THE RULE OF LAW THROUGH INTERNATIONAL CRIMINAL JUSTICE MECHANISMS

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ABSTRACT

The rule of law requires that States set up a fair and expeditious legal system and prosecute persons accused of crimes. In international law, and particularly in post-conflict situations, the rule of law is materialised through the establishment of international criminal tribunals, hybrid courts, truth commissions and by the exercise of universal jurisdiction by the community of nations. This has only been achieved in recent years and the success of any of these judicial institutions must be measured not only by reference to the number of persons it has prosecuted but also on the basis of whether it has influenced or enhanced the development of the local legal system. From a methodological point of view hybrid tribunals are more appropriate to bring about this dual result because they are part of the local legal system and local judges participate therein. However, as is the case with all international tribunals all the relevant actors wish to exercise some degree of control over their operations and so each institution must ultimately be judged on its deliverable results.

Keywords: ICTY, ICTR, ICC, hybrid tribunals, truth commissions, criminalisation

ÖZET

Hukukun üstünlüğü; devletlerin adil ve düzenli bir hukuk sistemi kurmasını ve suç isnat edilmiş kişileri yargılamasını gerektirir. Uluslararası hukukta ve özellikle ihtilaf sonrası durumlarda; uluslararası ceza mahkemeleri, karma mahkemeler, gerçek komisyonları kurarak ve milletler topluluğu tarafından evrensel yargının uygulanmasıyla hukukun üstünlüğü materyalize olur. Bu sadece son yıllarda başarılmıştır ve bu yargı kurumlarından herhangi birinin başarısı, sadece cezai takibat açtığı kişilerin sayısını referans göstererek ölçülmemeli aynı zamanda yerel hukuk sisteminin gelişmesini etkiyip etkilemediğine ve değerini artırıp artırmadığına dayanarak ölçülmelidir. Metodolojik bakış açısına göre; karma mahkemeler bu ikili sonucu meydana getirmek için daha uygundur çünkü onlar yerel hukuk sisteminin bir parçasıdır ve yerel hakimler orada katılım göstermektedir. Ancak, tüm uluslararası mahkemelerle olduğu gibi, tüm ilgili aktörler çalışmalarında kontrol derecesini uygulamak istemektedirler ve böylece her kurum nihai olarak teslim edilebilir sonuçlarıyla ilgili yargılanmalıdır.

Anahtar Kelimeler: ICTY, ICTR, ICC, karma mahkemeler, gerçek komisyonlar, suçlu hale getirme.

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[1] GREECE

Introduction

This article sets out to explore the existence of a premise between the rule of law and international criminal justice. The lens through which this association will be assed is predicated on mechanisms that are inextricably linked to the administration of justice by international entities, particularly the United Nations, but also through national efforts. In order to demonstrate these links I shall be discussing the role and operation of international criminal justice mechanisms from the middle of the nineteenth century to the present day with the aim of showing where and how laws and policies have progressed or regressed in the passage of time. In the course of this study I also take into consideration the work accomplished by international criminal tribunals. Whereas the international legal literature is rife with studies and commentaries on international criminal justice, particularly given that this discipline has flourished in the course of the last twenty years, there is relatively little on the interaction between such mechanisms and the rule of law. To be sure, much of the pertinent literature on the rule of law has diverted its attention on post-conflict situations where the focus has been more developmental, sociological and political science-oriented. My quest in this study is to discover direct links between the operation of international criminal tribunals and the rule of law, particularly as this relates to the development of domestic criminal justice institutions.

The notion of the rule of law is indeed very wide.[2] It encompasses a wide variety of structures, institutions and principles associated broadly with the State – not necessarily the public elements of the State – and through which the relationship of the State with its citizens and other States is supposed to be regulated through good and democratic governance. A State cannot claim to impose good governance if it arbitrarily detains its peoples because they oppose its policies. Equally, however, good governance requires the enforcement of certain standards irrespective of the political or other climate in a country and which are applicable against all

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2 J Raz, The Rule of Law and its Virtue, in J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979); B Tamanaha, *On the Rule of Law* (Cambridge University Press, 2004); see M Horwitz, The Rule of Law: An Unqualified Human Good? (1977) 86 Yale Law Journal 561. For an overview of some of the particular functions of the rule of law in its international context, see JM Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007)

no matter their status or beliefs. More than anything else, the rule of law entails the application of a minimum set of human rights rules to which the public authorities must religiously adhere to. Some of these are obvious, such as the need to ensure the freedom of association, the freedom against arbitrary arrest and torture. Others are not so obvious and need particular scrutiny and attention. When a State refuses to indict and arrest foreign national residing in or transiting its territory who are accused of having committed atrocious crimes in their country of nationality, it is not readily obvious what the connection is between the application of extraterritorial criminal jurisdiction and the rule of law in that State. This is particularly so in situation where the accused are model citizens in the State seeking to enforce universal jurisdiction. One of the chief arguments of this article is that international criminal justice has permeated national legal systems to the degree that one cannot isolate domestic rule of law concerns from the reality of transnational crime. The introduction of free trade and free movement of persons across numerous international frontiers now means that more and more crimes has become transnational and that persons accused of serious international crimes traverse from one place to another. To address these issues the European Union has for some time been trying to reach some consensus among its member States about harmonising their criminal legislation with a view to making extradition and other requests less cumbersome and procedurally straightforward.[3]

Whatever preconceptions the reader may entertain about international criminal tribunals – particularly misconceptions related to politics, which are no doubt true – he or she cannot help but appreciate their contribution to ending impunity in the last twenty. It was not too long ago that the concept of immunity justified the criminal conduct of leaders and their henchmen and the absence of a strong international community, restricted mainly because of Cold War politics, meant that no one could touch, subject to minor exceptions. Citizens in the developed world were accustomed to the idea that in the developing world you could do as you please. To a large degree the proliferation of corrupt practices by compa-

[3] This led to the adoption by the Council on 29 November 2000 of a Programme of Measures to Implement the Principle of Mutual Recognition in Criminal Matters, [2001] O.J. C12. See A Weyembergh, Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme, (2005) 42 Common Market Law Review 1567. The most significant instrument in this regard is certainly the European Arrest Warrant, Council Framework Decision of 13 June 2002 (2002/584/JHA), [2002] O.J. L190/1.

nies in the developed world is a manifestation and a direct result of this perception, which had subsequently solidified into practice. This was a system of international law – particularly immunity - that was instituted by developed nations and which was now at the mercy of a handful of dictators in the developing world. Since the law of immunity was not susceptible to rapid changes,[4] it was the system of international criminal justice itself that required re-wiring. In fact, as will be shown later on in this article the establishment of international criminal tribunals proved to be beneficial not only because they helped arrest and prosecute those responsible, but more significantly because they provided an impetus for political change in the target countries. The results of this change may not have been visible in the early years of operation of the tribunals, but the proliferation of this model of justice and the participation of civil society in huge numbers in bringing those responsible for crimes to justice necessitates a reappraisal of what this system has in fact achieved. Despite its shortcomings I am hopeful that the reader will come to the realisation that much has been achieved in the last twenty years and much more is certainly on the way.

Why State Interests Averted the Development of International Criminal Rules in the Period prior to the Twentieth Century

Prior to World War I the international community was not concerned with prosecuting individuals for violations of the laws and customs of war or other international infractions. In fact, prior to the mid-nineteenth century there did not even exist a definition of war crimes and it is unlikely that criminal responsibility could be incurred at all, let alone under international law. This is despite the emergence of some domestic laws and the promulgation of international treaties under the aegis of the International Committee of the Red Cross from the 1850s onwards.[5] At the time the very existence of international law was in doubt and one should remember that even the prohibition on the use of force by States was subject to very few limitations; namely to seek reparations from the

4 See *Al-Adsani v UK*, Judgment (21 Nov 2001), 34 EHRR (2002), 11, paras 55-66, in which the European Court of Human Rights ruled, by a majority of one vote only, that the rule of immunity effectively trumps the right of access to justice as this emanates from the right to a fair trial.

5 The first of these was the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 18 *Martens Nouveau Recueil General de Traites*, at 607; the 1868 Additional Articles Relating to the Condition of the Wounded in War extended the humanitarian principles enunciated in the 1864 Convention to warfare at sea.

liable State. Therefore, if recourse to war and armed conflict was an everyday affair and not susceptible to limitations during that time it is natural that the family of nations would not be interested in criminalising any infractions that were to take place in the course of the ensuing armed conflicts. In practice, because armies recruited their battle forces from the lower echelons of society, essentially conscripts who had no say in the matter and who lived in dire poverty, it was natural that they would be guided by instinct and not by humanitarian training (which of course they never received), given moreover that in their majority they would have not attended school or received any kind of education.[6] Such soldiers would be thrown in ferocious battles, knowing full well that they may not survive by the end of the day. Food rations were low, conditions were horrendous and hence the only incentive for these troops to fight was their instinct for survival, perhaps some booty and in some cases also the turning of a blind eye by their commanders in respect of looting and rape. What I am trying to demonstrate is that army officers would have found it incomprehensible to subject these wretched souls to a system of criminal discipline for behaviour on the battlefield, since this would have removed any serious incentive to stay on and fight, rather than desert and flee.

It is for this reason that when students of law studying this era of development of international law and particularly the efforts to establish a system of international criminal justice and a rudimentary *jus in bello*, they are typically confronted with material relating to the International Committee of the Red Cross. Few, if any, of those efforts were initiated by State entities and if they were they would have come about as a response to weaponry possessed by their enemies and which was beneficial for them to prohibit. Again, it should not be forgotten that this was also the era of colonialism and the discovery of new territories in Asia and Africa by European powers and the usurpation of power therein. The colonisers had inferior numbers as compared to the locals and it is natural that they would have used force to protect their vested interests. Again, it would have been contrary to logic to want to subject their own people to a criminal justice system not controlled by them, particularly in relation to activities pertaining to the colonisation process. The brutality of the colonisers against their local subjects is well known and documented and

6 MH Keen, *The Laws of War in the Late Middle Ages* (Routledge, London, 1965), at 50; see GIAD Draper, The Interaction of Christianity and Chivalry in the Historical Development of the Law of War, (1965) 3 International Review of the Red Cross 19

this represents an additional reason for the slow development of international criminal and international humanitarian law in the mid to late 1800s. The few attempts to impose some limitations by government agents are exceptional and should be attributed to the initiatives of particular individuals. One such notable example is the Code promulgated by Professor Francis Lieber of the United States Army during the US Civil War and which set out the obligations of the parties and the acceptable boundaries of warfare.[7]

In practice, any infractions of the laws and customs of war at the time were dealt with on the basis of domestic law. Typically, armies did not prosecute their own troops and at the end of a conflict enemy combatants would be prosecuted instead, if this was deemed appropriate. It was only in very extreme cases that armies or prosecutors decided to prosecute members of their own forces. As already stated this would not only have been condemned by the press by it would have removed all incentives from the ranks of the soldiers or officers. Hence, what in the present time a lawyer would have classified as a war crime or even a crime against humanity in the course of nineteenth century would have been heralded as an act of heroism, or alternatively if its details were gruesome these would have been left out from the popular narrative and would have been dressed up in heroic overtones. Of course, the actions of the enemy would have been painted by the propagandists in the bleakest of colours and the enemy in general would have been demonised in the eyes of the civilian population. Given the lack of intimacy provided by today's media outlets (Internet, television and others) it would have been impossible for the populations at the time to exorcise the enemy's demonization by the governments. As a result, governments were generally successful in garnering public opinion in respect of lengthy military campaigns by portraying the enemy as stated.

Hence, although international criminal law and humanitarian law are displayed as achievements of inter-State cooperation in fact they are nothing more than the efforts of a few idealists and the culmination of reciprocal interests between States. States that manufacture potent

[7] Instructions for the Government of Armies of the US in the Field, General Orders No. 100, 24 April 1863. See RR Baxter, The First Modern Codification of the Law of Armed Conflict, (1963) 29 International Review of the Red Cross 171. See also BM Carnahan, Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity, (1998) 92 American Journal of International Law 213.

military arsenals would be happy to employ these against their enemies, irrespective of their inhuman character. Equally, armies with inferior numbers would avoid fighting in open battle and would resort to guerrilla warfare which would necessarily cause their enemy fear and high casualties. It soon became evident that no one army could receive all the benefits and thus the need arose to compromise with the enemy. This reciprocity is a significant feature in the historical development of international humanitarian law and researchers should give it is proper place in their scholarship. This reciprocity, however, was beneficial because it heralded a new era in the promulgation of international rules whose main and most fundamental principle is that "the means and methods of injuring the enemy are not unlimited". This is still the cornerstone of international humanitarian law and is duly reflected in both customary law and the Geneva Convention of 1949[8] and their two 1977 Protocols.[9] It is true to say that the developments in the field of international humanitarian law (*jus in bello*) are even today the protagonists and chief standard-setters of international criminal law because of their influence and impact on international criminal justice. It should not be forgotten that crimes against humanity developed as a result of atrocities in armed conflict, as is also the case with genocide – certainly as far as occupied territories were concerned –and the concept of war crimes encompasses most conduct that is today considered as an international offence against the person. As has already been stated it was precisely because of the nature of war as a method for pursuing national interests that the criminalisation of the *jus in bello* was slow. In areas, however, were national interests were fewer criminalisation was a much more expedient enterprise. By way of example, piracy *jure gentium* had been considered an international offence since at least the 1500s and subject to universal jurisdiction, given that all maritime powers found it in their

8 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (No. I), 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Ship-wrecked Members of Armed Forces at Sea (No. II), 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (No. III), 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (No. IV), 75 UNTS 287. See T Meron, The Geneva Conventions as Customary Law, (1987) 81 American Journal of International Law 348.

9 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I], 1125 UNTS 3.

interest to combat this scourge through the help of other nations.[10] Exceptionally, piracy *jure gentium* did not traditionally encompass privateers who had been granted royal ascent to attack ships of the enemy. By contemporary standards, privateers would be liable for acts of piracy.

Attempts at Codification in the Early 1900s

This is an important era for the development of the *jus in bello*. By 1899 the International Committee of the Red Cross had managed to bring the major powers to the negotiating table in order to adopt a set of international treaties regulating recourse to war and a set of instruments regulating warfare. This was the prelude to the 1907 Hague Conference in which the most significant codification of the *jus in bello* took place. The powers to that conference achieved in agreeing on a plethora of international instruments and I will single out Convention No IV and the Regulations attached thereto,[11] which is in force to this day and represents the clearest exposition of the *jus in bello*. This set the relevant rules on the criteria for being a lawful combatant, the ingredients of the concept of *levee en masse*, the rules of occupation and duties of the occupying power, the applicable rules of warfare and the limitations to which armies are subject to and even regulated particular types of persons, such as spies and saboteurs. Of course, one thing that is not clear from the wording of these conventions is the degree to which the parties viewed any infractions thereof as entailing the criminal liability of the perpetrators. Moreover, if indeed criminalisation was foreseen by the drafters, was this of an international nature or simply of domestic import? The distinction is crucial, because if particular conduct is described merely as a crime under domestic law then it may not be prosecuted in the courts of another State, especially if said conduct is not criminal under its laws. Where, however, conduct is stipulated as an international crime then it is a criminal offence everywhere, even if a member State has not undertaken to criminalise it in the context of its domestic laws. The issue of criminalisation was not seriously discussed at the 1907 Hague Conference. It is unclear whether this was due to the fact that its drafters decided that the matter was divisive and better left to a more opportune future time or simply because they did not deem it important

[10] See E Kontorovich, The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation (2004) 45 Harvard International Law Journal 183. In *Re Piracy Jure Gentium* [1934] AC 856 the Privy Council upheld the customary nature of piracy.

[11] 1907 Convention Respecting the Laws and Customs of War on Land, 1 *Bevans* 631.

enough on the ground that the solution to this conundrum had already been answered under international law. International law at the time suggested that individuals could not incur international criminal liability because they lacked international legal personality (i.e. the capacity to assume rights and duties under international law and to be capable of enforcing these), which belonged only to States. Any rights or duties which may have pertained to individuals could only be pursued through the medium of their State under the doctrine of diplomatic protection or representation.[12] In fact, the vast majority of the cases brought to the Permanent Court of International Justice were premised on this principle. As a result of this observation it was deemed that if an individual were to violate the provisions of any of the Hague Conventions (e.g. the prohibition against killing prisoner of wars) said individual would at best incur criminal liability under the laws of his home State and that his home State would incur State responsibility under the pertinent rules of international law, which was monetary in character. This situation necessarily meant that international criminal law did not exist in theory or practice. If the process of international criminalisation was to establish itself it was necessary that international personality be granted to individuals, at least as regards their obligations under the *jus in bello*. Nonetheless, the resistance of States against this eventually was far too strong and things remained as such until the end of World War I.

In the aftermath of World War I it became evident that the aggressors, namely high ranking German officials including the Kaizer, should bear some criminal responsibility for waging a war of aggression and the crimes committed by their officers and lowly soldiers. In fact the Allied Nations set up a Committee in 1919 with the aim of assessing whether said German officials could be tried under international law and whether the offences for which they were charged gave rise to individual criminal responsibility. The Committee responded positively to both questions and reported back to the Allied Forces. The proposal however to try the accused persons as such was dismissed at the insistence of the USA and Japan who argued that there existed no precedent in international law under which individuals could incur criminal liability. Equally, they argued that the crime against the laws of humanity was not sufficiently

[12] See CF Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2009); Z Deen-Racsmany, Diplomatic Protection and International Criminal Law: Can the Gap Be Bridged, (2007) 20 Leiden Journal of International Law 909.

clear for any criminal prosecution.[13] One should also bear in mind that although Germany had lost the war she had not fully capitulated to the Allies, as was the case in the aftermath of World War II. Rather, Germany accepted to end the war and pay compensation to the victorious nations. This is significant because it meant that even if the proposals of the 1919 Committee were accepted by the victorious nations they could not be imposed against Germany except with the waging of an additional military campaign, which was out of the question. The compromise solution was the prosecution of certain German officers before the Federal Supreme Court in Leipzig (so-called Leipzig trials).[14] Although the initial list provided by the Allies was subsequently radically reduced by the Germans the Court conducted itself in an exemplary manner and its decisions took into consideration international law and set out precedents that are quoted even to this day. However, the operation of such a limited number of prosecutions was not a step forward for international criminal law. Nonetheless, it was an elementary step towards the recognition that violations of international rules could give rise to individual criminal liability on the basis of said international rules, even if applied by domestic courts under those circumstances. It should also be noted that between the period 1918 to 1922 there was a flurry of activity in respect of peace treaties and amnesty clauses, all of which were based on political criteria and which are generally regarded as evidence that the international community had recognised an elementary individual criminal responsibility. This was based on the fact that amnesties are only granted in response to crimes and therefore by implication treaty-based amnesties were directly related to treaty-based offences.

During the 1920s and 1930s the situation in respect of international criminalisation is described as stale. This is generally taken to mean that there were no developments as far as progression of the law was concerned. In my opinion this period was certainly a couple of steps backwards. On the one hand the newly-established League of Nations was a

[13] G Manner, The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War, (1943) 37 American Journal of International Law 414. Manner noted that the US delegates to the 1919 Commission argued that the applicable law with regard to suspected German war criminals was the military legislation of the country against whose nationals the violations were committed. This view, according to USA and Japan, was justified in the absence of an international penal law upon which a criminal indictment of offenders against the rules of warfare could be predicated.

[14] For a summary of the Leipzig Trials, see (1922) 16 American Journal of International Law, at 677-722.

weak institution whose drafters had failed to outlaw recourse to force, which was only limited by procedural as opposed to substantive rules.[15] As a result, during this period a number of blatantly illegal military campaigns took place, among which one should cite the Italian invasion of Abyssinia, the Japanese attack on China with an emphasis on Manchukuo and the invasion of the USSR against the three Baltic States of Latvia, Lithuania and Estonia. It is evident to the observer of these events that the impetus initiated by the 1907 Hague Conference and the aftermath of World War I with the establishment of the Committee had fizzled out and that the two decades prior to World War II were shrouded in an aura of impunity in which international law played no rule whatsoever. It came as no surprise therefore when the Hitler regime invaded Austria and Czechoslovakia, even if without obvious resistance, adopted discriminatory laws against its minorities and dissenters and then proceeded to invade Poland in September of 1939. The lesson to be learned from these two decades is that the establishment of weak rules and weak institutions ultimately leads to a sense of impunity for those inclined to violate them. Rather, the international community must adopt strong and effective rules and institutions and instil fear and respect to would-be culprits. Moreover, the threat of prosecution must always be present in international relations and pursued at any cost, lest impunity has a way of breeding and expanding. It is evident therefore that during this era the international community was not at all interested in what we can now refer to as the rule of law. Given the primitive nature of international society at the time the main preoccupation of the Great Powers was to achieve some type of international stability without disrupting the existing status quo.

However, as rudimentary as this period may have been in respect of upholding a domestic and an international rule of law it is important because it constitutes the first time States gathered around the same negotiating table to discuss how to minimise man's suffering as a result of the calamities of war.

This interest in the human being is the seed for the establishment of the rule of law. Let us now assess the development of international criminal justice following the end of World War II in 1945.

[15] G George, *The League of Nations, 1929 to 1946* (Avery Publishing, 1996).

The Nuremberg Process as a New Standard-Setter for International Criminal Justice

The Nuremberg process and legacy far exceeds the narrow confines of the Nuremberg Trials. In fact, it encompasses the period from 1940 until the mid-1950s and its influence is present and direct in the jurisprudence of the ad hoc tribunals for Yugoslavia and Rwanda. The invasion of Poland is generally viewed as the date of commencement of World War II, although in reality it started with the invasions against Austria and Czechoslovakia. The attack against Poland, however, demonstrated to the Allies that Hitler was not only prepared to invade and occupy the whole of Europe – including Russia with whom a secret non-invasion pact had been agreed prior to the War – but that in his pursuit of this aim he was willing to kill millions of civilians and exterminate a number of peoples, such as Jews, gypsies and others and all those that dissented. Hence, this was not like the previous war that was largely fought in the trenches and which did not have an immediate impact on civilian populations. This new war purposely engulfed the existence and well-being of all relevant civilian populations. Clearly, international law was not adequately equipped to deal with the perpetrators – taking also into consideration the lethargic two decades between 1922 to 1939 – and in any event this was not a time for niceties even on the part of the Allies. As a result, early on in their campaign the Allies adopted a number of declaration by which they expressly stated that both the invasion and the treatment meted out to captured combatants and persons from the occupied civilian populations were crimes under international law and that the perpetrators would be prosecuted at the close of the war. These proclamations constituted not merely statements of policy but more importantly reflections of State practice, which may also be taken as a progressive interpretation of the *jus in bello* conventions adopted from 1907 to the beginning of the war.

Subsequently, when Germany crumbled by early 1945 and the Allies had managed to enter Berlin it was time to put these proclamations into practice. The Allies had already established since 1942 a War Crimes Commission whose role was to document the various crimes and to identify the culprits in detail so that they could be prosecuted at a more opportune time. Thus, by the time that the Charter of the Nuremberg Tribunal was adopted by the Allies in August 1945 a significant amount of groundwork had been done to facilitate the prosecution of the accused.

This Charter is a watershed in the development of international criminal law because for the first time a treaty stipulates that physical persons (individuals) assume direct rights and duties (i.e. without the medium of their country of nationality) and can moreover be tried by an international tribunal. This was to a large measure a re-appraisal and reversal of the pertinent rule of international law which dictated that only States bore international legal personality. An important question was whether the 1907 Hague Conventions, as well as any other *jus in bello* treaties adopted prior to the war, could be construed under this light, albeit retrospectively. If this was so then said conventions that prohibited particular conduct but which conduct was not deemed to constitute a crime under international law, could now be employed to demonstrate that the culprits were liable under international law. The Nuremberg Tribunal accepted this argument by justifying it on grounds that even if in 1907 the relevant conventions did not confer international legal personality on individuals the process of customary international law since then had certainly brought about that effect. In any event, the Allied proclamations could very well serve as a *sui generis* case of instant custom, despite the absence of State practice by the losing nations. Any other conclusion would have hampered all efforts to prosecute the accused because they would have naturally relied on the provisions of German criminal and military law to show that all conduct attributed to them was lawful under the laws of Germany during the relevant periods. If said conduct was not characterised as international in nature then it would have had to be assessed on the basis of the dictates of German law, which would have created an absurd result.[16]

During the time of the Nuremberg Tribunal three other developments require mention. The first is the establishment of an equivalent criminal tribunal in respect of the crimes committed by the Japanese in the Far East theatre of operations; the second concerns the so-called subsequent tribunals, whereas the third involves an analysis of the alternatives to criminal prosecution put forward by some members of the Allied nations. The International Military Tribunal for the Far East (IMTFE) was not based on a treaty but on a proclamation by the occupying forces of Japan, i.e. the USA, which however did not wish to be seen as the sole

[16] F Biddle, The Nuremberg Trial, (1947) 33 Virginia Law Review 679; G Finch, The Nuremberg Trial and International Law, (1947) 41 American Journal of International Law 20, at 26–28; Q Wright, The Law of the Nuremberg Trial, (1947) 41 American Journal of International Law 38.

prosecuting authority.[17] Therefore, the IMTFE was composed of international judges with authority over the same set of offences as the Nuremberg Tribunal. The US Supreme Court refused to entertain a *habeas corpus* request by one of the accused, thus demonstrating that this was an international tribunal whose processes were not amenable to US jurisdiction.[18] In concert with the IMTFE and Nuremberg a plethora of other judicial institutions were set up to deal with the same crimes. As is well known the Nuremberg Tribunal was destined to deal only with the highest-ranking members of the Nazi apparatus and given its limited time even this was an arduous task. It could not deal with all the individual instance of war crimes and crimes against humanity in which thousands of individuals were involved. These offences were handled by specially set up tribunals in the respective zones of occupation in Germany or tried by the national courts of the countries where the crimes took place, on the basis of the nationality principle of criminal jurisdiction. These subsequent tribunals, particularly those that operated in occupied Germany, provided a significant body of jurisprudence that is more widely cited than the Nuremberg judgment. These tribunals satisfied the demands for justice sought by aggrieved formerly occupied populations. Finally, it should be stated that the decision to resort to judicial means was not supported by all the Allies, although this may seem odd by today's standards. In fact, Hitler and Churchill supported the view that the culprits should not stand trial at all and that instead they should all be caught and executed, because possible trials might lead to acquittals or server rendering them martyrs of heroes. At the insistence of President Roosevelt this option thankfully failed to materialise. Had it in fact materialised we would have had a full account of the atrocities from a universally recognised authoritative source and this would have served those later doubting the veracity of events. It would have also led to accusations of victor's justice which would have removed all traces of legitimacy. The trials therefore not only reinforced international legitimacy, but also the importance of the rule of law and provided a sound historical record of the events and of the responsibility of the culprits. Moreover, they provided a jurisprudential basis and a skeleton for the emergence of the discipline of international criminal law.

[17] See N Boister, R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford, Oxford University Press, 2008).

[18] *Hirota v McArthur* (1948) 338 US 197, 198.

The Nuremberg process may have been a watershed in comparison with the stalemate situation prior to World War II, but it was by no means faultless. Although it did not represent a blatant example of victor's justice, the Allies failed to even mention the responsibility of the USSR for their own invasion and annexation of the Baltic States, as well as the wide-scale atrocities committed under orders of Stalin against the population of Ukraine, the massacres at Katyn and others.[19] This situation is also observable today, but the reader should not interpret this as entailing the rejection of international criminal justice altogether. Let us now examine the progression of international criminal law in the aftermath of Nuremberg.

International Criminal Justice during the Cold War

The expectations following the developments at Nuremberg brought about a short period of euphoria. The Charter of the Nuremberg Tribunal even set forth two new international offences, namely crimes against humanity and crimes against peace, and it was expected that these would soon find their place in an international treaty. This euphoria was augmented by the fact that the crime of genocide was criminalised relatively soon after the end of the Nuremberg proceedings with the adoption of the Genocide Convention in 1948, which stipulated that the offence would be prosecuted by the territorial State as well as by an international criminal tribunal. This was taken as a prelude to the establishment of a permanent international criminal court. Finally, this confidence was justified by the terms of the UN Charter, which unlike its predecessor the League of Nations Covenant, outlawed the use of force altogether – save for self-defence and actions authorised by the Security Council – and thus it was thought that nothing could stand in the way of institutionalising international criminal justice.

Unfortunately, this optimistic climate did not materialise as expected. Instead, the setting of the Cold War averted any plan that may have been discussed between the chief protagonists. The rivalry between East and West culminated in the concretisation of their antithetical interests and this was no more clear than in the inability of the Security Council to meet its target of achieving international peace and security. This stalemate had a profound impact on all those processes that would have

[19] P. Allen (2010). *Katyń: Stalin's Massacre and the Triumph of Truth*. (Northern Illinois University Press, 2010).

brought to justice all those violating international norms, particularly serious crimes such as genocide and crimes against humanity. However, since the rival parties were engaged in their own wars throughout the globe, including brutal regime changes, it was impossible to indict any leaders or their implementers. During this period of the Cold War some of the most shocking crimes known to humanity took place, including the genocide inflicted by the Khmer Rouge in Cambodia. African leaders, now free from their colonial despots, soon engaged in their own killings against their internal enemies, and for a while it seemed that we had retrogressed back to the lamentable two decades of the 1920s and 1930s. The only silver lining during this period was the work of the International Law Commission on the statute of an international criminal court – even if by that time it was a distant dream – and its draft on crimes against the peace and security of mankind. Equally, national prosecutors continued to prosecute Nazi-era crimes, although the impetus for such prosecutions fizzled out by the mid-1990s, with minor exceptions which persisted until the early 1990s.[20] This step back was also evident from the fact that throughout the Cold War no treaty was ever agreed that would have contained a definition of crimes against humanity.

What we should retain from the Cold War era is the preservation of the Nuremberg principles on the basis of customary international law? The processes of customary law may not be visible during this time, particularly since States generally avoided prosecuting their enemies. In truth, however, one should distinguish between prosecutions and substantive law as elements of State practice. While it is true that States abstained from prosecutions they did not do so under the belief that criminal liability had been extinguished. This is exemplified by the fact that scholarship and legislation moved forward and the Geneva Conventions of 1949 were adopted, following by a plethora of other treaties, such as the 1977 Protocols, the 1974 Apartheid Convention, the Convention against Racial Discrimination, the 1984 Torture Convention and others. This evidence demonstrates that international law was going through a period of hibernation that was however active and very much alive. It was exactly because of this activity that when the Cold War came to an end the international community was ready to initiate a new

[20] LS Wexler, The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and back Again, (1994) 32 Columbia Journal of Transnational Law 289. These prosecutions were in their majority concerned with cases going all the way back to World War II.

period –perhaps the golden period of cooperation in criminal justice affairs –which was destined to change the way in which international criminal law operates.

The Pursuit of the Rule of Law through International Criminal Justice

One of the questions that arose after some years following the operation of the contemporary international criminal tribunals concerns their role in the delivery of international criminal justice. Some have queried whether the operation and running of these tribunals is financially sound, as opposed to using their resources to deliver other results. The question is essentially whether the pursuit of international criminal justice is more important than more immediate developmental and poverty-reduction goals. If one takes into consideration that the running costs of the International Criminal Tribunal for the former Yugoslavia (ICTY) runs into the hundreds of millions each year, this amount of money may well have been used to develop the infrastructure of more than one African nations, or to pay for the teachers and logistics of primary education in the third world. What therefore justifies paying these vast amounts of money to international judicial institutions over and above the aforementioned considerations? The tribunals themselves have never made reference to this matter and in any event it is beyond their remit or authority to comment on it. On the other hand, the UN Charter and its drafters does not simply view the maintenance of international peace and security as a mere component in the international security architecture, but as its principal and single aim and objective. Without peace and security the future of humanity is uncertain and everything else contained in the Charter becomes of secondary importance. How is international peace and security maintained? In the early days of the UN Charter it was believed that this was to be achieved by averting inter-State wars. It was thought, based on the experience of World War II, that international wars produce significant amount of casualties between the warring nations but most importantly they have the tendency of spilling into neighbouring or allied nations. This was to be avoided at all cost. As a result, if a government was found to be exterminating its own people this was considered an internal problem and as long as the conduct of that government did not produce a spill-over no action was taken by the Security Council. Thus, internal issues, no matter how serious they may have been, were not considered during the Cold War as worthy of any external intervention. This may seem problematic if judged by contemporary standards and

explains to a large degree why the Security Council refrained from taking any stance in many of the massacres of the post 1945 era.

With the advent of human rights following the 1948 Universal Declaration of Human Rights and the work of ECOSOC this situation has changed. Crimes taking place in the context of internal armed conflicts, or in order to quell calls for autonomy or secession, or simply so as to exterminate one's political foes, are seen as endangering international peace and security much in the same way as international armed conflicts. This is evident for example in respect of the Rwandan genocide of 1994, which although perpetrated in Rwanda produced a spill-over effect in neighbouring Congo, even up to this day and had some repercussions also in Burundi for a short while. In the contemporary world no conflict is purely internal and no country can claim to be able to contain the effects of such conflicts on its territory. The activation of the Chapter VII of the UN Charter mechanism by the Security Council in relation to the situations in the former Yugoslavia and Rwanda were certainly unprecedented in that neither of the two involved an international armed conflict, but were both purely domestic issues. This represented a break in the Council's way of thinking which was later replicated in the cases of Sierra Leone, East Timor, Cambodia and Lebanon (although in respect of the latter it is certainly true that Syrian involvement lay behind the assassination of President Hariri).[21] This new-found position of the Security Council is not unrelated to the change of political scenery following the fall of Communist rule in Europe and the coming of a new World Order. Since 1990 the functions and powers of the Security Council had become reinvigorated and it was now free to adopt significant resolutions, particularly concerning the authorisation of force against recalcitrant States. The Council showed its resolve by adopting Resolution 678 in late 1990 against the government of Saddam Hussein of Iraq because the latter had invaded and annexed Kuwait. This was the first Council authorisation for over forty years and marked a new era in the Council's authority to deal decisively and unanimously with matters dealing with international peace and security.

[21] For an analysis of the issues and jurisdiction of the Lebanon Special Tribunal see Report of the Fact-Finding Mission to Lebanon, Inquiring into the Causes, Circumstances and Consequences of the Assassination of former Prime Minister Rafiq Hariri (24 March 2005), UN Doc S/2005/203 (2005), as well as F Megret, A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice, (2008) 21 Leiden Journal of International Law 485.

What the Council wanted to show with the adoption of Resolution 678 and later with resolutions 827[22] (establishing the ICTY) and 955[23] (establishing the International Tribunal for Rwanda (ICTR) was not only its resolve for remedying the evils that had come about, but also that the dictates of justice were equally important and paramount. The catch phrase is that no peace can come about without justice. Justice is a manifestation of the rule of law and if the latter is to have any significance in international life the Council must demonstrate that it is not willing to sweep under the carpet any serious violation of international law, particularly where this concerns serious international crimes. The Council is well aware of the dangers inherent in solidifying a sense of impunity to corrupt or brutal leaders, because this will lead them to perpetuate their crimes, which in turn may cause fear to their neighbours, thus precipitating a pre-emptive strike or other measures. Impunity also sets a bad example to other leaders and would-be culprits, which as a result renders the imposition of a rule of law an impossible exercise. In more recent years the Council decided to indict before the International Criminal Court the President of Sudan, Al-Bashir, in respect of his role in the massacres, expulsions and inhumane treatment afforded to indigenous Darfuris.[24] The Council could have refrained from seeking the indictment of an acting Head of State on the basis that this may have jeopardised ongoing efforts to bring peace to South and West Sudan; yet, the Council chose to pursue the rule of law over and above any arguments in favour of containing the conflict by not angering its main protagonists. This in my opinion is the most sensible approach. No one can be certain if the intentional abstention from prosecuting a set of particular leaders will ultimately deliver a much desired peace agreement between warring parties. Such things are extremely difficult to predict. On the other hand, the establishment of the rule of law through the process of criminal trials for those responsible of violating international law is significant because it instils respect for the mechanisms of justice in the psyche of the victims, their families, as well as in the minds of the culprits, at least in the sense that they will think twice about repeating their evils a second time. Moreover, the enforcement of criminal justice mechanisms has the effect of alienating the culprits even from their former followers and

22 SC Res 827 (25 May 1993).
23 SC Res 955 (8 Nov 1994).
24 *ICC Prosecutor v Al-Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Al-Bashir (4 March 2009).

isolates them from the rest of the world, this slowly but surely rendering them a remnant of past times. The rule of law therefore has the effect of removing the culprits and their allies from power bases in fact as well as in law. The rule of law through the establishment of a criminal jurisdiction is a form of retributive justice. At this point I should recall the effects of the UN embargo on the formerly embattled President of Yugoslavia, Slobodan Milosevic. He found some internal support for a short while but later lost all confidence from his people and his retention in power was the result of a dictatorial rule.[25] The same is true for the leader of the Bosnian Serbs, Radovan Karadzic, who although a very popular figure while in power, when forced to flee because of the indictment issued against him by the ICTY he became a fugitive and was forced to change his identity and assume a false profile. Other leaders, such as Sudanese President Al-Bashir and former Israeli President Sharon refused to travel abroad for fear that they may be arrested and indicted for international crimes. The hope is that international prosecutions culminate in the isolation of the indicted persons both at home and abroad, which in turn leads to a change in government and the installation of democratic values. Later on in this article we shall also examine the role of non-judicial mechanisms, such as truth and reconciliation commissions, informal tribunals and others. These also play a significant role in rule of law processes because they concentrate on healing and the strengthening of institutions that are necessary for the functioning of an organised society. Let us now assess whether the ad hoc tribunals for Yugoslavia and Rwanda have promoted the rule of law.

One issue that comes up in any discussion on the rule of law is that of democratisation.[26] The term connotes various things to many people but it is generally used in this article as conveying the notion that public governance should only be assumed through free and fair elections and

[25] See I Bantekas, Enforcing Human Rights through the External Use of Local Public Opinion, in D Barnheizer (ed.), *Effective Strategies for Protecting Human Rights: Economic Sanctions, Use of National Courts and International Fora and Coercive Power* (Ashgate, 2002), at 193.

[26] See B Boutros-Ghali, *An Agenda for Democratization*, Supplement to the Reports A/50/332 and A/51/512 (17 Dec 1996), paras 8, 18, 28. The then UN Secretary-General underlined his position that the UN Charter's purposes and principles were in fact the legal basis for democracy and that the absence of the term from the phraseology of the Charter, as well as the existence of the non-intervention principle in Art 2(7), did not contradict this position; UN Human Rights Commission Resolution on a Right to Democracy, UN Doc E/.CN.4/1999/L.55/Rev.2 (1999), which, it must be stated, was opposed by a good number of developing countries, because of fears that it would used as a pretext for foreign intervention.

that the governing should rule on the basis of a system of legality.[27] The right to democracy had for some time been discussed as the emerging right which the UN was trying to pass to all developing nations and while this effort has not waned it has been overtaken by other "pressing" needs, such as the need to end poverty, famine and protect the victims of natural or man-made disasters. In the midst of all these "pressing" needs it is easy to forget that famine and poverty are in the vast majority of cases brought about by the lack of democratic governance. The absence of democracy leads to an autocratic system that necessarily fails to take into consideration the rule of law and is hostile to efforts to bring corrupt leaders to justice. In its efforts to sustain this system of injustice the autocratic government will eventually turn against its perceived enemies in order to stay in power. Thus, any discussion on the rule of law, particularly as this may be associated with the role and operation of international criminal justice mechanisms, should be cognisant on the need to incorporate significant elements of democratic governance. For obvious practical reasons this will not be achieved directly because no international organisation can impose a change of regime on a government in exchange for a tribunal, although in reality the UN only discusses the possibility of international justice mechanisms with transitional governments that are committed to democratic governance. Yet, the tribunals established by the UN, or under its aegis, must not be complacent that the local government is committed to democratic principles. It must be vigilant and keep the Security Council and the Secretariat constantly updated if it sees any deviations. It is not far-fetched to say that international tribunals are guarantors of democracy and human rights in transitional States and must be seen to fulfil that very role.

The Ad Hoc Tribunals and their Contribution to the Rule of Law

In late 1991 the Security Council had received numerous reports about the volatile situation in Yugoslavia and was particularly concerned with the escalation of armed violence by regular army forces as well as by paramilitary groups.[28] It was obvious that the various federal States within the country were in a process of disintegration and some had already made their plans known for full independence, particularly Slovenia, Croatia and Bosnia and Herzegovina. The Security Council was totally

[27] T Franck, The Emerging Right to Democratic Governance, (1992) 86 American Journal of International Law 46.
[28] SC Res 808 (22 Feb 1993).

unprepared for the situation at hand because none of its members, both permanent and non-permanent, had any idea as to the precise extent which the parties were prepared to employ brutal violence to achieve their aims. They thought the worst had passed with the subjugation of the Hussein regime in Kuwait and his retreat into Iraq earlier that year. Moreover, the Council was unaware that the Iraq-Kuwait affair was the last remnant of a long-gone era involving the invasion of one State by another. The world was now awakening to the reality of protracted and well organised internal armed conflicts which required the involvement of the international community. As a result it took the Council some time to decide the most appropriate course of action for the events in Yugoslavia. Its response was of a two-fold nature. On the one hand, it imposed a series of sanctions against all the parties in the hope that this would prevent an arms flow,[29] while on the other hand it sought to establish whether the *jus in bello* or other violations were of such a heinous nature and widespread as to warrant the adoption of special, and certainly unprecedented, measures. At hindsight, the sanctions had only a limited effect on the logistic capacity of the parties and a significant amount of smuggling was undertaken through central Europe and elsewhere and moreover a large number of mercenaries and foreign recruits partook in the ensuing conflicts. At one point, the leaders of the Bosnian Muslims, which were seen as the representative government of Bosnia, argued that the sanctions effectively precluded them from exercising their right to self-determination because they were unable to exercise their inherent right of individual self-defence.[30] There is certainly some merit to this argument. On the other hand, the Council appointed a Committee of Experts with the task of documenting the most serious offences and assessing whether the formation of an international criminal tribunal was possible and under what means.[31]

The Committee of Experts documented many of the crimes through a voluminous report running in the thousands of pages in which it demons-

[29] SC Res 713 (25 Sep 1991). This was effectively lifted by SC Res 1031 (15 Dec 1995), which authorised the use of force in order to implement the terms of the Dayton Peace Agreement and later by SC Res 1074 (1 Oct 1996), which expressly terminated the embargo. See also C Gray, *International Law and the Use of Force* (Oxford University Press, 2004), at 105-107

[30] E De Wet, for example, argues that the Council's resolutions led to the violation of two *jus cogens* norms; the restriction of self-defence and the Bosnian genocide. E De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart, 2004), at 25.

[31] See CM Bassiouni, The United Nations Commission of Experts Pursuant to Security Council Resolution 780 (1992), (1994) 88 American Journal of International Law 784.

trated that these crimes were not random but mostly well organised and many were characterised by a distinct pattern which aim at ethnic cleansing. This became a poignant catch phrase which although sounds like genocide because of it connotes the intent to destroy an ethnic group it is not confined to this juridical meaning alone. The concluding report of the Committee of Experts was that there was significant planning behind the crimes committed on the part of the Bosnian Serbs and its aim was to either expel the civilian populations of their adversaries or to effectively create homogenous ethnic areas. The report clearly expressed a preference for the creation of an international criminal tribunal by the Security Council while the various conflicts were still ongoing. The UN Secretary-General after analysing the findings and recommendation of the report agreed with its conclusions and suggested that the creation of an international criminal tribunal was both feasible and preferable.[32] The reader may recall that the international community was faced with the same situation more than seventy years earlier in the aftermath of World War I where the victorious Allies appoint a Commission of Experts to which they posed the exact same questions. Whereas then the Allies resisted the positive conclusions of the Commission and eventually declined to establish a tribunal, the Security Council having only recently been freed from the stranglehold of the veto prevalent during the Cold War was able to find unanimity among its permanent members and authorise the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) on the basis of Resolution 827 in mid 1993.

Just like the establishment of the Nuremberg Tribunal and Charter the creation of the ICTY was a major landmark in international law generally and international criminal law more particularly. Up until that point it was thought that the only way an international criminal tribunal can be set up was by multilateral treaty. Indeed, the International Law Commission (ILC) had been working on a draft treaty for an international criminal court since the latter part of the 1940s with the aim that a final text may eventually become acceptable to the community of nations with a view to ultimately being ratified. Of course, the dangers inherent in trying to establish international criminal jurisdiction through the means of a treaty are wholly apparent. For one thing it takes far too long to negotiate, by which time the conflict in Yugoslavia would have been over

[32] *Report of the Secretary General pursuant to Security Council Resolution 808* (1993), UN Doc S/25704 (1993), para 2, reprinted in (1993) 32 ILM 1159.

and the culprits would have escaped, not to mention that crucial evidence would have effectively been lost, forgotten or otherwise destroyed. One need only consider that the ILC's draft on a permanent international criminal court had been negotiated for over half a century without being any closer to a finalised text and it is true to say that most commentators had given up hope that said draft would ever become operational.[33] Thus, trying to negotiate a treaty even in respect of the territorial confines of Yugoslavia was rather futile. Secondly, even if some support was obtained for a treaty of this nature, it would be cumbersome to negotiate its express terms and the definitions of crimes contained therein and in any event it is unknown how many signatures would actually legitimise it. This is a particular important aspect because in case thirty nations signed up to this treaty, without the consent of Yugoslavia, what would that say about the abstinence of the remaining 170 nations of the world? Legitimisation was thus early recognised as a pillar of any rule of law measures through the establishment of an international criminal jurisdiction. Inextricably linked to legitimacy is the requirement of enforcement. A multilateral treaty in which the territorial State is not a party is bound to create enforcement problems, particularly where the accused reside or are otherwise in hiding there. Without employing force and violating the territorial integrity of Yugoslavia it is impossible to see how the prosecuting States could seize the accused. Thus, the other lesson learned in the course of this process was that international cooperation is paramount in the functioning of international tribunals, because without it one is faced with the prospect of non-trials or trials against only lower-ranking individuals.

For all these reasons it was decided that the establishment of a tribunal should not be made dependent on the conclusion of a multilateral treaty. For reasons of expediency, at least, but also because of an element of control – not manipulation I hasten to add – the Security Council decided to opt for a tribunal whose legal basis was premised on the Council's authority to adopt measures, binding on all States, which served the maintenance of international peace and security. This was a novel development because it is true that the creation of international tribunals was not in the express remit of the Council under Chapter VII of the UN

[33] A few years later the ILC presented its final draft Code of Crimes against the Peace and Security of Mankind. See ILC Draft Code Commentary, UN Doc A/51/10 (1996), reprinted in (1997)18 Human Rights Law Journal 96.

Charter. In fact, Article 41 of the Charter, which is the only sensible basis upon which such a measure could have been premised (i.e. measures falling below the use of armed force) says nothing about setting up judicial institutions. Nonetheless, as the ICTY succinctly pointed out in the *Tadic* case, the range of possible measures suggested in Article 41 of the UN Charter are merely indicative and not exhaustive.[34] Therefore the Council was free to be as imaginative as possible in order to accomplish its seminal function. By doing so the Council only required the positive votes of its five permanent members –which as has already been explained it secured rather easily because of the then recent collapse of communist rule in Europe and the indifference of China on the matter – and of four non-permanent members. Significantly, it did not require the consent of Yugoslavia and the newly-emergent republics that were beginning their course to independence at the time. More significantly, whereas treaties are subject to myriads of limitations that ultimately may make them devoid of any real power or bite, the adoption of a Security Council resolution means that the Council decides what is contained in the body of said resolution to the exclusion of all other interested voices. What is more, Council resolutions are binding upon every member of the international community, regardless if it agrees wholly or partially with the dictates of the resolution, including the territorial State. The implications of this observation are far more potent and expansive than meets the eye. Article 29 of the ICTY Statute, which formed part of the text of Resolution 827 and which therefore rendered it binding upon all nations, stipulated that member States of the United Nations were under an obligation to adhere to requests and orders made by the judicial chambers of the ICTY on all matters pertinent to its mandate. For example, as has proven to be the case in practice, the ICTY chambers may request documents, evidence, written depositions, the transfer of witnesses and of accused person to its jurisdiction from States that are not directly implicated in the Yugoslav conflicts.[35] These may well be States in which the victims, witnesses or the accused fled to following the eruption of the war or sometime thereafter. The implications of Article 29 requests for these nations are that they will have to comply with the

[34] *ICTY Prosecutor v Tadic,* Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 Oct 1995), para 15.

[35] C Warbrick, Co-operation with the International Criminal Tribunal for Yugoslavia, (1996) 45 International & Comparative Law Quarterly 945, at 950; see R Kushen and KJ Harris, Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda, (1996) 90 American Journal of International Law 510.

ICTY even if by doing so they may be violating their own domestic laws. This issue soon became a problem for some nations and the ICTY resolved it amicably be creating suitable procedures for handling sensitive information pertinent to the national security interests of UN member States.[36]

How Did the ICTY contribute to the Rule of Law in Yugoslavia?

This is a significant question which had not been thoroughly thought out in the deliberations leading to the establishment of the ICTY by the permanent members of the Security Council. Nonetheless, what I will try to do in this section is to address this matter as it has materialised on the ground. We have already stated that the ICTY was set up in 1993, which is two years before the comprehensive peace agreement was signed at Dayton which served to end hostilities between the parties. So, the period that is significant for the purposes of this discussion is that which followed the formal cessation of armed violence.

It must have seemed evident to the persons responsible for the violence that following the peace agreement they would be welcomed as heroes in their towns and cities. It also must have seemed that Yugoslavia would not need to surrender any of its nationals to the ICTY because it had made clear its objection to the legality of the tribunal, rightly deeming that the only way that such persons could be arrested was by an invasion of the country, which by the standards of the time was unprecedented. Although public opinion did for a little while side with the government of President Milosevic, this support gradually fizzled out. Yugoslavia was banned from most organisations and funding programs, thus raising unemployment and other opportunities for its people. This international isolation led to increasing frustration which eventually culminated in massive rallies against the President by the end of 1999. In search of a better livelihood the people of Yugoslavia put aside their feelings about the war and concentrated on rebuilding their lives by making their country once again part of the international community. This required deep incisions into government and public institutions, including cooperation with the European Union, the UN and above all the ICTY. Although reluctantly in the beginning the State apparatus begun a cycle of cooperation with the aforementioned institutions, the result of which

[36] *ICTY Prosecutor v Blaskic,* Appeals Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber I of 11 July 1997 (29 Oct 1997).

was that the "heroes" of the war had been forgotten and by early 2000 there was no longer any support in public opinion about the protagonists of the Bosnian conflict, namely Radovan Karadzic and Radko Mladic. If such support was strong these and others would not have been forced in hiding within the borders of their homeland. It was evident that the temporal removal of the people of Yugoslavia from the memories and feelings of the war instilled in them a desire to rebuild their public institutions. This process was certainly at odds with attempts a decade earlier to demonise the enemy. Hence, one was able to witness a transformation in society which embraces the precepts of international legality – even if it does not fully agree with all that it stands for – which in turn translates into adherence to a domestic legality. By 2007 at which time President Milosevic had been surrendered to the jurisdiction of the ICTY – but later died before the ICTY had the chance to deliver its judgment – and later the political leader of the Bosnian Serbs, Radovan Karadzic, had been captured and also delivered there was very little support against the two masterminds of the conflict.

In my opinion this is the first step towards a process of democratisation which was absent in Yugoslav society and politics since the end of World War II. In time the relations between the former enemy States have significantly improved and a large part towards this process was played by civil society and particularly Non Governmental Organisations (NGOs), many of which were fully or partially financed from abroad. Equally, with the advent of free and fair elections all those criminal elements of Yugoslav society that were associated with the conflict – particularly remnants of paramilitary groups that had transformed themselves into underground criminal gangs – had either dissipated or gone into hiding. A period of turmoil and instability grappled the country for some years but with the aid and assistance of the European Union which embraced Serbia as a prospective EU member organised criminal activity decreased considerably and adherence to law and order prevailed.

One of the lessons for the international community, which seems not to have been followed in the course of the April 2010 elections in Sudan,[37] was the degree of impartiality and fairness in the run up to the elections in all of the post-war Yugoslav States. The Organisation for Security and

[37] Sudan Holds Landmark Multi-party Elections, BBC News (11 April 2010), available at: http://news.bbc.co.uk/1/hi/8613572.stm. As it turned out, the international community was not at all pleased with the procedural fairness of the election and the results thereof.

Cooperation in Europe (OSCE) together with the EU undertook a long and arduous campaign from 1995 onwards on the basis of which they aimed at setting the background for a universal registration of voters with a view to free and fair elections. It is not sufficient that elections take place, as practice has shown. Rather, for the international community to rubber stamp an electoral process a number of requisites must take place. For one thing, all parties must be given the chance to have an equal voice in addressing the electorate. This is particular true in situations where a nation is coming out of a prolonged period of autocratic rule and in which the former autocrats are running for office.[38] In such situations it is natural that the latter have more financial resources than their adversaries as well as a foothold in political and other institutions and thus possess an undue advantage over their opponents. All political parties must be given an equal platform whether through press outlets, financial sponsoring and time to organise their campaigns. Equally, marginalised or weak groups must be given the opportunity to other politically organise themselves or seek appropriate alliances. This process must co-exist in tandem with the democratisation of the State, through the replacement of the old elite from public institutions with persons that closer represent societal interests. This is by no means an easy affair and certainly takes time to mature. It is only when civil society is sufficiently strong and active to oppose any revival or manifestations of autocracy that a State is ready to go to the polls. It is thus clear from this analysis that the mere stationing of elections observers in poll booths not only does not secure or guarantee free and fair elections but to the contrary; it may in fact help legitimise a wholly unfair electoral process initiated by a despotic regime.

The ICTR as a Model for Developing a Devastated Criminal Justice System?

The ICTY paradigm was not set against a fully devastated country, but was rather the result of a nation which the international community could not trust in delivering justice, at least as far as Yugoslavia was concerned. The Rwandan example is of a quantitatively different nature. The facts of the genocide are well known so I will narrate them in cursory fashion. A genocide was executed in the first six months of 1994 in which an unspecified number of Tutsi civilians were killed; it is estimated that at least half a million people perished as a result and that millions were

[38] See for example J Pettifer, The Albanian Elections: Electoral Manipulation, the Media and the OSCE, (1996) 1 Mediterranean Politics 388.

rendered homeless, destitute or were forced to flee into neighbouring nations. Moreover, the aftermath of the genocide resulted in the assumption of power by elements of the victim group, which necessarily meant that Rwandan society and surviving Tutsi were hostile towards members of the Hutu, the group from which the genocidaires came from. The Security Council was cognisant of the fact that it had failed to take any action to avert the catastrophe although there were numerous indications that it was impending and in event it had been alerted by reports submitted to the United Nations by an interim force stationed there.[39] There are many reasons as to why the UN failed to take any concrete action in Rwanda, but it is not prudent to analyse them in the course of this article. It suffices to note however that the Council was already preoccupied with the situation in the former Yugoslavia and did not believe that a genocide could erupt and be executed within a space of four months. At the same time it is now evident that the Council's early warning mechanisms were insufficient to deal with crises such as that of Rwanda, which is also true of the African Union. Although we are not here concerned with the reasons that brought about the genocide, we are interested with the institution of judicial mechanisms in order to deal with its aftermath and the impact these mechanisms may have had on the reinstatement of the rule of law in Rwanda.

When the new Tutsi government assumed power in Rwanda it in fact invited the Security Council to establish a tribunal similar to that created for the purposes of the former Yugoslavia. Although Rwanda's post conflict situation was volatile, as one would expect, it was in theory an easier environment to work in because the conflict had ended, despite the fact that the two groups continued their armed conflict particularly on the territory of the Democratic Republic of the Congo (DRC). Moreover, unlike Yugoslavia, the government of Rwanda rightly viewed itself and the Tutsi people as the victims in the genocide and naturally opened up itself for a full cooperation with the Security Council. This in turn would have allowed the prosecutor of an international tribunal to go after the culprits within the territory of Rwanda with the help of the authorities and the people of that country. Finally, given that the criminal justice system of Rwanda was absolutely devastated no serious argument could be mounted to counter the jurisdiction of the ICTR that the country was

[39] Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc S/1999/1257 (16 Dec 1999).

competent to undertake the trials on its own. As a result, all the indications demonstrated that the cooperation between the Security Council and the government of Rwanda would be smooth and the tribunal would achieve its primary aims without any confrontation. This did not prove to be the case however. On the contrary, the Tutsi government of Rwanda was under the mistaken belief that the Council would be willing to finance the project but ultimately cede full authority to Rwanda, which in turn could appoint its own judges and take over the proceedings.[40] Rightly, the Council refused to give in to these demands and made it clear to the Rwandan government that not only was it not in a position to institute fair, impartial and procedurally sufficient criminal proceedings, but also that the international community was not prepared to rubber stamp a project of dubious legality that would have been handled by a government that was engaged in an armed struggle with the people it wanted to put on trial. This turned out to be a wise decision for many reasons and served to enhance the legitimacy of the UN in Africa. Although the benefits of a system such as the ICTR should filter down to the judicial level of Rwanda and Rwandan society in general it was important that it remained unaffected by the overall situation in Rwanda. It should be remembered that in the aftermath of the genocide most Rwandan lawyers and judges had either been killed or forced to flee in fear of their lives. The same was also true in respect of specialists working within the wider field of criminal justice, including prosecutors, social workers and others. As a result there was no criminal justice system that anyone can really speak of. This was a truly tragic occurrence because a number close to 70,000 accused persons were arrested and hurled into Rwandan prisons, all of which in appalling conditions, awaiting some sort of trial. The absence of judges and lawyers necessarily meant the prisoners could not undergo swift trials and many remained in prison for a number of years. The situation was further compounded by the fact that even if a lawyer was found and who would be willing to defend any of the accused he or she would have to face the wrath of the Tutsi survivors would find the defence of Hutu accused abhorrent. Hence, no lawyer or judge could feel safe working under such conditions. It would not surprise the reader therefore to find out that the accused awaiting trial before the criminal justice system of Rwanda could

[40] See P Akhavan, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, (1996) 90 American Journal of International Law 501.

only hope to be prosecuted before the ICTR because of the better detention facilities, access to medical care and lawyers paid by the UN.

Alongside the work of the ICTR significant funds were poured into Rwandan society in order to assist with its post-conflict reconstruction. Most significant among these were efforts to train new local lawyers so that they could ultimately assume key roles in the judiciary and the legal profession with a view to gradually building up the country's criminal justice capacities.[41] This was a slow process which has, however, paid dividends in the long run. In the short-term the government of Rwanda sought the assistance of African customary law, which employs deep-rooted tribal conflict prevention and dispute resolution mechanisms. It thus reinvigorated the so-called *gacaca* courts, which are transitional justice mechanisms that operate at cellule (village) level in Rwanda and which co-exist in parallel with domestic Rwandan courts. Although this mechanism was traditionally established to deal with minor offences and family disputes at the community level on the basis of African customary law, the current *gacaca* courts were constituted under Rwandan law to prosecute the culprits of the lesser categories of the genocide.[42] Whether or not such justice mechanisms were appropriate under the circumstances it was understandable that some operational solution was necessary in order to deal with the large number of defendants. In my opinion, despite the obvious flaws of this mechanism, it is a procedure that is known to the accused and with which they are familiar and is moreover set down by law. In any event, my readers will agree that it is far more preferable to lengthy (between 2 to 8 years) detention periods during which all evidence may have been lost.

It is important for international judicial mechanisms to feed in the domestic criminal justice systems so as to retain a sense of coherency and continuity. For example, it is absurd for the two systems to apply wholly inconsistent and conflict laws. Equally, it is wrong for the two to impose incongruous penalties in respect of the same kind of conduct. The rationale of the international tribunal is not only that it acts, as in the case of Rwanda, as a transitional short-term mechanism, but that its work

41 Of course, in order to deal with the short-term problems arising from the lack of lawyers, the Rwandan Ministry of Justice authorised foreign lawyers working for Lawyers Without Borders to plead on behalf of accused persons. O Dubois, Rwanda's National Criminal Courts and the International Tribunal, (1997) 321 International Review of the Red Cross 717.

42 Rwandan Organic Law No 40/2000 (26 Jan 2001), as revised by Organic Laws No 16/2004 (19 June 2004) and 28/2006 (27 June 2006).

feeds into the domestic system in such a way as to provide and generate consistent results. In Rwanda this took some time to materialise. The retention of the death penalty under Rwandan law, in contrast to its rejection in the ICTR, led to an absurd result whereby the planners and instigators of genocide would, at most, receive life imprisonment sentences by the ICTR, whereas minor executioners were to suffer capital punishment under Rwandan criminal law.[43] The Rwanda Tribunal could do nothing regarding the discrepancy in sentencing, but it has played a seminal role in raising awareness over the need to enhance the Rwandan criminal justice system through international financing and training so that at least accused persons would not suffer lengthy detention periods.

Despite the early problems between the ICTR and the Rwandan government, by the time of writing these had faded away. The criminal justice system of the country has found its own footing and continues to prosecute ordinary cases in addition to those still pending from the genocide era. Indeed, Rwandan prosecutors have frequently in the past ten years requested the surrender of Rwandan nationals accused of genocide and who have fled the country. A number of extradition processes have been concluded as a result, which demonstrates that despite its numerous shortcomings the Rwandan courts are seen satisfying all the required guarantees for extradition. At hindsight it seems that the Security Council was right in taking hold of the proceedings and establishing an international tribunal under the same principles and legal bases as the ICTY. Its impartiality and serious jurisprudence was a significant aid to the burgeoning Rwandan system which looked up to its big brother and learned from his experience. No doubt the Rwandan criminal justice system falls far below international standards and has a long way to go before it can be said to be the protector of the rights of the people of Rwanda, but at the same time one cannot dispute the fact that it has made significant steps of progress. Much of this would not have been possible without the example and indirect guidance provided by the operation of the ICTR.[44]

[43] From July 1996 until April 2000 more than 2,500 persons have been sentenced by Rwandan courts, 300 of them to death. The first executions took place on 24 April 1998, when 22 people were put to death publicly. There have been no executions since, although the Government has not ruled them out.

[44] The Rwandan criminal justice system has rightly become of the recipient of severe criticism by humanitarian organisations. See Human Rights Watch, Law and Reality: Progress and Judicial Reform in Rwanda (2008), available at: www.hrw.org/sites/default/files/reports/rwanda0708_1.pdf>.

The Rise of Mechanisms that are Alternative to Criminal Justice

The international community is a slow learner when it comes to finding the optimum mechanism for peace building and confidence building in post-conflict societies. Its responses are reactions and are not generally characterised by a pre-emptive spirit. One thing it knows how to do well is to set up judicial mechanisms that deliver criminal justice and through which it is expected that perpetrators will be brought to justice and future perpetrators will be deterred from committing similar or other crimes in the future. This is certainly one, and very potent, facet of rule of law and one which focuses on deterrence and promotes punishment as a means of demonstrating to victims and others that impunity will not be tolerated. This in turn brings about an aura of safety and that the public authorities care and respect their citizens, even if violence is rife. Prosecutions are, however, not the sole mechanism through which post-conflict societies may be rebuilt or re-organised.

In the last twenty to thirty years State practice and the ingenuity of particular individuals has given rise to a number of other mechanisms, usually in parallel with judicial ones with a view to averting societal splits and breakdowns. Imagine for example a society that has only just come through a violent confrontation and is trying to integrate the members of the losing faction back into normal life. Such a task would be impossible if said members fear that by putting their arms down they would undergo vengeful prosecutions and that they would be stripped of any potential to fight back. Equally, even if they were guaranteed some immunity from prosecution, given that many may have been fighting all their adult lives, they would possess no other skill which they could use in civilian life and as a result would naturally be inclined to continue their armed struggle because they have nothing meaningful to look forward to in civilian life. These are problems that have been faced by strategists struggling to end long and bitter civil conflicts and policy makers who are unsure how to integrate guerrillas and members of paramilitary groups into civilian life.

It would be far too simplistic to argue that members of said groups should be given a blank cheque back into civilian life. Rather, every situation must be assessed on its own merits, although certain standards and

models may be nonetheless discerned.[45] One of the key issues in the debate on alternative justice mechanisms is whether these are generally compatible with the dictates of international which disfavours the granting of blanket amnesties in respect of serious violations of human rights and humanitarian law. The United Nations has for some time taken the view that serious violations of human rights cannot attract amnesties and the vast majority of national courts have confirmed this result in emphatic manner. It is not that certain classes of people cease to enjoy immunity (whether *ratione personae* or *ratione materiae*) conferred upon them by the operation of customary or treaty law; rather, it is the particular terms of the amnesties that ensure wide-ranging impunity that the UN is opposed to. If the terms of such impunity agreements were to prevail then it is clear that the deterrent effect of international criminal justice is no longer a serious component of the rule of law and that the efforts of the Security Council since the early 1990s has largely been futile or unnecessary politics and a waste of money. At the same time it is evident that if some pressure is not taken off some of the culprits they have no incentive to put down their arms. The arguments on both sides are equally persuasive and the apparent clash of values and goals that emerges requires some resolution. The truth generally lies somewhere in the middle. Let us assume a targets-based approach. If the goal of a post-conflict society is integration, stability and cessation of hostilities, then person bearing arms and those more exposed to the conflict need to be given assurances of non-prosecution, especially if the alternative entails an indefinite continuation of hostilities and violence. Another target must certainly be that of deterrence and respect for the rule of law, which must be instilled in all members of a particular society. This can only be achieved through the prosecution of those that have committed serious violations of human rights law in situations where this was not necessary. In practice, the criminality attributed to paramilitary groups or rebel forces, or even government forces, is not a collective enterprise – with minor exceptions applicable to small and compact groups – but concerns particular individuals, usually persons in the higher echelons of command. Everybody else is typically a mid or lower level executioner that

[45] See T Buergenthal, The United Nations Truth Commission for El-Salvador, (1994) 27 Vanderbilt Journal of Transnational Law 498. See M Scharf, The Case for a Permanent International Truth Commission, (1997) 8 Duke Journal of International & Comparative Law 1; T Klosterman, The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late? (1998) 15 Arizona Journal of International & Comparative Law 2.

had no part in the planning of the crimes, if indeed he or she has taken part in its execution with knowledge and foresight. What this means is that the vast majority of members of such large armed organisations are fighters on-the-ground, usually recruited from a young age without their full consent and as such have not been cultured to know any better. This is evident for example in past and present conflicts in Africa where the various groups most commonly resort to the employment of child soldiers whether by kidnapping or other forms of coercion.[46] Although the victims of brutality of such children will naturally want them to be convicted of their crimes, an impassionate observer will be inclined to suggest that they had not developed sufficient mental faculties to fully desire the outcome of their conduct. Some societies have come to terms with this reality, whereas others, such as that of Sierra Leone where children were used extensively through that country's civil war and which are associated with the widespread maiming of civilians, have not. To sum up this target-based approach, it seems to me that a particularly attractive option is to provide amnesties to the regular members of these groups, but to reserve prosecution for those that planned crimes and fuelled the conflict.

In certain situations the policy makers have opted to provide such amnesties and to end the matter there. I do not generally see this as the best possible solution. Rather, I tend to take the view that more targeted outcomes may be achieved by the conferral of amnesties. The South African Truth and Reconciliation Commission (TRC).[47] It will be remembered that South Africa was ruled by a white racist majority that had imposed segregationist policies under the name of apartheid. Following a historic agreement to put an end to the apartheid regime all power was bestowed upon the new government of Nelson Mandela. Mandela did not approve of a lengthy and vengeful prosecution of members of the previous regime, particularly since the larger part of the minority white population had backed this state of affairs and as a result he would have to alienate them from a future South Africa. He therefore devised the particular terms of the TRC, which was set up in 1993 on the basis of the 1993 interim Constitution and the Promotion of National Unity and Reconciliation Act, No 34 of 1995 and was comprised of three

46 M Happold, *Child Soldiers in International Law* (Manchester University Press, 2005).
47 P Parker, The Politics of Indemnities: Truth Telling and Reconciliation in South Africa, (1996) 17 Human Rights Law Journal 1.

branches: a Committee on Human Rights Violations (HRV), a Committee on Amnesty and a Committee on Reparation and Rehabilitation (R & R). The mandate of the HRV Committee was to investigate human rights abuses that took place between 1960 and 1994, based on statements made to the TRC. Its aim was to establish the identity and fate of victims, the nature of the crimes suffered and whether the violations were the result of deliberate planning by the prior regimes or any other organisation, group or individual. Victims were then referred to the R&R Committee, which considered requests for reparation only in regard to those formally declared victims by the TRC or their relatives and dependants. The primary purpose of the Amnesty Committee was to ascertain whether or not applications for amnesty were related to human rights violations that were committed within the ambit prescribed by the 1995 Act, that is, whether they were associated to omissions or offences pertinent to political objectives and committed between 1960 and 1994, in the course of the struggle for internal self-determination. An amnesty was granted only in those cases where the culprit made a full disclosure of all the relevant facts. Therefore, in cases where an offence was committed for purely private motives no amnesty was granted. This alternative model to criminal justice has an added advantage in contrast to the granting of amnesties under circumstances where no further conditions are imposed. This is generally referred to as the "truth-telling" model, whereby mid and lower-level executioners and sympathisers are granted an amnesty from prosecution under the condition that they disclose all the facts pertinent to their activities (at least) and sign a sworn testimony to this effect. There are several benefits to this model. The first and most obvious is that it serves to compile an accurate historical record of events, which may go some way in alleviating the pain of the victims. At the same time it brings about "closure", which is integral to any victim-oriented policy. Thirdly, it builds up a strong case against those that planned the criminal policy and gave the orders to their subordinates. Fourthly, it opens up the gates of reality and remorse for all, or most, mid and lower level executioners who may not by that time have fathomed the extent and brutality of their conduct against their fellow countrymen and women; this is the true measure and spirit of reconciliation. Finally, a historic record serves to authenticate and document the veracity of the series of events and the crimes committed for the benefit of future generations and in order to prevent sympathisers of the regime from arguing that said events did not take place. It will be recalled that Nazi

sympathisers have disputed the existence of death and extermination camps, as well as the brutal killings of Jewish and other populations during the course of World War II and such arguments may well have grown stronger had it not been for the story-telling character of the Nuremberg and subsequent tribunals. Truth-telling is not confined solely to truth commissions, but is a distinct, even if indirect, feature of international criminal tribunals. It is for this reason that the ICTY and ICTR have offered incentives for high-ranking officials to testify before them and moreover both tribunals do not simply provide legalistic judgments but rather a full and detailed account of all relevant events through the use of hard evidence. It is exactly for this reason that the ICTY and ICTR Rules of Procedure are not constrained by the rigidity of national rules of evidence, but instead render any evidence admissible as long as it has probative value.[48]

The Proliferation of International Tribunals and their Impact on Deterrence and Punishment

There was a point in time following the creation of the ICTY and the ICTR that the community of scholars believed that the next and last step was the establishment of a permanent international criminal court. This view was further justified because the idea of reviving the notion of a permanent institution had been taken forward within the United Nations, particularly on the basis of the apparent success stories of the two ad hoc tribunals. The champions of this process had achieved to set the wheels in motion and by the summer of 1998 fifty years of procrastination and disagreement had dissolved and an elaborate Statute had been adopted at the Rome conference. This was certainly a historic event which was bolstered even further by the quick coming into force of the Statute; actually, far sooner than what was originally predicted. Yet, despite the current sizeable workload of the ICC it has failed to convince all States that it is the only one and most appropriate forum for adjudicating international crimes. Following the adoption of the ICC Statute a number of other international criminal tribunals have mushroomed; these are the Sierra Leone Special Court, the Extraordinary Chambers of Cambodia, the East Timor Special Tribunal, the Special Tribunal for Lebanon, the Iraqi Special Tribunal for Crimes against Humanity, the UNMIK chambers in Kosovo and the Bosnian war crimes chamber. Why is it that

[48] Rule 89(c) ICTY and ICTR Rules of Procedure and Evidence.

all these tribunals have proliferated when a much-sought permanent international criminal court is in existence is a complicated matter that is not just down to criminal justice.

From a rule of law point of view it may rightly be argued that an international tribunal sitting in The Hague and composed solely of international judges and being oblivious to the law of the territorial State is not the most appropriate forum by which the rule of law may be instilled in a post-conflict nation. Of course, the ICC was not conceived as mechanism that would directly facilitate and enhance the rule of law in the target State, but was rather destined as a mechanism of deterrence and punishment. Exceptionally, the ICC, contrary to the Statutes of the ICTY and ICTR, provided for some tangible remedies for victims of crimes by means of participation in the proceedings[49] and possible compensation.[50] This may go some way in addressing rule of law issues, but certainly not far enough. On the other hand, so-called the hybrid tribunals alluded to in the previous paragraph do have the potential of offering these qualities. For one thing, they are situated in the target country and their proceedings are accessible to the local population, which as a result does not view them as distant and unapproachable. Secondly, victims and witness can connect much more to the proceedings, although this may not always ensure their safety and thus may render them reluctant to testify. The proximity of the proceedings to the target State ensures a constant social brewing – I hesitate to call it social engineering because it is largely spontaneous and not purposely driven by any particular actors – which helps translate the relevant results into civil action. For example, the courts of Sierra Leone can learn from the jurisprudence of the Sierra Leone Special Court and adjust their own rulings accordingly and interact with it, even if not at a wholly personal level, in a manner that a court in the DRC cannot interact or share the experiences of the ICC, even in respect of the same set of facts and legal categories. Secondly, the interaction of foreign and local judges in the context of hybrid tribunals, as well as a combination of both international law as well as domestic criminal law, ensures that the proceedings are directly relevant to the target country's legal system and local audience. Of course, one should

[49] Art 68(3) ICC Statute; see also CP Trumbull, The Victims or Victim Participation in International Criminal Proceedings, (2008) 29 Michigan Journal of International Law 779.

[50] See BN McGonigle, Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principle,' (2009) 22 Leiden Journal of International Law 127.

not dismiss the obvious disadvantages, particularly that it is hard for local judges to be dispassionate or to fully escape from local politics, especially since their candidature will have been set forth by the government of the territorial State. Another concrete advantage enjoyed by hybrid tribunals is that they ultimately become an inextricable part of a wider web of institutions and mechanisms, which is impossible for a distant and wholly independent ICC. Thus, in the course of the Sierra Leone Special Court it has had the opportunity of interacting with the independent Sierra Leone Truth Commission by advising some of the accused persons in its custody to abstain from testifying thereto because this may turn out to harm their interests during the presentation of evidence before the Special Court.[51] The protection of the rights of the accused is central in any discussion about the rule of law and despite the sensitivity of the ICC on this matter it is doubtful that it would have taken any action to stop an accused person from making any statements to a truth commission in his country of nationality. Unfortunately, we have no reliable data that would tend to show that hybrid tribunals actually fill the void of a supreme criminal court in the countries in which they operate. However, if this was not the right conclusion to draw from their operation they would naturally be shunned by the local legal community and would not have much reverence. Certainly, not all hybrid tribunals are viewed in the same light. The Sierra Leone Special Court has had to fight perceptions for numerous years and it has only recently emerged as a court whose jurisprudence is worth consulting. The same thing cannot be said about the East Timor Special Tribunal, for example, which for a number of reasons has been out of the spotlight and generally side-stepped.

The politics of hybrid tribunals suggest that their drafters were preoccupied with the maintenance of some kind of control over the proceedings. If Sierra Leone or Cambodia had no political interest in the fate of the proceedings they could just as well have conferred jurisdiction to the ICC, even if they were not parties to its Statute. Why is it that States want to retain this nominal control? Much has to do with the fact that the incumbent governments were on the side of the victims when their adversaries were in the process of committing the crimes with which they are charged. There is thus a feeling that proceedings must remain local

51 *SLSC Prosecutor v Norman*, Decision on Appeal by the TRC and Chief Norman against the Decision of Bankole J delivered on 30 October 2003 to Deny the TRC's Request to Hold a Public Hearing with Chief Norman (28 Nov 2003).

but validated by an international institution such as the UN, because if the accused are removed from the place of execution their crimes are somehow painted in less bleak colours. It is important that international law-makers are aware of this reality when negotiating criminal justice mechanisms with victim States. As a direct result of these considerations it is natural for the incumbent governments to want to use the proceedings to write a historical record and in some cases to appease the thirst for blood of the victims and their families.

Despite all this the role of the ICC remains paramount. There are more than 200 States in the world and each has its own political views, biases and preferences, all of which change from time to time. Hybrid tribunals may seem the best option for a particular country one year, whereas for another nation the ICC seems like a much less burdensome forum that is removed from the everyday vagaries and pressures of life in the territorial State. For a number of actors this represents an advantage because life can proceed without the emotions that can be stirred by a much heated criminal proceeding of a considerable duration. The ICC is also better suited to undertaking criminal investigations in respect of situations for which the territorial State would have never agreed to the establishment of a hybrid tribunal or any international intervention for that matter. This reality is succinctly exemplified by the Darfur case which was submitted to the ICC by the Security Council.[52] The Sudanese government had dragged its heels for some time and it was on the back of reports of a widespread humanitarian disaster that the Council decided to take the initiative and refer the case to the jurisdiction of the ICC. As for the question as to whether the ICC is capable of contributing to the restoration of the rule of law I am inclined to say that it cannot do so directly, but it has certainly the potential to do so indirectly. To its credit the ICC operates an outreach program through which the institutions of the territorial State can observe, learn and benefit from the experience of the ICC and its array of experts. The ICC helps with all relevant modalities for extradition and surrender through the Office of the Registry and any institutional assistance sought will be duly provided. In this respect alone the ICC can produce some trickling effect onto the local criminal justice system.

[52] See SC 1593 (31 March 2005) through which the Council ceded authority to the ICC to undertaken an investigation of the facts related to the Darfur massacres.

The Role of Domestic Criminal Courts in respect of International Crimes

In all of my discussion so far I have purposely made little reference to the role of domestic courts, primarily because the purpose of this article is to examine the role of international courts and tribunals in enhancing the rule of law in post-conflict situations. No doubt, the role of national courts is paramount, not least because there was always a time before international tribunals during which domestic prosecutions constituted the cornerstone for all international legal developments. One need only recollect the prosecutions of Eichmann,[53] Finta,[54] Barbie[55] and others in order to come to the realisation that national prosecutions of international crimes are necessary and important. The problem with national prosecutions is one of limitation of scope and availability of resources. For example, the courts of Austria would gladly initiate criminal proceedings in respect of Austrian nationals that had committed war crimes in Austria and elsewhere, but it would be stretched to do the same thing with regard to Angolan nationals for crimes that took place there. This is not to say that most countries in Europe have hesitated to exercise universal jurisdiction for crimes committed wholly abroad and without entertaining any connection thereto, but one must see the function of national prosecutors under a more realistic light. They are endowed with a limited number of resources and are generally insufficiently staffed. They are under strict deadlines and performance schedules, which mean that they must deliver results that demonstrate decrease in crime, prosecution successes and others. It matters little for politicians, particularly the incumbent Minister of Justice, if his prosecutors managed to indict and condemn foreign nationals by employing the principle of universal jurisdiction. This would entail sending one's staff abroad and facing a multitude of problems from local authorities in respect of evidence gathering, taking witness statements and others. Even so a conviction is by no means certain, especially given the fact that the prosecutor is sailing in legal territory with which he or she is probably unfamiliar. As a result, national prosecutors are generally reluctant to engage in lengthy prosecutions of foreign leaders or executioners, unless they are ambitious enough or have other interests in mind. It must also be

53 *Attorney-General of Israel v Eichmann*, 36 ILR 5 (District Court of Jerusalem, 1961), aff'd 36 ILR 277 (Supreme Court of Israel, 1962).
54 *R v Finta,* Canadian Supreme Court Judgment (1994) 104 ILR 284
55 *Barbie* case, French Court of Cassation Judgment (1988) 100 ILR 330.

emphasised that the assumption of criminal jurisdiction by the criminal courts of country A over conduct alleged to have been committed by high-level nationals of country B is likely to have serious repercussions between the two nations, as it will be likely perceived as an intrusion in one's domestic affairs. As a result, the courts of common law nations have devised the so-called "act of State" doctrine by which they can refer a particular matter to the jurisdiction of the executive if the matter is likely to have an impact on the country's international relations.[56] Thus, in conclusion, a prosecutor must have overcome a number of political and logistical hurdles before he can embark upon the prosecution of persons accused of extraterritorial conduct.

Despite these observations, the introduction of the concept of universal jurisdiction is a significant step forward for establishing a more coherent system of the rule of law. Let us take the example of country A, which generally takes pride that it investigates all crimes, prosecutes all offenders and generally takes good care of its citizens and upholds to the best of its abilities law and order. Country A therefore seems like the perfect model in respect of the criminal justice component of the rule of law. Now imagine that country A is used by persons that have committed genocide and other serious international crimes as a transit passage to other countries or as a country of leisure and rest and while there these persons are model citizens. Were country not to employ criminal justice mechanisms to arrest and prosecute these persons on its territory it would certainly justify itself that they have not committed any crime therein. Contemporary scholarship in international law, however, takes a different approach to this matter, rightly deeming that the exercise of universal jurisdiction under such circumstances is not discretionary but obligatory. In my opinion, the failure of country A to take any action against the culprits would offend not only its own morality but the very raison d'etre of the rule of law to which it aspires. Unfortunately, most States think about the rule of law and their citizens' safety and wellbeing from a very narrow perspective which is based exclusively on conduct taking place on their territory. It is not hard to understand why this sort of policy proliferates, despite the fact that information is now global and citizens can be aware about issues taking place beyond the strict confines of their

[56] See *Underhill v Hernandez* (1897) 168 US 250, at 252; JC Barker, State Immunity, Diplomatic Immunity and Act of State: A Triple Protection against Legal Action? (1998) 47 International & Comparative Law Quarterly 950.

own country. Of course, others cite the example of Belgium whose 1993 Law on Universal Jurisdiction was condemned by the International Court of Justice and as a result was forced to offer compensation.[57] Despite this unfortunate occurrence which is probably more attributable to bad policy manoeuvres rather than the content of the Law itself which – barring prosecutions against persons enjoying immunity *ratione personae* – is in full conformity with customary international law. The employment of universal jurisdiction in my opinion has the potential to create a species of transnational rule of law, in conjunction with the work undertaken by the plethora of international and hybrid criminal tribunals. Thirty years ago the worst a genocidaire could expect was an arrest in a foreign State with which his country entertained hostile relations. In fact, even this occurrence would have been unlikely and in any event the culprit would refrain from travelling to such hostile nations. As a result, persons who had committed serious infractions of human rights law and who were responsible for the killings of thousands of innocent people did not even think about the prospect of being prosecuted anywhere. This was something that was alien thirty years back. At present, the movement towards a transnational rule of law system seems to be led by international tribunals, but more importantly by the revival of universal and other types of criminal jurisdiction by the willing States of the world. No leader or official can now be sure that his or her travel abroad may not result in an arrest and prosecution.[58] It is not therefore the result of accident the fact that the majority of leaders of corrupt or autocratic regimes do not generally travel abroad, except in respect of UN or AU-sponsored events for which their immunity has been guaranteed. This transnational rule of law movement is beneficial not only for the countries where the offences have taken place, but also for all States because it leads to the reduction of crime globally and the democratisation of many parts of the world.

The principle of complementary in the context of the ICC Statute is certainly a distinct feature of this system of transnational rule of law. This allows ICC member States to confer cases to the Court which they would otherwise entertain themselves. While some States would never think about using the complementarity mechanism because they are unable of

[57] *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium) Judgment (14 Feb 2002), (2002) ICJ Reports 3.

[58] See D Akande, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities (2009) 7 Journal of International Criminal Justice 333.

envisaging how their national interests could be enhanced by ceding part of their sovereignty to an international institutions, other States may take a different position on the matter.[59] We have already seen in what manner many transitional States have asked the United Nations to assist them in setting up hybrid criminal tribunals. Despite initial fears that complementarity would work against the ICC in that no State would think it appropriate to confer a situation to the ICC this has certainly not been the case in practice. The ICC Prosecutor is already investigating four situations, all of which in Africa, and has been asked by several other States to commence investigations but has refrained from doing so. It is thus obvious that a number of States are content with the role of the ICC as an enforcer of the rule of law, particularly where it is viewed as an independent and impartial forum that is not susceptible to doubt in the territorial State. However, even if the principle of complementarity were to restrict or extinguish the ICC's work load this would actually be welcome because it would mean that States are prosecuting themselves, which is exactly the central point of international criminal justice. While to the external observer the proliferation of international criminal tribunals and their competition with national criminal jurisdictions may seem a struggle for survival and dominance of one over another, in reality the purpose of all of these institutions is to broaden the net of international criminal justice and by extension that of the rule of law. On the basis of this approach the system certainly seems to be functioning far better than all its predecessors.

Conclusion

The relationship between international criminal justice mechanisms and the rule of law in domestic legal systems is not an obvious one. Certainly, if one were to speak of a transnational rule of law predicated on a system of inter-State cooperation in which the objective was the arrest and prosecution of persons committing international crimes, he or she would probably find this in the work of the multitude of international and hybrid criminal tribunals. But even so, one would be asking himself if such a thing as a transnational rule of law existed. In this article I take the view that although a theoretical construct it does exist. It is based on the need of international society to work together in order to achieve the goals it has set itself. Thus, if the UN and its developed member States have set

[59] Arts 1 and 17 of the ICC Statute.

about to alleviate the effects of poverty, famine, lack of education, poor health and others through the Millennium Development Goals (MDG),[60] it is important that all States work together to fight the root causes of these unfortunate maladies. There was a time not too distant in which developed nations provided aid to developing countries knowing full well that the largest part of that aid would be usurped by corrupt leaders and would never reach its intended beneficiaries. Equally, they would sit on the negotiating table with autocratic and brutal regimes to talk about human rights and would accept their pledges in full knowledge that people were being tortured and killed. To put it even more bluntly, autocratic regimes are bad trading partners. Countries with atrocious human rights records cannot prosper financially because the lack of freedom prevents entrepreneurship which is central to the industrial development of nations and their people. Moreover, in undemocratic regimes wealth is usually confined to a small number of individuals, which means consumption and spending is low and as a result the markets have little cash to generate wealth and augment their business. Such countries most typically operate extensive black market economies as was the case with Iraq during the reign of Saddam Hussein in that country. Hence, international criminal justice must go hand-in-hand with the establishment of a rule of law, even a transnational rule of law, in addition to a healthy dose of democratic governance.

Very little data is available through which we can fully appreciate in what ways international criminal justice mechanisms contribute to the establishment of a rule of law. Certainly, the practice of the United Nations thus far is to negotiate only with transitional governments that are dedicated to democratic reforms and when this happens the instalment of a hybrid or other tribunal is usually followed by other measures, such as the appointment of a Truth Commission and delegations from various UN agencies, such as UNICEF, UNAID and many others. The UN therefore is fully aware that a transitional State cannot only be supported by one aspect of the rule of law (i.e. criminal justice) but requires many other components if it is to function properly. By way of example, the distribution of land rights to indigenous peoples that were forcibly removed from their land might be just as challenging and important because it helps such groups reintegrate in the new State.

[60] See the website of the MDG and the relevant reports and data displayed therein, available at: <http://www.un.org/millenniumgoals/>.

Hence, an important goal of transitional regimes is to provide a sense of community for the people and avoid alienating them by establishing mechanisms to which they cannot relate in their everyday life. The UN and other international organisations have been conscious about simply pouring money into devastated societies. As a result, they have turned to partnerships that ensure that funds are made available to those who need them on the basis of a results-based approach.[61] A number of trust funds have been set up through the direction and management of the International Bank for Reconstruction and Development (IBRD) and other regional development bank, the purpose of which is to allocate resources made available by donor nations in a manner that promotes local needs and without such funds necessarily going through public entities.

The current mechanisms of international criminal justice must certainly be seen as promoting the rule of law globally but also in the target countries for whose benefit they have been set up. The jurisprudence of the ICTY and ICTR has to a large degree rendered obsolete the case law delivered by Nuremberg and other subsequent tribunals and has created a very consistent and detailed body of law that is used extensively by every domestic court that deals with international crimes. It was on the back of the successes of the ICTY and ICTR that the international community was able to agree in very little time on the establishment of the ICC and to have it up and running in record time. Similarly, the euphoria of the period between 1993 to 1995 in which these three criminal tribunals were established provided the necessary impetus for the promulgation of hybrid tribunals. In turn, national courts, particularly in Europe,[62] caught up with these developments by indicting and prosecuting State leaders and other officials, despite the protests and other vociferous calls to the contrary. All this would not have been possible without a healthy and prosperous civil society which was central to all the lobbying efforts involved in convincing States to set up international tribunals. Equally, civil society was responsible for urging States to adopt laws on universal

[61] See I Bantekas, *Trust Funds under International Law: Trustee Obligations of the United Nations and International Development Banks* (TMC Asser, 2009), particularly chapter 5, which explains the purposes and modalities of dispersing money to recipients or project operators.

[62] Although it is true that some African States made some attempts to arraign individuals under universal jurisdiction. See *Special Prosecutor v Mengistu Hailemariam and Others*, Ethiopian Federal High Court Judgment (12 Dec 2006). For a thorough analysis, see FK Tiba, The Mengistu Genocide Trial in Ethiopia, (2007) 5 Journal of International Criminal Justice 513.

jurisdiction and also to enforce them. More importantly, civil society, through the so-called principle of lawfare was central to bringing public interest suits against persons alleged to have committed international crimes.[63] Had it not been for these organisations it is unlikely that national prosecutors would have found the interest and resources to prosecute the accused. This goes to demonstrate that the establishment of the rule of law, with all its requisite components, eventually promotes all the goals of a nation, even the pursuit of criminal justice, which otherwise seems like the sole prerogative of public entities. Hopefully, the readers of this essay will made the necessary links between the various themes discussed here and if anything else they will be convinced of the need to promote openness, democratic governance and international cooperation throughout the globe.

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[63] See T Yin, Boumediene and Lawfare, (2009) 43 University of Richmond Law Review 865. The term has been coined after the term "warfare". It suggests that public interest suits brought by powerful NGOs against government agents are tantamount to weapons, with the only difference that they are employed in court rooms and not on the battlefield.

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