of positivism'.[17] The major theoretical task is thus concerned with the exploration and elucidation of legal identity in order to understand more clearly the role of such actors in different contexts.

Table Two
Examples Of Non-State Actors

Infra-State actors	Examples
Heads of State	Pinochet, Milosevic, Saddam Hussein
Governments	Nazi regime, Vichy France, Khmer Rouge, 'Greek Colonels' (1967-74), Apartheid regimes
State agencies	SS/Gestapo, KGB
Individuals Corporations	Tojo Hideki, Eichmann, Tadic Shell, Microsoft, Monsanto
Proto-State actors	
Insurgent groups	Confederated States (America), Nationalists/Falange (Spanish Civil War)
National Liberation Movements (NLMs)	PLO, FLN (Algeria), FRELIMO (Mozambique), ANC (South Africa), FRETILIN (Timor)
Governments in exile	Haile Selasse, Nazi-exiled governments, French Free State, Taiwan (1949-71)
Factions	Taliban, Nazis, Unita, RUC
Supra-State actors	

16 Noortmann, above n 8, p 74.

17 Ibid.

States in coalition	Coalition / Allied States (Kuwait), NATO (Yugoslavia), Coalition (Iraq)
Intergovernmental organisations (IGOs)	UN, EU, WTO
Extra-State actors	
Terrorist organisations	Al Qaeda, IRA, Shining Path, Tamil Tigers, EOKA (Cyprus), EETA (Basques)
Criminal organisations	Mafia, Triad groups, drug cartels
Non-governmental organisations (NGOs)	Greenpeace, International Committee of the Red Cross (ICRC)

This question will now be examined further in the context of international conflict resolution. This may be done with reference to two major aspects of such legal identity: first, identity for purposes of achieving accountability; and secondly, identity as a means of facilitating the representative role of such actors. But first a short discussion of the theoretical basis of this exercise may be helpful.

Accountability and Representation as Elements of Legal Identity

Legal personality or identity is a functional notion, which essentially serves to indicate the possibility of undertaking action that is legally meaningful. An actor in the most basic sense may be identified by reference to a range of activities – for instance, physical, political or social – without reaching the stage of legal identity, which is concerned with capacity to act within a framework of legal rules. Thus, legal writers often equate legal personality or identity with the *capacity* for legal action. This position is nicely summarised by Brownlie, for purposes of discussion in the international context, in the following terms:

> A subject of [international] law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims. This definition, though conventional, is unfortunately circular since the *indicia* referred to depend on the existence of a legal person.[18]

Brownlie's analysis has the merit of emphasising the phenomena of legal rights, duties and claims, and (as he later explains)[19] also the relative character of personality in the sense that not all legal actors need to possess the same quantum of legal capacity. This relative character of legal personality is recognised as being especially significant in the international context, in which the range of potential actors is very varied, as indicated above. A slightly different way of presenting this

18 Brownlie, above n 6, p 57. Compare the oft-quoted analysis by Daniel P O'Connell, *International Law* (2nd ed, Stevens, 1970), at p 80. For a more detailed juristic analysis of legal personality, see: Hans Kelsen, *General Theory of Law and State* (transl. Anders Wedberg, Harvard University Press, 1946), p 93 *et seq*.

19 Brownlie, above n 6, p 57.

analysis of legal personality is to speak in terms of (a) the possession and assertion of rights and (b) being the subject of obligations. The first element – that of rights – conveys the legal actor's representative role, acting on behalf of certain interests, which have been translated into rights on the legal plane. The second element – that of obligation – establishes a process of accountability, whereby the actor becomes legally responsible for certain behaviour. In this way, legal personality or identity may be seen as a vehicle for achieving both appropriate and optimum representation and accountability through the medium of a particular actor. But – returning to the point about degrees of personality – this may not require the vesting of a full range of legal capacities in a particular actor, nor need there be an exact balance between any roles of either representation or responsibility.

On such an analysis, the award of legal personality should have a functional basis, as a response to the needs of the relevant community at any particular time in achieving both representation and accountability in the most effective manner. In asking questions about the emergence and role of non-State actors as legal persons, the first stage of enquiry is broadly empirical in nature, enquiring into the existence of actors as entities possessing a sufficiently distinct and stable identity to be viewed as effective and autonomous in a political and social sense. Table Two above illustrates the results of such an enquiry into the nature of contemporary participation in activity at the international level. The second stage of enquiry is concerned with the appropriate allocation of legal personality to any such actors, for purposes of achieving either representation or accountability. It is this latter part of the exercise which may now be carried out in the more specific context of international conflict resolution. Since accountability may appear as the more obvious and historically established element of legal personality in this context, it will be taken first in the order of discussion.

International Conflict: The Accountability of Non-State Actors

Individuals

The legal accountability of individuals at the international level is now well established in certain contexts of conflict, through the development of international criminal liability. Most obviously, following armed conflict and the use of force, individuals may be charged with war crimes and crimes against humanity and dealt with either by an international tribunal with jurisdiction over such conduct or by national courts, exercising national criminal jurisdiction or a kind of 'delegated' authority via universal jurisdiction over 'international' crimes. In fact, this is a burgeoning area of 'international criminal law' and represents a major instance of legal response to conflict situations. This is not the place to discuss in any detailed way the substantive or procedural issues arising from such a process,[20] but its significant place in the overall scheme of legal response should be noted.

20 For a useful overview and more detailed discussion of this area, see Cassese above n 1; Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001);

The important questions of policy and principle relate to the choice between allocating individual or State accountability, and then, in the case of the former, the choice between international and national legal process. The first of these questions is part of the wider subject of identity and personality under discussion here. The second question concerns the scope of the international legal order and its relationship to national legal systems.

The most relevant question in the present discussion concerns the allocation of responsibility as between human individuals and corporate or collective actors such as States and governments, and the extent to which it is possible to disentangle such individual and collective action, for instance in relation to the large-scale and systematic violation of human rights in the context of military and political conflict. The imposition of individual responsibility satisfies an imperative of retributive justice and indicates the reality of the individual contribution to collective action. At the same time, there are difficult legal questions which follow from this choice of the individual criminal responsibility route: notably, the consideration of jurisdictional alternatives, evidential difficulty in linking high-ranking personnel with the implementation of large-scale atrocities, and argument concerning appropriate penalties. State responsibility[21] avoids some of these problems by the presumptive attribution of broadly defined governmental action to the State as a whole, but in turn raises questions about the political wisdom and retributive justification for what is in some senses an imposition of collective responsibility. Thus, for example, both the imposition of reparations against Germany and other States in the aftermath of World War I[22] and of UN sanctions against Iraq during the 1990s[23] could be argued to have had undesirable political consequences and to have missed the mark by injuring 'innocent' sections of the population. While governments and States in a formal sense may be censured and shamed through such procedures and measures, that outcome may be compromised by a counterproductive feeling of distributive injustice and political alienation. In contemporary parlance, State responsibility may well not involve a 'smart target'.[24]

In general terms therefore the international community now has some choice between two main forms of legal accountability in relation to extreme action in

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Cesare P R Romano, Andre Nollkaemper and Jan K Kleffner (eds), *Internationalized Criminal Courts* (Oxford University Press, 2004); Christoph Safferling, *Towards an International Criminal Procedure* (Oxford University Press, 2003). There is a more detailed discussion of a number of aspects of international criminal liability in some of the other contributions to this collection.

21 See Nina H B Jörgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2003).

22 See Yoram Dinstein, *War, Aggression and Self-Defence* (2nd ed, Cambridge University Press, 1994), pp 109-10; J M Keynes, *The Economic Consequences of the Peace* 23 (*2 Collected Writings of J M Keynes,* 1971).

23 Deon Geldenhuys, *Deviant Conduct in World Politics* (Palgrave Macmillan, 2004), p 103 *et seq*.

24 But see also the discussion below on the way in which 'State responsibility' often ought to be more precisely viewed as 'governmental responsibility'.

conflict situations. Exercising this choice raises an increasingly complex range of political and legal questions.[25] But it must also be borne in mind that the subject is further complicated by the fact that this option of moving from State to individual responsibility remains uncertain in its availability. For instance, international criminal jurisdictions have so far emerged haphazardly and it is likely that the jurisdictional reach of the International Criminal Court will be patchy. Recently, for example, the legal options for dealing with Saddam Hussein were clearly constrained by political considerations. In sum, 'international criminal law' has a character which is still some way short of a coherent and complete system of objective justice.

Heads of State, Governments and Proto-governmental Entities

The accountability of governments, as distinct from that of individuals (of which governments are comprised) or States (whom governments represent), is at the present time legally tentative and problematical. In terms of legal responsibility and retributive justice, the crucial question is whether there may be any advantage in either practical or theoretical terms in attempting to distinguish the role of governments from either that of the individual or the State.

One particular point, however, is worth noting at this stage: the clearer delineation of responsibility of individual actors *as Heads of State*. It seems clear enough now that, as a matter of international law, earlier practice allowing pleas of immunity based on official status as a state agent to be pleaded by former Heads of State has been superseded by the principle that, in relation to international crimes such as genocide, war crimes, crimes against humanity, and torture, there should be no immunity once the agent has left office.[26] The precedent which was established by the prosecution of political and military leaders in the Nuremberg and Tokyo trials in the aftermath of World War II has been reinforced by the more recent or prospective prosecution of Heads of State such as Pinochet,[27] Milosevic[28] and

25 Alternatively, it may not be that choice as such, but a matter of using both, as for instance in the *Rainbow Warrior* case, in which New Zealand pursued an international claim against France, while French agents were also prosecuted under New Zealand criminal law: for details see, (1987) 26 ILM 1346.

26 This was accepted for instance in the pleadings of both parties (Congo and Belgium) before the ICJ in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium),* Judgment of 14 February 2002, ICJ Rep 2002.

27 Augusto Pinochet, President of Chile between 1973 and 1990 and head of a very repressive government, under which over 100, 000 people were arrested, and many tortured and never seen again. He was in the late 1990s the subject of a famous attempt at extradition from the UK (*R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (UK House of Lords), (1999) 2 All ER 97). Legal proceedings in Chile have subsequently been protracted, interrupted and uncertain. As Cassese commented: 'for all its theoretical and principled significance, this case has not led to a proper trial, not even in Chile' (Cassese, above n 1, p 298).

28 Slobodan Milosevic, former President of Yugoslavia and implicated in the destructive warfare and ethnic cleansing in Bosnia-Herzegovina and Kosovo; arrested and indicted

Saddam Hussein.[29] In one sense, this is of course nothing distinct from individual criminal liability. But in another, negative sense, the withering of immunity as an aspect of State sovereignty represents at the same time the arraignment of Heads of State and senior members of government as a way of specifying governmental rather than State responsibility. While such persons are in a strict legal sense being prosecuted and tried as individuals, they are also more symbolically being held accountable for their regime and system of government. In this broader reading of what is happening, it may be seen as a form of governmental accountability. Cassese[30] usefully explains the logic of such a process by referring to the persuasive argument employed by Justice Robert H Jackson in his comment on the prosecution of German war criminals in 1945. Jackson referred to:

> [T]he obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be least where power is the greatest.[31]

A general observation which may be made at this point is to note how formal legal claims against States are sometimes effectively claims against *governments* on behalf of the rest of the State. This is especially true when States are legally impugned in respect of human rights violations. For instance, when Denmark, the Netherlands, Norway and Sweden brought a claim against Greece in 1968 before the European Commission on Human Rights, alleging violations of the European Convention on Human Rights,[32] this was effectively a proceeding against the authoritarian 'Regime of the Greek Colonels' that had seized power in 1967. It is helpful to see that kind

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in 2001 before the International Criminal Tribunal for the Former Yugoslavia (ICTY): *Milosevic Case,* IT-02-S4. The trial still continues.

29 Saddam Hussein, President of Iraq between 1979 and 2003, implicated in the Iraq-Iran War, the invasion of Kuwait and repressive government within Iraq; captured by American occupation forces late in 2003 and arraigned for trial in July 2004 before an Iraqi court by the Iraqi Interim Government. But there are fears of a 'Milosevic effect' – that a high profile and protracted trial (especially in circumstances of continuing insurgency) will revive political support for the defendant.

30 Cassese above n 1, p 270.

31 Report to the US President, 6 June 1945, *International Conference on Military Trials* (San Francisco, 1945), p 47. Jackson was appointed 'Chief Counsel for the United States in prosecuting the principal Axis War Criminals'. Cassese emphasises the increasing imperative of this doctrine, when he observes that: 'Today, more so than in the past, it is State officials, and in particular senior officials, that commit international crimes.' Cassese above n 1, pp 270-71.

32 See the decision of the European Commission of Human Rights, 24 January 1968, (1968) 7 ILM 818. There is some intriguing argument in the proceeding relating to the Greek government's attempt to describe itself legally as a 'revolutionary government', not accepted by the Commission (see 7 ILM, p 834).

of legal proceeding in the same context as the subsequent criminal conviction and imprisonment under Greek law of two leading members of that regime, Papadopoulos and Pattakos, in 1974 after the regime had fallen. In the same sense, their liability was also a legal indictment of the regime and government of which they were part. There are of course, many other examples of legal action formally directed against States but effectively concerned with the behaviour of the governments of the States in question.[33]

While governments as such may not be specifically accountable in terms of criminal liability, they may and have been the subject of other legal measures which may be broadly described as enforcement action. There is a well-established practice contained in the process of recognition and non-recognition, of distinguishing governments from the States which they claim to represent and refusing to deal with them as the legal representative of such States. This process of relegating an entity which may have both the outward appearance and effective power of government to *de facto* status has a long and widespread history in international relations, often resulting in legally anomalous, classification-defying situations.[34] A classic example of this demotion from 'government' to 'illegal regime' is provided by the unilateral declaration of independence by the Rhodesian entity and government by white minority rule of the territory of Rhodesia (now Zimbabwe) between 1965 and 1980. In terms of international law and practice, the Rhodesian government or 'regime' was a clearly identifiable subject of international enforcement action (and to that extent an international legal person). For instance, Security Council Resolution 216 of 1965[35] called upon all States to refrain from recognition and assistance to the 'illegal racist minority regime'. Security Council Resolution 277 in 1970[36], decided, amongst other measures, that UN Member States shall:

> Immediately sever all diplomatic, consular, trade, military and other relations that they may have with the illegal regime in Southern Rhodesia, and terminate any representation that they might maintain in the territory.

As Roth comments, it is difficult to imagine 'a more definitive assertion by the international system of governmental illegitimacy',[37] but the logic of such a process is the conversion, for purposes of taking measures of legal enforcement, of the actor

33 See, for instance, the discussion of action taken against a number of 'delinquent' regimes (for instance: Chile, South Africa, Iraq, Libya) in Geldenhuys, above n 23, Chs 3 and 4.

34 See generally the discussion in Brad R Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, 2000); Geldenhuys, above n 23, pp 64-66. The consequent practical and legal difficulties of 'non-recognition' are well illustrated by the Rhodesian case: see, for example, *Adams v Adams* (1970) 3 All ER 572 in the United Kingdom courts.

35 12 November 1965, (1966) 5 ILM 167.

36 6 March 1970, (1970) 9 ILM 641.

37 Roth, above n 34, p 239. On Rhodesia, see generally Roth's account of the subject at pp. 236-43.

into another type of legal entity, usually in this context referred to as a 'regime', as distinct from 'government'.

The historical process of non-recognition and use of *de facto* status has (as the Rhodesian example reveals) evolved into a more contemporary international practice of dealing explicitly with some entities asserting formal governmental status as 'regimes' or 'factions' rather than as 'governments'. This is usually, again, for purposes of enforcement measures, and a common and legally significant source for this practice is to be found in Security Council Resolutions. A recent example is provided by the UN differentiation of the Taliban 'faction' and the State of Afghanistan. Thus, Security Council Resolution 1267 of 1999[38] specifies the identity of the Taliban in the following terms. The Council insisted that:

> the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organisations; take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organisation of terrorist acts against other states or their citizens, and co-operate with efforts to bring indicted terrorists to justice … all states ...

And, moreover, in addressing UN members, the Council required that they:

> Should freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban …

Other examples of international enforcement action taken against 'factions' via Security Council resolutions include a series of measures taken against Unita (União Nacional para a Independência Total de Angola) in Angola, the RUF (Revolutionary United Front) in Sierra Leone and the Khmer Rouge in Cambodia.[39] The action taken against UNITA for example culminated in a range of compulsory economic and political sanctions listed in Resolution 1173 of June 1998[40] and the setting up of a Panel of Experts in Resolution 1237 of 1999[41] to assist the Security Council's Sanctions Committee. In relation to the RUF, Resolution 1171 of 1998[42] included measures concerning arms control and the enforcement of personal restrictions. The

38 15 October 1999, (2000) 38 ILM 235.

39 See generally on these factions, Geldenhuys, above n 23, p 334 *et seq*. Unita was originally a liberation movement of the 1960s, but became a powerful rebel faction in post-independence Angola and was partly responsible for the devastation ensuing from the protracted civil war over three decades. The RUF was operating as a rebel movement in Sierra Leone from 1991 and was notorious on account of its vicious terrorist methods. The Khmer Rouge, formerly the genocidal government of 'Democratic Kampuchea', became a faction within Cambodia after being ousted from power in 1979.

40 S/RES/1173 (1998).

41 S/RES/1237 (1999).

42 S/RES/1171 (1998).

notorious Khmer Rouge was the target of Security Council measures in 1992,[43] when Resolution 792 threatened an oil embargo and the freezing of foreign assets.

Therefore, whatever the established formal legal categories may suggest, there is a significant practice of politically and legally distinguishing State, governmental and proto-governmental entities for certain purposes, even if the latter mainly comprise specific issues of enforcement.

A further issue that is relevant to this range of actors becomes apparent when they are viewed in terms of a spectrum or continuum (e.g. State > Head of State > government > regime > faction > individual), and concerns the legal complication resulting from the fluidity between these categories over time. Thus, today's government may become tomorrow's regime or faction, today's Head of State may become tomorrow's war criminal; or, in reverse, today's insurgent faction may become tomorrow's government, today's terrorist leader may become tomorrow's Head of State. The history of international relations during the twentieth century provides much illuminating evidence of these transformations. The Government of Nazi Germany was reclassified as a proscribed organisation,[44] the former minority government of South Africa was founded upon a now proscribed doctrine of governance (apartheid),[45] and Slobodan Milosevic, the former Head of the Yugoslav State has been indicted for war crimes. On the other hand, the African National Congress (ANC)[46] changed from a criminal organisation to a government-in-waiting and then the core of a new government, and Menachem Begin[47] moved from terrorist leader to Prime Minister of Israel and Nobel Peace Prize Winner. The history of the Zionist movement is also instructive, having a respected representative role with a wide measure of international support in the earlier part of the twentieth century,[48] but by the 1970s castigated by the UN General Assembly as a form of racism and racial domination. On the one hand, this evidence reveals the fragility of hard-and-fast legal definitions and promotes misgivings over the mismatch between the legal concept of State sovereignty and political and ethical 'reality'. On the other

43 S/RES/792 (1992).

44 The Nazi Party was outlawed in the German Federal Constitution (*Grundgesetz*) of 1948; see now Article 21 of the Constitution.

45 On the present status of apartheid as an international crime, see Cassese, above n 1, p 25.

46 Established in 1912, as an organisation representing the interests of 'all coloured peoples in South Africa, declared illegal by the Apartheid South African Government in 1960, and its leader Nelson Mandela arrested and convicted of sabotage in 1962. By the late 1980s it was in negotiation with the South African Government on political change, the legal ban was removed in 1990, and it naturally became a major political force in post-Apartheid South Africa.

47 Menachem Begin, Prime Minister of Israel from 1977 – 1983. He was earlier the leader of the terrorist movement Irgun, and later helped to found the right-wing coalition party Likud. Having negotiated the Camp David Accord with Egypt in 1978, he was subsequently awarded the Nobel Peace Prize.

48 See Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge University Press, 1995), p 232.

hand, it then explains the resort to and the fluctuations in such devices as sovereign immunity for State agents.

Intergovernmental Organisations and State Coalitions

At first sight it might seem bizarre to talk about the accountability of intergovernmental organisations (IGOs) such as the UN and the EU, whose own role is very much concerned with monitoring the behaviour and activities of States and other actors. But it should be remembered that some powerful IGOs evolve into distinct political actors and that, as a matter of principle there is a strong argument for some accountability on the part of those who judge and monitor the actions of others – the UN should be subject to the rule of law in the same way as any State. This argument may apply with particular force to those organisations which do achieve real autonomy on the international stage, despite their essentially intergovernmental foundation and formally 'derivative' authority. There is little doubt that organisations such as the UN, the EU and WTO have to a greater or lesser extent achieved some distinct identity and autonomy on the global stage and possess an ideology and practice which may not always conform to that of all their constituent member States. Nor are IGOs infallible, whatever their power and resources, and it is not inconceivable that such an organisation could act in breach of international law or cause injury so as to raise questions of legal liability.[49] For example, in so far as an organisation is involved in military peace-keeping activities, or a collective act of recognition, there is no reason theoretically why it should not engage legal responsibility in the same way as its constituent members, if the action in question is more properly regarded as a collective enterprise.[50] But, of course, to date, such accountability is in practice a prospective matter.

In both political and legal terms the accountability of 'coalitions' of States would seem at this stage to be both problematical and hypothetical. In a practical sense such coalitions[51] do not usually possess the unity of form which would characterise many of the other types of entity in this discussion and accountability may therefore appear to be best served by dealing with States as individual members of the group,[52] especially if there is, for example, some clear allocation of different responsibilities in a military action. On the other hand, it may still be worthwhile to reflect on the nature of these coalitions and the impact of their action, especially if they become

49 Would it be over-fanciful, for example, to contemplate the idea of EU-WTO trade wars leading to mutual legal challenge of their respective activities at the international level?

50 On the related question of assigning moral responsibility to international organisations, see the recent discussion in Toni Erskine (ed) *Can Institutions Have Responsibilities?* (Palgrave Macmillan, 2003).

51 The most significant examples in recent years are the military coalitions used against Iraq in Kuwait (1991), against Serbia in Kosovo (NATO, 1999), and against Iraq directly (2003).

52 Thus, Yugoslavia's legal claim against the NATO intervention took the form of a number of claims on the same issue brought severally before the ICJ against the NATO member States: *Case Concerning Use of Force,* 1999 ICJ Rep.

a more frequent aspect of international relations. There is, after all, a potent mix of ethical, political and legal argument arising from the recent examples of this kind of action (Kosovo in 1999, Iraq in 2003), as latter-day 'crusades' which are characterised alternatively as serious violations of international law, or (in their humanitarian intervention role) as a kind of 'international liberation movement' (and so, by an intriguing historical twist, a strange successor to the 'national liberation movement' of the decolonisation era).[53]

Terrorist and Criminal Organisations

In the formal scheme, States and governments may seem far removed from international terrorist and crime organisations. The two broad types of actor are conventionally opposed to each other, one representing the enforcement of law against the other as a law-breaker. But it is as well to remember that States and governments may be delinquent (and indeed may engage in both crime and terrorism), while both terrorist and crime organisations may eventually acquire legitimacy. In this sense the latter may be placed at one end of the spectrum referred to above. At the same time, such delinquent organisations (arguably a terrorist organisation is a type of crime organisation) may also be seen as identifiable legal actors, as viable in their infrastructure, capacity for effective action and external representation as a State or any other conventionally recognised corporate actor.[54]

In terms of accountability, little has been achieved as yet by way of attributing criminal liability to such delinquent organisations in themselves. But again, it is possible to point to international practice comprising enforcement action specifically directed at some terrorist organisations. Perhaps the most significant recent example is provided by the range of measures taken specifically in relation to Al Qaeda, by both States and international organisations, such as the EU and the UN. Security Council Resolution 1373 of 28 September 2001[55] authorised measures to be taken under Article 39 of the UN Charter specifically against Al Qaeda, following on from Resolution 1368 of 12 September 2001 which reiterated the right of self-defence for States against 'terrorist attack'. A number of instruments adopted by States or international organisations have identified terrorist organisations as the subject of legal measures, particularly for the purpose of dealing with the financial assets of the latter, some such instruments containing lists of outlawed organisations

53 There is indeed an ironic speculation in international history: are the Western-led international liberation movements (to protect or promote human rights and democracy) that have acted against power structures often established through the efforts of 'national liberation movements' of the earlier era a new ideological colonialism?

54 See: Christopher Harding, 'The Concept of Terrorism and Responses to Global Terrorism: Coming to Terms with the Empty Sky', Ch 7, in: Paul Eden and Thérèse O'Donnell (eds), *September 11, 2001: A Turning Point in International and Domestic Law?* (Transnational Publishers, 2004).

55 (2001) 40 ILM 1278.

within this framework of control.[56] Particularly since 2001, terrorist groups have become more frequently and significantly identified for purposes of international enforcement measures. The significance of such developments is tellingly conveyed in Fitzpatrick's analysis of the post-September 11 'war' against terrorism, when she suggests one possible characterisation of this activity as

> an international armed conflict against Al Qaeda as a kind of quasi state, establishing a dramatic new paradigm in the law of armed conflict.[57]

Finally, a brief note may be made of one further category of delinquent actor that has attracted international attention, although as a rather more diffuse phenomenon compared to terrorist or crime groups: the mercenary soldier, sometimes now referred to under the heading of 'private military companies' (PMCs). Although mercenary activities have been strongly condemned (for instance by the UN Commission on Human Rights and General Assembly[58]), there is also an argument in favour of regulation rather than outright condemnation.[59]

'Benign' Corporate Actors: NGO's and Transnational Corporations

It may well be asserted that both NGOs and companies are (for the most part) neither delinquent nor major players in international conflict, and are in any case legally creatures of national legal ordering and accountable therefore at that level. Part of the answer to this point lies in the fact that some NGOs and corporations in actuality have a very significant international presence and reach and may have some specific role in the development or resolution of conflicts at that level. The economic activities of transnational companies may well be closely bound up with the political dynamic of the development of disputes.[60] Many humanitarian NGOs may be involved in attempts to manage the negotiation of disputes, the conduct of disputes and post-dispute reconstruction. In such contexts they are identifiable actors with potential responsibility and so their accountability may well be an issue. But, as in the case of individual actors discussed above, the crucial question may

56 See e.g. EC Regulation 2580 of 2001, authorising the freezing of assets (OJ 2001, L 344), EU Council Decision and Common Position, 21 December 2001, 2 May and 17 June 2002 (OJ 2002, L 116 and L 160).

57 Joan Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism', 96 (2002) *American Journal of International Law* 345, p 346.

58 UN Commission on Human Rights, 'The right of peoples to self-determination …', Report of the Special Rapporteur on Mercenaries, 21 December 1994; GA Resolution 56/232.

59 See generally the discussion in Geldenhuys, above n 23, pp 341-7; and the UK Foreign Office Green Paper, *Private Military Companies: Options for Regulation 2001-02* (Foreign and Commonwealth Office, February 2002).

60 See, for instance: Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004).

relate to the possible relocation of such responsibility to the international rather than the national domain.

International Conflict: The Representative Role of Non-State Actors

Discussion of the representative role of non-State actors – making legal claims and participating in dispute resolution and rule creation – also proceeds from a critical consideration of the State-centred paradigm. The central question concerns the extent to which such non-State actors in actuality carry out this role at the international level, and ought therefore to be accorded an appropriate position in the theory of international law. The debate may be summarised in the following terms:

> what is at issue here is the idea that the sovereign state is immutably the natural or most appropriate and effective representative of individual or even group interests in an international setting. This assertion is an important aspect of state sovereignty and its justification … In effect, sovereign states proclaim, in order to demonstrate the legitimacy of their existence: 'we are in the best position to act as guarantors of individual or aggregate human interests on a wider international stage.[61]

However, during the twentieth century, this representative claim on the part of States and their governments has been regarded with increasing scepticism and in practice a number of other actors have asserted themselves in the international legal arena in order to take on some of this role. Partly, the problem has resided in the legal confusion of State and government coupled with the ethical problem of the 'bad sovereign': the evidence that some governments are far from representative of (and indeed sometimes repressive towards) significant individual or collective interests. In short, the practice of delinquent governments, exploiting the legal authority of State sovereignty, has gradually spawned a range of more truly representative actors, whose main role is to defend certain interests against the power of governments (and therefore of States).

This development may be seen first of all in the gradual emancipation of the individual at the international level, especially as an independent claimant of basic human rights against governments. Thus increasingly individuals may now act on their own behalf under human rights protection treaties,[62] a major legal advance on the earlier system of discretionary and paternalistic 'diplomatic protection',[63]

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61 Christopher Harding, 'Statist assumptions, normative individualism and new forms of personality: evolving a philosophy of international law for the twenty first century', (2001) 1 *Non-State Actors and International Law* 107, p 123.

62 Notable examples include the right of petition under the European and Inter-American Conventions on Human Rights, and under the First Protocol of the International Covenant on Civil and Political Rights.

63 See for instance the discussion in Ch 24 of Brownlie, above n 6. Brownlie addresses some of the implications of 'fusing' personalities under that approach: 'Vattel, in a much-quoted passage, stated that an injury to the citizen is an injury to the state. His principle is often described as a fiction, but it is surely inadequate so to characterize the legal

which in any case was directed at other governments, not the victim's own government. Also, more and more frequently during the twentieth century, States and intergovernmental organisations have taken up the legal cause of individuals, groups and wider communities. The claim by the Scandinavian countries and the Netherlands against Greece (or more precisely, the 'Greek Colonels'), mentioned already,[64] is in effect an example of an 'intergovernmental humanitarian coalition', as was (more controversially) NATO in relation to Kosovo. Organisations such as the Council of Europe and the EU have a significant role in promoting a wide range of individual and collective interests, usually in opposition to governmental and State interests (even though such organisations have an intergovernmental foundation).[65]

So far, this argument is not especially controversial, since this kind of role for both individuals and IGOs is now an established and accepted part of the international legal landscape. But there are other actors who are also now competing with governments to exercise a representative capacity at the international level, but whose candidature is more controversial: in particular, insurgent groups and political factions (proto-governmental entities), NGOs and (most controversially) terrorist and other delinquent organisations. Such entities may be important political actors in major international disputes and thus have a potentially significant role in both dispute resolution, and in the longer term, policy and law formation.[66] This point may be illustrated for example by the evolution of the role of the Palestinian Liberation Organisation (PLO) as a representative of the interests of the Palestinian people, that of an NGO such as Greenpeace in representing 'civil society' interests in relation to arguments concerning nuclear testing,[67] and that of a terrorist organisation such as Al Qaeda in representing Islamic, anti-Western interests in the wider context of global governance. The PLO in particular provides a fascinating study of international legal status and personality, standing as a classic 'anomalous' case in textbook accounts. Founded in 1964 as an 'umbrella' representative organisation, its complex membership has embraced both political and violent strategies. Nonetheless, it eventually acquired for many other States a government-in-exile status and became a member of a number of international organisations, such as the Arab League, the Non-Aligned Movement and the Group of 77. Brownlie refers to an 'eccentric

relation between a 'corporate' legal person and its membership. In any case Vattel was not contending that any harm to an alien was an injury to his state: the relation simply provides a necessary basis for principles of responsibility and protection'. (p 497)

64 See n 32 above.

65 On the developing representative role of the EC and EU, see the discussion in Harding, 'Legal Subjectivity as a Fundamental Value', above n 15, pp 126-34.

66 See the discussion of NGO activity in Chapters 10 -12, in Arts, Noortmann and Reinalda, above n 8.

67 See (1987) 26 ILM 1346. On the representative role of Greenpeace in legal claims under EC law before the Court of First Instance, see: Case T-585/93, *Stichting Greenpeace Council v Commission* (1995) ECR II-2205.

bilateral process' between the PLO and the Government of Israel on the issue of Palestinian statehood.[68]

Each of the three entities mentioned above have achieved differing levels of acceptance (and so international legal personality) in performing a representative role. The challenge for international law (and legal theory) lies in coming to terms with the political reality of such representative activity, especially when the mode of behaviour of the actors in question raises strong ethical and political objection. The legal and ethical dilemma is neatly summed up in the conundrum that status is denied to the terrorist insurgent but not to the terrorist government. The political and legal significance of such ethical agonising should not be underestimated. When the UN General Assembly voted to give the ousted genocidal Khmer Rouge the Cambodian seat in the General Assembly in 1979, supporters of political expediency were calling in aid the device of State sovereignty in the face of moral objection.[69] But such intergovernmental activities undermine the confidence of civil society in the system of international law, and in turn the credibility of the latter.

Concluding Comments

International conflict has a rich and diverse participation which, increasingly during the course of the twentieth century, has moved away from its earlier State-centred paradigm. The more formal aspects of the international legal system remain wedded to a sovereign State dominated structure which concedes a derivative personality to individuals and intergovernmental organisations but prefers to treat other types of participant in international legal activity as anomalous. This formal position does not help either to explain or understand the nature of international conflict and its possible resolution. While there have been some notable developments regarding the international legal accountability of individuals, there is still hesitation in disaggregating governments and governmental actors from the totality of the State, resulting in particular in inconsistency in the treatment of those who hold formal power and those who have not achieved such recognition. Yet in ethical and political terms the dividing line between Head of State and war criminal, or between government and terrorist organisation, may be much more problematical. Moreover, the increasingly significant role played by a range of non-governmental organisations - insurgent movements and political factions, corporate actors, civil society NGOs, and transnational criminal and terrorist networks – needs to be more firmly grasped by the theory of international law. To do so will serve the needs of ethical and legal accountability, and also the practical needs of conflict resolution. Adherence to the intergovernmental fiction of the legal order suggests something of an exclusive club:

68 Brownlie above n 6 at p 77. See also Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal,* above n 48, pp 230-48.

69 See the discussion in Leo Kuper, *Genocide* (Penguin, 1981), especially at p 173.

> I do business with the people I do business with. I don't do business with the people I don't do business with. If I do business with the people I don't do business with, the people I do business with don't do business with me.[70]

The above discussion has sought to show, not that such realities of participation have been ignored as a matter of the operation of international law and relations, but rather that the underlying theory of the subject and formal categories require refinement and adaptation. But the latter task involves political as much as legal will and therein lies much of the problem. It may not be palatable, for instance, to accept that Al Qaeda is a more significant international actor than many sovereign States, but that is a reality of international conflict. It is also represents a major challenge for the conventional dynamic within international law.

70 Adapted from the screenplay of Louis Malle's film, *Atlantic City*.

What Crisis at the United Nations?

Stephen Bouwhuis[1]

> Many of us sense that we are living through a crisis of the international system, or – as some put it – of the 'architecture' of international peace and security.
>
> The war in Iraq, as well as crises such as those in Liberia and the Democratic Republic of the Congo, force us to ask ourselves whether the institutions and methods we are accustomed to are really adequate to deal with all the stresses of the last couple of years – or whether, perhaps, they are in need of a radical reform.[2]

Introduction

The quotation from the Secretary-General of the United Nations (UN) speaks of a need to reassess the role of the UN in the contemporary international system and to look for radical reform. Others have gone further and assert that the situation resulting from intervention in Iraq represents something of a crisis for the UN. Some even speak of the growing irrelevance or demise of the organisation.[3]

However, rather than a crisis or a fundamental challenge, the situation resulting from the intervention in Iraq is more akin to a continuation of the status quo. A status quo that, although changed by the end of the Cold War, has continued since the creation of the UN in 1945.

The system in which that status quo operates is one in which Member States have played the dominant role and is underpinned by the general rule of non-use of force. Although there have been a number of contraventions of the rule, none of them has been sufficient to shatter the status quo.

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1 The views expressed in this paper are expressed in a personal and not an official capacity.

2 Transcript of Press Conference by Secretary-General Kofi Annan at United Nations Headquarters, 30 July 2003, Press Release SG/SM/8803.

3 See, eg, Editorial, A Wounded United Nations, *The New York Times* 2 January 2004; Thomas M. Franck 'What Happens Now? The United Nations After Iraq' (2003) 97 (3) *American Journal of International Law*, 607 at 616 – 17 (the system stands in mortal jeopardy of being destroyed altogether); Michael J. Glennon, 'Why the Security Council Failed' (2003) 82 (3) *Foreign Affairs*, 16; David Rieff, 'Hope is not Enough' *Prospect* (October 2003), 26 – 32 (that the UN is facing possible irrelevance).

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 571-583.*
 ISBN 90 04 14599 0.

In the discussion that follows the author argues that the present debate over the legality of intervention in Iraq forms part of this status quo. In short, the intervention in Iraq represents just one of a number of instances in the history of the UN whereby Member States have taken actions argued to be inconsistent with the UN's Charter.

Despite such actions the organisation has continued to perform its functions in much the same way as it has previously.

It is important to clarify at the outset that the point of this paper is not to try to justify the intervention in Iraq, but rather to put the current debate into its historical perspective. It is the author's thesis that arguments suggesting that the organisation is in crisis or at risk of irrelevance are overstated.

Previous Interventions

Intervention in Iraq by coalition forces in the 2003 was far from an isolated instance of intervention in the post-Cold War period. Indeed contemporary international relations have been marked by a large number of interventions by one Member State in another where the legality of the intervention has been questioned. Particularly significant examples include:[4]

- India in Eastern Pakistan (Bangladesh) (1971)
- Turkey in Cyprus (1974)
- Indonesia in East Timor (1975)
- Vietnam in Cambodia (1978 – 79)
- Tanzania in Uganda (1978 – 79)
- The Soviet Union in Afghanistan (1979)
- The United States in Grenada (1983)
- The United States in Panama (1989)
- Iraq in Kuwait (1990)

Many of these interventions have been described by commentators in similar ways to the crisis in Iraq. So, for example, actions taken by the United States (US) in Nicaragua during the Reagan administration were summed up by one author in the following manner:

> Curiously, in defending its forceful actions against the Sandinista government, the Reagan administration no longer feels the need for legal justifications. Although these actions were originally defended largely in terms of the U.N. Charter's Article 51 provision for collective self-defence (i.e., that they were undertaken by the U.S. in law-enforcing response to alleged Nicaraguan support for anti-government rebels in El Salvador), the current position of the Reagan administration is grounded

4 For a comprehensive listing of interventions and conflicts see Mikael Eriksson, Nils Petter Gleditsch and Margareta Sollenberg et al, *Armed Conflict Dataset* (2004) <http://www.prio.no/cwp/armedconflict>.

> exclusively upon geopolitical considerations. As a result, the Reagan administration seriously undermines worldwide respect for the rule of law.[5]

Some would argue that the number of interventions totally undermines the rule.[6] However, whilst there have been a number of examples of breaches of the general rule, Member States, for the most part, have conformed to it. Indeed governments react with opposition when they believe there has been a contravention of the rule. Member States who intervene also generally set out the arguments for the legality of their actions and insist they conform to the general rule. This, it will be argued, has been the case with the intervention in Iraq. Although not everyone would agree with the justifications put forward for that intervention, the fact that the explanations are in the terms of the rule strengthens the rule.

Legal Justifications

As in previous cases, the intervening parties in Iraq argued that their actions conformed to the general framework of existing international legal rules. This is particularly significant given the general principle of international law that if Member States argue that what are seen by some as derogations from a rule are actually consistent with it then they act to strengthen the rule, rather than to weaken it. As stated by the International Court of Justice in *Nicaragua*:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not that State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[7]

In the United Kingdom the advice provided in favour of the legality of intervention was that a violation of the obligations of Iraq under the cease-fire established by earlier resolutions of the UN Security Council could revive the authorisation of the

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5 Louis René Beres, 'Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America' (1985) 14 (1) *Denver Journal of International Law and Policy*, 76 at 76 – 77.

6 Glennon, above n 3, 16 (Since 1945, so many States have used armed force on so many occasions, in flagrant violation of the charter, that the regime can only be said to have collapsed).

7 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) ICJ Rep 1986 14, ¶ 186.

use of force in those resolutions.[8] Significantly, for the purposes of this paper, that advice was framed in terms consistent with the existing rule of international law, namely that the intervention was legally justified on the basis of prior resolutions of the UN Security Council.

Within Australia the advice provided in favour of the legality of intervention was that existing resolutions of the UN Security Council provided the authority for the use of force directed towards disarming Iraq of weapons of mass destruction and restoring international peace and security to the area.[9] Again the legal justification was put in terms of existing international law. That is, that the intervention was justified based on existing resolutions of the UN Security Council.

The advice offered by the legal advisers of the US is similarly consistent. They took the view that a material breach of the conditions that had been essential to the establishment of the earlier cease-fire left the responsibility to Member States of the UN to enforce those conditions, and that Member States could, operating consistently with Resolution 678, use all necessary means to restore international peace and security to the area.[10] Again the reasoning by the advisers is in terms of existing resolutions of the UN Security Council.

Each advice is couched in terms of existing international law; each argues that intervention was consistent with existing resolutions of the UN Security Council and with international law more generally. In no instance is the advice dismissive of international law – indeed each advice claims that its government is acting consistently with it. Based then on the rule of interpretation expressed in *Nicaragua*, the result is not to weaken the rule against non-intervention, but rather to strengthen it.

A counter argument could be made that whatever Member States say about what they do there have been so many contraventions that the rule effectively no longer exists. However, while it must be conceded that there have been a number of contraventions of the general rule, Member States do not just invade each other at random waiving off arguments about legality as some holdover from some long-dead ancient rule. Certainly the rule on non-intervention is honoured much more than breached.

Another counter argument would be to note that if every time one Member State invaded another it put up an argument for consistency (however flimsy that argument) then the rule would be ineffectual. This has to be conceded but only

8 Lord Goldsmith 2003. The Written Answer of the Attorney General, Lord Goldsmith, to a Parliamentary Question on the legal basis for the use of force in Iraq, 17 March 2003, <http://www.britain-in-switzerland.ch/news/Legal_use_of_force_doc.pdf>. See also House of Commons Foreign Affairs Committee, 2002, *Foreign Policy Aspects of the War Against Terrorism: Seventh Report of Session 2001 – 02:* Appendix 7: Memorandum from the Foreign and Commonwealth Office dated April 2002 <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmfaff/384/384ap08.htm>.

9 Bill Campbell and Chris Moraitis. *Memorandum of Advice on the Use of Force Against Iraq,* March 18, 2003 <http://www.pm.gov.au/iraq/displayNewsContent.cfm?refx=96>.

10 William H. Taft IV and Todd F. Buchwald 'Preemption, Iraq and International Law' 97(3) *American Journal of International Law* (2003) 557 – 63.

if such a practice was widespread and only if Member States took the view that the rule no longer held. Again, while there are clear examples of Member States putting up flimsy arguments, witness Iraq's attempted justification for the invasion of Kuwait, the weight of these is not such as to contravene the general rule.

Pre-Emption

A more significant challenge to the thesis of status quo as presented by this paper is the doctrine of pre-emption, which in the post-September 11 environment has found favour in both the US and more recently in the Russian Federation.[11]

The doctrine has found its greatest expression in the US in a document entitled *The National Security Strategy of the United States of America*.[12] However, there were a number of indicators that the views of the US were shifting in this direction prior to the publication of this text. For example, in May 2002 the US Embassy in London alluded to a shifting in the rules of international law post September 11:

> When governments violate the rights of their people on a large scale – be it as an act of conscious policy or the by-product of a loss of control – the international community has the right, and sometimes even the obligation, to act. Since 11 September, behind President Bush's leadership, we have seen similar changes in how the international community views States' responsibilities vis-a-vis terrorism. Countries affected by States that abet, support, or harbour international terrorists, or are incapable of controlling terrorists operating from their territory, have the right to take action to protect their citizens.[13]

The National Security Strategy takes the view that pre-emptive strikes are self-evidently lawful. Indeed the document talks about the changing nature of threats in the international system and the need to adapt the concept of imminent threat, forming part of the doctrine of pre-emption, to these new circumstances.[14]

The relevant paragraphs from the Strategy are worth quoting at length:

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often condi-

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11 MosNews, Russia Plans Pre-Emptive Strikes Against Global Terror Bases, 8 August 2004 <http://www.mosnews.com/news/2004/09/08/preemtive.shtml> ('As for launching pre-emptive strikes on terrorist bases, we will carry out all measures to liquidate terrorist bases in any region of the world', General Yuri Baluevsky).

12 *The National Security Strategy of the United States of America*, September 2002 <http://www.whitehouse.gov/nsc/nss.html>.

13 House of Commons Foreign Affairs Committee, 2002, *Foreign Policy Aspects of the War Against Terrorism: Seventh Report of Session 2001 – 02*: Appendix 8: Reply from the US Embassy to the Committee's questions dated May 2002, ¶ 7 <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmfaff/384/384ap09.htm>.

14 The National Security Strategy of the United States of America, above n 12, 15.

> tioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue States and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning.
>
> …
>
> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.
>
> The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.

Subsequently the US Secretary of State, Colin Powell, moved to place some limitations upon the doctrine. Powell stated that the scope of the doctrine of preemption 'applies only to the undeterrable threats that come from non-State actors such as terrorist groups'.[15] That is, that the doctrine does not apply against Member States and their governments, but rather against non-Member State actors such as terrorist groups.

Whatever the limits of the doctrine the text of the Charter of the UN does not seem to accommodate it. Article 51 of the Charter provides that '[n]othing in the present Charter shall impair the right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'.

The crucial phrase here is 'if an armed attack occurs.' The International Court of Justice has provided guidance, principally in the *Nicaragua*[16] decision and more recently in the *Iranian Oil Platforms* case,[17] as to what constitutes an armed attack and the importance of the elements of necessity and proportionality in the response.

The issue is, however, not as simple as a plain textual reading. Arguments have been made about surviving rights, an evolution in the Charter, implied exceptions to the Charter, or how one might interpret the term 'armed attack'.[18] As was noted

15 Colin L Powell, 'A Strategy of Partnerships' (2004) 83 (1) *Foreign Affairs* 24.

16 *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm> ¶ 43, 51, 64, 72 – 77.

17 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* ICJ Rep 1986 14, ¶ 176, 194 – 5, 282.

18 See, eg, Abraham D. Sofaer, 'On the Necessity of Pre-emption' (2003) 14(2) *European Journal of International Law*, 209; Yoo John, 'International Law and the War in Iraq'

by the International Court of Justice in the *Nicaragua* case, the Charter was not intended to cover the whole area of the regulation of the use of force in international affairs.[19]

For the purposes of this paper it is unnecessary to argue such exceptions further, but rather to note that this is not the first time that grounds seemingly inconsistent with the text of the Charter have been put forward as a basis for intervention.

One such example is the rescue of nationals, a ground that featured prominently in the intervention by the US in Grenada[20] as well as a number of years later in the intervention in Panama.[21] The example is interesting in that, like pre-emption, the justification doesn't square with the actual text of the Charter. Nowhere does the Charter expressly say that one Member State may intervene in another State should the first Member State's nationals be at risk. Perhaps such an intervention can justified as being a form of self-defence or an evolution in the interpretation of the Charter. Such a view would stand in contrast to an interpretation based on the intent of the drafters of the Charter, whom one assumes had Member States rather than individuals in mind when they drafted the provision.

The point in this context is not to condone such exceptions, but rather to highlight a number of examples where Member States have argued for a narrow class of interventions, seemingly inconsistent with the Charter. Whether Member States seek to justify such exceptions as some sort of surviving rights, an evolution in the Charter, or as implied rights, the point is that they are still trying to operate within the Charter framework, albeit one that they are trying to adapt.

(2003) 97(3) *American Journal of International Law* 563 at 571 – 4 (right of self-defence exists independently of the Charter).

19 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* ICJ Rep 1986 14, ¶ 176.

20 Francis A. Boyle, Abram Chayes, and Isaak Dore et al, 'International Lawlessness in Grenada' (1984) 78 *American Journal of International Law*, 172; Christopher C. Joyner, 'The United States Action in Grenada: Reflections of the Lawfulness of Invasion' (1984) 78 *American Journal of International Law*, 131; John Norton Moore, 'Grenada and the International Double Standard' (1984) 78 *American Journal of International Law*, 145; Detlev F. Vagts, 'International Law under Time Pressure: Grading the Grenada Take-Home Examination' (1984) 78 *American Journal of International Law*, 169; L. Wheeler, 'The Grenada Invasion: Expanding the Scope of Humanitarian Intervention' (1985) 8 (2) *Boston College International and Comparative Law Review*, 413.

21 D.W. Alberts, 'The United States Invasion of Panama: Unilateral Military Intervention to Effectuate a Change in Government-A Continuum of Lawfulness' (1991) 1 *Transnational Law and Contemporary Problems*, 261; Anthony D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny' (1990), 84 *American Journal of International Law*, 516; Tom J. Farer, 'Panama: Beyond the Charter Paradigm' (1990) 84 *American Journal of International Law*, 503; Ved P. Nanda, 'The Validity of United States Intervention in Panama under International Law' (1990) 84 *American Journal of International Law*, 494; Jennifer Miller, 'International Intervention – The United States Invasion of Panama' (1990) 31 *Harvard International Law Journal*, 633.

Another example of state action that would not necessarily fall within the terms of the Charter is humanitarian intervention.[22] Whilst some governments and commentators have argued that such interventions were not consistent with the Charter's prohibition on the use of force, officials of other governments have justified their actions on the basis that humanitarian interventions are an exception to the UN Charter. With respect to Kosovo, for example, the Prime Minister of the United Kingdom, Tony Blair, stated in April 1999:

> Under international law a limited use of force can be justifiable in support [of] purposes laid down by the Security Council but without the Council's express authorisation when that is the only means to avert an immediate and overwhelming humanitarian catastrophe. Any such case would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.[23]

Such exceptions are likely to be seen as an anathema to those who adopt a strict reading of the Charter – those who are likely to see even their discussion as evidence of a decline in the rule against non-intervention. However, the development of such exceptions is consistent with a constitutional approach to the interpretation of the Charter. Such an approach allows for developments in the interpretation of the Charter to meet changes in the contemporary international system.[24]

This approach is hardly radical. Turning to other phrases in the Charter, the term 'concurring' in Article 27(3) of the Charter, requiring 'the concurring votes of the permanent members', has been interpreted by the International Court of Justice to allow the abstention, or even the absence, of one of the permanent members of

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22 See, eg, Stephen Bouwhuis, 'Kosovo: the Legality of Intervention?' (2000) 6 (2) *Australian Journal of Human Rights,* 57 (arguments based on the Charter; State practice; State legitimacy; and the rights of minorities); Senator Jesse Helms, Chairman on the Senate Foreign Relations Committee, remarks to the United Nations Security Council, 20 January 2000 <http://www.usia.gov/topical/pol/usandun/helmstx.htm>; J.L. Holzgrefe and Robert O. Keohane, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003); Geoffrey Robertson, *Crimes Against Humanity* (first published 1999, 2002 ed.) at 429 – 37; Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988); Daniel Wolf, 'Humanitarian Intervention' (1988) 9 *Michigan Yearbook of International Legal Studies* 333.

23 Tony Blair 1999 *Written Answer to Mr Mackinlay: United Nations*, 29 April 1999, Hansard, <http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990429/text/90429w08.htm#90429w08.htm_spmin2>.

24 See, eg, Belatchew Asrat, *Prohibition of Force Under the UN Charter* (1991), 56 – 63; Edward Gordon, 'Article 2(4) in Historical Context' (1985) 10 *Yale Journal of International Law* 271, 273; Nigel S. Rodley, 'Collective Intervention to Protect Human Rights and Civilian Populations: the Legal Framework' in Nigel S. Rodley (ed), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (1992) 14, 16; Wolf, above n 22, 360 – 61.

the Security Council.[25] Another example comes from the *South West Africa* case, where the Court implied the continuation of the mandate for Namibia established under the League of Nations, despite the termination of the League of Nations.[26] Similarly in the *Certain Expenses* case, the Court was willing to allow the UN General Assembly to levy contributions for peacekeeping forces even though it appeared that the Security Council was the body responsible for the maintenance of international peace and security.[27]

More threatening to the organisation, perhaps, has been the failure of Member States to intervene in the face of massive humanitarian catastrophes. The failure to stop the genocide in Rwanda is a glaring example of a failure to intervene. To quote from the *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*:

> The overriding failure in the response of the United Nations before and during the genocide in Rwanda can be summarised as a lack of resources and a lack of will to take on the commitment which would have been necessary to prevent or to stop the genocide. UNAMIR, the main component of the United Nations presence in Rwanda, was not planned, dimensioned, deployed or instructed in a way which provided for a proactive and assertive role in dealing with a peace process in serious trouble. The mission was smaller than the original recommendations from the field suggested. It was slow in being set up, and was beset by debilitating administrative difficulties. It lacked well-trained troops and functioning material. The mission's mandate was based on an analysis of the peace process which proved erroneous, and which was never corrected despite the significant warning signs that the original mandate had become inadequate. By the time the genocide started, the mis-

25 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) ICJ Rep 1971, 10 ¶ 22 ('the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions').

26 *International Status of South-West Africa (Advisory Opinion)*, ICJ Rep 1950, 128.

27 *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* ICJ Rep 1962, 151. The court first noted that while the Security Council has primary responsibility for the maintenance of international peace and security under Article 24(1) of the Charter of the United Nations the General Assembly is also concerned with issues relating to international peace and security (163 – 4). From this basis the Court reasoned that the General Assembly could recommend the establishment of peacekeeping operations since there appeared to be no provisions preventing this establishment and that the General Assembly could force States to contribute to paying for an operation set up as a result of such a recommendation. The problem, on a strict textual reading, however, is set up by Korestsky J in dissent 'The General Assembly may only *recommend* measures. Expenses which might arise from such recommendations should not lead to an obligatory apportionment of them among all Members of the United Nations. That would mean to convert a non-mandatory recommendation of the General Assembly into a mandatory decision; this would be to proceed against the Charter, against logic and even against common sense' (also see Winiarshi J at 232 – 3).

> sion was not functioning as a cohesive whole: in the real hours and days of deepest crisis, consistent testimony points to a lack of political leadership, lack of military capacity, severe problems of command and control and lack of coordination and discipline.[28]

Rwanda is far from the only example, however. Another notable example is the war between Ethiopia and Eritrea, which ran for some 20 years, resulting in somewhere between 50 000 and 75 000 directly related deaths.[29] A further example is the war between Iran and Iraq, which ran for nearly a decade and claimed over 400,000 in official war casualties.[30]

It is of course the Member States of the UN who are responsible in these cases; it is Member States who possess the capacity to intervene in these circumstances. Considering that the UN Military Staff Committee was never activated and that the UN does not maintain a standing army, the organisation is dependent upon Member States to provide the resources to intervene in conflict situations.

Failures in this regard have been costly, although they do not in themselves undermine the rule of non-intervention. The UN Charter, in particular Article 2(4), remains the bedrock of the international system. Without it, or at least without a new comparable system, we would risk a life that, to borrow a phrase, would be 'solitary, poor, nasty, brutish, and short'.[31]

The case for the status quo would be different if Member States simply started to abandon the UN. Yet despite the limitations of the organisation they have neither chosen to do so, nor appear to have such intentions. Indeed, powers such as the US have been at pains to emphasise that they seek to work in partnership with the organisation.[32]

Towards a New United Nations

Given the argument of this paper – regarding the conflict in Iraq as a continuation of the status quo – it would not be a surprising corollary to argue that the conflict in Iraq is unlikely to generate the necessary momentum for many of the changes to the UN sought by reformers. That is, that the present debate about intervention into Iraq is unlikely to generate the necessary momentum for significant reform of the organisation.

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28 *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* <http://www.un.org/News/ossg/rwanda_report.htm>.

29 Tekeste Negash and K. Kjetil Tronvoll, *Brothers at War: Making Sense of the Eritrean-Ethiopian War* (2000) 3.

30 Magnus Clarke, *The Wars of Iraq* (1995) 1; Dilip Hiro, *Neighbours, Not Friends: Iraq and Iran after the Gulf Wars* (2001) 18.

31 Thomas Hobbes, *Leviathan* (first published, 1961 ed), Part 1, Chapter 13.

32 Powell, above n 15.

Minor reforms of the organisation are of course ongoing. Kofi Annan started his term with his concept of two-track reform.[33] The first track comprised reforms that the Secretary-General could implement in the absence of the approval of Member States. Those reforms were quickly implemented. They included the establishment of the Senior Management Group and the consolidation of agencies of the UN into 'UN Houses' in Member States.[34]

The second track of reforms comprised reforms that did require the consent of Member States. These reforms proved much more difficult to achieve, although they were gradually put into place. The reforms included the adoption of results-based budgeting and the placement of sunset provisions on programs.

The second track of reforms was ambitious but not fundamental. For example, it did not include reforming the structure of the Security Council. Gaining the agreement of Member States to reform agendas is sufficiently difficult without attempting widespread Charter reform. Fundamental reform seems, for the time being, beyond the grasp of Member States. For example, whilst some may propose it, there seems little prospect of any veto wielding-member of the Security Council giving up their power.

The Trusteeship Council of the UN provides a good example of the difficulties in this regard. Chapters 12 and 13 of the Charter of the UN are dedicated to establishing the International Trusteeship System for trust territories. Chapter 13 established the Trusteeship Council to oversee the International Trusteeship System. However, despite having suspended its work in 1994 (having no trust territories left to administer) no agreement has been reached on the abolition of the Council. Indeed, in view of this inability to abolish the Trusteeship Council, Kofi Annan proposed a new role for the Council as a forum 'through which Member States exercise their collective trusteeship for the integrity of the global environment and common areas such as the oceans, atmosphere, and outer space'.[35]

While a more positive proposal than simply deleting Chapters 12 and 13, the proposal by the Secretary-General would still require significant amendments to these Chapters. Agreement on such a proposal would seem difficult to achieve and most likely would not be made any easier whether or not Chapters 12 and 13 had already been deleted. Indeed, deletion of these chapters may go some way to convincing policy makers that there is indeed the capacity to look at more broad-ranging reforms to the Charter.

Too often, despite the obvious difficulties of getting 191 Member States to agree on anything, reformers seem to strive for nothing less than a comprehensive overhaul of every aspect of the UN. The question that has to be asked is, why not start small and build momentum?

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33 *Reform at the United Nations: Track 2* (hereinafter 'Track 2') (UN Department of Public Information 1997) <http://www.un.org/reform/track2>.

34 *Secretary-General Updates Assembly on United Nations Reform* (UN press release SG/SM/6539 GA/9404 – 27 April 1998).

35 Track 2, above n 33, ¶ 85.

One area where momentum is being built is in peacekeeping. As noted above, the UN is dependent upon its Member States for its ability to conduct peacekeeping operations. The UN does not maintain a standing force and it is limited in generally only being able to deploy lightly equipped forces that are themselves subject to the whim of their respective Member States. These sorts of forces typically lack the equipment, personnel, funding and the training in the inter-operability of forces to carry out operations at the higher end of the scale.[36] The unwillingness of Member States to provide resources, including sensitive information,[37] has been a criticism emerging from past investigations into the difficulties faced by the organisation.[38]

The loss of confidence in the organisation had reached the point where in 1996 UN peace-keepers made up only around 15 per cent of total deployed peacekeepers worldwide.[39] At that time peacekeeping operations were being conducted outside the framework of the UN by the North Atlantic Treaty Organisation, the Economic

36 Boutros Boutros-Ghali, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992* (1992) (UN Doc A/47/277 – S/24111) <http://www.un.org/Docs/SG/agpeace.html> ¶ 50; Boutros Boutros-Ghali, *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations* (1995) (United Nations Doc A/50/60 S/1995/1 – 3 January 1995), ¶ 99; Doug Bandow, 'Avoiding War' (1993) 89 (Winter) *Foreign Policy* 156, 171; Gareth Evans, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond* (1993) 123, 126, 149; Trevor Findlay, 'Multilateral Conflict Prevention, Management and Resolution', in *SIPRI Yearbook 1994* (1994) 13, 28; Gustav Hagglund, 'Peacekeeping in a Modern War Zone' (1990) 32 (3) *Survival* 233, 235 – 236; John Hilden, 'Picking Up U.N. Peacekeeping's Pieces: Knowing When to Say When' (1998) 77 (4) *Foreign Affairs* 96, 100; John M. Lee, Robert von Pagenhardt & Timothy W. Stanley, *To Unite Our Strength: Enhancing the United Nations Peace and Security System* (1992) 44 – 45; Brien Urquhart, 'Looking for the Sheriff' (1998) *New York Review of Books*, 16 July 1998; Thomas G. Weiss and Kurt M. Campbell 'Military Humanitarianism' (1991) 33 (5) *Survival* 451, 456 – 7.

37 See, eg, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35 (1998)* <http://ds/dial/pipex.com/srebrenica.justice/UNsreb.htm> ¶ 473 'the failure of intelligence-sharing' was 'an endemic weakness throughout the conflict'; further ¶ 486 'the absence of an intelligence-gathering capacity, coupled with the reluctance of Member States to share sensitive information with an organization as open, and from their perspective, as "insecure" as the United Nations, is one of the major operational constraints under which we labour in all our missions'.

38 *Secretary-General Stresses United Nations Unique Role in Preventing Conflict, Resolving Disputes* (UN press release SG/SM/6531 – 20 April 1998). In the case of Srebrenica, for example, the Dutch battalion of 150 combat troops found themselves facing a force of around 2 000 troops supported by armour and artillery (*Report of the Secretary-General Pursuant to General Assembly Resolution 53/35 (1998)* <http://ds/dial/pipex.com/srebrenica.justice/UNsreb.htm> ¶ 472). The original request for 35,000 troops to fulfil the United Nations mandate in former Yugoslavia was not met – only 7,600 troops were provided (UN Peacekeeping: Some Questions and Answers (UN Department of Public Information DPI/1851/Rev.9 – June 1999) <http://www.un.org/News/facts/peacefct.htm>. See also Urquhart, above n 36.

39 The figure is an estimate derived from *The Military Balance 1997 – 98* (1997) 284 – 5.

Community of West African States, the Commonwealth of Independent States and by a coalition of Member States led by Australia in East Timor.

The UN has, however, staged something of a comeback. The organisation has undertaken reforms to the Department of Peacekeeping Operations and has also shown a willingness to resist the sorts of impossibly under-resourced mandates assigned by Member States that characterised earlier missions in the post-Cold War period.[40] Indeed by 2001 the percentage of peacekeeping operations conducted within the framework of the UN had increased to an estimated 35 per cent,[41] with major operations at that time in the Democratic Republic of the Congo, Liberia and Sierra Leone.

Conclusion

The UN is a crucial part of the contemporary system of international relations. In addition to the numerous functions it performs it also serves as a symbol of hope to the people of the world.

The organisation performs its operations in a world dominated by Member States, albeit one in which, for the most part, a rule of non-intervention between Member States prevails. The intervention in Iraq has not changed the fundamental pattern of relations that has characterised the UN since its establishment.

For these reasons it seems unlikely that the result of the intervention will be a 'shock to the consciousness' of the voting public around the world in anything like the numbers needed to generate the political incentive for more significant reform. Incremental reform is still possible, however, and by building on reforms that have already taken place further momentum can be generated.

The UN Charter itself hints at what is necessary if further change is to be undertaken. It is 'we the people' who must push for the continued modernisation and relevance of the organisation.

40 See Boutros-Boutros Ghali, *Unvanquished: A U.S. – U.N. Saga* (1999).

41 The figure is an estimate derived from *The SIPRI Yearbook 2002: Armaments, Disarmament and International Security* (2002), Appendix 2A: *Multilateral Peace Missions, 2001*, 124 – 39.

The Role, Rights and Responsibilities of UNHCR in Situations of Acute Crisis [1]

Geoff Gilbert [2]

UNHCR was established under Article 22 of the United Nations Charter as a subsidiary organ by the General Assembly. Its statute was appended to General Assembly Resolution 428(V) of 14 December 1950 and contains the following description of the organization's mandate.

> 1. The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

In sum, UNHCR provides international protection to refugees as its principal function and assists governments as it seeks permanent solutions for those refugees – only states can provide *permanent* solutions such that the refugees no longer need UNHCR to provide international protection. By way of corollary, Article 35 of the Convention Relating to the Status of Refugees 1951[3] provides that:

> The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, … in the exercise of its functions … .

It is this duty of protection set out in the Statute that will form the focus of this paper.

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1 Situations of acute crisis self-evidently include conflict, but this phrase is broad enough to include both the post-conflict and pre-conflict periods as well. Using the concept of acute crisis also prevents one from having to make fine distinctions as to when conflict truly commences.

2 The law is stated as at 1 January 2004. Attendance at the Challenge of Conflict conference would not have been possible without the generous support of the British Academy.

3 189 UNTS 150.

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 585–598.*
 ISBN 90 04 14599 0.

The Statute

The original mandate of the High Commissioner was for three years.[4] At that time, it was expected that his work would be centred on the displaced from World War II and those fleeing the Soviet Bloc in Eastern Europe. Very soon, however, the centre of attention moved to those displaced by decolonisation.[5] In the past fifteen years, though, the major displacements have occurred through complex emergencies involving predominantly non-international armed conflicts, for example the former Yugoslavia and Rwanda. Various questions have been posed about operations in such situations in terms of the mandate to provide international protection. The most obvious is that in-country operations during a complex emergency will involve working with persons who are not refugees within the scope of the Statute[6] and may effectively prevent persons crossing an international border and benefiting from true refugee status. In addition, in a complex emergency it may not be possible to obtain consent from the State to carry out operations on its territory.

Where Paragraph 1 of the Statute lays down international protection as UNHCR's primary function, protection is expounded upon in Paragraph 8:-

> 8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:
>
> (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
>
> (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;

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4 Paragraph 5. It was renewed in 1953 (UNGA Res.727(VIII)), in 1957 (UNGA Res.1165(XII)), and every five years thereafter.

5 For the early development of the work of High Commissioner, see G. Loescher, *The UNHCR and World Politics: A Perilous Path* (OUP, 2001) pp.50 *et seq.*; G. Loescher, *Beyond Charity: International Co-operation and the Global Refugee Crisis* (OUP, 1996); and A.C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (OUP, 2002).

6 Refugees are defined in paragraph 6: 'The competence of the High Commissioner shall extend to: A. …. (ii) Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is *outside the country of his nationality* and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it. … B. Any other person who is *outside the country of his nationality*, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.' (Emphasis added)

(c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
(d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
(e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
(f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
(g) Keeping in close touch with the Governments and inter-governmental organizations concerned;
(h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
(i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

While the opening sentence indicates that the High Commissioner is to provide protection to Statute refugees, it does not ignore assistance. Nevertheless, assistance is for governments, who must execute 'measures calculated to improve the situation of refugees', and for private organizations 'concerned with the welfare of refugees'.[7] The mandate would seem on its face, though, to exclude in-country work, since the beneficiaries are to be refugees. Such an interpretation, notwithstanding the express reference, would, however, be narrow and would ignore the practical implementation of protection for refugees.

There is one principal aspect of protecting refugees that is, of necessity, in-country. When refugees decide to return, UNHCR does not leave them at the border. Properly prepared repatriation programmes allow UNHCR to monitor their return and ensure that the refugees' rights are respected upon their return.[8] UNHCR practice with respect to returnees goes much further than mere protection. As UNHCR defines such activities, it includes the 4Rs: repatriation, reintegration, rehabilita-

7 How far guaranteeing the right to life for refugees, part of their physical protection, requires the supply of food reflects the difficulty of drawing precise distinctions between protection and assistance. See generally, N. Morris, 'Protection Dilemmas and UNHCR's Response: A Personal View from within UNHCR' (1997) 9 *International Journal of Refugee Law* 492.

8 It is an essential element of paragraph 8(c): see, for example, the work of UNHCR in Afghanistan working with returning refugees and IDPs – *UNHCR Global Report 2003*, at pages 317 *et seq*. See also, UNHCR's Model Co-operation Agreement with Governments (Model Agreement): 'Article III.4 – The Government shall at all times grant UNHCR personnel unimpeded access to refugees and other persons of concern to UNHCR … Article XVII.2 – This Agreement shall be interpreted in the light of its primary purpose, which is to enable UNHCR to carry out its international mandate for refugees fully and efficiently and to attain its humanitarian objectives in the country.'

Cf. Western Sahara Peace Agreement of 1998. See M. Bhatia, 'Repatriation Under a Peace Process: Mandated Return in the Western Sahara' (2003) 15 *International Journal of Refugee Law* 786.

tion and reconstruction.[9] Not all elements of the 4Rs are protection *stricto sensu*. Nonetheless, they provide for effective repatriation and a comprehensive protection. The 4Rs may well advance human rights guarantees in the returned population beyond what had been enjoyed prior to the displacement.[10] Inevitably during the return process following any mass trans-border influx, the returnees will mix with populations that did not cross any international border. As such, it will be impossible for UNHCR to avoid providing protection in-country for former refugees and internally displaced persons (IDPs). While not within the mandate, the practical reality of providing protection to refugees as they return is that UNHCR will protect IDPs, too, in mixed populations.

Finally in relation to in-country work within Paragraph 8, sub-paragraph (b) can be read broadly to allow for such activities even where there is no returning refugee population: '[promoting] through special agreements with governments the execution of *any measures* calculated … to reduce the number requiring protection'. If there is an IDP population that might develop into a mass trans-border out flux, it is possible to argue that Paragraph 8(b) mandates UNHCR to work in-country to reduce the number that *might* require international protection in the future. This analysis would view IDPs as potential refugees. It could even be read to allow for capacity building programmes in transitional societies so that international human rights law is observed and there is no reason for forced displacement, internal or international. An example of such an approach is the work undertaken by UNHCR in Colombia to IDP groups[11] where it has provided human rights training and fostered socio-economic empowerment. However, the opening sentence of Paragraph 8 does expressly refer to Statute refugees, thus this interpretation of the paragraph goes way beyond what was originally envisaged as the function of the High Commissioner.

If Paragraph 8 cannot be read in such a way as to encompass all of UNHCR's operations in the field, the Statute does allow for an extension of mandate under Paragraph 9:[12]

> The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.

9 See UNHCR, *Handbook for Repatriation and Reintegration Activities* (UNHCR May 2004) at Module One-7, Section 2 (pp.41 *et seq*.).

10 See UNHCR, *UNHCR Good Practices on Gender Equality Mainstreaming – A Practical Guide to Empowerment* (2001), 'The Kosovo Women's Economic Empowerment Project' at pp.9-11: 'Micro-finance helps to combat poverty and a sense of hopelessness. But it also helps refugees and returnees to restore their dignity, facilitates community reconciliation in a post-conflict environment, and has become a tool of protection because it encourages mutual responsibility and co-operation.' (p.10)

11 *UNHCR Global Report 2003*, *supra* n8, at p.480.

12 Paragraph 3 is to be read as directed solely at policy directives within the context of Paragraph 1 and cannot of itself justify extensions of the mandate.

The General Assembly has mandated the High Commissioner to work with non-refugees under the umbrella of his 'good offices'[13] and even to work in-country with internally displaced persons.[14] Nevertheless, the General Assembly has rarely prospectively mandated additional activities. More often, UNHCR operations in-country follow on from requests by the United Nations Secretary-General, the Security Council or the State itself.[15] The first thing to note is that the Statute does not give authority to either the Secretary-General or the Security Council to extend UNHCR's mandate[16] – in part, this flows from the fact that under Paragraph 2, the work of the High Commissioner is to be of an entirely non-political character.[17] This process, parallel to the Statute, by which UNHCR operates beyond its mandate, should, therefore, be consensual. For instance, UNHCR's involvement in the former Yugoslavia resulted from a letter in October 1991 to the High Commissioner from the then Secretary-General, Javier Perez de Cuellar, requesting UNHCR's participation. The General Assembly has given authorization for this mutual co-operation of the Secretary-General and the High Commissioner.[18]

Since Security Council Resolution 688 (1991) on Iraq, UNHCR has been regularly involved in Chapter VII operations. Chapter VII resolutions are directed at Members of the United Nations, that is, States.[19] Given that the High Commissioner is meant to be non-political, even though UNHCR is a subsidiary organ of the

13 UNGA Res.1167(XII) authorized the High Commissioner to use his good offices for the benefit of mainland Chinese in Hong Kong who did not qualify as refugees.

14 See UNGA Res.2958(XXVII) 1972 on UNHCR's activities in Sudan dealing with all the displaced. See also, UNHCR, *UNHCR's Operational Experience of Working with Internally Displaced Persons* (1994).

15 For instance, UNHCR's operation in Colombia resulted from an official request in June 1997 to the High Commissioner for UNHCR to provide expertise in favour of national institutions working with IDPs. UNHCR was then also invited to open an office in Colombia. After initial resistance, the request drew broad support from key donors, Latin American countries and the NGO community. Following consultations with key partners and with the concurrence of the UN Secretary-General, UNHCR replied positively to the Colombian Government. In June 1998, the UNHCR office in Bogota was established. See the 'Memorandum of Intention between the Government of the Republic of Colombia and UNHCR, on Cooperation aimed at Addressing the Problem of Forced Displacement', signed in Geneva on 22 January 1999. I am indebted to UNHCR for this information.

16 There is no reference to the Security Council, while Paragraph 17 provides that the 'High Commissioner and the Secretary-General shall make appropriate arrangements for liaison and consultation on matters of mutual interest'.

17 See also Paragraph 13, where the High Commissioner is elected by the General Assembly, not appointed by the Secretary-General.

18 See UNGA Res. 2956(XXVII) 1972, requesting, '[the] High Commissioner to continue to participate, at the invitation of the Secretary-General, in those humanitarian endeavours of the United Nations for which his Office has particular expertise and experience.' (paragraph 2)

19 See Article 25 of the Charter. *Cf.* UNSC Res.941 (1994), 23 September 1994, para.5, which called on the Bosnian Serbs, who are not a Member State of the United Nations, to give unimpeded access to UNHCR to Banja Luka, Bijeljina and other areas of concern.

United Nations, the Security Council should not be able to direct it to act in any particular operation. Like the Secretary-General, the Security Council should consult with the High Commissioner as to the involvement of the Office in measures to maintain or restore international peace and security.[20] Nevertheless, Security Council resolutions have involved UNHCR acting beyond the traditional mandate and engaging in in-country activities.[21]

Finally, in one sense, all UNHCR operations are with the consent of the State because UNHCR will draw up a Memorandum of Understanding to govern its in-

20 *Viz.* UNSC Res.787 (1992), where the Security Council '[*invited*] the Secretary-General, *in consultation* with the United Nations High Commissioner for Refugees …, to study the possibility of and the requirements for the promotion of safe areas for humanitarian purposes' (paragraph 19- emphasis added). The inter-relationship with the Security Council is complicated. While all organs of the United Nations are equal, some may appear 'more equal than others'. In the *Lockerbie* case, the ICJ seems to have deferred to the Security Council (*Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v United Kingdom and the USA*, 1992 ICJ Rep. p.3 at paras.39 *et seq.*, 31 ILM 662 (1992). See F. Beveridge, 'The Lockerbie Affair', 41 *ICLQ* 907 at pp.916-919 (1992); *cf.* J-E. Alvarez, 'Judging the Security Council', 90 *AJIL* 1 (1996)). See also, §IV.7 of the dissenting judgment of Judge Weeramantry in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ General List No.95, 8 July 1996: 'For the sake of completeness, it should here be pointed out that, even if the Security Council had expressly endorsed the use of such weapons, it is this Court which is the ultimate authority on questions of legality, and that such an observation, even if made, would not prevent the Court from making its independent pronouncement on this matter.' Moreover, Article 24.2 of the Charter states that the Security Council, when discharging its functions, shall 'act in accordance with the Purposes and Principles of the United Nations'. Article 1 of the Charter provides that the Purposes include promoting and encouraging respect for human rights and for fundamental freedoms – as such, the Security Council could never direct UNHCR, in the interests of international peace and security, to *refoule* refugees contrary to the latter's duty of international protection. (I gratefully acknowledge my colleague, Elizabeth Griffin, for her thoughts and ideas on this issue. But for her insights, this paper would have been much the poorer – needless to add, any errors are mine alone.)

21 See UNSC Res 876 (1993) on Abkhazia, paragraph 7; UNSC Res 898 (1994) on Mozambique, paragraph 18; UNSC Res 1101 (1997) on Albania, paragraph 5; UNSC Res 1216 (1998) on Guinea-Bissau, paragraph 5; UNSC Res 1234 (1999) on the DRC, paragraph 9; UNSC Res 1237 (1999) on Angola, paragraph 12; UNSC Res 1272 (1999) on E.Timor, paragraph 10; UNSC Res. 1311 (2000) on Georgia, paragraph 9; UNSC Res. 1355 (2001) on the DRC , paragraph 19; UNSC Res.1495 (2003) on Western Sahara, paragraph 5; UNSC Res. 1497 (2003) on Liberia, paragraph 11. I am indebted to K. Luopajärvi for some of this information: see 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15 *International Journal of Refugee Law* 678.

country activities.[22] The Westphalian State is still very much sovereign.[23] However, while an invitation to work with IDPs by the government can be seen as a recognition of need in dealing with an acute crisis, it must never be forgotten that this is and continues to be an issue of the State's responsibility to protect people within its jurisdiction. UNHCR's involvement cannot let the State 'off the hook'.

Other Approaches to Protection

If the original Paragraph 8 understanding of protection was a guarantee of safety across an international border whilst seeking a permanent solution, UNHCR's operations have developed a broader human rights approach – in-country work cannot but be premised on the standards encompassed within international human rights law rather than *non-refoulement*. There is a large overlap between international human rights law standards and *non-refoulement*, but the latter includes the additional idea of not being sent back, that is, being returned in any manner whatsoever to the frontiers of a territory where their life or freedom would be threatened. In all cases, though, the focus is on displaced persons. The International Committee of the Red Cross has, understandably, a different concept of protection[24] and one that often operates alongside UNHCR's in situations of acute crisis.[25] Other actors focus on their own mandates, whether that is international human rights law, humani-

22 Even after UNSC Res 688 (1991) establishing the safe haven in Northern Iraq, UNHCR swiftly drew up a Memorandum of Understanding with Baghdad. UNSC Res.688 (1991) provided as follows: 3 *Insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operation; … 5 *Requests further* the Secretary-General to use all the resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population.' The United Nations Guard was agreed to by Iraq in a Memorandum of Understanding of May 25 1991, UN Doc. S/22663, 30 ILM 860 (1991). See H. Cook, *The Safe Haven in N. Iraq* (Colchester, HRC/KHRP, 1995) at pp.56 *et seq*. UNHCR's presence in Northern Iraq was covered by a Memorandum of Understanding of April 18 1991 between Iraq and the Secretary-General's Executive Delegate and a request by Iraq on April 23 that the United Nations should take over the Centres being established by the Allies' Combined Task Force *Provide Comfort* (I am grateful to Nicholas Morris, formerly of UNHCR, for this information).

23 S. Baldini and G. Ravasi (eds.), *Humanitarian Action and State Sovereignty – Refugees: A Continuing Challenge* (Edizioni Nagard, 2003).

24 See F. Krill, 'The ICRC's policy on refugees and internally displaced civilians', (2001) 83 (No.843) *IRRC* 607, and J.P. Lavoyer, 'Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC', (1995) 305 *IRRC* 162. The ICRC, consistent with its mandate, focuses on the context in which the victims are suffering rather than distinguishing between them on the basis of the victim's reaction, to flee or stay.

25 See D.P. Forsythe, 'Humanitarian Protection – the ICRC and the United Nations High Commissioner for Refugees', (2001) 83 (No.843) *IRRC* 675.

tarian assistance, international law of armed conflict or some mix thereof.[26] Under the auspices of the ICRC the various field organizations have drawn up protection guidelines in the light of their complementary functions.[27] In 1999, at the workshop on *Protection – doing something about it and doing it well*, the participants[28] drew up a new understanding of protection applicable to field operations. It distinguished the purpose of protection from protection activities. The purpose of protection was defined as follows:

> The concept of protection encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. human rights, humanitarian and refugee law). Human rights and humanitarian actors shall conduct these activities impartially and not on the basis of race, national or ethnic origin, language or gender.[29]

It is with respect to protection activities that the workshop took a more all-encompassing approach that at various points merged protection and assistance. Protection work was defined as:

> any activity consistent with the above-mentioned statement of purpose, to create an environment conducive to respect for human beings, to prevent and/or alleviate the immediate effects of a specific pattern of abuse, and to restore dignified conditions of life through reparation, restitution and rehabilitation.[30]

The workshop found that those three activities could be described as responsive action, remedial action and environment-building action, all of which were part of one overall framework. What is apparent is that protection in this interpretation incorporates assistance. While humanitarian organizations might well prefer a protection framework as opposed to a human rights framework, as the workshop recognized, it was also noted that it 'tended to lessen accountability to the rights-holder'.[31]

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26 Whether, in practice, all actors tend to become more victim-oriented rather than mandate-directed is open to question. For a detailed consideration of the practical consequences of multiple players in the same arena, see P. Bonard, *Modes of Action Used by Humanitarian Players: Criteria for Operational Complementarity*, (ICRC, 1999).

27 A series of workshops have been held discussing the various problems raised by complex emergencies involving multiple agencies: *International Humanitarian Law and Protection*, November 1996; *Protection – towards professional standards*, March 1998; *Protection – doing something about it and doing it well*, January 1999; *The challenges of complementarity*, February 2000; see also, *Strengthening Protection in War*, May 2001. All of the documents are available on the website of the ICRC: <http://www.icrc.org/web/eng/siteengo.nsf/html/publications>.

28 Including a representative from UNHCR. Also in attendance were representatives from Amnesty International, Médecins sans Frontières, Oxfam and UNHCHR.

29 Above note 27, at p.21.

30 Ibid at p.25, *per* Jacques de Maio, ICRC. See generally, pp.25-27.

31 Ibid at p.28.

International human rights law focuses on the rights-holder whereas the international law of armed conflict tends to impose obligations on the parties thereto rather than giving rights to the non-combatants. International refugee law sits between these two approaches, but UNHCR's mandate of protection is directed towards ensuring the rights of the refugee, not to providing welfare assistance.[32] The workshop's approach to protection work was holistic so as to be inclusive of all actors in field operations. Thus, UNHCR's statutory mandate of international protection has to be seen in that context – as one aspect of this broader concept of protection work that can only truly be understood by reference to the activities of all actors in field operations.

Situations of Acute Crisis, International Law and UNHCR

Before looking at the various sources of law applicable to situations of acute crisis, one other aspect of UNHCR's in-country work needs to be noted. The traditional view of the work of UNHCR is protecting people across a border. While there was always danger, as why else would people be fleeing, refugee camps were meant to be safe. Undoubtedly, refugee camps were not always safe, whether that was from attack by those from whom the refugees had initially fled[33] or from those in the camps themselves where separation of former combatants and non-combatants proved impossible. It must be remembered that camp populations might consist of armed and unarmed persons, and those deserving protection and those who ought to be excluded.[34] In-country operations by UNHCR inevitably increases the danger, not just for those in need of protection, but for UNHCR staff, too.[35] The ICRC, who have always been seen as neutral, are not immune from attack any longer,[36] and UNHCR, where the United Nations is sometimes perceived to be the enemy, are, in some senses, even more at risk.[37] The protection of UNHCR staff is the respon-

32 Paragraphs 8(i) and 10 of the Statute make it clear that UNHCR co-ordinates the work of others in this regard.

33 *Cf.* EXCOM Conclusion No.48 (XXXVIII) 1987 dealing with military or armed attacks on refugee camps.

34 *Eg.* The Great Lakes Crisis – see, S. Lautze, B.D. Jones & M. Duffield, *Strategic Humanitarian Coordination in the Great Lakes, 1996-1997: An Independent Assessment*, (IASC 1998).

35 See UNSC Res. 1234 (1999), at paragraph 9.

36 See *The Guardian*, p.10, 17 February 1997, and p.12 18 February 1997, on the successful outcome to a hostage-taking of UN and ICRC personnel by a Tajik 'warlord'. *Cf.* The murder of an ICRC representative in Bosnia-Herzegovina on 18 May 1992; three ICRC delegates killed in Burundi, 4 June 1996, (1996) 312 *IRRC* 323-24; the killing of six Red Cross staff in Chechnya, 17 December 1996, (1997) 318 *IRRC* 311-12; the killing in Rwanda of three Spanish aid workers in January 1997 by extremist Hutu militants – The Guardian p.12, 21 January 1997; and, the ICRC's staff reduction in Iraq because of fighting among Shias and between Kurds and Turkomans – *The Guardian*, p.12, 26 August 2003.

37 See the murder of a French UNHCR worker in Afghanistan, *The Guardian*, p.14, 17 November 2003, and that of UNHCR staff in West Timor in 2000 – see UNSC Res.

sibility of the State in which they are operating, but also of UNHCR itself. It must obtain as many guarantees as possible from the host state, train staff properly for working in insecure environments and withdraw if circumstances dictate that no other response is adequate.[38]

Situations of acute crisis have an additional international legal framework to the one specific to refugees. International human rights law applies at all times to anyone within the jurisdiction of the State, subject only to legitimate derogations properly declared. However, in situations of acute crisis, the protection mechanisms that make human rights effective are often unable to operate. It is for that reason that international actors such as UNHCR have to be involved. Nevertheless, the international human rights law framework is still in place and binding on States. More directly pertinent in many situations of acute crisis would be the international law of armed conflict. While there are specific provisions dealing with recognized refugees in the control of one of the parties to the conflict,[39] it is those provisions that deal with the needs of non-combatants caught up in the situation of acute crisis that are of most relevance. As noted, the ICRC protects all civilians in times of armed conflict, whether they have remained in their own homes or have been displaced. UNHCR, on the other hand, should focus on refugees across an international border unless IDPs are persons of concern and they are operating in-country. Depending on whether the armed conflict is international or non-international, either Protocol I or II[40] respectively will be of relevance.

Protocol I, Article 70

Relief actions

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

…

1319 (2000). See also, EXCOM Conclusion No.83 (XLVIII) 1997, Safety of UNHCR Staff and Other Humanitarian Personnel, and paragraphs 88 *et seq*. of UNHCR's Annual Budget, 2004, EXCOM, 54th Session, A/AC.96/979, 25 August 2003.

38 UNHCR closed the Atroush camp in Northern Iraq because it alleged it could not run it as it wished – *The Guardian*, p.8, 2 April 1997. See also MSF's experience in Dagestan – *The Guardian*, p.15, 20 December 2003.

39 *Eg*. Article 44 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287; Article 73, First Additional Protocol to the Geneva Conventions, 1977, 1125 UNTS 3, 16 *ILM* 1391 (1977).

40 1125 UNTS 609, 16 *ILM* 1442 (1977).

> 3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel … (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted; (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power; (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.
>
> **Protocol II, Article 18**
> *Relief societies and relief actions*
> …
> 2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.[41]

Given Paragraph 2 of the 1950 Statute, UNHCR can definitely offer itself as a humanitarian and impartial actor providing relief supplies. The question, however, is whether by providing humanitarian assistance in-country, UNHCR effectively prevents persons from seeking protection beyond the international border.[42] Does this in-country work, that undoubtedly saves lives, contradict UNHCR's mandate? It is not that the relief work is not essential, rather the problem is whether UNHCR should be carrying it out. Alternatively one could argue that if UNHCR has agreed to act in-country at the behest of the Secretary-General or the Security Council it is implicit that the actions might reduce any mass trans-border out flux and that this is, indeed, the very object of UNHCR's involvement. Even if UNHCR is able to offer effective protection in-country,[43] however, there is one issue that presents a major conflict of interest – assisting with the forcible relocation of persons so as to

41 As can be seen, neither Article 70 nor Article 18.2 provide a right to receive humanitarian relief. At best, there is a right for it to be offered, but even if the offer is accepted, the parties have the right to ensure its wholly humanitarian character, even if this means that to check whether arms are hidden on a refrigerated lorry with food and medicines, for instance, the lorry is taken apart such that all the food and medicines are ruined by the heat.

42 From discussions with UNHCR, having workers on both sides of the border is seen in some cases as facilitating entry into the neighbouring State, preventing rejection at the frontier.

43 *Cf.* Landgren, 'Safety Zones and International Protection: A Dark Grey Area', (1995) 7 *International Journal of Refugee Law* 436. Mooney, 'Presence Ergo Protection? UNPROFOR, UNHCR and the ICRC in Croatia and Bosnia-Herzegovina' (1995) 7 *International Journal of Refugee Law* 436.

make that displacement less egregious.[44] As a response of last resort where UNHCR was the only actor in the field, it may be justifiable so as to save lives, but it must not be seen as part of the normal protection of displaced persons and, if other actors are available, UNHCR ought to withdraw.

Other issues relating to situations of acute crisis apply whether the work is in-country or across an international border. All of them pertain to the location of displaced persons in order to ensure their protection and the necessarily humanitarian character of these camps.[45] It has already been noted that camps should not be subject to attacks, but camps should also be humanitarian and neutral. This can present problems when working as part of a complex operation with a military component, particularly in relation to a Chapter VII resolution. While liaison with the military forces in any armed conflict will be necessary, where there are peacekeeping forces it is more difficult to distinguish between humanitarian and non-humanitarian activities. For the UNHCR this poses a dilemma: to what extent can it utilize peacekeeping forces? So as to preserve the humanitarian character of the UNHCR operation, the help of the peacekeepers in establishing the camp or providing assistance should be eschewed as much as possible, but it is clear that the peacekeeping forces may be necessary to guarantee the protection of the displaced in certain cases. With respect to even this limited use of peacekeeping forces it would assist matters if members of the military were properly trained for this work, acted impartially towards all the displaced and were under civilian command.

More obviously, the neutral and humanitarian character of camps also entails separating out those who are armed and who refuse to give up their weapons from those who are prepared to accept the civilian character of camps.[46] The UNHCR should not be seen to be providing supplies to armed elements, even if this means 'policing' those in the camps to ensure they do not provide resources. Furthermore, camps should not be recruiting grounds for either side. The recruitment of children under 15 is a war crime under Article 8.2(b)(xxvi) and (e)(vii) of the Statute of the International Criminal Court and so child refugees should be especially protected. The issue of war crimes also raises the question of exclusion. Under Paragraph 7(d) of the 1950 Statute:[47]

> The competence of the High Commissioner as defined in paragraph 6 … shall not extend to a person:
>
> (d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime

44 See the ICRC workshop, February 2000, *The challenges of complementarity*, Chapter III.

45 These comments flow from communications with UNHCR staff.

46 See generally, R da Costa, *Maintaining the Civilian and Humanitarian Character of Asylum* (UNHCR PPLA/2004/02, June 2004).

47 For UNHCR, exclusion from international protection will be under Paragraph 7(d) of its Statute; given that the State where the camp is located is a party to the 1951 Convention and/or the 1967 Protocol, then it will exclude the displaced person from refugee status under Article 1F(a).

> mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

While UNHCR cannot be responsible for ensuring the prosecution of those committing war crimes, it should not offer them protection. It is for the State to prosecute or to surrender such persons to a competent tribunal. In sum, however, it needs to be remembered that UNHCR staff are unarmed civilians who cannot enforce such a system on their own.

Conclusion

It is inevitable that after over 50 years, the understanding of the mandate would have developed in light of practice and experience. Nevertheless, that understanding ought to be consistent with the original intention and certainly should not contradict the plain wording of the Statute. The mandate of UNHCR is to provide international protection (legal and physical) to refugees, subject to any extension authorized by the General Assembly. Protecting refugees from the moment of trans-border flight until it is clear that voluntary repatriation is completed and safe will inevitably entail in-country work and may well include the protection of IDPs if populations become mixed. Moreover, while assistance is for other organizations or the State, basic sustenance and shelter must, at least initially, be part of the mandate of physical protection. On the other hand, as the work of UNHCR has expanded on an *ad hoc* basis, particularly during the 1990s, the new operations have placed the organization in various dilemmas. Some of the questions that require an answer are: does in-country protection of people who might become refugees prevent people crossing a border to seek international protection, does it allow States to claim that situations of acute crisis are safe so that refugees can be returned thereto, does it play into the hands of Western governments who do not wish to admit people fleeing conflict and share the burden of displacement, and could it leave UNHCR with no alternative but to be involved in a programme of ethnic cleansing, no matter how unwillingly, in order to protect lives? The true problem may well lie in the fact that given people need protection and that most armed conflicts are now internal and not international, that some organization, probably from within the United Nations because of the increasing recognition of its global humanitarian role, has to act and that until an alternative can be found, UNHCR is the only option. The General Assembly has requested:[48]

> 2. The High Commissioner to continue to participate, at the invitation of the Secretary-General, in those humanitarian endeavours of the United Nations *for which his Office has particular expertise and experience*. (emphasis added)

48 UNGA Res. 2956(XXVII) 1972.

While the Office for the Co-ordination of Humanitarian Affairs can act as a focal point at any stage of a humanitarian crisis, it is not in a position to carry out the field operation. The United Nations Development Programme is essential post-conflict, but is not geared towards acting during the conflict; the Department of Peacekeeping Operations fulfils its own unique but non-humanitarian role in situations of acute crisis; and the other United Nations bodies have specific niches but no overall, long-term general expertise. The Office of the High Commissioner for Human Rights is still relatively new and UNICEF, the WHO and FAO are not set up for general protection in situations of acute crisis. UNHCR is the default organization for such circumstances and is left to solve the dilemma of a mandate geared to international protection across a border and operational capacity that blurs protection and assistance and invariably has an in-country element. It is possible to criticize some of UNHCR's activities and operations, particularly during the 1990s, but it is difficult to conceive of the successful outcomes that have been achieved, often with limited support from the international community,[49] without the involvement of UNHCR.

49 Where were the military contingents from the United States, the United Kingdom and France in the then Zaire as UNHCR coped with a mixed population of displaced persons that included the *genocidaires* from Rwanda?

International Law and the Concept of Human Security

Barbara von Tigerstrom

Introduction

In the years following the Cold War there have been many attempts to reconceptualise security. One product of these attempts is the concept of 'human security'. This concept has been variously defined, but can briefly be described as the idea that the security of individuals, rather than that of states, should be the primary concern, for example of foreign policy or international organisations. Since its introduction in the mid-1990s this concept has been taken up and promoted by several national governments, most notably Canada and Japan, as a key part of their foreign policies.[1] A dozen states from various regions are currently members of the Human Security Network, a group of states dedicated to advancing human security.[2] The concept has also found its way into the discourse and practice of some international organisations; for example, the Secretary-General of the United Nations has referred to human security as the 'unifying concept' of the organisation,[3] and several UN agencies have made use of the concept. In addition, several important international commissions have recently discussed the concept in their reports.[4]

Despite a substantial and growing literature in other disciplines, the concept of human security has received relatively little attention from legal scholars.[5] This paper

1 See, eg, Canada (Department of Foreign Affairs and International Trade), *Freedom from Fear: Canada's Foreign Policy for Human Security* (2000); Japan (Ministry of Foreign Affairs), *Chronology of activities related to Human Security by the Japanese Government* (2003) <www.mofa.go.jp/policy/human_secu/chronology.html> at 9 February 2004.

2 Human Security Network, *The Human Security Network* (2003) <http://www.humansecuritynetwork.org/network-e.php> at 9 February 2004.

3 Kofi Annan, 'The Quiet Revolution' (1998) 4 *Global Governance* 123, 136.

4 Commission on Human Security, *Human Security Now: Protecting and Empowering People* (2003); Commission on Global Governance, *Our Global Neighborhood: The Report of the Commission on Global Governance* (1995); International Commission on Intervention and State Sovereignty, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001).

5 Notable exceptions include: Claude Bruderlein, 'People's Security as a new measure of global stability' (2001) 842 *International Review of the Red Cross* 353; Bertrand G. Ramcharan, *Human Rights and Human Security* (2002); Errol Mendes, 'Human Security, International Organizations and International Law: The Kosovo crisis exposes the "tragic flaw" in the U.N. Charter' (1999) 38 *Human Rights Research and Education Centre*

Ustinia Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, *pp. 599-615.*
 ISBN 90 04 14599 0.

shares some of the findings of research undertaken to fill this gap,[6] and specifically to explore the ways in which this new way of thinking about security might relate to the norms and principles of international law. Although there are many different types of threats to human security, as will be seen below, armed conflict and threats associated with it are a major source of insecurity to individuals in many regions of the world. As a result, conflict and law's response to it is of special interest in any discussion of human security. The aim of this paper is therefore to examine some of the implications of rethinking security for international law, with a particular focus on international law's response to conflict. It will first give an account of the development, uses and meaning of the concept, and then provide some examples of the ways in which it could contribute to the discussion of legal issues relating to conflict.

The Concept of Human Security

The concept of human security was developed as a reaction to 'traditional' or 'realist' notions of national security that had been dominant throughout the Cold War, which emphasised the security of the nation-state from external military threats. Human security, in contrast, focuses on the security of the individual human beings who inhabit states, and their protection from a wide range of threats, from military and criminal violence to hunger and disease. At the core of the concept is the shift from states' security to the security of individuals as the primary concern.

Origins and Development of the Concept

The articulation of this concept occurred against a background of growing dissatisfaction with traditional approaches to security and attempts to redefine the various dimensions of security: the referent object of security (who or what is being secured, e.g. national security), the threats from which the object is secured (e.g. military security), or the means by which security is sought (e.g. collective security).[7] Typically, at least in the early stages, revisiting the concept of security meant broadening the range of threats that were considered relevant to national

Bulletin <http://www.cdp-hrc.uottawa.ca/publicat/bull38.html> at 9 February 2004; Dwight Newman, 'A Human Security Council? Applying a 'Human Security' Agenda to Security Council Reform' (1999-2000) 31 *Ottawa Law Review* 213.

6 This work comprised the author's PhD research at the University of Cambridge from 2000-2003: see Barbara von Tigerstrom, *The concept of human security: some implications for international law* (PhD Thesis, University of Cambridge, 2003), which explores in greater detail the issues discussed in this paper. The support of the Social Sciences and Humanities Research Council (Canada) and the invaluable assistance of my doctoral supervisor, Dr. Susan Marks, in completing this research are gratefully acknowledged.

7 An overview of critiques and the 'traditionalist counterattack' is provided in Barry Buzan, 'Rethinking Security after the Cold War' (1997) 32 *Cooperation and Conflict* 5, 6-12. There is a large volume of literature on this subject; one author has described efforts to redefine security as 'something of a cottage industry': David A. Baldwin, 'The concept of security' (1997) 23 *Review of International Studies* 5, 5.

security.[8] The well-known concepts of collective security and common security provide variations on the traditional model of state security in terms of the means of seeking security. However, some writings have also suggested reconceptualising security by shifting the focus to other referent objects. Although the state may have a crucial role in providing security for individuals, arguably it should be considered an instrument of security rather than its central referent.[9] Furthermore, if, as is often the case, the state does not provide security for its citizens, some analysts question whether it should continue to be the focus of the study of security.[10] These arguments provide the conceptual foundations of what is now labelled 'human security.'

In fact, though, the origins of the concept of human security as currently understood are to be found most directly not in security studies or international relations, where these ideas were being discussed, but in development studies. In particular, the introduction of the concept of human security in this field is related to the larger context of 'human development', a concept explained and promoted most notably in the UN Development Programme (UNDP) *Human Development Report*, published annually beginning in 1990. Human development was intended to correct a perceived over-emphasis on economic growth and national indicators, asking whether these were actually improving the lives of the individual human beings who were the supposed beneficiaries of development. According to the *Human Development Report 1995* the 'real point of departure of human development strategies is to approach every issue in the traditional growth models from the vantage point of people'.[11] This 'people-centred' approach to formulating and evaluating policy is the key conceptual contribution of human development to human security. Generally speaking, this approach, transposed to the area of security, approximates what we now know as 'human security'. Both concepts demand explicit and direct attention, and assign normative priority to the impact of policies on individuals' well-being and personal circumstances.

Human security was first introduced in the *Human Development Report 1993* as one of the 'five pillars of a people-centred world order'.[12] It was further elaborated in the *Human Development Report 1994*, which devotes a chapter to the concept.[13] It argues that we need to broaden our understanding of security in the aftermath of the Cold War, to focus on the 'worries about daily life' of 'ordinary people' rather

8 See, eg, Richard H. Ullman, 'Redefining Security' (1983) 8 (1) *International Security* 129; Jessica Tuchman Mathews, 'Redefining Security' (1989) 68 (2) *Foreign Affairs* 162.

9 Ken Booth, 'Security and emancipation' (1991) 17 *Review of International Studies* 313, 320; Bill McSweeney, *Security, Identity and Interests: A Sociology of International Relations* (1999) 58.

10 S. Neil MacFarlane & Thomas G. Weiss, 'The United Nations, regional organisations and human security: building theory in Central America' (1994) 15 *Third World Quarterly* 277, 278-79.

11 UNDP, *Human Development Report 1995* (1995) 123; Mahbub ul Haq, *Reflections on Human Development* (2nd ed., 1999) 23.

12 UNDP, *Human Development Report 1993* (1993) 2.

13 UNDP, *Human Development Report 1994* (1994) 22ff. This latter report is usually credited as the publication that introduced the concept of human security.

than the threat of a 'cataclysmic world event'.[14] Human security is defined as 'safety from such chronic threats as hunger, disease and repression' and 'protection from sudden and hurtful disruptions in the patterns of daily life'.[15] In part, this effort to redefine the concept of security was motivated by the desire to reemphasise the link between security and development in the post-Cold War period, in order to maintain – and even increase – investment in development. It cannot be said to have been particularly successful in this regard, but the resulting concept of human security – though not immediately popular[16] – has had a lasting impact.

The Canadian Department of Foreign Affairs and International Trade (DFAIT) began using the concept in 1996 and pursued a 'human security agenda' over the following years,[17] using the concept as a framework for addressing such issues as anti-personnel mines, the International Criminal Court and protection of civilians in armed conflict.[18] Japan, the other most prominent advocate of human security in foreign policy, has been using and promoting the concept since 1998.[19] The Group of Eight (G8), of which both Canada and Japan are members, has referred to human security on a number of occasions, and the G8 foreign ministers have expressed a commitment to human security.[20] Canada has also introduced human security into the debates of the Organization of American States,[21] while Japan and Thailand have

14 Ibid 22.

15 Ibid 23.

16 The *Human Development Report 1994* had proposed that the concept of human security be used at the Social Summit (1995 World Conference for Social Development), but it did not have a high profile at the Summit, although similar ideas were expressed in the Declaration: *Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development, Report of the World Summit for Social Development*, UN Doc A/CONF.166/9 (1995), Resolution 1, Annex I: *Copenhagen Declaration on Social Development*.

17 'Timeline: Human Security in Canadian Foreign Policy' in Rob McRae and Don Hubert (eds.), *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (2001) 267; Canada (Department of Foreign Affairs and International Trade), *Canada in the World: Canadian Foreign Policy Review* (1995); Canada (Department of Foreign Affairs and International Trade), *Human Security: Safety for People in a Changing World* (1999); Canada, *Freedom from Fear*, above n 1.

18 See, eg, Canada, *Freedom from Fear*, above n 1; Canada (Department of Foreign Affairs and International Trade), 'Axworthy Outlines Canada's United Nations Security Council Presidency Agenda' (News Release No. 64, 6 April 2000) <http://webapps.dfait-maeci.gc.ca/minpub/default.asp?language=E> at 9 February 2004.

19 Japan, *Chronology of activities*, above n 1; Japan (Ministry of Foreign Affairs), *The Trust Fund for Human Security: For the 'Human-centered' 21st Century* (2002), 3; Japan (Ministry of Foreign Affairs), *Diplomatic Bluebook 1999: Japan's Diplomacy with Leadership Toward the New Century* (1999).

20 *Conclusions of the G8 Foreign Ministers' Meeting* (13 July 2000), G8 Information Centre <http://www.g7.utoronto.ca/foreign/fm000713.htm> at 9 February 2004; Conclusions of the meeting of the G8 Foreign Ministers (10 June 1999), G8 Information Centre <http://www.g7.utoronto.ca/foreign/fm9906010.htm> at 9 February 2004.

21 OAS, General Assembly, *Human Security in the Americas*, Document presented by the Delegation of Canada, 30th Regular Session, OEA/Ser.P, AG/doc. 3851/00 (2000).

promoted the concept in Asia.[22] In 1998 Canada formed a partnership with Norway on human security (known as the 'Lysøen partnership'),[23] which subsequently evolved into the Human Security Network, an informal coalition of states that is committed to working together to strengthen human security.[24] Another significant development has been the establishment of the Commission on Human Security, an independent international commission set up with the support of the Japanese government and co-chaired by former High Commissioner for Refugees Sadako Ogata and the eminent economist Amartya Sen. The Commission on Human Security released its final report in 2003,[25] and an Advisory Board on Human Security has been established to carry forward its recommendations.[26]

The concept of human security has been used as a reference point to define an agenda for action by national governments and international organisations. The 'human security agenda' is comprised of areas needing to be addressed in order to increase the level of security enjoyed by individuals worldwide. It brings together an otherwise diverse set of issues, concerns and initiatives, including: landmines, transnational organised crime, terrorism, small arms, illicit drugs, environmental degradation, infectious diseases (especially HIV/AIDS), poverty, gender-based violence, natural disasters, war-affected children, protection of civilians in armed conflict, internally displaced persons and refugees, peacekeeping and peace building, humanitarian intervention, the International Criminal Court, conflict prevention, corporate social responsibility, and the role of non-state actors.[27] There are different

22 Japan, *Chronology of activities*, above n 1; Amitav Acharya, 'Debating Human Security: East Versus the West' (2001), Harvard Program on Humanitarian Policy and Conflict Research <http://www.hsph.harvard.edu/hpcr/events/hsworkshop/acharya.pdf> at 9 February 2004, 4 and n 4 (referring to the Thai foreign minister's address to ASEAN); Ramesh Thakur, 'Human security regimes' in William T. Tow, Ramesh Thakur & In-Taek Hyun (eds.), *Asia's Emerging Regional Order: Reconciling Traditional and Human Security* (2000) 229, 230. The most recent Asia-Pacific Economic Cooperation (APEC) ministerial statement also refers to promoting human security: 'Joint Statement' (Fifteenth APEC Ministerial Meeting, 17-18 October 2003) APEC <http://www.apec.org/content/apec/ministerial_statements/annual_ministerial/2003_15th_apec_ministerial.html> at 9 February 2004.

23 Canada (Department of Foreign Affairs and International Trade), 'Canada and Norway Form New Partnership on Human Security' (News Release No. 117, 11 May 1998) <http://webapps.dfait-maeci.gc.ca/minpub/default.asp?language=E> at 9 February 2004.

24 Human Security Network, *The Human Security Network*, above n 2. The member governments are Austria, Canada, Chile, Greece, Ireland, Jordan, Mali, the Netherlands, Norway, Slovenia, Thailand and Switzerland. South Africa participates as an observer. Human Security Network, *Members of the Human Security Network* (2003) <http://www.humansecuritynetwork.org/members-e.php> at 9 February 2004.

25 Commission on Human Security, *Human Security Now*, above n 4.

26 Commission on Human Security, 'Advisory Board on Human Security' (Press Release, 11 September 2003) <http://www.humansecurity-chs.org/abhs/pressrelease.html> at 9 February 2004.

27 For some examples of the range of issues considered to be part of the human security agenda, see Commission on Human Security, *Human Security Now*, above n 4; Canada, *Freedom from Fear*, above n 1; Japan, *Trust Fund for Human Security*, above n 19; Human

kinds of elements included on the agenda – particular threats to security, vulnerable groups whose security is of special concern, and means or agents with an important role in increasing human security – but they are tied together by their perceived significance for the protection of people's security.

Defining the Concept

As references to the concept have proliferated, many have attempted to define it more precisely and delineate its scope.[28] The Commission on Human Security defines human security as the protection of 'the vital core of all human lives in ways that enhance human freedoms and human fulfilment'.[29] The Canadian government defines human security as 'freedom from pervasive threats to people's rights, safety or lives',[30] while Japan has suggested definitions focussing on the protection of the lives, livelihood, and dignity of individual human beings.[31] Despite variations, most definitions refer to protection or safety of individuals from threats to their lives and physical integrity, and to their rights, freedom, and/or dignity. Virtually all of them include (or imply) reference to a broad range of threats – from various sources and including indirect or 'structural' violence as well as direct or physical violence – although the scope of threats has become a point of contention, for example between the Canadian government, which favours a narrower focus on physical violence, and

Security Network, *Report on the status of the Human Security Network's main action areas* (2002) < http://www.humansecuritynetwork.org/docs/santiago_annex2-e.php> at 9 February 2004; and the chapters in Rob McRae and Don Hubert (eds.), *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (2001).

28 A list and comparative chart of various definitions have been prepared by the Harvard Program on Humanitarian Policy and Conflict Research: Harvard Program on Humanitarian Policy and Conflict Research, *Definitions of Human Security* (2001) <http://www.hsph.harvard.edu/hpcr/events/hsworkshop/list_definitions.pdf> at 9 February 2004; Harvard Program on Humanitarian Policy and Conflict Research, *Comparison of Human Security Definitions* (2001) <http://www.hsph.harvard.edu/hpcr/events/hsworkshop/comparison_definitions.pdf> at 9 February 2004.

29 Commission on Human Security, *Human Security Now*, above n 4, 4.

30 Canada, *Freedom from Fear*, above n 1, 3. See also Canada, *Human Security*, above n 17, 5. The definition used by the Human Security Network is very similar: see Human Security Network, *The Vision of the Human Security Network* (2003) <http://www.humansecuritynetwork.org/menu-e.php> at 9 February 2004.

31 Japan (Ministry of Foreign Affairs), 'Toward Effective Cross-sectorial Partnership to Ensure Human Security in a Globalized World' (Statement by Mr. Yukio Takasu, 19 June 2000) <http://www.mofa.go.jp/policy/human_secu/speech0006.html> at 9 February 2004: 'the preservation and protection of the life and dignity of individual human beings'; Japan (Ministry of Foreign Affairs), *Diplomatic Bluebook 2002* (2002), 88: 'Human security is a concept that focuses on the strengthening of human-centred efforts from the perspective of protecting the lives, livelihoods, and dignity of individual human beings and realizing the abundant potential inherent in each individual'. See also Japan, *Trust Fund for Human Security*, above n 19, 3.

the broader Japanese or UNDP approach.[32] The more useful definitions also contain some reference to a threshold or critical point at which matters become concerns of human security rather than more general concerns regarding human well-being.

Human security is often referred to as a concept, but it may also be understood as an approach or perspective. To approach a particular issue from a human security perspective is to approach it from the perspective of affected individuals, focussing specifically on the impact on their security. An early Canadian policy paper suggested that 'human security is perhaps best understood as a shift in perspective or orientation' or as 'an alternative way of seeing the world, taking people as its point of reference'.[33] It might be helpful to say, somewhat more precisely, that it is an approach that takes the *security* of people as its point of reference, since this is what distinguishes it from other 'people-centred' or 'human-centred' approaches (notably human development or human rights).

As one might expect, the task of adequately defining human security and translating it into concrete policies or practices has been difficult and controversial. Some dismiss the concept as being too vague or too ambitious;[34] even one of its chief proponents admits that human security is 'as elusive as it is appealing'.[35] These difficulties are particularly acute for policy-makers attempting to construct policies based on a human security approach, but, as has been argued elsewhere, they are not necessarily impediments to the use of human security as an analytical tool or interpretive aid in international law.[36] In fact, it should be recognised that the problems of definition and conceptual clarity are no greater for human security than for many other commonly used concepts, including other security concepts.[37] This is not to say that one need not attempt to understand more precisely what is meant by

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32 On the differences between Canadian, UNDP, and Asian approaches, see Kanti Bajpai, 'Human Security: Concept and Measurement' (Kroc Institute Occasional Paper 19: OP:1, August 2000) 8ff, Kroc Institute <http://www.nd.edu/~krocinst/ocpapers/op_19_1.PDF>; Acharya, above n 22, 2-5.

33 Canada, *Human Security*, above n 17, 5.

34 See, eg, Yuen Foong Khong, 'Human Security: A Shotgun Approach to Alleviating Human Misery?' (2001) 7 *Global Governance* 231; Heather Owens and Barbara Arneil, 'Human Security paradigm shift: a new lens on Canadian foreign policy?' (1999) 7(1) *Canadian Foreign Policy* 1, 2; R. Paris, 'Human Security: Paradigm Shift or Hot Air?' (2001) 26 *International Security* 87, 88-93; Anne Hammerstad, 'Whose Security? UNHCR, Refugee Protection and State Security After the Cold War' (2000) 31 *Security Dialogue* 391, 399. See also discussion in Bajpai, above n 32, 50; M. McDonald, 'Human Security and the Construction of Security' (2002) 16 *Global Society* 277, 280; Ellen Lammers, *Refugees, Gender and Human Security: A Theoretical Introduction and Annotated Bibliography* (Utrecht: International Books, 1999), 48.

35 Sadako Ogata, *Overview for the Commission on Human Security* (2001) 1, Commission on Human Security <http://www.humansecurity-chs.org/activities/meetings/first/overview.pdf> at 9 February 2004. Paris suggests that '[h]uman security is like "sustainable development" – everyone is for it, but few people have a clear idea of what it means': above n 34, 88.

36 von Tigerstrom, above n 6, 35-36.

37 Ibid 33.

'human security'. One way to do this is to describe the key elements of the concept or approach that are central to its meaning and guide its use in analysis.

Central Aspects of the Concept

Though there are undoubtedly many different ways to describe the concept's key elements, it is suggested here that there are three such elements, the conjunction of which amounts to what is commonly understood as human security. The first aspect is the 'human-centred' approach. As explained above, human security is sometimes described as an approach that places individual human beings at the centre of our attention and efforts. This approach stands in opposition to a state-centred approach which, although not necessarily indifferent to the security or well-being of individuals, tends to assume that these will follow automatically if we protect the state, and to treat the protection of the state as an end in itself. A human security approach instead begins at the level of the individual, and is inclined to test rather than accept assumptions that actions taken to protect the state will necessarily benefit individuals within it. It therefore requires direct and explicit attention to the impact of actions, policies, and structures on individuals, especially those who are most likely to be affected or who are most vulnerable. This shift in perspective has been described as a shift from the 'abstract' to the 'visceral'.[38]

It is this human-centred approach that distinguishes human security from other security concepts (most notably national security). Something more is needed, though, to distinguish it from other human-centred concepts, and this, not surprisingly, is its emphasis on security. What, then, does this entail? Security can be understood very generally to mean freedom from threats. It involves the protection of a certain object by reducing its vulnerability and by eliminating or lessening threats to its existence or functioning.[39] Such protection requires a proactive, preventive orientation: security – including both the objective reality of protection and the subjective sense of feeling secure – cannot be adequately ensured by actions taken after the fact but rather demands actions taken to prevent or mitigate harm. The second main aspect of human security could then be described as its preventive orientation. Proponents of human security emphasise the need to minimise the human (and economic) cost of security threats by preventing harm, instead of trying to contain or repair it after the fact.[40] Human security is 'deliberately protective',[41] aiming to reduce the impact

38 Anthony Burke, 'Caught between National and Human Security: Knowledge and Power in Post-crisis Asia' (2001) 13 *Pacifica Review* 215, 226: 'human security implies a radical shift from the abstract imagery of the nation state, and its interests, to the visceral distress of the human'.

39 Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era* (2nd ed, 1991), 112ff.

40 UNDP, *Human Development Report 1994*, above n 13, 22, 38; UN, *Report of the Secretary-General on the Work of the Organization*, UN GAOR, 55th Sess, Supp No 1, [40] UN Doc A/55/1 (2000).

41 Sabine Alkire, 'Conceptual Framework for Human Security (Excerpt: Working Definition and Executive Summary)' (2002) 1, Commission on Human Security <http://

of security threats by preventing harm.[42] The preventive approach is part of what makes human security so difficult to conceptualise and to put into practice, since preventive action often has to be undertaken based on imperfect information and tends to demand a level of understanding and capacity that we may not possess.[43] Nevertheless, it is crucial to the concept of human security.

The third main aspect of the human security concept and approach could be called 'common concern' for human security.[44] This third aspect is less obvious than the first two and thus requires some explanation. It is derived from two distinct but complementary tendencies in the current uses of human security in official and academic discourse. The first is the recognition that the security of individuals in different parts of the world is often interrelated or mutually dependent, and that collective action will often be essential to ensuring human security because of this interdependence and the transnational nature of many important threats to human security. Human security is thus a common concern in the sense that the security of others, even in a distant part of the world, may affect the security of any of us, and no one's security can adequately be ensured without common effort.[45] The second tendency takes this a step further and posits some form of common responsibility for the security of all people in all parts of the world. Since we are concerned – under the human-centred approach just described – with the security of individuals, and we know from experience that people's security is not necessarily ensured by their own government, it follows that some kind of common responsibility must be accepted if their security is to be protected. This could be referred to as a cosmopolitan perspective insofar as it assumes that all individuals form a single moral community for whom each actor bears some responsibility. This 'strong' form of common concern for human security can sometimes – though not consistently – be found in the discourse on human security alongside the 'weak' form which emphasises interdependence and the need for collective action to address transnational threats. It has been described as the most radical element of the human security concept.[46]

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www.humansecurity_chs.org/activities/outreach/frame.pdf> at 5 May 2003.

42 UNDP, *Human Development Report 1994*, above n 13, 22, 38; UN, *Report of the Secretary-General*, above n 40, [40].

43 Emma Rothschild, 'What is Security?' (1995) 124 (3) *Daedalus* 53, 72. Denis Stairs, 'Canada and the security problem' (1999) 54 *International Journal* 386 suggests that the 'human security agenda' demands a capacity for 'social engineering' that we likely do not possess (400-401).

44 The term 'common concern' is borrowed from international environmental law, where it has been used to refer to matters such as global climate change or biodiversity, which are of common interest and entail common responsibility. See, eg, Patricia Birnie & Alan Boyle, *International Law and the Environment* (2nd ed, 2002) 97ff.

45 See, eg, Sadako Ogata, 'Enabling People to Live in Security' (Speech delivered at the International Symposium on Human Security, Tokyo, 28 July 2000): 'nobody is secure while a good many men, women and children live in fear'. See also eg Louis Hamel, 'Towards human security: a people-centred approach to foreign policy' in UNESCO, *What Agenda for Human Security in the Twenty-first Century?* (2000) 15, 16.

46 Project Ploughshares, 'Human security and military procurement' (1999) 20(2) *Ploughshares Monitor* <http://www.ploughshares.ca/CONTENT/MONITOR/monj99d.html> at 9

These three threads of the human security concept have been identified in order to better understand its meaning and implications, but it is important to treat them as interrelated parts of a single conceptual framework. None of these ideas is particularly novel in itself; the distinctive contribution of human security relies on the combination of these elements in a unifying concept or approach. The next section will examine some examples of the contribution this concept and approach could make to the analysis of international law, and in particular, its response to conflict.

Human Security and International Law

It has been said that the concept of human security can be used as a 'template', a 'guiding principle', or a 'conceptual framework for international action'.[47] The aim of this section is to define more precisely how this might work, specifically in the context of international law, drawing examples from three issues: humanitarian intervention, protection of internally displaced persons, and control of small arms and light weapons. Reference to the concept of human security can be helpful in shaping the agenda for the examination and development of international law, in framing questions or problems to be addressed in a useful way, and in providing a critical perspective from which to question assumptions and re-examine existing analytical or normative frameworks.

Setting the Agenda

The 'human security agenda' was introduced above: a group of diverse issues that are assigned priority due to their importance for human security. We might treat human security as a policy goal toward which developments in international law should be directed, and use human security as a touchstone to define the agenda for analysis and action. This may help us to identify areas where the law's protection of a vulnerable group or response to a threat may be inadequate, and where we might attempt to 'fill the gap' with specific initiatives such as the development or adaptation of an institution or set of norms.

Reference to the concept of human security can be especially helpful in drawing attention to issues that may have been neglected because they have not seemed significant for national or international security, yet have serious consequences for the security of individuals. An important example of this is the legal regulation of small arms and light weapons, including anti-personnel mines. For many years, small arms were not a subject of much concern for arms control efforts, because their value in proportion to the annual arms trade is relatively small and unlike major weapons

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47 Canada, *Human Security*, above n 17, 8; Canada (Department of Foreign Affairs and Trade), *Statement to the UN First Committee Thematic Debate: Conventional Weapons* (22 October 2003) <www.humansecurity.gc.ca/thematic_debate-en.asp> at 9 February 2004; International Commission on Intervention and State Sovereignty, above n 4, 6.

systems, their proliferation was not seen as a threat to national and international security.[48] Yet their impact on individuals, especially on civilians in the context of armed conflict, is now seen as justifying greater concern and effort. The issue of anti-personnel mines in particular was an early but central feature of the human security agenda promoted by the Canadian government.[49] A ban on anti-personnel mines was considered to be a priority because of the effect of mines on individuals and communities, especially vulnerable groups.[50] Similar efforts are currently underway to promote action on the larger category of small arms and light weapons.[51]

Attention to individuals' experiences of insecurity is an important part of a human security approach, and can also help to identify gaps in protection that need to be included on the agenda. Because of the ways in which displacement of people is often both a cause and a symptom of their insecurity, displaced persons feature prominently on the human security agenda as a group whose security is of particular concern. Using the perspective of human security, we can examine the existing legal framework relating to displaced persons, and identify areas where existing legal protection may be insufficient. This could include, for example, the category of 'internally displaced persons' who are not legally considered to be refugees but whose security may be at equal or even greater risk.

This agenda-setting function of human security is in some respects the most limited of its functions in relation to international law, and the human security agenda may overlap with the agendas set by reference to other cognate concepts such as humanitarian concerns or human rights. However, looking at issues from a human security perspective can help to ensure that problems are identified and

48 See, eg, Michael Klare, 'An Overview of the Global Trade in Small Arms and Light Weapons' in Jayantha Dhanapala et al (eds.), *Small Arms Control: Old Weapons, New Issues* (1999) 3, 3; UN Secretary-General, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, [65] UN Doc S/1995/1 (1995); Paul Herby, 'Arms transfers, humanitarian assistance and international humanitarian law' (1998) 325 *International Review of the Red Cross* 685, 689.

49 Carl J. Ungerer, 'Approaching human security as "middle powers": Australian and Canadian disarmament diplomacy after the Cold War' in William T. Tow, Ramesh Thakur & In-Taek Hyun (Eds.), *Asia's Emerging Regional Order: Reconciling Traditional and Human Security* (2000) 78, 79, 89-90; Mark Gwozdecky and Jill Sinclair, 'Landmines and Human Security' in Rob McRae and Don Hubert (eds.), *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (2001) 28.

50 See, eg, Lloyd Axworthy, 'Towards a New Multilateralism' in Maxwell A. Cameron, Robert J. Lawson and Brian W. Tomlin (eds.), *To Walk Without Fear: The Global Movement to Ban Landmines* (1998) 448, 451; Gwozdecky and Sinclair, above n 49, 28; Lloyd Axworthy and Sarah Taylor, 'A ban for all seasons: The landmines convention and its implications for Canadian diplomacy' (1998) 53 *International Journal* 189, 191.

51 See, eg, Centre for Humanitarian Dialogue, *Putting People First: Human Security Perspectives on Small Arms Availability and Misuse* (2003); Human Security Network, *Statement of the Human Security Network to the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects* (2001). <http://www.humansecuritynetwork.org/docs/SALW_Statement-e.php> at 9 February 2004; Canada, *Freedom from Fear*, above n 1, 9.

addressed taking account of their importance for the security of individuals. Once these issues are identified, the next function comes into play: the concept of human security can influence the ways in which they are understood and questions about them are articulated.

Framing the Question

Consideration of issues from the perspective of those individuals most affected can influence the way issues and questions are framed, which in turn influences potential outcomes. Continuing with the example of internally displaced persons, when this issue is approached from the perspective of human security, the relevant question is not whether these people are treated 'the same' as refugees as a legal category, but whether there is some legal framework in place that responds adequately to their particular situation and the risks to which they are subject. Further, we are concerned not only that there is a theoretical framework of rights and responsibilities that should protect these vulnerable people but that there is a realistic prospect that these will provide *effective* protection. To say, for example, that internally displaced persons will be protected if their home government respects certain recognised rights[52] is inadequate if we know that the very reason for their vulnerability is that their government is violating those rights. The issue thus becomes not just one of displacement but of the prospect of effective protection. Considering internally displaced persons as part of the human security agenda thus suggests a particular set of concerns, tied to the protection of their security.

As part of the human security agenda, the problem of small arms and light weapons is defined in terms of its human impact. A human security approach to this issue 'clearly prioritis[es] the safety and security of people as the benchmark of any control effort'.[53] Thus human security is used to define the nature of the problem, the specific areas or problems needing attention, and what counts as 'success' in dealing with this issue. The campaign against anti-personnel mines, for example, approached mines as a 'humanitarian crisis' rather than as a disarmament issue.[54] The campaign's objectives followed from this definition of the problem: first, only a complete ban was viewed as an acceptable outcome,[55] and second, measures to

52 The position of the International Committee of the Red Cross, for example, is that refugees and internally displaced persons are different because '[w]hile refugees are victims of persecution and as such are in need of a specific legal regime, the internally displaced are in their own country and accordingly remain *fully entitled to* the full range of protection provided by international human rights law, humanitarian law and domestic law': International Committee of the Red Cross, 'Internally displaced persons: The mandate and role of the International Committee of the Red Cross' (2000) 82 *International Review of the Red Cross* 491, 494 (emphasis added).

53 Centre for Humanitarian Dialogue, above n 51, 6.

54 Axworthy, above n 50, 451. See also Gwozdecky and Sinclair, above n 49, 28; Axworthy and Taylor, above n 50, 191.

55 Axworthy, above n 50, 451; Robert J. Mathews & Timothy L. H. McCormack, 'The influence of humanitarian principles in the negotiation of arms control treaties' (1999)

prevent and mitigate the human impact of mines were required, including demining, mine awareness programs, and obligations regarding the care, rehabilitation, and reintegration of mine victims. Efforts to take a similar approach to the larger category small arms and light weapons have been more complicated for various reasons[56] – for example, an outright ban is not a realistic option in this context. However, framing the problem in terms of human security is still significant. It has encouraged attention to demand reduction as well as supply issues[57] and raised questions about the international community's focus on illicit trafficking, as we will see below.

Revisiting the familiar debates on 'humanitarian intervention' from the perspective of human security also provides a useful alternative way of framing questions about intervention. These debates have typically been concerned with establishing whether there is a right to intervene for humanitarian purposes, focussing on the interpretation of the prohibition on the use of force and the relative weight of human rights or sovereignty concerns. A human security approach to the issue places the impact on individuals' security at the centre of our attention. A number of implications flow from this. First, it would suggest that framing the problem as a conflict between human rights and sovereignty is problematic, because military intervention can result in injury to individual human beings as well as the more abstract injury to the sovereignty of the target state. Reframing it in terms of outcomes for affected individuals is more consistent with a human security approach. This does not necessarily resolve difficult questions about when intervention should take place, but it provides a more helpful framework within which to debate the question. Furthermore, as the International Commission on Intervention and State Sovereignty recognised, approaching the issue of humanitarian intervention from the perspective of human security suggests that it may be more useful to frame it as a question of responsibilities rather than of the 'right' to intervene.[58] Looking at the issue in this way reflects the idea of human security as a common concern and responsibility, as discussed above. A broad view of responsibilities could help to encourage consideration of what might be done to prevent crisis situations arising in the first place, thus making a preventive approach a reality in this context rather than just a matter of debating the timing of an intervention.

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834 *International Review of the Red Cross* 331, 351.

56 See, eg, Jan Egeland, 'Arms availability and violations of international humanitarian law' (1999) 81 *International Review of the Red Cross* 673, 677.

57 Don Hubert, *Small arms demand reduction and human security: towards a people-centred approach to small arms* (Ploughshares Briefing 01/5, 2001) Project Ploughshares <http://www.ploughshares.ca/content/BRIEFINGS/brf015.html> at 9 February 2004; Jennifer Loten, 'Case Study: The Challenge of Microdisarmament' in Rob McRae and Don Hubert (eds.), *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (2001) 65.

58 International Commission on Intervention and State Sovereignty, above n 4, 11ff.

Adding a Critical Perspective

Framing issues in a particular way – especially a way that departs from traditional approaches to familiar problems like humanitarian intervention or arms control – can also be a step toward usefully critiquing existing approaches. Like its precursor concept human development, human security is particularly well-suited to providing a critical perspective. The underlying rationale of both concepts is that we cannot accept certain assumptions at face value if we are genuinely concerned with human well-being: a country's economic growth will not *automatically* benefit individuals living in that country; the security of a state does not *necessarily* ensure, and its pursuit may even undermine, the security of its inhabitants. By focussing on the actual, 'visceral' state of human beings we are forced to question assumptions and test the reality of 'abstract' theories and concepts.

As mentioned above, a human security approach to small arms and light weapons entails giving primacy to the impact of these weapons on affected individuals. One effect of this way of understanding the problem is that it calls into question the dominant place of illicit trafficking in weapons on the international agenda. The 2001 UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, as its name suggests, focussed on illicit trade rather than on the problem of small arms proliferation as a whole, largely as a result of some states' resistance to a more inclusive agenda.[59] Although illicit trafficking in weapons is a serious problem, the disproportionate attention devoted to it cannot be seen as justified given that legally traded weapons are also implicated in causing insecurity for individuals, which is our primary concern.[60] A human security approach would therefore support critiques of the current approach and calls for a broader agenda, which have been voiced by human rights activists, for example.[61]

Another example of the potential critical function of human security is the analysis of a preventive approach to displacement. Recently, the UNHCR has taken a more proactive approach to refugee issues, with a greater focus on protection

59 See, eg, Small Arms Survey, *Small Arms Survey 2002: Counting the Human Cost* (2002), 203, 219-20.

60 By even the most generous estimates, illicit transfers account for only about half of global trade in SALW. See, eg, UN Department for Disarmament Affairs, *Disarmament Issues* (no date), <http://disarmament.un.org/issue.htm> at 9 February 2004 (estimating 40-60%); Small Arms Survey, *Small Arms Survey 2001: Profiling the Problem* (2001) 141, 145 (estimating 10-20 percent).

61 See, eg, Amnesty International and Human Rights Watch, *Address to the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (New York, 16 July 2001), United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects <http://disarmament.un.org/cab/smallarms/statements/Ngo/aisl.html> at 9 February 2004; Human Rights Watch, 'U.N. Conference on Small Arms Trafficking' (Press Statement, 9 July 2001); Charly Wyatt, 'The Forgotten Victims of Small Arms' (2002) 22 *SAIS Review* 223; Lena Eskeland & Paul Herby, 'United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects' (2001) 843 *International Review of the Red Cross* 864, 865.

within the country of origin.[62] International concern for internally displaced persons is closely related to this preventive approach. The root causes of refugee flows are often the same as those of internal displacement, so efforts to address these causes will affect both groups, and providing effective protection for the internally displaced could be one way of preventing refugee flows. Extending protection to internally displaced persons as well as refugees can therefore be seen as part of a broad, proactive, preventive approach to displacement. However, some fear that this approach might protect only states' security at the expense of the security of the displaced. The conjunction between states' desires to reduce the number of refugees and the new enthusiasm for a preventive approach has raised suspicions that the real aim is containment of refugee flows.[63] The concept of human security could usefully function as a critique of a 'containment' approach. Human security entails an emphasis on prevention, but within a framework that privileges people's security. The objective is protection of people's security, rather than prevention of displacement as an end in itself. Using human security as a reference point prompts us to consider what it is that we are trying to prevent, rather than assuming that a preventive approach is necessarily beneficial. The concept could thus be used to evaluate preventive measures, seeking to ensure that they primarily enhance human security.

Finally, as we saw in the previous section, revisiting the debates on humanitarian intervention from the perspective of human security raised questions about the ways in which those debates have typically been framed and suggested different ways of structuring the relevant questions. We can take this a step further to consider the ways in which the traditional forms of argument in this context have tended in fact to obscure rather than confront the risk of harm to individuals, understood broadly to include the risks that flow from military intervention. Attempts to provide justifications for intervention have often assumed that intervention will be beneficial and therefore that establishing a right to intervene in international law would be a positive development. This assumption may need to be re-examined from the vantage point of the security of those most affected. Furthermore, if we take the ideas of preventive action and common concern seriously, it becomes apparent that the continued focus on debating the right – and even the responsibility – to *intervene* has tended to displace attention from other, equally important questions about states' responsibilities. It would encourage us to consider the ways in which the actions and omissions of states may contribute to human insecurity, regardless of whether they are deliberately 'intervening' or not. Important work on the role of other states in allowing or contributing to the development of crises in the former Yugoslavia and in Rwanda would be especially relevant from this point of view.[64]

62 See, eg, Erin D. Mooney, 'In-country protection: out of bounds for UNHCR?' in Frances Nicholson and Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 200.

63 See discussion in ibid 206-207, 213-26.

64 See, eg, Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443; Stephen D. Goose

Thus a critique of the humanitarian intervention debate from a human security perspective would question the focus on intervention and the apparent assumption that military intervention is a logical response to acute problems of insecurity, to the exclusion of other more appropriate responses.

Conclusions: The Role of Human Security in Analysing International Law's Response to Conflict

Taken together, these functions suggest a useful role for the concept of human security in approaching issues about international law and its response to conflict. It provides a way of identifying issues that need to be addressed and linking them to each other and to a range of other issues. Human security has been described as a 'unifying concept' because of this function of bringing diverse issues together in a single agenda. The obvious question then arises: what is the benefit of bringing the issues together in this way? This is a fair question, since many of the issues thus identified will not be novel or previously unrecognised. However, identifying issues as part of a human security agenda entails bringing a particular perspective to bear upon them and approaching them in a particular way. Again, human security is not the only framework within which risks to individuals can be appreciated and addressed – human rights, humanitarian law, and public health approaches are others which have made valuable contributions relating to conflict – but it does offer the benefit of a single cohesive conceptual framework which can bring together insights from such diverse perspectives and add to them.

In a human security approach, attention is focused on identifying and preventing or mitigating, through collective action, threats to individuals' security. This offers a way of identifying and prioritising issues to be addressed in respect of international law and conflict. Whose security is most affected, and how? What response would best prevent or reduce insecurity? It also provides a useful perspective from which to re-examine existing or proposed efforts, to determine whether they may be having unintended negative effects on peoples' security 'on the ground' in spite of good intentions, or whether they are achieving the goals articulated in terms of benefit to affected populations. In this role human security is better seen as a useful way of asking questions than as an answer to problems, but this question-framing function can be significant, as the campaign against anti-personnel mines, for example, demonstrated. Reference to human security will not necessarily provide answers or solutions, and indeed may sometimes seem to complicate the search for solutions by introducing a challenging level of complexity. Nevertheless, the importance of asking the right questions or orienting discussion in a useful direction cannot be underestimated.

In addition to encouraging or drawing attention to initiatives to develop international law in certain areas (such as arms control or the protection of internally displaced persons), human security provides a perspective from which to

& Frank Smyth, 'Arming Genocide in Rwanda' (1994) 73 (5) *Foreign Affairs* 86; Small Arms Survey, *Small Arms Survey 2001*, above n 60, 206-207.

scrutinise general principles and concepts in international law which are relevant to responses to conflict. In some respects, a human security approach challenges traditional understandings of international law, which typically focus on the rights and relations of states, in contrast to the 'human-centred' focus of human security. The report of the International Commission on Intervention and State Sovereignty, for example, cited the impact of the concept of human security as an important part of the impetus for its reconceptualisation of sovereignty.[65] Taking a human security approach might encourage us to revisit concepts in international law that have been typically framed in terms of the protection of states' security, such as the prohibition on the use of force,[66] and consider how they might be interpreted in a way that would give priority to the security of individuals. It can also be a starting point from which to identify and foster existing aspects of the law that lend themselves to the protection of individuals and prevention of harm. There is therefore the potential to engage with international law at the level of principles and concepts, as well as specific issues, using human security as a point of reference.

Examining international law through the lens of human security should not be understood as an alternative intended to displace other established approaches, such as human rights or humanitarian approaches to conflict and other issues. It can, however, have a useful role to play as a complement to such approaches and as a way of connecting them with security discourse. Though the concept of human security has already been influential in some academic and policy circles, its broader significance and its potential as an analytical tool for international lawyers are only beginning to be seriously explored. This paper has offered some examples of ways in which the concept might usefully inform the analysis of international law's response to conflict. As a perspective grounded in the experience of those to whom our response to conflict matters most, it could be a valuable addition to discussions of this important subject.

65 International Commission on Intervention and State Sovereignty, above n 4, 13.

66 The prohibition on the use of force in article 2(4) of the *Charter of the United Nations* refers to 'the threat or use of force *against the territorial integrity or political independence of any state*, or in any other manner inconsistent with the Purposes of the United Nations' (emphasis added).

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