

National measures to repress violations of international humanitarian law (Civil law systems)

Report
on the Meeting of Experts

Advisory Service

on International Humanitarian Law



ICRC

**National measures
to repress violations
of international
humanitarian law**
(Civil law systems)

**Report of the
Meeting on Experts**
Geneva, 23-25 September 1997

Cristina Pellandini
Legal Adviser



ICRC

International Committee of the Red Cross
Advisory Service on International Humanitarian Law
19 Avenue de la Paix, 1202 Geneva, Switzerland
T +41 22 734 60 01 F +41 22 733 20 57
E-mail: advisoryservice.gva@icrc.org www.icrc.org

ISBN 2-88145-114-4

© International Committee of the Red Cross
Geneva, September 2000

TABLE OF CONTENTS

Preface	9
PART I	
Meeting of experts on national measures to repress violations of international humanitarian law	13
Chapter I	
Introduction to topics	15
■ Opening of the meeting <i>Yves Sandoz, ICRC Director for International Law and Policy</i>	15
■ The importance of complying with international humanitarian law <i>Cornelio Sommaruga, President of the ICRC</i>	18
■ The repression of violations of international humanitarian law at national level and the work of the ICRC Advisory Service <i>María Teresa Dutli, head of the ICRC Advisory Service on International Humanitarian Law</i>	23
■ The need for international accountability <i>M. Cherif Bassiouni, Professor of Law, International Human Rights Law Institute, DePaul University, Chicago</i>	29
■ The work of the Athens Congress (May 1997) of the International Society for Military Law and the Law of War on national measures to repress violations of international humanitarian law <i>André Andries, Director of the Society's documentation centre</i>	65

Chapter II	National systems to repress violations of international humanitarian law	74
■	Belgium <i>Damien Vandermeersch, Investigating Judge, Brussels</i>	74
■	Switzerland <i>Robert Roth, Professor of Criminal Law, University of Geneva</i>	76
■	Germany <i>Horst Fischer, Professor of International Law, Institute for International Law of Peace and Armed Conflict, Ruhr University of Bochum</i>	78
■	Spain <i>José-Luis Rodríguez-Villasante y Prieto, Judge Advocate General, Madrid</i>	80
■	Croatia <i>Zvonimir Separovic, Professor of Law, University of Zagreb</i>	82
Chapter III	Relations between national courts and the ad hoc Criminal Tribunals for the former Yugoslavia and Rwanda	85
	<i>Wen-qi Zhu, Legal Adviser, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia</i>	85
	<i>Laity Kama, President of the International Criminal Tribunal for Rwanda</i>	94
Chapter IV	Particular cases and problems: repeated violations, mass violations, violations committed by many perpetrators, and the judicial structures set up to deal with them ...	98

■	The case of Rwanda <i>Siméon Rwagasore, Prosecutor General of the Supreme Court of Rwanda</i>	98
■	The case of Ethiopia <i>Yosef Gebreegziabher Gebreyohannes, Attorney at Law and Legal Adviser</i>	108
Chapter V	Group work	113
■	Introduction to topics put forward for discussion <i>Cristina Pellandini, Legal Adviser, ICRC Advisory Service on International Humanitarian Law</i>	114
■	Report of Group I Substantive law and legislative approach.....	117
■	Report of Group II General principles of criminal law	123
■	Report of Group III Procedural law.....	130
Chapter VI	Closure of the meeting	139
■	Conclusions of the Chairman <i>Yves Sandoz, ICRC Director for International Law and Policy</i>	139
■	ANNEXES	
I.	Agenda of the meeting	143
II.	List of participants	147
III.	Recommendations of the International Society for Military Law and the Law of War on the essential principles related to the national repression of grave breaches of the law of armed conflict	150

PART II	Case studies of systems for national repression	155
■	BELGIUM	
	Belgian legal system for the repression of crimes under international law <i>Damien Vandermeersch, Investigating Judge, Brussels</i>	157
■	SWITZERLAND	
	The repression of violations of international humanitarian law in Switzerland <i>Robert Roth, Professor of Criminal Law, University of Geneva Marc Henzelin, Assistant Lecturer, Law Faculty, University of Geneva</i>	197
	The prosecution of presumed war criminals in Switzerland <i>Jürg van Wijnkoop, Judge Advocate General, Swiss Federal Military Department</i>	216
	The repression of violations of international humanitarian law in Switzerland: Aspects of criminal procedure <i>Bernhard Sträuli, Investigating Judge</i>	231
■	GERMANY	
	The repression of violations of international humanitarian law under German domestic law <i>Sascha Rolf Lüder, under the supervision of Horst Fischer, Professor of Law, Institute for International Law of Peace and Armed Conflict, Ruhr University of Bochum</i>	242

■	SPAIN	
	The protection of war victims under the 1995 Spanish Penal Code: Offences against persons and objects protected in the event of armed conflict	
	<i>José-Luis Rodríguez-Villasante y Prieto, Judge Advocate General</i>	256
	Violations of international humanitarian law: Questionnaire	
	<i>Colonel Fernando Pignatelli and Lieutenant Colonel García Labajo, under the supervision of Major General José-Luis Rodríguez-Villasante y Prieto and the coordination of Manuel Fernández Gómez, Spanish Red Cross Centre for the Study of International Humanitarian Law</i>	279
■	INTERNATIONAL COMMITTEE OF THE RED CROSS	
	Comparative study of some national systems of repression	
	<i>Summary prepared by the ICRC Advisory Service on International Humanitarian Law</i>	293
■	ANNEXES	
	I. Questionnaire.....	318
	II. (a) Comparative table of national systems of repression: Substantive criminal law	321
	II. (b) Comparative table of national systems of repression: Procedural criminal law	324

Preface

“One of the greatest deterrents to crime
is not the severity of the punishment
but its inevitability.”

Cesare di Beccaria (1738-1894)

International humanitarian law sets out detailed rules to protect the victims of armed conflict and limit the means and methods of warfare. It also provides mechanisms for ensuring compliance with its provisions. The repression of violations figures prominently among these mechanisms. Under international humanitarian law, individuals are held responsible both for committing violations themselves and for ordering others to do so. The law also demands that those responsible for grave breaches of its provisions be prosecuted and punished wherever they may be.

The 1949 Geneva Conventions, their Additional Protocols I and II of 1977 and a number of other humanitarian treaties impose specific obligations on the States party thereto. In particular, these States are required to adopt the measures necessary for the implementation at national level of the repressive mechanisms set out in those treaties.

The national legislation of each State should, in particular, prohibit and repress the *grave breaches* listed in the treaties, providing adequate penalties for them. It should also make it possible to prevent or put a stop to all other acts prohibited by the above-mentioned treaties but not specifically termed grave breaches. The legislation should apply to both civilians and members of the armed forces, irrespective of their nationality, who commit or order someone else to commit a grave breach, even if the breach consists in failing to take compulsory action. Moreover, such legislation must cover both acts committed on national territory and those committed abroad, independently of their relationship with the State that has jurisdiction over the place where they occurred.

Pursuant to its mandate to ensure the faithful implementation of international humanitarian law, the ICRC has for a number of years been striving to encourage States to meet their obligations at the national level by adopting regulations and legislation as required by the law. The ICRC supports States in this endeavour through its *Advisory Service on International*

Humanitarian Law, which lays particular emphasis on national measures to repress violations.

So as to be better able to help States, the ICRC has embarked on an analysis of the criminal measures they can adopt. Wishing to further this analysis by making available the views of those with practical experience in criminal law and the prosecution of war criminals, the ICRC held a ***meeting of experts on national measures to repress violations of international humanitarian law*** from 23 to 25 September 1997. Chaired by the ICRC's Director for International Law and Policy, the meeting confined itself to examining the national implementation of repressive mechanisms in States with civil law systems. The ICRC plans to organize further meetings on implementation in States that have other legal systems.

The above-mentioned meeting, whose proceedings are the subject of the present publication, was aimed in particular at drawing lessons and offering advice to national legislatures and decision-makers on the basis of the measures practised by a number of States. To prepare for the meeting, participants were asked to submit case studies so as to provide an overview of repressive mechanisms in force in several selected countries. These case studies, which were presented at the meeting, are grouped together in the second part of the publication.

When implementing repressive mechanisms, lawmakers and national courts alike are confronted with very specific questions relating to substantive and procedural criminal law and to the organization of the judiciary. A number of issues relating to legislative approaches, general principles of criminal law, jurisdiction, the organization of proceedings, and cooperation and mutual assistance in criminal matters between States were studied and discussed in working groups, using as reference material the examples of national systems of repression submitted.

The meeting's agenda was supplemented by a presentation of the work of the *May 1997 Athens Congress of the International Society for Military Law and the Law of War*, which dealt with the issue of national measures to repress war crimes. This was followed by a discussion on *the relationship between the ad hoc Tribunals for the former Yugoslavia and Rwanda* on the one hand, and *national courts* on the other.

The individual opinions expressed by the experts, who attended the meeting in a personal capacity, and the conclusions drawn collectively will be used by the ICRC as the basis for providing technical advice and

practical recommendations on incorporating repressive measures into national legislation.

The ICRC Advisory Service would like to express its sincere thanks to experts from around the world for their active participation in the meeting. It is also deeply grateful to the authors of the studies contained in this publication, to the President and members of the ICRC and to all the other experts whose helpfulness and commitment made the meeting a success.

The editor

PART ONE

**Meeting of experts
on national measures
to repress violations of
international humanitarian law**

CHAPTER I

Introduction to topics

Opening of the meeting

Yves Sandoz

ICRC Director for International Law and Policy

Ladies and Gentlemen,

To open this meeting, I would like briefly to put the work we are about to undertake into context within the general framework of the ICRC's activities to improve protection for the victims of war.

The ICRC is known primarily for its operations in the field: the direct and practical protection and relief work it carries out to assist war victims. In terms of volume, this continues to account for the vast majority of its activities.

In compliance with the mandate it has received from the international community, the ICRC also seeks to convince all parties to conflict to conduct themselves in accordance with international humanitarian law. While war inevitably leads to tragedy, much of the suffering is clearly caused not just by the conflict itself, but by the way in which it is waged. Without affecting the actual outcome of a war, conduct that is in keeping with international humanitarian law spares countless lives and prevents innumerable physical and moral traumas. For this reason, it is important to act before the event, to try to persuade all concerned of their responsibility, their duty to observe international humanitarian law and ensure that it is complied with. If this message is to have a chance of being heard, it must not only be delivered to the armed forces in peacetime but it must also be spread in schools and universities, adapted in each case to the age and culture of those for whom it is intended.

The ICRC has endeavoured to persuade States to take the steps needed to achieve this. It is well aware that this is a long-term undertaking and, in order to carry it out properly, has sought to rely on national partners, in particular the National Red Cross and Red Crescent Societies. The ICRC has itself also helped States by holding regional seminars and by helping to organize courses — at the national, regional and international levels — for

senior armed forces officers, in particular those held by the International Institute of Humanitarian Law in San Remo.

It was in this spirit as well that the ICRC set up an Advisory Service on International Humanitarian Law to help States decide on the measures to be taken, in particular at the legislative and regulatory levels, and to urge them to set up appropriate bodies, such as inter-ministerial commissions, to promote implementation of the law. Another aim is to prompt a degree of emulation between States, especially at the regional level.

The meeting I have the pleasure of opening today fits into this framework. Repressing violations of international humanitarian law is important for the law's credibility and, therefore, for its effectiveness. Yet though we rejoice today in the efforts being made at the international level, we must bear in mind that it is primarily at the national level that this repression must be organized and applied. Indeed, it is first and foremost the members of their own armed forces that governments must require to conduct themselves in exemplary fashion, and the authorities must consequently provide for adequate repression of violations.

Clearly, no one is going to improvise appropriate means of doing this in the heat of battle, so it is vital to address the problem in advance, in peacetime. But, like the judges who must ultimately apply international humanitarian law, legislatures wishing to introduce into domestic law provisions for the punishment of acts prohibited by international law face difficulties not only as to the content of the rules to be adopted but also regarding their form and implementation.

The ICRC's aim, therefore, is precisely to make technical and practical advice available to States, in the form of guiding principles, fact sheets and anything else that seems appropriate. The ICRC wishes to take into account both the requirements of international humanitarian law and the experiences of States that have already put in place a system of repression for these types of crime. To this end, the ICRC felt it necessary to consult experts, and that is why this meeting has been organized. The practice of consulting experts is, moreover, a well-established tradition for the ICRC, which has used it to bring about a great many of the developments in international humanitarian law.

The purpose of this meeting is thus to discuss specific issues arising from the national implementation of the repressive mechanisms provided for in the international humanitarian law treaties, on the basis of the lessons

learned from existing systems of repression. Expert opinions are required in particular on the proposed advice prepared in the form of modules. It would also be useful for experts to give their views on the role in this sphere of the ICRC and its Advisory Service, and on more specific questions such as whether it is worthwhile drafting a regional or universal model law.

It should be mentioned, finally, that this meeting will concentrate on the practice of States which use the civil law system, and that it is meant to constitute the start of a process. Similar meetings will be held in countries with other legal systems — in particular those based on common law — and follow-up meetings will be organized at the regional level.

This meeting will start with the presentation of a study on several national systems, followed by presentations on the relationship between the ad hoc tribunals set up to repress crimes committed in the former Yugoslavia and Rwanda, on the one hand and national courts on the other; a report will be given on the work of the Athens Congress of the International Society for Military Law and the Law of War, which dealt with the national repression of war crimes. For we feel that, in embarking on this endeavour, it is vital to take into account relevant experience already acquired and discussions held, so as to avoid any duplication of effort.

The meeting will continue with work in groups, where it will be possible to delve more deeply into various aspects of the above-mentioned subjects, on the basis of specially drafted papers.

I will take up no more of your precious time except to thank you most warmly for answering our call and to stress yet again that the ultimate aim of this meeting is better protection for the victims of war. It is important for us to keep this overriding aim in mind, even in a meeting that will go into highly specialized and sometimes very technical details.

The importance of complying with international humanitarian law

Cornelio Sommaruga
President of the ICRC

Thirty years ago, Martin Luther King, that great champion of civil rights, declared that our technological prowess had far surpassed our spiritual capacity: “*Our scientific power has outrun our spiritual power. We have guided missiles and misguided men.*” Unfortunately, this remains true in our day. Indeed, it seems that throughout history, humanity’s power to inflict suffering has exceeded its power to prevent cruelty, to alleviate distress and to punish evil. And yet, the conquests of civilization — science and technology, essentially, and the rule of law — have made it possible to defend and promote the principle of respect for human dignity. Whether as nurses on the battlefield or judges in the courtroom, men and women of noble heart and informed mind have put their skills at the service of humanity.

It therefore gives me great pleasure to welcome you to this very special ICRC event. For over 130 years, our organization has been endeavouring to protect and assist the victims of armed conflict, with the support of dedicated people — all experienced professionals — throughout the world. Ladies and Gentlemen, you are eminent jurists from all over the globe and come from a long and prestigious line. I thank you for your presence here, for your commitment and for the important work you are undertaking.

Promoting international humanitarian law has always been a key objective for the ICRC. Henry Dunant’s initial vision — the very basis of the International Red Cross and Red Crescent Movement — comprised two main aspects: humanitarian action on the battlefield and international rules designed to alleviate the suffering caused by war. This vision was reflected in the composition of the original International Committee which, in addition to Henry Dunant, included the lawyer Gustave Moynier and men who practised medicine or had military experience. General Guillaume-Henri Dufour, one of the five founders of the ICRC, had calmly declared to his troops of the Swiss federal army in 1847 — 11 years before becoming the organization’s first President: “*We must emerge from this struggle not just victorious, but also above reproach. People must be able to say of you, ‘They fought*

valiantly when they had to, but were always humane and generous'. [...] Anyone who lifts a hand against a harmless person brings dishonour on himself and sullies his flag [...]."

Turning to good account its delegates' experience in the field, the ICRC has for over 130 years tried to develop humanitarian law — to extend protection for those not or no longer taking part in the fighting, and to limit the means and methods of warfare. This is a never-ending challenge. We must be determined and imaginative in foreseeing technological progress and the misuse of human achievements. And there are spectacular successes, it must be said. Last week in Oslo, after a difficult campaign, a treaty banning anti-personnel mines was finally signed. This is an important victory for the international community, and for the ICRC, and a first step towards a world freed from the scourge of mines.

But developing the law is not enough. Without implementation, the law is quite simply a dead letter — an exercise in theory. If we wish to attain its noble objectives, we must comply with it. Implementation is without doubt the greatest challenge facing international humanitarian law today. You need only open the newspaper or turn on the television to learn that people protected by the law in wartime have once again fallen victim to acts of horrendous violence. The reports from our delegates in the field that I read in my office send a shiver down my spine. But they must serve to stiffen our determination to eliminate such barbarism.

Those who have worked so hard to develop humanitarian law have also sought to put in place mechanisms designed to ensure that it is respected. It is vital for all those concerned by ordinary and military law to be familiar with its provisions. Making humanitarian law widely known is both a clear obligation for governments and a major activity for the ICRC. Today we have delegates responsible for “dissemination” all over the world, in particular specialists who work directly with the armed forces, with government representatives and with academics. In each case, the message and the medium used must be adapted to the particular audience. Knowledge of humanitarian law can be spread through activities as diverse as puppet shows, university seminars, radio serials, school books, rock music and military manuals.

It is likewise vital to take action at the international level to ensure respect for humanitarian law. Under Article 1 common to the Geneva Conventions, States must not only respect but also “ensure respect for” the law. The ICRC strives constantly, both bilaterally and within

intergovernmental organizations, to remind States of their international obligations. It encourages those that have not yet done so to ratify the main treaties of humanitarian law and to accept the competence of the International Fact-Finding Commission, in accordance with Article 90 of Additional Protocol I. This Commission remains, in my view, an important international mechanism for promoting compliance with the law. Once it has been called upon, its value and the skills of its members will be widely acknowledged.

Nonetheless, while diplomatic action is vital, compliance with humanitarian law ultimately depends on each individual — whether on the battlefield, in places of detention, at military headquarters or in exalted stations of government. Humanitarian law was one of the first spheres of international law in which it emerged clearly that every individual — and not just the State — was responsible for his own acts. The message is simple but powerful. Grave breaches of humanitarian law are crimes — heinous crimes. Those responsible must be tried and punished in the same way as any other criminal. War, reason of State, military necessity — none of these can possibly justify the ill-treatment of persons protected by humanitarian law. Murder, torture and rape are crimes in time of war as in peacetime. They must be punished.

As you know, humanitarian law has gone further. The Geneva Conventions were among the first treaties to *require* States to pursue the perpetrators of such crimes — and to do so regardless of their nationality or of the place where they committed them. We must do whatever is needed to ensure that there is no refuge for war criminals. Applying the principle of individual responsibility is undoubtedly an important means of ensuring that international humanitarian law is respected.

For many years, we watched in frustration as those guilty of war crimes went unpunished, the obligation to call them to account simply being ignored. Today, however, new events are taking place that will leave their mark on history. As I speak, international criminal tribunals — the first for 50 years — are in session in The Hague and Arusha. Negotiations on the setting up of a permanent international criminal court are progressing within the United Nations. The ICRC is fully behind all these efforts. For me it is an honour, and a pleasure, to see among us high-ranking judges from these tribunals, and the people who have worked tirelessly to have them set up.

Nevertheless, we must not act solely at the international level. As I pointed out earlier, States are clearly obliged to bring war criminals before their national courts, and this is what we are seeing at present — undoubtedly at the instigation of the international community, which is fired with a new sense of determination. Although the number of trials is limited, the example they give is of paramount importance. It is also an honour and a pleasure for me to welcome those who have made such a decisive contribution to ensuring that justice is done in their own countries.

* * * * *

The ICRC attaches the utmost importance to everything that can be done at the national level to prevent and repress violations of international humanitarian law. At the request of the international community, it has set up an Advisory Service, which has the task of assisting and advising governments and National Red Cross and Red Crescent Societies on measures to implement humanitarian law in their respective countries.

In its first two years of existence, the Advisory Service has been active the world over: it has encouraged States to ratify the humanitarian law treaties, urged them to set up commissions or other national bodies for the law's implementation and advised their legislators in these matters. But we cannot act alone; nor do we wish to.

Throughout its history, the ICRC has sought to join forces with internationally renowned experts, and it continues to do so today. I am therefore particularly grateful to you for agreeing to come here to discuss questions relating to criminal law and jurisdiction over criminal offences. These are complex technical issues, but they are extremely important in practical terms. Your conclusions will be most valuable to us in pursuing our task, and your contribution will constitute a key component of the effort being made constantly, the world over, to ensure respect for international humanitarian law.

Once again, I would like to thank you all, especially my ICRC colleagues. Our common aim is to promote humanitarian principles so as to protect the victims of armed conflict. Lawyers, public prosecutors and judges form an integral part of this process. Repressing war crimes — regardless of where they have been committed or the nationality of the accused — is vital if the law is to be respected. It is a powerful deterrent!

Cesare di Beccaria, in his treatise *On Crimes and Penalties*, declared: “[...] The aim of punishment must therefore be to prevent the guilty from doing fresh harm to his fellow citizens and to dissuade others from doing similar harm [...].”

Which prompts me to conclude by stressing the responsibility — for all of us — to promote the national repression of violations of international humanitarian law.

Ad augusta per augusta!

The repression of violations of international humanitarian law at national level and the work of the ICRC Advisory Service

María Teresa Dutli

*Head of the ICRC Advisory Service
on International Humanitarian Law*

1. The role of the ICRC's Advisory Service on International Humanitarian Law

For many years the ICRC has done its utmost to encourage and assist States in their efforts to implement international humanitarian law at the national level. To extend its activities in this sphere, it has set up an Advisory Service on International Humanitarian Law whose aim is to provide — at the request of States or with their consent — technical assistance in the adoption of national laws and regulations pertaining to international humanitarian law.

The Advisory Service, which has existed since 1995, works in a decentralized manner with lawyers based on every continent. Among its priority areas of activity are the following:

- translation of the Geneva Conventions and their Additional Protocols into national languages;
- where necessary, incorporation of international humanitarian law into national law;
- adoption of criminal legislation to repress war crimes;
- adoption of legislation to ensure respect for the emblem;
- incorporation of teaching on humanitarian law into official curricula;
- setting-up of national information offices.

The Advisory Service has a documentation centre for gathering relevant information and the texts of domestic laws and regulations; it makes these available to the authorities concerned, both on paper and by electronic means.

In the areas given priority coverage by the Advisory Service, all problems relating to the measures necessary for the national repression of violations

of the international humanitarian law treaties are supremely important. Punishment must be an integral part of any coherent legal system, and the threat of punishment acts as a major deterrent, thereby promoting progress towards improved respect for the law.

2. National repression under the system provided for in the international humanitarian law treaties

The Geneva Conventions of 1949 for the protection of war victims and their Additional Protocols I and II, applicable in situations of international and non-international armed conflicts respectively, create for States the obligation to take the legislative measures necessary to punish any of the grave breaches enumerated in those texts. Furthermore, States must take appropriate steps to prevent and put a stop to other acts that are contrary to the provisions of these treaties but are not specifically designated as grave breaches. Other international humanitarian law texts, in particular the 1980 Convention on Conventional Weapons and its Protocols, also create an obligation to take legal action to repress certain breaches, but that is an issue we will not go into here.

3. What needs to be included in national legislation to meet the obligations imposed by the treaties?

Criminal legislation promulgated to punish violations of international humanitarian law should at least:

- specify the nature and extent of the punishment for each breach, taking into account the principle whereby the punishment must be in proportion to the seriousness of the crime;
- recognize the individual criminal responsibility not only of the persons who commit a breach but also of those who order it to be committed;
- recognize the individual criminal responsibility of superior officers;
- provide in particular for the repression of breaches committed by omission, in cases where the omission is not already punishable under ordinary domestic law;
- rule out political, military or national interest and necessity, and orders from a superior, as grounds for exemption from punishment;
- specify a material and personal scope allowing application of the law to anyone who commits one of these breaches, regardless of the nationality of the accused or the place where the act was committed;

- guarantee every person prosecuted and tried for such a violation the right to a fair trial by an impartial, regularly constituted court, and to regular legal proceedings that respect generally recognized judicial guarantees;
- respect the obligation to facilitate cooperation with other States as concerns mutual assistance in criminal matters and extradition.

4. The activities of the ICRC's Advisory Service with regard to the national repression of violations of international humanitarian law treaties

Through its Advisory Service, the ICRC has carried out technical assessments of national criminal legislation in force or in preparation in various countries, with the aim of including the repression of war crimes in these texts. The assessments were carried out in close cooperation with the authorities and the National Society of each country.

As an example, over the past 18 months there has been regular contact with the authorities of the following countries.

- ♦ **Colombia:** at the request of the *Consejería Presidencial para los Derechos Humanos*, national legislation was analysed. A draft text amending the Penal Code has now been submitted to the authorities.
- ♦ **United States:** jointly with the National Society, contacts have been established with the House of Representatives and the State Department in connection with the law on the repression of war crimes. The United States War Crimes Act entered into force on 21 August 1996. This text represses grave breaches of the Geneva Conventions and any protocol to which the United States is a party, whether these breaches are committed by or against a United States national or in the service of such a national, whether on national territory or outside it.
- ♦ Similar activities were carried out in **Costa Rica, Guatemala, Rwanda** and **Togo**, among other places.

All the countries in Eastern Europe and Central Asia are going through a period of legislative change owing to the major political upheavals that have occurred in the region. One aspect of this change is the adoption of new criminal legislation. Following contacts with representatives of the national authorities — Ministries of Justice, Supreme Courts — the ICRC was asked to prepare expert technical reports on these new instruments. To date, such

studies have been conducted in the following countries: **Armenia, Belarus, Estonia, Georgia, Kyrgyzstan, Lithuania, Tajikistan, Turkmenistan and Ukraine.**

Working papers have been submitted to the authorities in order to launch discussion on the best way to include the repression of grave breaches in national legislation and to incorporate it into the current process of legislative revision.

This is not an easy task for several reasons, in particular because the national repression of war crimes raises a number of difficulties for legislatures and the authorities responsible for applying the law, given its specific nature and characteristics. Some examples one could cite are the requirement of universal jurisdiction, and the fact that the concepts used in international law and its — sometimes rather vague — wording are different from those used in domestic law, which is more familiar to national judges.

5. Main problems involved in transferring international obligations to the domestic level

To provide a foundation and to give examples of the methods used by some countries in making grave breaches of humanitarian law punishable at the national level, the ICRC has commissioned studies from correspondents in Belgium, France, Germany, Spain and Switzerland, on the basis of a questionnaire. The aim of these studies is precisely to analyse the different methods used at the national level and to draw conclusions about the advantages and/or disadvantages of the various systems and their application. The studies requested have been examined and summarized in a background paper for this meeting.

In addition, papers have been drafted for the meeting on the following subjects:

- ♦ obligations of States with regard to national repression (*specifies the sources, grounds and scope of the obligation to repress incumbent on States*);
- ♦ methods of incorporating punishment for violations of international humanitarian law into national legislation (*sets out the various methods possible for translating into domestic law the commitments arising from international law*);

- ♦ omissions and responsibility of superiors (*violations of international humanitarian law often take the form of failure to act, and in this regard the issue of the responsibility of superiors is a fundamental one*);
- ♦ time-barring (*describes the current situation in international law and invites States to provide that there shall be no time bar for serious violations of international humanitarian law*);
- ♦ criminal procedure (*in respecting the judicial guarantees provided for in international law, States have a good deal of room for manoeuvre — this paper addresses the very serious consequences their choices may have*);
- ♦ universal jurisdiction (*one of the main features of the system for repressing violations of international humanitarian law is the prosecution and trial of perpetrators, whatever their nationality and wherever the breach was committed — this paper sets out the grounds for and describes the application of universal jurisdiction*).

On the basis of these background papers and the above-mentioned studies conducted by national experts, the meeting will address the following questions in working groups:

- legislative approach: *how can/should national legislatures incorporate the repression of violations into domestic law*
 - *with regard to criminalization*
 - *with regard to the place of incorporation*
- general principles of criminal law: *universal jurisdiction*
 - *time-barring*
 - *order from a superior*
 - *breach by omission*
- jurisdiction and organization of prosecution.

These will be supplemented by presentations on the relationship between the ad hoc Tribunals for the former Yugoslavia and Rwanda and national jurisdictions, and on the work of the Congress of the International Society for Military Law and the Law of War, which addressed the issue of the national repression of war crimes at its recent session in Athens.

6. Other activities of the Advisory Service

Following this meeting, the proceedings of which will be published, the Advisory Service intends to prepare information sheets on various issues that have a bearing on the repression of war crimes at the domestic level, in

order to help those concerned reach conclusions about the advantages and/or disadvantages of different possible solutions.

Furthermore, this meeting, which is confined to experts from countries with civil law systems, is the first in a series. A similar meeting is already being planned for 1998, this time with experts from countries using the *common law* system. The aim will be to discuss the same subjects and gather proposals tailored to the different legal systems.

Decentralized regional meetings will also be held to discuss the systems and methods that are most appropriate for each region and each country. With this in mind, a first regional meeting, which will give priority to the issue of national repression, will take place in Bishkek, Kyrgyzstan, on 9 and 10 October 1998, with the participation of the five Central Asian republics and representatives from the Baltic countries.

A seminar on the national implementation of international humanitarian law will be held early in December in the Russian Federation, and this too will give priority to the question of the national repression of violations of this body of law.

Finally, a regional meeting planned for next year in Central America will bring together representatives of both the authorities and the National Societies to discuss this crucial issue.

In conclusion, we feel it is important to underline that in order to promote the adoption of effective and practicable domestic systems for repressing violations of the rules of international humanitarian law, and given the individual characteristics peculiar to each system and the difficulties inherent in the subject, we have attempted to follow an inductive method of research based on national experiences that point to conclusions we can pass on to others. We have endeavoured to examine a number of important points with acknowledged experts in this field — both practitioners and academics — and to share the discussions and the conclusions drawn from the debates at both the regional and national levels, so that they may be given practical effect.

The need for international accountability*

M. Cherif Bassiouni

Professor of Law

International Human Rights Institute

DePaul University, Chicago

Rabban Simeon ben Gamaliel said:

The world rests on three pillars: on truth, on justice and on peace (Abot 1, 18).

A Talmudic commentary adds to this saying:

The three are really one. If justice is realized, truth is vindicated and peace results.

Prophet Mohammed, in a *Hadith* (Saying), said:

*If you see a wrong you must right it;
with your hand if you can (meaning by action), or,
with your words, or,
with your stare, or
in your heart, and that is the weakest of faith.*

Pope Paul VI, in a Message for the Celebration of the “World Day of Peace,” January 1, 1972,** said:

If You Want Peace, Work For Justice.

The historical context

Since World War II, the number of conflicts of an international character declined, as did their harmful impact, in comparison to other types of conflicts whose harmful consequences increased. Indeed, the occurrence of conflicts of a non-international character and purely internal conflicts has dramatically increased in number, intensity and victimization far exceeding the harmful results, both quantitatively and qualitatively, generated by all other types of conflicts.¹

Conflicts of a non-international character, purely internal conflicts and tyrannical regime victimization have, and continue to occur all over the

* Reprinted, with the kind permission of the publishers, from M. Cherif Bassiouni (ed.), *International Criminal Law: Enforcement*, second edition, Volume III, Transnational Publishers, Ardsley, New York. This article is the final version of the paper delivered by Professor Bassiouni at the meeting of experts.

** Ways of peace: Papal messages for the World Days of Peace (1968-1986).

world. That victimization includes genocide, crimes against humanity and war crimes, along with, *inter alia*, extra-judicial executions, torture, and arbitrary arrest and detention, all of which constitute serious violations of fundamental human rights protected by international human rights law.²

During the course of the twentieth century it is estimated that conflicts of a non-international character, internal conflicts and tyrannical regime victimization have resulted in over 170 million deaths.³ This is compared with an estimated 33 million military casualties which have resulted over the same period of time.⁴ Since World War II alone, it is estimated that more than 250 conflicts of a non-international character, internal conflicts and tyrannical regime victimization have occurred. These post-World War II situations have resulted in an estimated 86 million casualties.⁵

Yet, notwithstanding this high level of victimization, there have been few prosecutions, whether at the international or national level. In fact, since the post-World War II prosecutions, there have been only: two internationally established *ad hoc* investigatory commissions and two *ad hoc* tribunals (for Yugoslavia and Rwanda respectively);⁶ one international truth commission (for El-Salvador,⁷ which did not, however, generate prosecutions); two national prosecution systems established in the aftermath of conflicts (in Ethiopia and Rwanda); some select national prosecutions (in Argentina⁸ and Chile,⁹ where a national inquiry commission was also set up); and a special body called “The Truth and Reconciliation Commission in South Africa,”¹⁰ from which some prosecutions may be generated. In some Eastern and Central European countries, “lustration” laws have been passed to remove persons of the past regime from office, but only a few prosecutions have taken place.¹¹ For all practical purposes, very little else has occurred, and even these existing accountability mechanisms have produced few tangible results. Only a few of the perpetrators of the crimes described above have ever faced justice, including those who committed *jus cogens* crimes such as genocide, crimes against humanity, war crimes and torture, for which there is a duty to prosecute and punish. Furthermore, even the basic truths of what happened in these conflicts — how they evolved and why, by whom such victimization occurred, and what was the quantum of victimization — has only seldom been exposed by governmental or international bodies. That task, with all its understandable limitations, has been undertaken primarily by NGOs, dedicated journalists, and committed researchers, to whom so much is owed for fulfilling this needed function.

The question arises as to why there have been so few instances of prosecution and other accountability mechanisms. The answer is that justice is all too frequently bartered away for political settlements. Whether in international, non-international or purely internal conflicts, the practice of impunity has become the political price paid to secure an end to the violence of ongoing conflicts, or as a means to ensure tyrannical regime changes.¹² In these bartered settlements, the victims' rights become the objects of political trade-offs, and justice becomes, depending upon one's perspective, the victim of *realpolitik*.

Bartering away justice for political results, albeit in the pursuit of peace, is the goal of most political leaders who seek to end conflicts or facilitate transitions to nontyrannical regimes. The grim reality is that in order to obtain peace, negotiations must be held with the very leaders who frequently are ones who committed, ordered, or allowed atrocious crimes to be committed. Thus, the choice presented to negotiators is whether to have peace or justice. Sometimes this dichotomy is presented along more sophisticated lines: peace now, and justice some other time.¹³ The choice is, however, frequently fallacious and the dichotomy may be tragically deceptive. Surely, no one can argue that peace is unnecessary and not preferable to a state of violence. But the attainment of peace is not necessarily to the exclusion of justice, because, frequently, justice is necessary to attain peace.

The question thus arises as to the meaning of the word "peace" — namely, its scope, goals and duration. Indeed, the word "peace" is used freely in the context of ending conflicts or insuring transition to nontyrannical regimes. But, the word is used without being defined, or more particularly, without any identification of what the peace goal is or how long the purported peace is designed to last. There is, therefore, a wide range to what peace can mean. In the political discourse of ending conflicts it ranges from the cessation or absence of hostilities to popular reconciliation and forgiveness between social groups previously in conflict with one another. It also includes the removal of a tyrannical regime or leader, and the effectuation of a regime change. The processes of attaining peace, whatever the intended outcomes may be, vary in accordance with the type of conflict, its participants, the level of victimization, the manner in which the victimization occurred, other destructive conduct by opposing groups and popular perceptions of what occurred, as well as the future expectations of popular reconciliation between, or co-existence amongst, opposing groups. Peace, therefore,

encompasses a wide range of policy options, some of which can be combined to attain that end. But, in a world order based on the rule of law and not on the rule of might, the attainment of peace to end conflicts cannot be totally severed from the pursuit of justice whenever justice may be required in the aftermath of violence. Granted, peace and justice are ideals founded on certain values whose meaning varies epistemologically and according to group and individual beliefs. Yet, however relative these ideals and their outcomes may be, they are nonetheless subject to the world community's norms and standards which represent the threshold of international legality. If peace is not intended to be a brief interlude between conflicts, it must, in order to avoid future conflict, encompass what justice is intended to accomplish: prevention, deterrence, punishment and rehabilitation.

Realists and *realpolitik* proponents argue that every conflict is *sui generis* and that the variables of each conflict are so diverse that the conflicts cannot be categorized, or characterized in a way that a common international legal regime can be applicable to the varied situations. While there is no doubt that every conflict has its own peculiarities, and can even be labeled *sui generis*, that reality, in itself, however, does not and cannot exclude the application of existing international legal norms such as those relative to the regulation of armed conflicts of an international character and of a non-international character, as well as those relative to times of war and of peace (namely, crimes against humanity, genocide and torture) and irrespective of legal characterization.

The normative framework

The normative framework that applies to armed conflicts, whether of an international or non-international character and to internal conflicts, has certain weaknesses and gaps. While conflicts of an international character are adequately covered by the four Geneva Conventions of 1949¹⁴ and Protocol I of 1977,¹⁵ conflicts of a non-international character are less adequately covered by common article 3 of the four Geneva Conventions of 1949 and Protocol II of 1977.¹⁶ Furthermore, purely internal conflicts and tyrannical regime victimization are not covered by these and other aspects of the regulation of armed conflicts, including the customary law of armed conflicts.¹⁷ Notwithstanding the above weaknesses, crimes against humanity,¹⁸ genocide,¹⁹ and torture²⁰ apply to all these contexts, irrespective of legal characterization or the nature of the conflict. Still,

crimes against humanity have yet to be embodied in a specialized convention which would clarify certain ambiguities relative to its earlier formulation in Article 6(c) of the International Military Tribunal's Statute.²¹ In addition, both genocide and crimes against humanity have certain normative weaknesses. As to genocide, certain groups are not included in the Convention's protective scheme, and the requirement of a specific intent required by the Convention is a high threshold which is frequently difficult to prove. Lastly, there is an obvious overlap between genocide and crimes against humanity, as well as an overlap between these two crimes and war crimes. These overlaps need to be clarified.

Notwithstanding the weaknesses and gaps in the normative framework of the three major categories of international crimes, namely genocide, crimes against humanity and war crimes (irrespective of context), there is also a significant weakness in the practice of states with respect to carrying out the underpinning of these normative proscriptions — an underpinning consisting of two duties; namely, the duty to prosecute or extradite and the duty of states to cooperate with other states in the investigation, prosecution and adjudication of those charged with such crimes, and the punishment of those who are convicted of such crimes.²² Although the duty to prosecute or extradite exists in the Genocide Convention,²³ the Geneva Conventions of 1949²⁴ and Protocol I of 1977,²⁵ it does not exist in conventional law with respect to crimes against humanity due to the fact that there is no specialized convention for that category of crimes, as mentioned above.²⁶ Nor do these obligations explicitly exist with respect to common article 3 of the four Geneva Conventions of 1949 and Protocol II of 1977,²⁷ applicable to conflicts of a non-international character, even though it can be argued that such obligations implicitly exist. It should be noted, however, that in 1971 the United Nations General Assembly adopted a resolution on war criminals,²⁸ affirming that a state's refusal "to cooperate in the arrest, extradition, trial and punishment" of persons accused or convicted of war crimes and crimes against humanity is "contrary to the United Nations Charter and to generally recognized norms of international law."²⁹ Further, in 1973, a resolution was adopted by the United Nations General Assembly entitled "*Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*."³⁰ No specialized international convention, however, has been passed on that subject, and therefore, the duty to prosecute or extradite, while argued for by scholars, needs,

nonetheless, to be proven as part of customary international law in the absence of a specific convention establishing such an obligation.³¹

Of course, the duty to prosecute or extradite could not be effective if statutes of limitations applied. Thus, in 1968, the United Nations adopted a “Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,”³² and similarly, in 1974, the Council of Europe adopted a “European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European).”³³ It is disturbing, however, that the United Nations convention has been ratified by only 54 states,³⁴ and the European convention by only one,³⁵ thus indicating a marked reluctance on the part of the 185 member states of the United Nations to support the proposition that no time prescriptions should apply to these crimes, and thereby making more difficult their prosecution. Surely, the existence of statutes of limitations weakens the underpinnings of a normative scheme which already has troublesome gaps.

There exists another impediment to the national enforcement of genocide, crimes against humanity, and in some respects, war crimes: the limited recognition and application of the theory of universal jurisdiction to such crimes.³⁶ Indeed, few states recognize the application of the theory of universality.³⁷ Surely, if more states would recognize and apply this theory of jurisdiction, national criminal justice systems would have the competence to exercise their jurisdiction for such crimes.³⁸ Furthermore, few countries have enacted national legislation needed to prosecute genocide and crimes against humanity.³⁹

Crimes against humanity, genocide, war crimes (under conventional and customary regulation of armed conflicts), and torture are international crimes which have risen to the level of *jus cogens*.⁴⁰ As a consequence, the following duties arise: the obligation to prosecute or extradite, the obligation to provide legal assistance, the obligation to eliminate statutes of limitations, and the obligation to eliminate immunities of superiors up to and including heads of states. Under international law, these obligations are to be considered as *obligatio ergo omnes*, the consequence of which is that impunity cannot be granted.⁴¹ These crimes establish inderogable protections and the mandatory duty to prosecute or extradite accused perpetrators, and to punish those found guilty, irrespective of locus since universal jurisdiction presumably applies. And, as stated above, there can be no statutory limitations for these crimes. What is needed, therefore, is the

uniform application of these norms to the same types of victimization irrespective of the contexts in which they occur and regardless of how they are legally characterized, but the enforcement of these norms and their nonderogation through political settlements and peace arrangements. The protections afforded victims and the responsibility befalling perpetrators and their leaders should not be bound by the legal characterization of the nature of a given conflict, nor should they be bound by the expectations of political settlements and peace arrangements.

Even though the weaknesses and gaps of the normative scheme discussed above must be resolved, this does not mean that existing norms are insufficient to apply to the crimes in question.⁴² There are, indeed, sufficient norms; what is lacking is the political will to enforce them. The establishment of a permanent international criminal court will certainly contribute to the enhancement of international enforcement.⁴³ But, even when an international criminal court is established it will have to be considered as being on the same continuum as national criminal courts, and in order to achieve effective deterrence, all these legal systems will have to work in a complementary way to reinforce one another.

International crimes: *jus cogens* and *obligatio erga omnes*

International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the nonapplicability of statutes of limitations for such crimes, the nonapplicability of any immunities up to and including heads of state, the nonapplicability of the defense of “obedience to superior orders” (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their nonderogation under “states of emergency”, and universal jurisdiction over perpetrators of such crimes.

Jus cogens as a binding source of legal obligation in international criminal law

Jus cogens refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime’s characterization as *jus cogens*. Thus, these two concepts are different from each other.

International law has dealt with both concepts, but mostly in contexts that do not include international criminal law (“ICL”).⁴⁴ The national criminal law of the world’s major legal systems and ICL doctrine have, however scantily, dealt with each of the two concepts.⁴⁵ Furthermore, the positions of publicists and penalists on this question diverge significantly. The main divisions concern how a given international crime achieves the status of *jus cogens* and the manner in which such crimes satisfy the requirements of the “principles of legality”.⁴⁶

With respect to the consequences of recognizing an international crime as *jus cogens*, the threshold question is whether such a status places *obligatio erga omnes* upon states, or merely gives them certain rights to proceed against perpetrators of such crimes. This threshold question of whether *obligatio erga omnes* carries with it the full implications of the Latin word *obligatio*, or whether it is denatured in international law to signify only the existence of a right rather than a binding legal obligation, has neither been resolved in international law nor addressed by ICL doctrine.

To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are nonderogable in times of war as well as peace.⁴⁷ Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite,⁴⁸ the nonapplicability of statutes of limitation for such crimes,⁴⁹ and universality of jurisdiction⁵⁰ over such crimes irrespective of where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.⁵¹

Positive ICL does not contain such an explicit norm as to the effect of characterizing a certain crime as part of *jus cogens*. Furthermore, the practice of states does not conform to the scholarly writings that espouse these views. The practice of the states evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations.

There is also much question as to whether the duty to prosecute or extradite is in the disjunctive or in the conjunctive,⁵² which of the two has priority over the other and under what circumstances, and, finally, whether implicit conditions of effectiveness and fairness exist with respect to the duty to prosecute and with respect to extradition leading to prosecution.⁵³

The gap between legal expectations and legal reality is, therefore, quite wide. It may be bridged by certain international pronouncements⁵⁴ and scholarly writings,⁵⁵ but the question remains whether such a bridge can be solid enough to allow for the passage of these concepts from a *desideratum* to enforceable legal obligations under ICL, creating state responsibility in case of noncompliance.⁵⁶

Jus cogens crimes

The term “*jus cogens*” means “the compelling law” and, as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles.⁵⁷ As a consequence of that standing, *jus cogens* norms are deemed to be “peremptory” and nonderogable.⁵⁸

Scholars, however, disagree as to what constitutes a peremptory norm and how a given norm rises to that level. The basic reasons for this disagreement are the significant differences in philosophical premises and methodologies of the views of scholarly protagonists. These differences apply to sources, content (the positive or norm-creating elements), evidentiary elements (such as whether universality is appropriate, or less will suffice), and value-oriented goals (for example, preservation of world order and safeguarding of fundamental human rights). Furthermore, there is no scholarly consensus on the methods by which to ascertain the existence of a peremptory norm, nor to assess its significance or determine its content. Scholars also disagree as to the means to identify the elements of a peremptory norm, to determine its priority over other competing or conflicting norms or principles, to assess the significance and outcomes of prior application, and to gauge its future applicability in light of the value-oriented goals sought to be achieved.⁵⁹

Some scholars see *jus cogens* sources and customary international law as the same,⁶⁰ others distinguish between them,⁶¹ while still others question whether *jus cogens* is simply not another semantical way of describing certain “general principles”.⁶² This situation adds to the level of uncertainty as to whether *jus cogens* is a source of ICL.

The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*.⁶³ This legal basis consists of the following: (1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law;⁶⁴ (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law;⁶⁵ (3) the large number of states which have ratified treaties related to these crimes;⁶⁶ and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.⁶⁷

If a certain rigor is to apply, however, this legal basis cannot be examined in a cumulative manner. Instead, each one of these crimes must be examined separately to determine whether it has risen to a level above that stemming from specific treaty obligations, so that it can therefore be deemed part of general international law applicable to all states irrespective of specific treaty obligations.⁶⁸ To pursue the approach suggested, it is also necessary to have a doctrinal basis for determining what constitutes an international crime and when in the historical legal evolution of a given crime it can be said to achieve the status of *jus cogens*.⁶⁹

As discussed below, certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity.⁷⁰ If both elements are present in a given crime, it can be concluded that it is part of *jus cogens*. The argument is less compelling, though still strong enough, if only one of these two elements is present.⁷¹ Implicit in the first, and sometimes in the second element, is the fact that the conduct in question is the product of state-action or state-favoring policy. Thus, essentially, a *jus cogens* crime is characterized explicitly or implicitly by state policy or conduct, irrespective of whether it is manifested by commission or omission. The derivation of *jus cogens* crimes from state policy or action fundamentally distinguishes such crimes from other international crimes. Additionally, crimes which are not the product of state-action or state-favoring policy often lack the two essential factors which establish the *jus cogens* status of a particular crime, namely a threat to the peace and security of mankind and conduct or consequences which are shocking to the conscience of humanity.

Each of these *jus cogens* crimes, however, does not necessarily reflect the co-existence of all the elements. Aggression is on its face a threat to peace and security, but not all acts of aggression actually threaten the peace and security of humankind. While genocide and crimes against humanity shock mankind's conscience, specific instances of such actions may not threaten peace and security. Similarly, slavery and slave-related practices and torture also shock the conscience of humanity, although they rarely threaten the peace and security. Piracy, almost nonexistent nowadays,⁷² neither threatens peace and security nor shocks the conscience of humanity, although it may have at one time.⁷³ War crimes may threaten peace and security; however, their commission is only an aggravating circumstance of an already existing condition of disruption of peace and security precisely because they occur during an armed conflict, whether of an international or non-international character. Furthermore, the extent to which war crimes shock the conscience of humanity may depend on the context of their occurrence and the quantitative and qualitative nature of crimes committed.⁷⁴

Three additional considerations must be taken into account in determining whether a given international crime has reached the status of *jus cogens*. The first has to do with the historical legal evolution of the crime. Clearly, the more legal instruments that exist to evidence the condemnation and prohibition of a particular crime, the better founded the proposition that the crime has risen to the level of *jus cogens*.⁷⁵ The second consideration is the number of states that have incorporated the given proscription in their national laws.⁷⁶ The third consideration is the number of international and national prosecutions for the given crime and how they have been characterized.⁷⁷ Additional supporting sources that can be relied upon in determining whether a particular crime is a part of *jus cogens* is other evidence of "general principles of law"⁷⁸ and the writings of the most distinguished publicists.⁷⁹

The jurisprudence of the Permanent Court of International Justice ("PCIJ") and the International Court of Justice ("ICJ") is also instructive in determining the nature of a particular crime. The ICJ, in its opinion in *Nicaragua v. United States: Military and Paramilitary Activities in and Against Nicaragua*,⁸⁰ relied on *jus cogens* as a fundamental principle of international law. However, that case also demonstrates the tenuous basis of using of legal principles to resolve matters involving ideological or political issues or calling for other value judgments.⁸¹ Earlier, the ICJ held that the

prohibition against genocide is a *jus cogens* norm that cannot be reserved or derogated from.⁸²

As noted above, *jus cogens* leaves open differences of values, philosophies, goals, and strategies of those who claim the existence of the norm in a given situation and its applicability to a given legal issue.⁸³ Thus, *jus cogens* poses two essential problems for ICL; one relates to legal certainty and the other to a norm's conformity to the requirements of the "principles of legality". The problem of normative positivism becomes more evident in the case of a void in positive law in the face of an obvious and palpable injustice, such as with respect to crimes against humanity, as enunciated in the Statute of the International Military Tribunal ("IMT") in the London Charter of August 8, 1945.⁸⁴ The specific crimes defined in Article 6(c) of the London Charter fall into the category of crimes which were not addressed by positive law, but depended on other sources of law to support implicitly the formulation of a crime.⁸⁵ Proponents of natural law advocate that *jus cogens* is based on a higher legal value to be observed by prosecuting offenders, while proponents of legal positivism argue that another principle whose values and goals are, at least in principle, of that same dignity, namely the "principle of legality" — *nullum crimen sine lege* — should prevail.⁸⁶ A value-neutral approach is impossible; thus, the only practical solution is the codification of ICL.⁸⁷

Obligatio erga omnes

The *erga omnes* and *jus cogens* concepts are often presented as two sides of the same coin. The term *erga omnes* means "flowing to all", and so obligations deriving from *jus cogens* are presumably *erga omnes*.⁸⁸ Indeed, legal logic supports the proposition that what is "compelling law" must necessarily engender an obligation "flowing to all".

The problem with such a simplistic formulation is that it is circular. What "flows to all" is "compelling", and if what is "compelling" "flows to all", it is difficult to distinguish between what constitutes a "general principle" creating an obligation so self-evident as to be "compelling" and so "compelling" as to be "flowing to all", that is, binding on all states.⁸⁹

In the *Barcelona Traction* case, the ICJ stated,

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By

their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁹⁰

Thus, the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the ICJ, “the obligations of a state towards the international community as a whole”.⁹¹ While the ICJ goes on to give examples of such obligations in *Barcelona Traction*,⁹² it does not define precisely what meaning it attaches to the phrase “obligations of a state towards the international community as a whole”.⁹³

The relationship between *jus cogens* and *obligatio erga omnes* was never clearly articulated by the PCIJ and the ICJ, nor did the jurisprudence of either court explicitly articulate how a given norm becomes *jus cogens*, or why and when it becomes *erga omnes* and what consequences derive from this. Obviously, a *jus cogens* norm rises to that level when the principle it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio juris*, by most states.⁹⁴ Thus, the principle of territorial sovereignty has risen to the level of a “peremptory norm” because all states have consented to the right of states to exercise exclusive territorial jurisdiction.⁹⁵

Erga omnes, as stated above, however, is a consequence of a given international crime having risen to the level of *jus cogens*.⁹⁶ It is not, therefore, a cause of or a condition for a crime’s inclusion in the category of *jus cogens*.

The contemporary genesis of the concept *obligatio erga omnes* for *jus cogens* crimes is found in the ICJ’s advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*.⁹⁷ The concept also finds support both in the ICJ’s *South West Africa* cases⁹⁸ as well as from the *Barcelona Traction*⁹⁹ case. However, it should be noted that the *South West Africa* cases dealt, *inter alia*, with human rights violations and not with international crimes *stricto sensu*¹⁰⁰ and that the *Barcelona Traction* case concerned an issue of civil law.

It is still uncertain in ICL whether the inclusion of a crime in the category of *jus cogens* creates rights or, as stated above, nonderogable duties *erga omnes*. The establishment of a permanent international criminal court having inherent jurisdiction over these crimes is a convincing argument for the proposition that crimes such as genocide, crimes against humanity, war

crimes and torture are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them.¹⁰¹

Conclusion

There are both gaps and weaknesses in the various sources of ICL norms and enforcement modalities. The work of the ILC in formulating the 1996 Draft Code of Crimes is insufficient. A comprehensive international codification would obviate these problems, but this is not forthcoming. Existing state practices are also few and far between and are insufficient to establish a solid legal basis to argue that the obligations deriving from *jus cogens* crimes are in fact carried out as established by law, or at least as perceived in the writings of progressive jurists. Thus, it is important to motivate governments to incorporate the obligations described into their national laws as well as to urge their expanded use in the practice of states. Jurists have, therefore, an important task in advancing the application of these ICL norms, which are an indispensable element in the protection of human rights and in the preservation of peace.

Accountability mechanisms

The relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent future victimization. Their relevance to justice is self-evident.

International and national prosecutions are not the only methods of accountability. There are other options that must be examined, though in the opinion of this writer, there exists a duty to prosecute, whether at the international or national level, for genocide, crimes against humanity, war crimes and torture.¹⁰²

Accountability measures fall into three categories: truth, justice and redress.¹⁰³ Accountability must be recognized as an indispensable component of peace and eventual reconciliation. Accountability measures which achieve justice range from the prosecution of all potential violators to the establishment of the truth.

Accountability is the antithesis of impunity, which occurs either *de facto* or through amnesties. But amnesty is essentially a form of forgiveness,¹⁰⁴ granted by governments, for crimes committed against a public interest.

How, though, can governments forgive themselves for crimes they committed against others? And how can governments forgive crimes committed by some against others? The power to forgive, forget or overlook in the cases of genocide, crimes against humanity, war crimes and torture, is not that of the governments, but of the victims.

While amnesty is a deliberate positive action (the act of amnesty), impunity is an act of exemption — an exemption from punishment, or from injury or loss.¹⁰⁵ Amnesty can occur after a person or a group of persons have been convicted, not beforehand. The recurrence of pre-prosecution amnesty is, therefore, an anomalous phenomenon developed as part of a policy of impunity.

Impunity can also result from *de facto* conduct, occurring under color of law when, for example, measures are taken by a government to curtail or prevent prosecutions. As a *de facto* act, it can be the product of either the failure to act or the product of more deliberate procedural and practical impediments which preclude prosecution.¹⁰⁶ It is also possible to achieve impunity through other practical impediments.¹⁰⁷ The attainment of truth, justice and redress raises a host of issues addressed by other studies.¹⁰⁸

The accountability options include the following.

International prosecutions

“International prosecutions” includes prosecutions before a permanent international criminal court and prosecutions before *ad hoc* international criminal courts. As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors. This policy, however, does not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals.¹⁰⁹ There must be prosecution for at least the four *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture. There can be no impunity for these crimes, and therefore, prosecution is essential. Why prosecution at the international level? One reason is that international prosecution may be the only way to reach the leaders, senior executors and policy-makers, who may otherwise be *de facto* beyond the reach of local law.¹¹⁰

International and national criminal investigatory commissions

“International and national criminal investigatory commissions” include internationally established commissions, or designated individuals, assigned to collect evidence of criminality, in addition to other fact finding information of a more general nature.¹¹¹ They can be of importance both as the basis for future national and international prosecutions, and as the documentation of what occurred.

Acknowledgment of responsibility through national mechanisms such as investigative and truth commissions and reconciliation hearings and findings, both national and international

This accountability option centers on the acknowledgment of the facts through mechanisms such as truth commissions and fact-finding investigative bodies. These commissions, which can be established internationally, regionally or nationally, have the mandate to discover the entirety of the truth, or a portion thereof. Truth commissions, however, should not be deemed a substitute for prosecution of the four *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture. These commissions may run in conjunction with prosecutions, but still, their role is to establish a record of what has happened, and to disseminate this information widely at both the national and the international level.¹¹² Essentially, their goals are to serve the end of peace and reconciliation, and may sometimes be less relevant to criminal justice, though by no means less important to that purpose. The advantage of these commissions is that they establish the broader context of a given conflict, thus eliminating the need at national and international prosecutions to provide that broader context or to use a given trial as a means of establishing a historical context¹¹³ that could, in some cases, be deleterious to the case under prosecution or the due process quality of the trial. It is to be noted that an international or national truth commission is not necessarily a reconciliation commission. Some of these commissions can also be of a hybrid nature, taking on investigatory features.¹¹⁴

National prosecution

“National prosecutions” should include all persons who have committed criminal acts subject, however, to reasonable and justified prosecutorial discretion. This includes persons who have committed the four *jus cogens*

crimes of genocide, crimes against humanity, war crimes and torture¹¹⁵— and there should be a principle of no general amnesty for these four crimes. For crimes other than the four mentioned above, the national system may develop criteria for selectivity or symbolic prosecution consistent with their laws, provided these criteria are not fundamentally unfair to the accused. This does not preclude prosecutorial discretion when the evidence is weak or the criminality tenuous, or when a plea bargain can lead to the prosecution of more culpable offenders. It is subject to standards whereby the exercise of discretion against prosecution, unless legally or factually justifiable, should result in remanding the individual to another accountability mechanism. For example, persons may receive sentences other than the privation of liberty, including: the personal payment of reparations or compensation to the victims; the undertaking of some form of community service; or the making of a public apology. Other options could include the serving of limited sentences, or the serving of only partial sentences, followed by an amnesty or pardon, provided there are no *a priori* blanket amnesties or pardons which fail to take into account the criminality of the act and the consequences applicable to each individual receiving such an amnesty or pardon. It is also suggested that victims be allowed to participate as *partie civile* in relevant legal proceedings so as to have the right to claim compensatory damages in an appropriate legal forum.

National lustration mechanisms

“National lustration” is a purging process whereby individuals who supported or participated in violations committed by a prior regime may be removed from their positions and/or barred from positions of authority or elective positions. Though punitive in nature, these mechanisms are used essentially as a political sanction which carries moral, social, political and economic consequences, though not depriving individuals of their due process rights. The danger with such mechanisms is that they tend to deal with classes or categories of people without regard to individual criminal responsibility, and thus, lustration may tend to produce injustice in a number of individual cases. Furthermore, when lustration laws result in the loss of any type of earning capacity, secondary victimization befalls the dependents of those individuals who fall within the ambit of the lustration legislation. Lastly, though related to the above concept of secondary victimization, these laws tend to have a stigmatization effect which carries

beyond those who may have deserved such stigmatization, and onto innocent third parties or family members.¹¹⁶

National civil remedies

“National civil remedies” are the development, within civil legislation, of the right to bring suit by victims and their heirs, which enable them to obtain certain civil remedies.¹¹⁷ For example, individuals should be able to institute legal actions to compel the inclusion of a person in national criminal prosecution or in the category of those subject to lustration laws. Certain types of injunctive remedies can also be contemplated. National civil remedies can also include compensation, whether as a result of individual or group legal action, or as part of a national program that provides remedies. Persons having certain rights under civil law should also be allowed to join in national prosecutions as *partie civile* in criminal proceedings.

International mechanisms for the compensation of victims

Victim compensation is a necessity. When it is in the nature of a national or international program which allocates a certain amount to compensation, these programs must provide for a fair administrative method to determine actual damages, as opposed to punitive damages. Monetary compensation should not be deemed the only outcome. Nonmonetary forms of compensation should also be developed, particularly in societies where the economy is unable to sustain large monetary sums. Note that in 1985, the United Nations adopted a General Assembly resolution entitled “*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,”¹¹⁸ and at the last Preparatory Committee meeting on the Establishment of an International Criminal Court, a proposal by Egypt, stating the connection between victim compensation and the establishment of criminal liability, was put forward.¹¹⁹

Policy considerations

Which of these accountability measures or what combination thereof is appropriate in light of the circumstances of a given conflict, the expectations of the parties to the conflict, and the anticipated outcomes, will depend on a variety of factors which must be weighed in the aggregate. This is obviously not an easy task. In the balance lies peace and justice. It is a

task that is both challenging and fraught with dangers affecting the lives and well-being of many. But it is a task that must be guided by legal, moral, and ethical considerations. Accountability is among these considerations. The accountability mechanisms described above are not mutually exclusive; they are complementary. Each mechanism need not be taken as a whole. Rather, a portion may be used and combined with other mechanisms. No single formula can apply to all types of conflicts, nor can it achieve all desired outcomes. Just as there is a range in the types of conflict and a range in the types of peace outcomes, there is a corresponding range of accountability mechanisms. In the final analysis, whichever mechanism or combination of mechanisms is chosen, it is chosen to achieve a particular outcome which is, in part justice, and wherever possible, reconciliation, and ultimately, peace. And in this respect, we cannot look at each mechanism exclusively from the perspective of a crime control model, but as an instrument of social policy which is designed to achieve a particular set of outcomes which are not exclusively justice-based. So far, however, there exists no set of international guidelines by which to match the type of conflicts, expected peace outcomes, and eventual accountability mechanisms. Such guidelines are needed in order to constitute common bases for the application of these mechanisms and in order to avoid abuses of and denial of justice. What should be achieved is not only a sense of justice, but the elimination of a sense of injustice. In choosing these mechanisms, it must be remembered that among the goals of these accountability mechanisms is to educate and prevent and to shake people from a sense of complacency, one that bureaucracies, including military and police bureaucracies, tend to foster in a climate of silent conspiracy — the *omerta* of these bureaucracies must be eliminated.¹²⁰

Accountability mechanisms, if they are to have a salutary effect on the future and contribute to peace and reconciliation, must be credible, fair, and as exhaustive of the truth as possible. Without that, the embers of yesterday's conflict can become the fire of tomorrow's renewed conflict. Truth is a means by which to cleanse, at least in part, the misdeeds of the past. The fundamental principle of accountability must take into account:

1. the cessation of the conflict and thereby the ending of the process of victimization;
2. prevention of conflicts in the future;
3. deterrence of conflicts in the future (particularly conflicts which may be initiated directly after the cessation of the conflict being addressed);

4. rehabilitation of the society as a whole and of the victims as a group; and,
5. reconciliation between the different peoples and groups within the society.

At a minimum, the establishment of truth, as relative as it may be, must be established in order to provide a historical record of what occurred so as to mitigate the simmering effects of the hardships and hardened feelings which result from violent conflicts that produce victimization, to dampen the spirits of revenge and renewed conflict, to educate people and, ultimately, to prevent future victimization.¹²¹ Truth is, therefore, an imperative, not an option to be displaced by political convenience because, in the final analysis, there truly cannot be peace (meaning reconciliation and the prevention of future conflict arising out of previous conflictual episodes) without justice (meaning at the very least, a comprehensive exposé of what happened, how, why, and what the sources of responsibility are). Forgiveness can only follow from the satisfaction of all parties, particularly those who have been victimized, after that truth has been established.

It should be noted, however, that in the context of the consideration stated above, there is a difference between the qualities of mercy and the qualities of forgiveness. Whereas forgiveness is a change of heart towards a wrongdoer that arises out of a decision by the victimized person, and is therefore wholly subjective, mercy, on the other hand, is the suspension or mitigation of a punishment that would otherwise be described as retribution, and is an objective action which can be taken not only by the victim but by those entrusted with government.¹²² Forgiveness is not a legal action, rather, forgiveness is primarily a relationship between persons. The arena of resentment and forgiveness is individual and personal in a way that legal guilt and responsibility are not.¹²³ Institutions, states and systems of justice cannot forgive; they can pardon and act in mercy.¹²⁴ The act of mercy may arise out of feelings of compassion or pity for the wrongdoer, however, these feelings are to be distinguished from those of forgiveness, which belong to the victim. What of the relationship of mercy to justice? Does the obligation of criminal justice to uphold the rule of law and to impose “just punishment” run counter to the act of mercy? Does the act of mercy towards the wrongdoer neglect the victim’s need for justice? To what extent are these questions more imperative in the face of historical denial and its subtext of justification?¹²⁵ Legal developments must address these and other questions because they are essential to both justice and peace.

Philosophical considerations

History teaches us that humankind has evolved not only by the laws of God or the laws of nature, but by the laws of man. For some, these laws of man are inspired by the higher laws of God as understood in the three monotheistic faiths, their differences notwithstanding. To others, they represent the laws of humanity to be understood as an expression of the lofty callings of humanism. More frequently, however, human practices have been nothing more than the elevation of atavistic predator instincts to self-justifying levels. It is the difference between these types of laws that distinguishes civilized *homo sapiens* from certain predator species of the animal world. The former is what the rule of law seeks to strengthen by means of institutional practices and social controls. The latter harnesses the worst of our instincts and limits the more harmful of our conduct despite the dilemma of right and wrong that confronts us individually and collectively. Law, legal and social institutions control and mitigate the consequences of these contradictions: the contradiction of lion and lamb lying side by side within us, and which are magnified by the collective us.

History reveals that the crimes committed in the course of conflict usually occurred after a breakdown in social controls. Some ascribe it to cultural factors and argue that some cultures have a tendency to be more cruel or violent than others.¹²⁶ It is difficult to say, however, whether these cultural factors are endemic, or whether they are produced by social and economic conditions and by the absence of effective legal and social controls. Accountability mechanisms are, therefore, important because they tend to shore up legal and social controls which are preventive, and they tend to support the hypothesis of deterrence.

Human nature also has its darker side, and while evil can emerge on its own without external inducement, it no doubt tends to emerge more harmfully when external controls are reduced and inducements offered. Impunity is certainly one of these inducements, as is the prospect of indifference and the expectation that the worst deeds may be characterized as justified, reasonable, acceptable or normal.

Victimization frequently involves the dehumanization of the prospective victims, frequently after a stage of psychological preparation by the perpetrators. Anyone “less than human” can, therefore, be dealt with as an animal or an object to which anything can be done without fear or risk of legal or moral consequence. Another approach is for the perpetrators to

characterize the victims as perceived threats, thus providing a rationalized justification for the ensuing victimization. Such characterization can even rise to the level of self-defense against individuals, or a group, portrayed or perceived as constituting a threat or danger of some degree of plausibility and immediacy. Thus, the victims can be portrayed and perceived as being responsible for the victimization inflicted upon them, as if they had done something to justify it, or had called for it by their conduct, or for that matter, as in the case of the Holocaust, for their very being.¹²⁷ This rationalization can even reach the point where the perpetrators can perceive themselves as forced to inflict the victimization. That reasoning can reach the absurd: the perpetrators become the victims by being “forced” by the actual victims to engage in victimizing conduct.

Such distorted intellectual processes may be the product of inherent evil. But they are most frequently the product of evil manipulation by the few of the many. From the days of Goebbels’ and Streicher’s propaganda to the 1994 Rwanda Hutu incitement to kill the Tutsis, the use of propaganda has been the main instrument of group violence. Obviously, the less educated or the more gullible a society is, the more likely it is to be induced into such false beliefs. But there are many other factors which influence the credibility of such techniques and which use the accumulation of uncontradicted falsehood over time to produce their deleterious effect. It is during that time that the international community should mobilize on the basis of certain early warning signals that group victimization is about to occur. Thus, the prevention of such forms of victimization must be developed.

Accountability mechanisms appear to focus on events after the fact and may appear to be solely punitive, but they are also designed to be preventive through enhancing commonly shared values and through deterrence. Accountability, therefore, has a necessary punitive aspect. However, it is also integrally linked to prevention and deterrence. The weakness in the accountability argument is that it is after the fact, but its strength is that it has a crucial role to play in the formation and strengthening of values and the future prevention of victimization within society.

As stated above, impunity is the antithesis of accountability. To foster or condone impunity can be illegal and immoral. Frequently, impunity is also counterproductive to the ultimate goal of peace. Indeed, large scale victimization arising out of international crimes is never safely tucked away in the limbo of the past. Instead, it remains fixed in time in an on-going

present that frequently calls for vengeance, and longs for redress. Victims need to have their victimization acknowledged, the wrongs committed against them decried, the criminal perpetrators, or at least their leaders, punished, and compensation provided to the survivors. Above all, the lessons of the past must instruct the future in order to avoid repeating the same mistakes, and to ensure some prevention and deterrence against similar occurrences.

A more outcome-determinative consideration of the processes of peace and the prospects of justice is to limit the discretion of leaders who are involved in political settlement processes that are intended to bring an end to conflicts. These leaders' values, expectations, personal ambitions, positioning of power, the degree of public support they possess, and, above all, their responsibilities in connection with the initiation of the conflict and the conduct of the hostilities, particularly when international humanitarian law violations have occurred, affect the outcome of political settlements and bear the most on the subsequent pursuit and integrity of justice processes. Leaders involved in conflict situations are those who negotiate political settlements, usually through the mediation efforts of other leaders. Without the involvement of leaders in conflict situations, there can be no cessation of hostilities, and that is why they are essential to the pursuit of peace. But, conversely, they may also be opposed to the pursuit of justice. That is the essence of the mediator's dilemma — how to bring about peace without sacrificing justice. In most conflicts, that dilemma has been resolved at the expense of justice. To avoid this dilemma in the future, the peace negotiators acting in good faith in the pursuit of peace must be immune from the pressures of having to barter away justice for political settlements. That card must not be left for them to play in the course of negotiating political settlements. Impunity must, therefore, be removed from the “tool box”¹²⁸ of political negotiators.

Conclusion

Impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation. To remember and to bring perpetrators to justice is a duty we also owe to our own humanity and to the prevention of future victimization.¹²⁹ To paraphrase George Santayana, if we cannot learn from the lessons of the past and stop the practice of impunity, we are

condemned to repeat the same mistakes and to suffer their consequences. The reason for our commitment to this goal can be found in the eloquent words of John Donne:

No man is an island, entire of itself; every man is a piece of the continent, a part of the main...

Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee...¹³⁰

¹ See DANIEL CHIROT, MODERN TYRANTS: THE POWER AND PREVALENCE OF EVIL IN OUR AGE (1994). PIERRE HASSNER, VIOLENCE AND PEACE: FROM THE ATOMIC BOMB TO ETHNIC CLEANSING (1995); RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT (1994). See also ERIC HOBSBAWM, THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991 (1995). A figure used in Mr. Hobsbawm's book is 187 million "people killed or allowed to die by human decision" for the "short century" that he examines. Hobsbawm notes that this accounts for about 10 percent of the global population at the year 1900. The category "by human decision" includes non-war-time politically caused deaths as those in the Soviet Union (1930s Ukrainian starvation and the "Gulag") and in China between 1949 and 1975 (the massive starvation of the "Great Leap Forward" and various "repression campaigns"). However, likely deaths in those two countries for political government-decided reasons are on the order of 35 million and 45 million respectively, or 80 million, for a total of around 205 million, rather than Hobsbawm's figure of 187 million.

² For the applicable norms, see THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989). See also, e.g., RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE (1991); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS (1990); HENRY J. STEINER, INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS, TEXT AND MATERIALS (1996).

³ See RUMMEL, *supra* note 1, at 3, 9 (reports a total of 72.521 million casualties).

⁴ See *id.*

⁵ See SIPRI YEARBOOKS. 1975-1996. There were two reported studies in the PIOOM Newsletter and progress report in 1994 and 1995: A.J. Jongman & A.P. Schmid, *Contemporary Conflicts: A Global Survey of High and Lower Intensity Conflict and Serious Disputes*, 7 PIOOM NEWSLETTER AND PROGRESS REPORT 14 (Winter 1995) (Interdisciplinary Research Program on Causes of Human Rights violations, Leiden, The Netherlands); and *Study*, 6 PIOOM NEWSLETTER 17 (1994); Alex P. Schmid, *Early Warning of Violent Conflicts: Casual Approaches*, in VIOLENT CRIME & CONFLICTS 47 (ISPAC 1997); *PIOOM World Conflict Map 1994-1995*, 7 PIOOM NEWSLETTER, *supra*. See also *supra* note 2.

The following are some illustrations of situations producing a high level of victimization (estimated conflict deaths), including genocide, crimes against humanity, and war crimes for which there has been no accountability:

- (a) *Conflicts of an international character*: Afghanistan (1979-1989) 1.5 m; Vietnam (1945-1994) 3.7 m.
- (b) *Conflicts of a non-international character*: Angola (1975-1994) 1.5 m; Bangladesh (1971-1973) 5 m; Burundi (1972) 250,000; Cambodia (1975-1985) 1.5 m; Ethiopia (1961-1991) 3 m; Mozambique (1978-1992) 1 m; Rwanda (1994) 5 m; Somalia (1991-1993) 4 m; Yemen (1962-1965) 1 m.
- (c) *Purely internal conflicts*: Argentina (1976-1983) 0.25 m; Chile (1973-1990) 0.03 m; El Salvador (1979-1992) 1 m; Guatemala (1965-1996) 0.06 m; Indonesia (1965) 0.45 m; (1975-1980) 0.15 m; Lebanon (1975-1990) 0.15 m; Liberia (1989-1996) 0.15 m; Peru (1980-1996) 0.05 m; Philippines (1968-1986) 0.05 m.

- (d) *Tyrannical regime victimization*: China (1945-1975) 35 m; Iraq (1980-1996).3 m; North Korea (1948-1987) 1.6 m; Uganda (1971-1985).6 m; USSR (1917-1989) 30 m; Yugoslavia (1943-1945).5 m, (1991-1995).25 m.
See also the latest *PIOOM World Conflicts Map 1997-1998* and the PIOOM website at <http://www.fsw.leidenuniv.nl/w3_liswo/pioom.htm>.
- ⁶ M. Cherif Bassiouni; *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).
- ⁷ See FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR, REPORT OF THE UNITED NATIONS COMMISSION ON THE TRUTH FOR EL SALVADOR, U.N. Doc. S/25500 (1993).
- ⁸ See NUNCA MÁ, INFORME DE LA COMISION SOBRE LA DESAPARICION DE PERSONAS (1985); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996).
- ⁹ See REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Philip E. Berryman trans., 1993); Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile*, 2 TULSA J. COMP. & INT. L. 253, 279 (1995).
- ¹⁰ See Lynn Berat & Yossi Shain, *Retribution or Truth-telling in South Africa? Legacies of the Transitional Phase*, 20 L. & SOC. INQUIRY 1, 163 (1995); Ziyad Motala, *The Promotion of National Unity and Reconciliation Act, the Constitution and International Law*, 28 COMP. & INT. L. J. S. AFRICA 338 (1995).
- ¹¹ See generally III TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); Maria Loñ, *Lustration Land Truth Claims: Unfinished Revolutions in Central Europe*, 20 L. & SOC. INQUIRY 1, 117 (1995); Adrienne M. Quill, *To Prosecute or Not to Prosecute: Problems Encountered in the Prosecution of Former Communist Officials in Germany, Czechoslovakia, and the Czech Republic*, 7 IND. INT'L & COMP. L. REV. 1, 165, 188-91 (1996).
- ¹² See *Progress Report on the Question of Impunity of Perpetrators of Human Rights Violations*, prepared by Mr. Guissé and Mr. Joinet, pursuant to Sub-commission resolution 1992/23, Sub-Commission on Prevention and Protection of all Minorities, 45th Sess., Item 10(a), (19 July 1993) E/CN.4/Sub.2/1993/6; *Preliminary Report on Opposition to the Impunity of Perpetrators of Human Rights Violations (economic, social and cultural rights)*, prepared by Mr. Guissé and Mr. Joinet, pursuant to Sub-commission resolution 1993/37, Sub-Commission on Prevention and Protection of all Minorities, 46th Sess., Item 10(a), (22 June 1994) E/CN.4/Sub.2/1994/11; *Progress Report on the Question of Impunity of Perpetrators of Violations of Human Rights (civil and political rights)*, prepared by Mr. Joinet, pursuant to Sub-Commission resolution 1994/34; Sub-Commission on Prevention and Protection of all Minorities, 47th Sess., Item 10, (28 June 1995) E/CN.4/Sub.2/1995/18; *Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights)*, Final Report prepared by Mr. L. Joinet, pursuant to Sub-commission resolution 1995/35; Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Sess., Item 10, (29 June 1996) E/CN.4/Sub.2/1996/18; NAOMI ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 14 (1995); Stephen P. Marks, *Forgetting the Policies and Practices of the Past: Impunity in Cambodia*, THE FLETCHER F. 17 (1994); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?* 31 TEX INT'L L.J. 1 (1996); Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 867 (1995).
- ¹³ For a critical appraisal of that practice, see Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 L. & SOC. INQUIRY 1, 51, 77-78 (1995).
- ¹⁴ See the Four Geneva Conventions of Aug. 12, 1949: Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (Geneva Convention I), Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, T.I.A.S. No. 3362; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217, T.I.A.S. No. 3363; Convention

- Relative to the Treatment of Prisoners of War (Geneva Convention III), Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364; Convention Relative to the Protection of Civilian Persons in Times of War (Geneva Convention IV), Aug. 12, 1949, 75 U.N.T.S. 28, 6 U.S.T. 3516, T.I.A.S. No. 3365. For “grave breaches” see articles 49 (I), 129 (III), 146 (IV), and for conflicts of a non-international character, see common article 3.
- ¹⁵ Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, *reprinted in* 16 I.L.M. 1391, Schindler/Toman 551 [hereinafter 1977 Protocol I]. *See especially* articles 11, 85, 86.
- ¹⁶ Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex II, *reprinted in* 16 I.L.M. 1391, Schindler/Toman 619 [hereinafter 1977 Protocol II].
- ¹⁷ *See* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 3 Martens (3d) 461, 36 Stat. 2277, T.S. No. 539, 3 Martens Nouveau Recueil (ser.3) 462, *reprinted in* 2 AM. J. INT'L L. 90 (1908)(Supp.), 1 FRIEDMAN 308, 1 BEVANS 631 [hereinafter 1907 Hague Convention]; the 1954 Convention for the Protection of Cultural the Property in the Event of Armed Conflict and certain weapons conventions such as: Protocol for the Prohibition of the Use in War Of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, 14 I.L.M. 49; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, 11 I.L.M. 309; Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, U.N. Doc. A/CONF.95/15, 1342 U.N.T.S. 7, 19 I.L.M. 1523; including Protocol on Non-Detectable Fragments to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (Protocol I), Oct. 10, 1980, U.N. Doc. A/CONF.95/15 (1980), 19 I.L.M. 1529; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Appendix C, (Protocol II), Oct. 10, 1980, U.N. Doc. A/CONF.95/15 (1980), 19 I.L.M. 1529; and Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (Protocol III), Oct. 10, 1980, U.N. Doc. A/CONF.95/15 (1980), 19 I.L.M. 1534, *entered into force* with provisions; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 32 I.L.M. 800.
- ¹⁸ *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis [London Charter], Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 3 Bevans 1238, *entered into force* Aug. 8, 1945; Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, *reprinted in* 1 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (2 vols.1980); International Military Tribunal for the Far East, Jan. 19, 1946 and amended Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20; Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (United Nations General Assembly Resolution), Dec. 11, 1946, U.N.G.A. Res. 95(I), U.N. Doc. A/64/Add.1 (1946); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, July 29, 1950, U.N. GAOR Supp. (No. 12), at 11, U.N. Doc. A/1316 (1950), 44 AM. J. INT'L L. 126 (1950); Code of Crimes Against the Peace and Security of Mankind: Titles and texts of articles on the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session (1996), U.N. GAOR Int. Law Comm., 48th Sess., U.N. Doc. A/CN.4/L.532 (1996), July 15, 1996, *revised by* U.N. Doc. A/CN.4/L.532/corr. 1, U.N. Doc. A/CN.4/L.532/corr. 3; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature*, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/RES/2391 (1968), 754 U.N.T.S. 73, 8 I.L.M. 68, *entered into force* Nov. 1970; European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-

- European), Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540, *not yet entered into force*; Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter ICTY Statute], May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159; Statute of the International Criminal Tribunal for Rwanda [hereinafter ICTR Statute]; S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598.
- ¹⁹ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1 U.N. GAOR Res. 96 (Dec. 11, 1946), 78 U.N.T.S. 277; *see also* ICTR Statute, *supra* note 18; and ICTY Statute, *supra* note 18.
- ²⁰ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46, Feb. 4, 1985, 23 I.L.M. 1027. *See also* United Nations Standard Minimum Rules for the Treatment of Prisoners (ECOSOC Resolution), 1955, ECOSOC Res. 663C (XXIV), July 31, 1957, and 2076 (XXII), May 13, 1977, U.N. Doc. A/CONF.6/1, Annex I.A; Treaty of European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Inter-European), Nov. 26, 1987, Eur. T.S. No. 126, 27 I.L.M. 1152; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, AG/Res. 783 (XV-0/85), O.A.S. General Assembly, 15th Sess. IEA/Ser.P. AG/Doc. 22023/85 rev. 1 at 46-54 (1986), O.A.S. Treaty Series, No. 67, 25 I.L.M. 519.
- ²¹ The 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theatre 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 [hereinafter IMT].
- ²² M. Cherif Bassiouni, *Modalities of Inter-State Cooperation in Penal Matters*, in INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 3d rev. ed. forthcoming 1999). *See also* EUROPEAN INTER-STATE COOPERATION IN CRIMINAL MATTERS (Ekkehart Müller-Rappard & M. Cherif Bassiouni eds., 1993).
- ²³ *Supra* note 19.
- ²⁴ *Supra* note 14.
- ²⁵ *Supra* note 15.
- ²⁶ M. Cherif Bassiouni, "Crimes against Humanity:" *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457-94 (1994).
- ²⁷ *See supra* note 16.
- ²⁸ G.A. Res. 2840, (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971).
- ²⁹ *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 499-527 (1992).
- ³⁰ *Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030, Dec. 3, 1973.
- ³¹ *See* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE, AUT JUDICARE (1995).
- ³² Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/RES/2391 (1968), 754 U.N.T.S. 73, 8 I.L.M. 68, entered into force Nov. 1970.
- ³³ *See* European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European), opened for signature at Strasbourg Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540, not yet entered into force. *See also* Christine Van den Wyngaert, *War Crimes, Genocide and Crimes Against Humanity: Are States Taking National Prosecutions Seriously?*, in 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2d rev. ed. forthcoming 1999); and the special issue of 37 REVUE INTERNATIONALE DROIT PÉNAL (1966), especially the reports of J. Graven, J. Dautricourt, S. Glaser, J.B. Herzog and H.H. Jescheck.

- ³⁴ M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS, 451-54 (1997).
- ³⁵ EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS, *supra* note 22.
- ³⁶ M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 356-66 (3d ed. 1996).
- ³⁷ See Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 834 (1988); Luc Reydam, *Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice*, 1 EUR. J. CRIME. L. CRIM. JUST. 18 (1996).
- ³⁸ In such cases, however, national legal systems would have to adopt substantive national legislation to prosecute persons accused of genocide, crimes against humanity, and war crimes, as well as torture.
- ³⁹ Germany and Italy have included genocide as part of their criminal codes. France, Canada, the United Kingdom, and Australia have developed specialized legislation which includes retrospective application to World War II events, although Australia has not been successful in any prosecutions. (There have been three cases, all of which resulted in acquittal before trial: *DPP v. Polynkovich*; *Malone v. Berezowsky*; *Heinrich Wagner*). See THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 130-34 (Timothy L.H. McCormack & Gerry J. Simpson, eds., 1997). The United Kingdom is in the process of prosecuting one case (Szymon Serafinowicz) under the United Kingdom War Crimes Act 1991, France has prosecuted three with one pending, and one case (*R. v. Finta*) has been prosecuted in Canada under the Canadian Criminal Law Amendment Act 1985 S.C., 1985, C. 19 which amends the Canadian criminal code. See DICK DE MILDT, IN THE NAME OF THE PEOPLE: PERPETRATORS OF GENOCIDE IN THE REFLECTION OF THEIR POST-WAR PROSECUTION IN WEST GERMANY (1996); Leila Sadat-Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994).
- ⁴⁰ See BASSIOUNI & WISE, *supra* note 31. See also BASSIOUNI, *supra* note 29, at 489-99; LAURI HANNIKAINEN, PEREMPTORY NORMS (*JUS COGENS*) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988); Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 429-35 (1989).
- ⁴¹ See ANDRE DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES 45-46 (1996). For different perspectives on government obligations, see Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990), whose author strongly supports such a duty, and José Zalaquett, *Confronting Human Rights Violations Committed by Previous Covenants*, 13 HAMLIN L. REV. 623 (1990), whose position is more flexible with respect to such a duty.
- ⁴² See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199 (1998).
- ⁴³ See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I, U.N. GAOR, 51st Sess., Supp. No. 22, ¶ 212-93, U.N. Doc. A/51/22 (1996) [hereinafter *Preparatory Committee Report*]; M. Cherif Bassiouni, *Draft Statute International Criminal Tribunal*, 9 NOUVELLES ÉTUDES PÉNALES (1993).
- ⁴⁴ See, e.g., Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF.39/27. See also G.C. ROZANKIS, THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES (1976); DE HOOGH, *supra* note 41 (embodying the author's doctoral dissertation, which is rich in public international law material and mostly based on the work of the ILC, but poor on ICL).
- ⁴⁵ See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987) [herein-

after BASSIOUNI, DRAFT CODE]; M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 REVUE INTERNATIONALE DE DROIT PÉNAL 405 (1974); see, e.g., I, II, AND II INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed. 1986, 2d rev. ed. forthcoming 1999); LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW (1997), INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN DOCUMENTS (Christine Van den Wyngaert ed., 1996); JOHN DUGARD & CHRISTINE VAN DEN WYNGAERT, INTERNATIONAL CRIMINAL LAW AND PROCEDURE (1996); INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS (1996); NDIVA KOFELE-KALE, INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES (1995); FARHAD MALEKIAN, THE CONCEPT OF ISLAMIC INTERNATIONAL CRIMINAL LAW (1994); ANDRE HUET & RENEE KOERING-JOULIN, DROIT PÉNAL INTERNATIONAL (1994); BASSIOUNI, *supra* note 29; HAIDONG LI, DIE PRINZIPIEN DES INTERNATIONALEN STRAFRECHTS (1991); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMES DIGEST/INDEX (1985); CLAUDE LOMBOIS, DROIT PÉNAL INTERNATIONAL (2d rev. ed. 1979); MOHAMMED HASSANEIN EBEID, AL-JARIMA AL- DAWLIA (1979); STEFAN GLASER, DROIT INTERNATIONAL PÉNAL CONVENTIONNEL (Vol. 1 1971 & Vol. 2 1978); GUILLERMO J. FIERRO, LA LEY PÉNAL Y EL DERECHO INTERNACIONAL (1977); BART DESCHUTTER, LA BELGIQUE ET LE DROIT INTERNATIONAL PÉNAL (1975); 1 & 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) [hereinafter 1 TREATISE]; DIETRICH OEHLER, INTERNATIONALES STRAFRECHT (1973); A.H.J. SWART, INTERNATIONAAL STRAFRECHT (1973); STANISLAW PLAWSKI, ÉTUDE DES PRINCIPES FONDAMENTAUX DU DROIT INTERNATIONAL PÉNAL (1972); AKTUELLE PROBLEME DES INTERNATIONALEN STRAFRECHTS (Dietrich Oehler & Paul G. Potz eds., 1970); OTTO TRIFFTERER, DOGMATISCHE UNTERSUCHUNGEN ZUR ENTWICKLUNG DES MATERIELLEN VÖLKERSTRAFRECHTS SEIT NURNBERG (1966); INTERNATIONAL CRIMINAL LAW (G.O.W. Mueller & Edward M. Wise eds., 1965); ANTONIO QUINTANO-RIPOLES, TRATADO DE DERECHO PÉNAL INTERNACIONAL Y PÉNAL INTERNACIONAL PÉNAL (1957); STEFAN GLASER, INFRACTIONS INTERNATIONALES (1957); GEORGE DAHM, ZUR PROBLEMATIK DES VÖLKERSTRAFRECHTS (1956); STEFAN GLASER, INTRODUCTION A L'ÉTUDE DU DROIT INTERNATIONAL PÉNAL (1954); HANS-HEINRICH JESCHECK, DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VÖLKERSTRAFRECHTS (1952); JOSEPH B. KEENAN & BRENDAN F. BROWN, CRIMES AGAINST INTERNATIONAL LAW (1950); NINO LEVI, DIRETTO PÉNALE INTERNAZIONALE (1949); ALBERT DE LA PRADELLE, UNE REVOLUTION DANS LE DROIT PÉNAL INTERNATIONAL (1946); ROLANDO QUADRI, DIRITTO PÉNALE INTERNAZIONALE (1944); FRANCESCO COSENTINI, ESSAI D'UN CODE PÉNAL INTERNATIONAL DRESSÉ SUR LA BASE COMPARATIVE DES PROJETS & TEXTES RÉCENTS DES CODES PÉNAUX (1937); HELLMUTH VON WEBER, INTERNATIONALE STRAFGERICHTSBARKEIT (1934); CARLOS ALCORTA, PRINCIPIOS DE DERECHO PÉNAL INTERNACIONAL (1931); EMIL S. RAPPAPORT, LE PROBLÈME DU DROIT PÉNAL INTER ÉTATIQUE (1930); HENRI DONNEDIEU DE VABRES, LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL (1928); VESPASIAN V. PELLA, LA CRIMINALITÉ COLLECTIVE DES ÉTATS ET LE DROIT PÉNAL DE L'AVENIR (1925); HENRI F. DONNEDIEU DE VABRES, INTRODUCTION À L'ÉTUDE DU DROIT PÉNAL INTERNATIONAL (1922); MAURICE TRAVERS, LE DROIT PÉNAL INTERNATIONAL ET SA MISE EN OEUVRE EN TEMPS DE PAIX ET EN TEMPS DE GUERRE (1922); JOSEF KOHLER, INTERNATIONALES STRAFRECHT (1917); SALVATORE ADINOLFI, DIRITTO INTERNAZIONALE PENALE (1913); FRIEDRICH MELLI, LEHRBUCH DES INTERNATIONALEN STRAFRECHTS UND STRAFPROZESSRECHTS (1910); see also, e.g., M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983); Robert Friedlander, *The Foundations of International Criminal Law: A Present Day Inquiry*, 15 CASE W. RES. J. INT'L L. 13 (1983); Leslie C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251 (1983); Farooq Hassan, *The Theoretical Basis of Punishment in International Criminal Law*, 15 CASE W. RES. J. INT'L L. 39 (1983); G.O.W. Mueller, *International Criminal Law: Civism Maxima*, 15 CASE W. RES.

J. INT'L L. 1 (1983); M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights*, 8 YALE J. WORLD PUB. ORD. 193 (1982); Leslie C. Green, *New Trends in International Criminal Law*, 11 ISR.Y.B. H.R. 9 (1981); Hans-Heinrich Jescheck, *Development, Present State and Future Prospects of International Criminal Law*, 52 REVUE INTERNATIONALE DE DROIT PÉNAL 337 (1981); Leslie C. Green, *International Crime and the Legal Process*, 29 INT'L & COMP. L.Q. 567 (1980); Leslie C. Green, *An International Criminal Code—Now?*, 3 DALHOUSIE L.J. 560 (1976); Yoram Dinstein, *International Criminal Law*, 5 ISR. Y.B. H.R. 55 (1975); Quincy Wright, *The Scope of International Criminal Law: A Conceptual Framework*, 15 VA. J. INT'L L. 561 (1975); M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 REVUE INTERNATIONALE DE DROIT PÉNAL 405 (1974); Robert Legros, *Droit Pénal International 1967*, 48 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 259 (1968); Hans-Heinrich Jescheck, *État Actuel et Perspectives d'Avenir des Projets dans le Domaine du Droit International Pénal*, 35 REVUE INTERNATIONALE DE DROIT PÉNAL 83 (1964); W.J. Ganshof van der Meersch, *Justice et Droit International Pénal*, 42 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 3 (1961); Leslie C. Green, *New Approach to International Criminal Law*, 28 SOLIC. 106 (1961); Jean Y. Dautricourt, *Le Droit International Pénal*, 37 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 243 (1957); Jacques Verhaegen, *Les Impasses du Droit International Pénal*, 38 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 3 (1957); Stefan Glaser, *Élément Moral de l'Infraction Internationale*, 59 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 537 (1955); A.D. Belinfante, *Les Principes de Droit Pénal International et les Conventions Internationales*, 2 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAL RECHT 243 (1955); Giuliano Vassalli, *In tema di Diritto Internazionale Pénal*, 56 GIUSTIZIA PENALE 257 (1951); Stefan Glaser, *Les Infractions Internationales et Leurs Sanctions*, 29 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 811 (1949); Henri F. Donnedieu de Vabres, *La Codification du Droit Pénal International*, 19 REVUE INTERNATIONALE DE DROIT PÉNAL 21 (1948); Stefan Glaser, *Le Principe de la Légalité des Délits et des Peines et les Procès des Criminels de Guerre*, 28 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 230 (1948); Henri F. Donnedieu de Vabres, *Le Procès de Nuremberg et le Principe de la Légalité et des Peines*, 26 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 813 (1947); Henri F. Donnedieu de Vabres, *Le Procès de Nuremberg Devant les Principes Modernes du Droit Pénal International*, 7 RECUEIL DES COURS 481 (1947); Albert de la Pradelle, *Une Révolution Dans le Droit Pénal International*, 13 NOUVELLE REVUE DE DROIT INTERNATIONAL PRIVÉ 360 (1946); Max Radin, *International Crimes*, 32 IOWA L. REV. 33 (1946); Gerald Abrahams, *Retribution: An Inquiry into the Possibility of an International Criminal Law*, 92 LAW J. 38, 45, 53 (1942); Roberto Ago, *Le Délit International*, 68 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 419 (1939); Henri F. Donnedieu de Vabres, *La Répression Internationale des Délits de Droit des Gens*, 2 NOUVELLE REVUE DE DROIT INTERNATIONAL PRIVÉ 7 (1935); Vespasian P. Vella, *Plan d'un Code Répressif Mondial*, 12 REVUE INTERNATIONALE DU DROIT PÉNAL 348 (1935); Carlos Alcorta, *La Doctrina del Derecho Pénal Internacional*, 2 REVISITA ARGENTINA DE DERECHO INTERNACIONAL 271 (1931); Giuseppe Sagone, *Pour un Droit Pénal International*, 5 REVUE INTERNATIONALE DE DROIT PÉNAL 363 (1928); Quintiliano Saldana, *Projet de Code Pénal International*, 1 CONGRÈS INTERNATIONAL DE DROIT PÉNAL (1926); G. Glover Alexander, *International Criminal Law*, 5 J. COMP. LEGIS. & INT'L L. 90 (1923); G. Glover Alexander, *International Criminal Law*, 3 J. COMP. LEGIS. & INT'L L. 237 (1921).

⁴⁶ BASSIOUNI, *supra* note 29, at 87.

⁴⁷ See, e.g., M. Cherif Bassiouni, *States of Emergency and States of Exception: Human Rights Abuses and Impunity under Color of Law*, in NON-DEROGABLE RIGHTS AND STATES OF EMERGENCY 125 (Daniel Prémont ed., 1996).

⁴⁸ See BASSIOUNI & WISE, *supra* note 31.

⁴⁹ See Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity, *supra* note 18.

⁵⁰ See generally Randall, *supra* note 37; and Reydams, *supra* note 37.

- 51 See *supra* note 12; see also RUMMEL, *supra* note 1; TRANSITIONAL JUSTICE, *supra* note 11; Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995); Roht-Arriaza, *supra* note 41.
- 52 See BASSIOUNI, *supra* note 36, at Ch.1.
- 53 See BASSIOUNI & WISE, *supra* note 31, at 8.
- 54 See, e.g., *Question of the Punishment of War Criminals and of Persons Who have Committed Crimes Against Humanity*, G.A. Res. 2840, U.N. GAOR 3d Comm., 26th Sess., Supp. No. 29 at 88, U.N. Doc. A/8429 (1971); *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30 at 78, U.N. Doc. A/9030 (1973).
- 55 See, e.g., MERON, *supra* note 2; see also Claudia Annacker, *The Legal Regime of "Erga Omnes" Obligations and International Law*, 46 AUSTRIAN J. PUB. INT'L L. 131 (1994); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1 (1986).
- 56 See IAN BROWNLIE, STATE RESPONSIBILITY: SYSTEM OF THE LAW OF NATIONS (1983).
- 57 See M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 MICH. J. INT'L L. 768, 801-09 (1990).
- 58 See, e.g., HANNIKAINEN, *supra* note 40.
- 59 See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512-15 (3d ed. 1979); 1 HERSH LAUTERPACHT, INTERNATIONAL LAW 113 (Elihu Lauterpacht ed., 1970); GEORGE SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 5 (1971); Christenson, *supra* note 40; Parker & Neylon, *supra* note 40. Other commentators have also noted that the function of peremptory norms in the context of international law has not been adequately addressed:
- Peremptory norms of international law (*jus cogens*) have been the subject of much recent interest. In light of their extensive and quite unprecedented treatment by the International Law Commission and the Vienna Conference on the Law of Treaties, it may be surprising that attention has not been greater. At the same time, inquiry into the relationship between peremptory norms and the sources and functions of international law have been virtually non-existent. This is indeed surprising, given the recent substantial interest in these areas as part of a larger "theoretical explosion" in international legal studies.
- N.G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DENVER J. INT'L L. & POL'Y 187 (1973).
- 60 See ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 132 (1971).
- 61 See Christenson, *supra* note 40; cf. Mark Janis, *Jus Cogens: An Artful Not a Scientific Reality*, 3 CONN. J. INT'L L. 370 (1988).
- 62 See *supra* note 57.
- 63 The ICTY Statute and the ICTR Statute, *supra* note 18, address genocide, crimes against humanity, and war crimes. The 1996 Code of Crimes includes these three crimes plus Aggression. See *Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its Forty-Eighth Session*, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996) revised by U.N. Doc. A/CN.4L.532/Corr.1 and U.N. Doc. A/CN.4 L.532/Corr.3; *Crimes Against U.N. Personnel*, in BASSIOUNI, *supra* note 34.
- 64 See Michael Ackehurst, *Custom as a Source of International Law*, 1974 BRIT. Y.B. INT'L. L. 1.
- 65 See BASSIOUNI, *supra* note 34.
- 66 See *id.*
- 67 See Bassiouni, *supra* note 6.

- 68 For the proposition that some violations of the *Geneva Conventions* are *jus cogens* see MERON, *supra* note 2, at 9. *See also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 95 (June 27) (concerning the applicability of the *Vienna Convention on the Law of Treaties*); BASSIOUNI, *supra* note 34, at 341-46. The *Vienna Convention on the Law of Treaties* with annex, 23 May 1969, U.N. A/Conf. 39/27, specifies in Article 53 that a treaty provision contrary to *jus cogens* is null and void. Article 71, paragraph 1(a) makes it clear, however, that the entire treaty is not null and void if the parties do not give effect to the provision in question. The I.C.J. has also considered the question. In *U.S. Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24), the Court holds that some treaty obligations can also be “obligations under general international law,” and in its advisory opinion on reservations to the Convention on Genocide 1951 I.C.J. 15 (May 28) it holds that the *Genocide Convention* is part of customary law.
- 69 In a tongue-in-cheek way, Professor Anthony D’Amato reflected the loose way in which *jus cogens* is dealt with in international law in the title of his short essay *It’s a Bird, it’s a Plane it’s Jus Cogens!*, 6 CONN. J. INT’L L. 1 (1990).
- 70 Threats to peace and security are essentially political judgments, and the U.N. Charter gives that function under Chapter VII to its primary political organ, the Security Council. Thus it is difficult to assess in objective legal terms what constitutes aggression. *See*, among the many writers on the subject, YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* (1988). As to what is (or what is not) shocking to the conscience of humanity, that too may be a subjective factor. For example, a single killing, coupled with the required intent to “destroy in whole or in part” required in Article II of the Genocide Convention, is sufficient for that single act to be called genocide. But the killing of an estimated 2 million Cambodians is not genocide because it is not by one ethnic, religious or national group against another, but by the same national, religious, and ethnic group against its own members, and for political reasons. Since political and social groups are excluded from the protected groups in the Genocide Convention, such massive killing is not deemed to be genocide, unless it can be factually shown that there is a diversity between the perpetrator and victim groups. Thus, one killing would be genocide and consequently *jus cogens*, while 2 million killings would not. Such mass killings do however fall under crimes against humanity and war crimes, and are therefore *jus cogens* crimes under other criminal labels. *See* BASSIOUNI, *supra* note 29.
- 71 ICL doctrine has not however sufficiently dealt with the doctrinal bases of international crimes, elements of international criminalization, and the criteria for their application to each and every international crime. This is evident in the writings of most ICL scholars. *See* M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 3d ed. forthcoming 1999); M. Cherif Bassiouni, *Characteristics of International Criminal Law Conventions and International Criminal Law and Human Rights*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 1 & 15 (M. Cherif Bassiouni ed., 1986); Daniel Derby, *A Framework for International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 33 (M. Cherif Bassiouni ed., 1986).
- 72 Except for the notable problem in the South Asia Seas. *See* G.O.W. MUELLER & FRED A ADLER, *OUTLAWS OF THE OCEAN: THE COMPLETE BOOK OF CONTEMPORARY CRIME ON THE HIGH SEAS* (1985).
- 73 *See* Jacob Sundberg, *The Crime of Piracy*, in 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 3d ed. forthcoming 1999).
- 74 *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554 (1995) (arguing that artificial legal distinctions between conflicts of an international and non-international character should be eliminated, a position strongly supported by this writer; *see* M. CHERIF BASSIOUNI (IN COLLABORATION WITH PETER MANIKAS), *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995). *See also* HOWARD LEVIE, *TERRORISM IN WAR CRIMES: THE LAW OF WAR CRIMES* (1993).
- 75 *See, e.g.*, BASSIOUNI, *supra* note 34.

- 76 This is particularly true with respect to the military laws of 188 states that embody the normative proscriptions and prescriptions of the Geneva Conventions of August 12, 1949; 147 states for Additional Protocol I and 139 for Additional Protocol II. *See* BASSIOUNI, *supra* note 34, at 252.
- 77 *See* Bassiouni, *supra* note 6.
- 78 *See* BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (George W. Keeton & Georg Schwarzenberger eds., 1953); BASSIOUNI, *supra* note 29.
- 79 II HUGO GROTIUS, *DE JURE BELLI AC PACIS*, ch. XXI, §§ III, IV, *in* CLASSICS OF INTERNATIONAL LAW 526-29 (James B. Scott ed. & F. Kelsey trans., 1925); II EMMERICK DE VATTEL, *THE LAW OF NATIONS*, *in* CLASSICS OF INTERNATIONAL LAW (Charles G. Fenwick trans., 1916).
- 80 1986 I.C.J. 14. *See generally* Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits), 81 AM J. INT'L L. 77 (1987).
- 81 *See* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Fisler Damrosch & David Scheffer eds., 1991).
- 82 *See* Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, 1951 I.C.J. 1, 15 (May 28); Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.
- 83 One example in ICL is the nonapplicability of the "defense of obedience to superior orders" to a patently illegal order. But when is such order deemed illegal on its face and on what normative basis? *See* YORAM DINSTEN, *THE DEFENSE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW* (1965); LESLIE GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976); NICO KEIJZER, *MILITARY OBEDIENCE* (1978); EKKHART MULLER-RAPPARD, *L'ORDRE SUPERIEUR MILITAIRE ET LA RESPONSABILITE PENALE DU SUBORDONNE* (1965); Leslie Green, *Superior Orders and Command Responsibility*, 1989 CAN. Y.B. INT'L L. 167.
- 84 London Charter, *supra* note 8.
- 85 *See, e.g.*, BASSIOUNI, *supra* note 29; M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 201, 208-14 (1979).
- 86 *See* BASSIOUNI, *supra* note 29, Ch. 2.
- 87 *See* BASSIOUNI, *DRAFT CODE*, *supra* note 45; *see also* *Draft Code of Crimes*, *supra* note 63; M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, *in* INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2d ed. forthcoming 1999).
- 88 *See* Randall, *supra* note 37, at 829-30 (1988); Reydam, *supra* note 37.
- 89 In an important study bearing on the *erga omnes* and *jus cogens* relationship, Professor Randall notes that "traditionally international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines." Randall, *supra* note 37, at 830. However, he, too, seems to accept the *sine qua non* relatively.
- Jus cogens* means compelling law. [The *jus cogens* concept refers to] peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any such principles or norms. *Id.* While authoritative lists of obligations *erga omnes* and *jus cogens* norms do not exist, any such list likely would include the norms against hijacking, hostage taking, crimes against internationally protected persons, *apartheid*, and torture. Traditionally, international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines, which addresses violations of individual responsibility. These doctrines nevertheless, may subsidiarily support the right of all states to exercise universal jurisdiction over the individual offenders. One might argue that "when committed by individuals," violations of *erga omnes* obligations and peremptory norms "may be punishable by any State under the universality principle." *Id.*

- ⁹⁰ Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).
- ⁹¹ *Id.*
- ⁹² *Id.* The court further stated in the ensuing paragraph:
Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.
- ⁹³ *Barcelona Traction*, 1970 I.C.J. at 32.
- ⁹⁴ In Right of Passage Over Indian Territory (*Portugal v. India*), 1960 I.C.J. 123, 135 (Apr. 12) (Fernandes, J. dissenting), Judge Fernandes states:
It is true that in principle special rules will prevail over general rules, but to take it as established that in the present case the particular rule is different from the general rule is to beg the question. Moreover, there are exceptions to this principle. Several rules *cogestes* prevail over any special rules. And the general principles to which I shall refer later constitute true rule of *jus cogens* over which no special practice can prevail.
See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 66 (June 21) (Fernandes, J., dissenting).
- ⁹⁵ *See S.S. "Lotus" (France v. Turke.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
- ⁹⁶ MERON, *supra* note 2, at 188-97.
- ⁹⁷ 1951 ICJ REP. 15 (May 28); *see* Gordon Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 93 (1987).
- ⁹⁸ (Preliminary Objections) (*Ethiopia v. South Africa; Liberia v. South Africa*), 1963 ICJ REP. 319 (Dec. 21); *see* Christenson, *supra* note 97.
- ⁹⁹ Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5); *see* Christenson, *supra* note 97.
- ¹⁰⁰ Lech Gardocki, *Report, Les Crimes Internationaux et le Droit Pénal Interne*, 60 REVUE INTERNATIONALE DE DROIT PÉNAL 91 (1989); Otto Triffterer, *Report, Les Crimes Internationaux et le Droit Pénal Interne*, 60 REVUE INTERNATIONALE DE DROIT PÉNAL 31 (1989).
- ¹⁰¹ On the establishment of the permanent international criminal court, *see Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR 51st Sess., Supp No. 22, U.N. Doc A/51/22 (1996); *The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, 13 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed. 1997).
- ¹⁰² Whether such cases should be prosecuted before an international or national body is essentially relevant to the issue of primacy of competence and to the issue of effectiveness and fairness of national prosecution. Another relevant question arises as to the prosecution of decision-makers, senior executors and perpetrators of particularly heinous crimes and other violators. A policy could be established to prosecute the former before an international criminal court as a first priority, leaving lesser violators to be prosecuted by national bodies. In addition, the question arises as to the possibility of lesser sentences or alternatives to traditional criminal sentences for lesser offenders and for national bodies to resort to various forms of conditional release, pardons or amnesties after conviction of lesser offenders. These measures would not be contrary to the principle of nonderogation to the duty to prosecute.
- ¹⁰³ For a survey of various accountability measures from a criminological perspective, *see* Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past*, 20 L. & SOC. INQUIRY 7 (1995).

- ¹⁰⁴ *Forgiveness, Forgetfulness, or Intentional Overlooking*. THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 67 (Lesley Brown ed., 1993).
- ¹⁰⁵ *Id.*
- ¹⁰⁶ For example, a short term statute of limitation can preclude prosecution.
- ¹⁰⁷ For example, in the situation involving rape in the former Yugoslavia, prosecutions are taking place in the Netherlands while victims may be refugees in different countries. If the victims are required to travel to the Netherlands without speaking the language, without proper support (familial, social, psychological, medical, emotional), and are to be cross-examined there, then they may elect not to testify, the result being impunity for the crimes committed. M. Cherif Bassiouni & Marcia McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia* (Occasional Paper # 1, 1996, International Human Rights Law Institute, DePaul University). This is the case in the *Tadic* case before the ICTY, where the defendant was acquitted of charges of rape because the victims were fearful of testifying. *Prosecutor v. Tadic*, Case No. IT-94-1-T (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, May 7, 1997) (McDonald, J., dissenting).
- ¹⁰⁸ *See Accountability For International Crimes and Serious Violations of Fundamental Human Rights*, 59 LAW & CONTEMP. PROBS. (1996); *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1997*, 14 NOUVELLES ÉTUDES PÉNALES (Christopher C. Joyner Special Ed. & M. Cherif Bassiouni General Ed. 1998); TRANSITIONAL JUSTICE, *supra* note 11. These issues include: Can the need for redress always be found through traditional monetary or prosecutorial mechanisms? What level of compensation should be given, and to whom? Can it not, particularly in financially poorer countries, be achieved in a non-monetary form? Many of the crimes involve the potential accountability of many people, maybe large sectors of a society. How many people do you prosecute to attain justice? How can the interest and support of the general population be maintained?
- ¹⁰⁹ It may be important to prosecute lower level actors in order to generate information regarding the actions and identities of higher level officials.
- ¹¹⁰ Victims should also be allowed to participate as *partie civile*, which is provided for in civilist legal systems in order to have the right to claim compensatory damages. *See infra* note 118 and accompanying text.
- ¹¹¹ Such as the Commission of Experts for the former Yugoslavia. *See The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/674 (1994); Annexes to the *Final Report*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 (1994). *See also* M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AM. J. INT'L L. 784-805 (1994); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L. F. 279-340 (1994). The Commission on Human Rights and the Sub-Committee on the Prevention of Discrimination and Protection of Minorities established, respectively, Rapporteurs and Special Rapporteurs whose work and contribution over the years have proven invaluable.
- ¹¹² *See* Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 607 (1994).
- ¹¹³ GIDEON HAUSNER, JUSTICE IN JERUSALEM 3, 4 (1966) (commenting on the *Eichmann* case).
- ¹¹⁴ *See, e.g.*, Berat & Shain, *supra* note 10 at 186.
- ¹¹⁵ *See supra* note 39 regarding national prosecutions.
- ¹¹⁶ *See supra* note 39.

- ¹¹⁷ U.S. Alien Tort Claims Act 28 U.S.C.A. § 1350. *See also Flartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert denied* 116 S.Ct. (1996).
- ¹¹⁸ U.N. Doc. A/RES/40/34, Dec. 11, 1985, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. For a discussion of this, see *International Protection of Victims*, 7 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1988). *See also* Security Council Resolution 808 establishing the ICTY: S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 1, U.N. Doc. S/RES/808 Feb. 22, 1993). Resolution 808 stated that the Security Council “[d]ecides that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”
- ¹¹⁹ *Preparatory Committee Report, ILC Draft*, Art. 43 (C) (“The judgement of the Court shall also include a determination of the scope and extent of the victimization in order to allow victims to rely on that judgement for the pursuit of civil remedies, including compensation, either in national courts or through their Governments, in accordance with international law.”).
- ¹²⁰ *See* HANNAH ARENDT, EICHMANN IN JERUSALEM; A REPORT ON THE BANALITY OF EVIL 14, 15 (1963).
- ¹²¹ *See* Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 493 (1995).
- ¹²² *See* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 33-34, 162-86 (1988).
- ¹²³ *See id.* at 33.
- ¹²⁴ *See* KATHLEEN DEAN MOORE, PARDONS, JUSTICE, MERCY, AND THE PUBLIC INTEREST 181-97 (1989); *see especially id.* at 193.
- ¹²⁵ Historical denial is characterized by claims of “nothing happened” or “whatever happened is exaggerated,” the subtext of justification is characterized by the claim “it was justified” or “there was no other choice.” *See* Israel Charny, *The Psychology of Denial of Known Genocide*, in 2 GENOCIDE (Israel Charny ed., 1988); Roger W. Smith, *Denial of the Armenian Genocide*, in 2 GENOCIDE (Israel Charny ed., 1988).
- ¹²⁶ *See, e.g.*, GEOFFREY BEST, WAR AND LAW SINCE 1945 (1994); JOHN KEEGAN, A HISTORY OF WARFARE (1993).
- ¹²⁷ *See* RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS (3 Vols. 1985).
- ¹²⁸ W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT’L L. 175 (1995). Reisman notes that “[t]here is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and re-establishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on all the relevant goals of public order.” *Id.* at 185. The question is to what extent accountability mechanisms are deemed a part of “public order?” *Id.* at 185. Where do such mechanisms rank, what is their value?
- ¹²⁹ In the classic and profoundly insightful characterization of George Orwell, “Who controls the past, controls the future. Who controls the present, controls the past.” Thus, to record the truth, educate the public, preserve the memory, and try the accused, it is possible to prevent abuses in the future. *See* Cohen, *supra* note 103, at 49.
- ¹³⁰ JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS XVII (1624).

**The work of the Athens Congress
(May 1997)
of the International Society for Military Law
and the Law of War on
national measures to repress violations
of international humanitarian law**

André Andries

Director of the Society's documentation centre

1. International Society for Military Law and the Law of War

The Society was set up in 1956 by a group of experts whose task was to prepare a draft common military penal code and disciplinary regulations for the countries that were to join the European Defence Community. As they were anxious to preserve and pursue the studies in comparative law that they had embarked on, they continued their meetings after the European project had been abandoned.

The Society, which is open to anyone specializing in these subjects (including the criminal law of armed conflict), gradually saw an increase in the nationalities of its members. While remaining rather NATO-centric, it expanded during the Cold War period to the point where it represented some 50 States from all five continents. Once the bipolarization of international relations ended, the Society was joined by experts from 15 additional countries that had belonged to the Communist bloc.

The Society's purpose is to harmonize national legislation in the military sphere — both between countries and vis-à-vis international law — and to promote the law of armed conflict, showing full respect for human rights.

Constituted under Belgian law as a scholarly association, it is a Society whose members express only personal opinions based on their professional qualifications. It is composed of theoreticians such as university professors and practitioners such as judges, lawyers, civil servants and, of course, military personnel. A review on military law and the law of war is published under its auspices in Belgium. In addition to its Board of Directors and Managing Board, the organization comprises national groups, a docu-

mentation centre located at its Brussels headquarters and specialized committees, including one on criminology.

2. The Society's work regarding war crimes

For the past decade, the Committee for Military Criminology has been endeavouring to fill a gap in purely criminological studies on criminality in war. At the Edinburgh Congress in 1988, the Committee undertook this task by documenting (as far as possible) the extremely rare cases of actual prosecution given the proliferation of war crimes recorded all over the world. At the 1991 Congress in Brussels, it dealt with the criminological approach to the perpetration of premeditated crimes, drawing on the various disciplines of the humanities to determine how apt most people were to commit acts of cruelty in situations where social control had been relaxed. At the 1994 Congress in Baden-Baden, it made a criminological inquiry into the way society responds to crime, identifying obstacles of all kinds (legal, material and moral) that explain why, despite the universal nature of the obligation to repress these crimes at the national level, so few legal systems seem capable of prosecuting and sentencing those under their jurisdiction for serious violations of the law of armed conflict. All these proceedings have been published in the *Military Law and Law of War Review*.

3. The Athens Congress (10-15 May 1997)

At present, it is conceivable that a new dynamic may arise in these different areas, both through the obligation on the part of States to cooperate (without risk to their sovereignty) with the international criminal tribunals set up by the United Nations Security Council and through the prospect of a diplomatic conference on the creation of a permanent international criminal court, the subsidiarity principle of which encourages States wishing to remain in control to give their own courts the means needed to prosecute war crimes falling within their jurisdiction.

The Society's Board of Directors — aware of the potential impact of this development on civilized society and therefore engaging in a kind of ongoing survey of the difficulties to be resolved — chose the national repression of violations of the law of armed conflict as the main theme for its Athens Congress, in May 1997.

A committee of experts was given the task of drawing up a preparatory questionnaire for national delegations on the current status of this issue in their countries. The questionnaire was novel in that it asked not only about the formal fulfilment of obligations stemming from international humanitarian law, but also about all the conditions needed for the effective functioning of national repression in these areas.

The following issues were addressed in the questionnaire.

3.1 Regarding substantive criminal law

- The issue of criminalization in domestic law, not only of violations (whether serious or not) of international humanitarian law (with a special question on violations of the law of non-international armed conflicts), but also of violations of the other conventions of humanitarian law, crimes against humanity and genocide.
- The form taken by the legislation, the reasons for choosing between a special law and existing penal codes, whether ordinary or military.

3.2 Regarding general principles of international criminal law

Not only the application of the rules of international humanitarian law regarding command responsibility and commission of a crime by omission, but also the absence of a time bar, acts preparatory to the commission of an offence, grounds for justification or excuse, grounds for declaring someone not criminally liable and the unintentional moral element.

3.3 Regarding jurisdiction

Not only the granting of universal jurisdiction to national courts in accordance with the 1949 Geneva Conventions (radically different from the varieties of extraterritorial capability generally recognized in domestic criminal law), but also the distribution of jurisdiction between the various national courts, with special questions on the legal and logistical means required for bodies engaged in a judicial inquiry to be present in military operation zones, the extent to which the judicial authorities are truly independent of the political and military authorities, and the latter's jurisdictional immunities and privileges.

3.4 Regarding procedure

- The issue of instituting proceedings, the role assigned to victims, to the political and military authorities and to the legal advisers of the armed forces, special training on these issues for the prosecuting bodies and the moral or psychological difficulties that they may encounter in carrying out their task.
- The question of judicial guarantees, guarantees for witnesses against pressure and threats, and the effect of military secrecy on testimony and the defence.

4. Final recommendations regarding national legislation on the repression of war crimes¹

Twenty-five national delegations responded to the preparatory questionnaire: Albania, Argentina, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Iran, Ireland, Italy, the Netherlands, Norway, Romania, Russia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Having been appointed general rapporteur for the section on national laws and procedures, I corresponded with the national rapporteurs each time their initial responses did not seem to me to be precise enough to write a summary of comparative law.

A systematic compilation of national responses both to the preparatory questionnaire and to my additional questions will be published in 1998, as part of the proceedings of the Congress, as will the general report, in which I have attempted to provide a critical summary. These texts were forwarded to the national groups in advance of the Congress.

So that the Congress itself would make a practical contribution towards the building of a worldwide legal order in this crucial area, which represents the Society's central purpose, I obtained permission from the Managing Board to include in the general report some draft recommendations for national lawmakers, and a discussion of this draft constituted the business of the plenary session on national laws and procedures. A drafting committee prepared the final text of these recommendations, to which no objection was raised. This is the text that has been distributed to you and will feature as an appendix to my written presentation. On these issues it represents

¹ See Annex III.

— alongside the basic documentation gathered — the main contribution of the Society, which has just been granted the status of consultative body to the United Nations.

5. The basis for several crucial points in the final recommendations

In the speaking time allotted to me I can do no more than comment briefly on the most important sections of this document. A commentary on the other sections will be included in the proceedings of the Congress.

5.1 Section A

What strikes the outside observer on reading the different countries' responses to the questionnaire is both the difficulty experienced by the respondents in finding, in the rules scattered throughout domestic criminal law, items that correspond to the many problems associated with the national repression of war crimes, and the dubious nature of some replies owing to the fact that legislation in this sphere is inconsistent.

I think I can say that it is as if the States Parties were motivated mainly by a concern to be able to affirm that their respective legal systems comply with the essential obligations laid down by international humanitarian law, while few of these systems demonstrate a firm determination to ensure effective repression of war crimes. On this subject, the French rapporteur, Professor P. Daillier, writes: "The willingness shown to respect the obligation laid down by the 1949 Geneva Conventions to prosecute serious violations and recognize jurisdiction has not been sufficiently emphatic to avoid leaving national courts a number of technical pretexts for evading the obligation to repress."

A coordinated summary of the relevant provisions with the aim of systematically addressing all the problems raised by this particular kind of repression therefore seems to be a condition for both the system's feasibility (or even comprehensibility for the public and for practitioners) and its effectiveness. In this regard, it is equally important to note that, while they are included in domestic criminal law owing to the obligation to "provide criminal sanctions", the rules of the criminal law of armed conflict concern international crimes threatening public international law and order, and not simply the internal law and order of States.

These crimes are addressed by the procedures laid down in substantive criminal law as well as non-time-barred and extraterritorial procedural rules corresponding to their international character, all of which differ on some very important points from those in domestic law.

In addition, crimes may be committed by civilians as well as by soldiers. Logic therefore dictates that they should be the subject of a special law drawing together all the rules on their repression. On this subject, the International Association of Criminal Law in 1953 recommended the drafting of a model law that could be adopted by all the States party to the Geneva Conventions. At the time, attempts made to do so were considered premature but there is no doubt that, in the absence of a model law, harmonization of national laws must in any case involve the adoption by the States Parties of special legislation allowing for comparative law studies whose results will be less dubious. We must not lose sight of the requests for clarity, precision and concision from those directly concerned by the law, i.e. the military.

Specific, systematic legislation is also the way for national lawmakers to play an educational and mobilizing role in relation to judicial bodies not very familiar with these matters.

5.2 Section B (3)

The perspective of this paragraph is more that of developing the law of armed conflict by means of customary law than by strictly applying codified law. This has considerable importance in practice as it underscores how inconsistent it would be to punish crimes committed in international armed conflicts, which are ever less numerous, while not punishing those committed in internal conflicts, which nowadays account for almost all victims of war.

5.3 Section C (3)

This paragraph is extremely important since the possibility of justifying violations of the law of armed conflict on the grounds of military necessity or vital national interests could compromise the consistency of all the provisions of this law, insofar as giving extensive weight to these considerations could cause the concept of military victory at any cost to take precedence over all prohibitions laid down by *jus in bello*. It was the fact

that they had waged total war that caused various Nazi leaders to be convicted at Nuremberg. The international law of armed conflict has thus, logically, reduced the value of military advantage from a justification for practically any violation to grounds only for violations committed in accordance with the principle of proportionality.

The unconditional prohibitions contained in the human rights instruments outlaw acts incompatible with respect for human life (in the form of illegal acts of war) even in the event of a public danger threatening the life of a nation. As the Spanish report so rightly states, this issue has to do with the drafting of international law, and not with its implementation by legislation in different countries.

To avoid reintroducing the risk of doing away with the very principle of limiting violence in war through a wilful misinterpretation of the proportionality principle, it is also essential to recall the limits to this principle set by the Martens clause, as reaffirmed in the ICRC's *Commentary* on the 1977 Additional Protocols.

5.4 Section D

This section on the organization and jurisdiction of the national courts responsible for repressing war crimes is of considerable practical importance as the very real obstacles to the effectiveness of this repression — obstacles covered by the questions — are generally obscured by the theoretical studies on this subject.

The first paragraph is based on the consideration that it is the capability of national courts, based on universal jurisdiction, to try war crimes that, under the Geneva Conventions system, was supposed to offer a credible alternative to the absence of international criminal courts. Making the Conventions universal was meant to render impunity for war criminals theoretically impossible.

The inadequate implementation of this treaty obligation is itself enough to explain much of the ineffectiveness of the present system.

The operation of the international criminal tribunals set up by the Security Council has clearly shown the need to extend this principle to repressing violations of the law regarding internal armed conflict. The countries that have done this are, very understandably, particularly interested in getting other countries to shoulder their share of the burden.

As powerful psychological obstacles often stand in the way of the judicial authorities of a country at war when it comes to prosecuting their own citizens for violating the law of armed conflict, the universal jurisdiction afforded the courts of other countries must prevent the system from becoming completely paralysed.

Paragraphs two and three of this section concern two aspects of the same problem. The functional split assessed by the general report as bedevilling the national system for repressing international crimes presents particularly noticeable flaws in terms of judicial law: the States responsible for implementing the law of armed conflict — and therefore, if necessary, the law on violations of it — must organize the repression of those violations. The system thus necessarily presupposes that the judiciary is independent of the political and military authorities, as regards both the instituting of proceedings and the judgements that result. Otherwise, the warring States would themselves be the direct judges of the way in which the conflict was waged, which would clearly violate the principles of a fair trial. The problem in judicial terms for the national repression of war crimes is how to ensure this independence of the prosecuting and judicial bodies while also ensuring their proximity to the military, and in particular to combat operations, for without this proximity it would be impossible to properly monitor the legality of those operations.

Paragraph two deals with the first aspect of this problem: the independence of the judiciary. It is aimed in particular at military courts which, while normally enjoying greater proximity to the operational command than ordinary courts, are likely to have fewer guarantees of real independence. Since the international legal order has imposed absolute limits on the choice of means and methods of warfare, the old adage *salus patriae suprema lex esto* should be adapted to the new wording proposed by Professor Eric David: *salus juris suprema lex esto*.

Paragraph three constitutes the counterpart of the preceding paragraph with regard to guarantees which must exist for bodies such as ordinary courts that normally enjoy a degree of independence and have the means to inquire, directly and substantially, into events in the zone of military operations. This requires, in particular, autonomous means of transport and communication.

The time has perhaps come to envisage a model for a national war-crimes tribunal that is a standing component of the judiciary, a body which would

combine the essential qualities of independence of and proximity to the military.

The investigative and prosecuting bodies should, of course, be totally shielded from political and military influence, and they should have all the means necessary to ensure their presence and freedom of action in the field during military operations. At the diplomatic conference that led to the adoption of the Protocols additional to the Geneva Conventions, some experts proposed the setting up of a bureau of international prosecutors for national courts, but there was not sufficient consensus on this point.

In order to combine judicial capacity with a knowledge of the issues involved in armed operations, the trial components of these national courts should be composed in equal measure of non-military judges and military judges, avoiding a majority on either side.

CHAPTER II

National systems to repress violations of international humanitarian law

■ Belgium

Mr Vandermeersch, *Investigating Judge*, presented the mechanisms in force in Belgium to repress violations of international humanitarian law.¹ He highlighted the Belgian Act of 16 June 1993, which provided for the repression of grave breaches of the 1949 Geneva Conventions and their 1977 Additional Protocols I and II. The Act, which established penalties and set up prosecution procedures, contained several innovative features, such as an extension of its scope to include non-international armed conflicts, the notion of universal jurisdiction and the exclusion of time-barring. The wording of the Act was similar to that of the Geneva Conventions, thereby avoiding confusion. Article 1 listed crimes under international humanitarian law, while Articles 3 and 4 defined preparatory acts or other types of behaviour preceding a war crime. Article 4 defined an order to commit a breach of international humanitarian law as a crime, along with incitement and failure to act. Exoneration from prosecution for reasons of political necessity or for obeying higher orders was prohibited.

Under the Act of 16 June 1993, the rule of universal jurisdiction applied to breaches of international humanitarian law, irrespective of the nationality of the victim or the perpetrator. If the accused was not present in Belgium, a special clause applied to the question of extraterritoriality. In accordance with domestic rules regarding competence, military courts had jurisdiction over violations of international law committed in wartime; in times of peace, action could be taken in the ordinary courts. Cooperation took place between Belgian courts and the International Criminal Tribunals for the former Yugoslavia and Rwanda in matters concerning the detention and transfer of alleged war criminals.

Given the close ties between Belgian and Rwanda, the large number of Rwandans living in Belgium and the public outcry caused by the murder of

¹ See “Belgian legal system for the repression of crimes under international law”, p. 157.

10 Belgian blue helmets in Kigali in 1994, several Belgian pressure groups had campaigned for the prosecution in Belgium, under the Act of 16 June 1993, of perpetrators of grave breaches of international humanitarian law committed in Rwanda. In February 1995 a positive injunction had been obtained, ordering the Prosecutor General to institute proceedings in Brussels. As a result, 10 cases had been tried, involving 20 Rwandans. The Act of 16 June 1993 contained many references to the repression of torture, inhuman treatment causing severe bodily harm to others, incitement and failure to act. Although universal jurisdiction made it easier for Belgian judges to accept such cases, there still remained a certain inertia and lack of resolve. Despite the fact that some of the potential civil plaintiffs were Rwandans living in Belgium, the obligation laid down in Belgium domestic law for them to pay part of the procedural expenses meant that they preferred to serve as witnesses only.

Cooperation with the International Criminal Tribunal for Rwanda had led to positive results, despite some overlapping. The primacy of the International Tribunal meant that a clear hierarchy existed between it and Belgian national courts; three Belgian cases had already been transferred to the Tribunal. There were, however, certain problems linked to incompatibility since Belgian national procedures did not always correspond to those of the International Tribunals.

In Belgium, the assize courts were competent to try alleged perpetrators of grave breaches of international humanitarian law. Although most investigations had been completed, proceedings seemed at present to be at a standstill.

* * * * *

Discussion

Mr Sarr asked whether the principle of universal jurisdiction was not detrimental to some of the principles enshrined in Belgian law.

Mr Vandermeersch replied that if universal jurisdiction did not exist, Rwandans would not have been able to bring cases to court in Belgium and international arrest warrants could not have been issued for a number of individuals living outside Belgium. Although universal jurisdiction could be seen by some as tantamount to universal policing, it opened up numerous possibilities for bringing criminals to justice.

Mr Andries pointed out that countries which had adopted the principle of universal jurisdiction wished that others would rapidly follow suit. Belgium did not have the material resources to try all the serious breaches of international humanitarian law committed throughout the world.

Ms Jarraya asked for information on the discretionary powers of Belgian judges under the Act and enquired into factors such as the burden of proof and the presumption of innocence, which might affect those powers.

Mr Vandermeersch replied that ordinary law generally prevailed, which meant that judges were free to appreciate the nature of the evidence, and that the provisions of the European Convention on Human Rights were respected.

Mr Potey stated that Belgian judges were not *in situ*. As a result they incurred the risk of assessing the facts incorrectly.

Mr Vandermeersch agreed that distance was a problem with respect to universal jurisdiction.

Mr Salinas Burgos, enquired as to whether there had been any conflicts between different systems of law and the mechanism of universal jurisdiction.

Mr Vandermeersch replied that the primacy of the International Criminal Tribunals was recognized by Belgian domestic law. Where cases could not be transferred to these Tribunals, the Belgian judicial authorities would continue their work. If extradition was possible, decisions had to be taken as to priorities. The aim was to ensure that a maximum number of cases was tried. Generally speaking, there were more negative conflicts than positive ones.

* * * * *

■ Switzerland

Mr Roth, *Professor of Criminal Law, University of Geneva*, described the general framework for the repression of breaches of international humanitarian law in Switzerland.² Although most violations of the law were dealt with by military courts, they could also come under the jurisdiction of ordinary

² See “The repression of violations of international humanitarian law in Switzerland”, p. 197.

courts where no specific provision of the Military Penal Code applied. The two systems therefore existed side by side, even though it could be useful to inquire into the wisdom of attributing competence to military judges when matters relating to civilians might be dealt with more efficiently by an ordinary court. Dual criminal liability was not allowed but extradition was possible under Swiss law. International law has been incorporated into a large number of provisions of Swiss criminal law. The Military Penal Code, for instance, contained various chapters dealing with offences under the law of nations and the law of armed conflict; international conventions ratified by Switzerland could be invoked under ordinary criminal law in order to repress violations thereof. A consensus existed concerning the prosecution of war criminals, regardless of their nationality, in connection with a conflict to which Switzerland was a party. However, the issue became increasingly ambiguous where this was not the case, especially if the perpetrator's country had not ratified the provisions of international humanitarian law.

Mr Roth also presented a brief summary of the report on criminal procedure written by Mr Sträuli³ (Assistant Lecturer, University of Geneva), highlighting the steps required to prosecute a breach of international law, the manner in which trials were conducted and the rights of victims, together with the protection of witnesses.

* * * * *

Discussion

Mr Gebreegziabher Gebreyohannes asked if the division between military courts and ordinary courts in Switzerland led to variations in the amount of evidence required and affected the presumption of innocence.

Mr Roth replied that the Swiss ordinary and Military Penal Codes were both in compliance with the norms laid down in the European Convention on Human Rights. Although there had been differences with respect to the admission of evidence and the protection of victims or witnesses in the past, both Codes were now similar.

³ See "The repression of violations of international humanitarian law in Switzerland: Aspects of criminal procedure", p. 231.

Mr Dubois inquired as to whether the procedures for extradition were similar for both ordinary and military courts.

Mr Roth said that the same degree of legal protection was required in both cases.

* * * * *

■ Germany

Mr Fischer, *Professor of International Law, Ruhr University of Bochum*, informed the meeting on the ways in which violations of international humanitarian law were repressed under German domestic law.⁴ He said that Germany did not have military criminal courts, although such courts could be set up under the Constitution. The German Penal Code made no specific reference to the Geneva Conventions and their Additional Protocols, to which Germany was party, but it contained provisions for the punishment of war crimes and other breaches of international humanitarian law committed by German citizens or on German soil. The extradition of German citizens was nevertheless prohibited. Whether the German Penal Code covered all aspects of war, such as the use of perfidious weapons, detention and imprisonment, was a matter for debate, although it was highly probable that its provisions applied in most situations. The Penal Code did not refer specifically to the type of conflict dealt with, which implied that non-international armed conflicts came within its jurisdiction. In practice, however, German courts tended to try war crimes in cases of international armed conflicts only, whereas genocide could be prosecuted in connection with both internal and international armed conflicts.

As for the prosecution of foreign nationals, reference was made in the *Tajic* and *Jorjic* cases to Article 6, para. 9, of the Penal Code, which provided for extraterritorial jurisdiction in the case of genocide and other offences that Germany is required to prosecute under the terms of an international treaty by which it is bound. For legal action to be taken, however, a link had to be established with Germany, e.g. the foreign national must have elected domicile in Germany, and the crime had to be sufficiently serious in nature.

According to German penal procedure, competence for violations of international humanitarian law lay with the regional courts and the regional

⁴ See "The repression of violations of international humanitarian law under German domestic law" p. 242.

high courts. The public prosecutor could, however, choose to abandon proceedings if they were considered to be prejudicial to Germany. As German penal procedure was based on an oral hearing before the court, written documents were deemed satisfactory in exceptional circumstances only. Witnesses were therefore invited to testify in Germany, or the judges must travel to see them, all of which could be costly. In addition, testimonies made in court several years after the alleged violations took place were often disappointing.

In the Tajic case, a special law had to be drafted and enacted by the German parliament to authorize the suspect's transfer to the International Criminal Tribunal for the former Yugoslavia in The Hague. As yet, no such law has been enacted with regard to the International Criminal Tribunal for Rwanda. It would therefore be useful for the parliament to fill any gaps that existed in its legislation as quickly as possible.

* * * * *

Discussion

Mr Kama asked whether a person accused of murder or genocide could nevertheless be transferred to the International Tribunal for Rwanda.

Mr Fischer replied that to do so, the German parliament would have to adopt new legislation.

Mr Rowe enquired as to whether the German parliament intended to extend the country's jurisdiction to include tourists entering Germany.

Mr Fischer replied that German public interest in the matter had already started to wane. He called upon the meeting to urge the parliament to act as soon as possible since potential new loopholes were becoming evident.

Ms Roberge pointed out that the apparently narrow jurisdiction afforded by Germany seemed to contradict the outstanding work it had achieved with respect to the definition of war crimes.

Mr Fischer said that German jurisdiction was limited rather than narrow. However, if an international criminal court were to be set up, Germany would be forced to change the provisions of Article 6, para. 9, of its Penal Code.

* * * * *

■ Spain

Mr Rodríguez-Villasante y Prieto, *Judge Advocate General*, presented Spain's mechanisms for the repression of violations of international humanitarian law.⁵ He emphasized the pioneering role played by CEDIH in the codification of war crimes in his country. Previously, serious violations of international humanitarian law had been punishable solely under the Military Code. Nowadays, Spain had a mixed system under which war crimes could be prosecuted and individuals and property were protected in international and non-international armed conflicts. The principles of extraterritoriality and universal jurisdiction were laid down in Spanish law. Extradition was possible and legislation had been enacted to facilitate cooperation with the International Criminal Tribunals for the former Yugoslavia and Rwanda. Commission of crimes by omission was also covered by recent legislation. Military courts dealt with crimes committed by soldiers; if civilians were involved, ordinary criminal courts had jurisdiction.

Under the 1985 Spanish Military Code, protected persons specifically included victims, the wounded, the shipwrecked, civilians, victims of internal and international armed conflicts, members of protecting powers and their substitutes (such as the ICRC) and parliamentarians. Cultural property and installations essential for the survival of the civilian population were also covered. The Spanish ordinary Penal Code of 1995 provided for the punishment of war crimes and other serious violations of international humanitarian law in proportion to their degree of gravity. War crimes, with the exception of genocide, were nevertheless subject to a statute of limitations. Punishment of violations of humanitarian law depended on the consequences of the acts. The death penalty, previously applicable only in times of war and under military law, had been abolished. The 1995 Penal Code also prohibited certain means and methods of warfare mentioned in the law of The Hague and the Geneva Conventions. Members of the clergy, medical personnel and relief workers were protected under the Penal Code. Incitement or conspiracy to commit war crimes and the apology of such crimes were proscribed. Both the Military Penal Code and the ordinary Penal Code contained residual clauses covering other violations of international humanitarian law. If public officials committed war crimes,

⁵ See "The protection of war victims under the 1995 Spanish Penal Code: Offences against persons and objects protected in the event of armed conflict", p. 256.

they were automatically expelled from public service. Similarly, anyone who committed such acts was barred from taking public office.

* * * * *

Discussion

Mr Salinas Burgos enquired into the statute of limitations, and possibilities of amnesties and pardons under Spanish law, along with their relevance to human rights violations and processes of national reconciliation.

Mr Rodríguez-Villasante y Prieto replied that Spain had not ratified the 1968 Convention on statutes of limitations. The Spanish Constitution prohibited general pardons and amnesties.

Mr Condorelli asked if there were differences in sentencing between military courts and ordinary criminal courts, especially with regard to the notion of attenuating circumstances and the acts of public servants.

Mr Rodríguez-Villasante y Prieto said that sentences passed under the Spanish Military Code tended to be harsher. Soldiers were formally bound to act under orders. As far as penalties for violations of international humanitarian law were concerned, the Spanish Military Code judged crimes according to their consequences. Sentencing was thus heavier in cases leading to death than in those involving mistreatment alone. Under ordinary Spanish criminal law, the degree of gravity of the act was a key issue, and soldiers could be held to account in a different manner. Attacks on individuals were punished more severely than acts causing material damage. An attempt was being made to bring the Spanish Military Penal Code into line with ordinary criminal law so that the same principles would be applied in all cases, although areas such as the duty of obedience within a hierarchy remained specific to the military.

Mr Sarr pointed out that the International Court of Justice had recognized the value of customary law and its relevance to the provisions of international humanitarian law. He enquired as to whether customary law might not be invoked to deal with the exemption of certain crimes from the statute of limitations. He could not see why genocide was considered exempted, whereas war crimes were not.

Mr Rodríguez-Villasante y Prieto replied that the Spanish Red Cross Society felt that the current legal situation with regard to that problem was dissatisfying and needed to be modified.

* * * * *

■ Croatia

Mr Separovic, *Professor of Law, University of Zagreb*, described the current situation in the former Yugoslavia, where 5,000 people were still missing and many mass graves had yet to be discovered.

Half a million Croats and two million people from Bosnia and Herzegovina were no longer able to live in their own homes. Cultural monuments had been destroyed and the population had been traumatized. He praised the ICRC for its efforts to ensure the application of international humanitarian law in truly horrific circumstances. The problem in the former Yugoslavia was that innumerable crimes had been committed and that some were of such magnitude that they defied comprehension. He enquired into the notion that crimes against humanity could only be perpetrated on a mass scale and pointed out that such crimes could exist outside the context of war, independent of armed conflict. Although international humanitarian law must be respected at all times, the conflict in the former Yugoslavia had revealed that this obligation was not necessarily heeded. The Yugoslav federal army had been aware of the rules of international humanitarian law, but this did not prevent them from committing atrocities and violations. Ethical teachings, such as the prohibition against killing found in both the Bible and the Koran, had also been ignored during the conflict.

After its secession from Yugoslavia, Croatia became a party to the international humanitarian law treaties. The criminal court system, which handled violations of that law, was set up along lines similar to the legal systems in Germany and Austria. Such violations were therefore dealt with under Croatia's ordinary Penal Code. The death penalty had been abolished, and the maximum punishment for grave violations of the law was 40 years' imprisonment. International law had been incorporated into the Croatian legal system and took precedence over national law. Croatia's criminal law was a mixed system involving inquisitorial and adversarial proceedings. The accused had a right to be present at his trial, although

sentencing *in absentia* was possible. There were no special courts, only ordinary ones. Victims' rights were a key issue.

In view of the lack of available resources, it was highly important to set up an international fund to compensate victims or provide them with redress whenever the State was unable to do so. Victims of the war in Croatia required protection of their personal dignity (especially in cases of rape), protection from acts of revenge when testifying, legal counselling, medical care and psychological support. Croatia's legal sovereignty was limited by its obligations to the International Tribunal for the former Yugoslavia. Those obligations included the general requirement to bring domestic legislation in line with the rules of the Tribunal, acceptance of the Tribunal's authority, the duty to try perpetrators of grave breaches and the provision of legal assistance to the Tribunal in executing its requests and orders.

The incorporation of international humanitarian law into domestic legislation should be encouraged, together with the establishment of a permanent international criminal court. The help of the international community was needed in clearing mines, which were a serious problem in the former Yugoslavia. It would also be useful to introduce the notion of crimes against peace. An early-warning system should be set up in order to forestall internal armed conflicts, and the rights of victims should remain an integral part of any criminal procedure whatsoever.

* * * * *

Discussion

Mr Sandoz, referring to the problem of victims of the war in the former Yugoslavia, pointed out that although rape was not specifically mentioned in the Geneva Conventions it was considered a war crime because it was an attack on a person's physical integrity.

Mr Demin asked what kinds of early-warning systems could be envisaged.

Mr Separovic said that factors likely to generate internal armed conflict usually became apparent well before violence exploded. Prevention was better than a cure.

Mr Gebreegziabher Gebreyohannes supported the speaker's appeal for introducing the notion of crimes against peace but enquired as to who

should be held responsible — heads of State or legislative bodies — for such crimes.

Mr Separovic said that individual responsibility was a highly important but sensitive issue. Although it was common to speak of collective victimization, it was difficult to broach the subject of collective responsibility. The people who gave orders to commit crimes against peace were obviously responsible. That would, therefore, include both the head of State and politicians. However, other people could also be involved, such as journalists, who should outlaw incitement to hate in their professional code of ethics. It was difficult enough for the international community to agree on a definition of aggression. The United Nations Charter, for instance, was full of references to peace, but avoided any definition of responsibility as this could incur the wrath of certain powers and therefore be subject to veto.

* * * * *

CHAPTER III

Relations between national courts and the *ad hoc* Criminal Tribunals for the former Yugoslavia and Rwanda

Wen-qi Zhu

*Legal Adviser, Office of the Prosecutor,
International Criminal Tribunal for the former Yugoslavia*

Introduction

The International Criminal Tribunal for the former Yugoslavia (hereinafter “the International Tribunal” or “the Tribunal”) was set up nearly four years ago to prosecute alleged perpetrators of serious violations of international humanitarian law committed in that territory as from 1991. This was the first time since the Nuremberg and Tokyo Military Tribunals were set up after the Second World War that the United Nations had established a judicial body to try individuals charged with violations of international law as a means of restoring or maintaining international peace and security. It is therefore not at all surprising that the International Tribunal has generated such an enormous amount of concern and discussion within the international legal community.

In presenting my topic, “The International Tribunal, States and national courts”, I intend to explain briefly:

- (1) why States have an obligation to cooperate with the International Tribunal;
- (2) how the International Tribunal tries its best to encourage States to cooperate with it; and
- (3) what efforts the Prosecutor of the International Tribunal has made, given the limited resources available, to help the national courts of the States having comprised the former Yugoslavia to prosecute persons responsible for serious violations of international humanitarian law and how these efforts have contributed to the development of international criminal law.

1. Obligation of States to cooperate with the International Tribunal

The International Tribunal was set up by the United Nations Security Council as a means of restoring or maintaining international peace and security. It is vested by its Statute and its Rules of Procedure and Evidence with the power to issue orders or requests as it deems necessary for its own functioning. However, as a judicial body the International Tribunal is unique in that, unlike national courts, it does not operate within a wider criminal system comprised of other law enforcement agencies and has no means of ensuring that the orders or requests it issues are complied with.

Under Article 1 of its Statute, the International Tribunal has criminal jurisdiction over “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”. Accordingly, the Tribunal is authorized to prosecute and try those persons. Nevertheless, it is very clear that the Tribunal cannot do its work alone. It must rely upon the cooperation of sovereign States, on whose territory and under whose control the persons responsible for serious crimes that come within its jurisdiction could be brought to trial. The Tribunal must also turn to States if it is to investigate crimes, collect evidence, summon witnesses and have indictees arrested and handed over to it. Furthermore, the Tribunal does not have prison facilities in which persons convicted and sentenced by it may serve their terms. The enforcement of sentences must therefore be undertaken by States with such facilities.

It is exactly for this reason that the importance and necessity of cooperation with States was stressed at the very outset by the United Nations Security Council in resolution 827, which provided that: “all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution.”

The Statute of the International Tribunal, which was adopted by the Security Council as an annex to resolution 827, provides in Article 29 that:

- “1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.”

Rule 58 of the Rules of Procedure and Evidence further supplements the duty in relation to the transfer of accused persons to the International Tribunal, providing that:

“The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.”

It should be stressed that the obligation set out in Article 29 of the Statute is one which is incumbent on every member State of the United Nations. Article 25 of the UN Charter states that “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” The UN Security Council, the body entrusted with primary responsibility for the maintenance of international peace and security, has asked all member States to cooperate with the International Tribunal and to comply with its orders and requests as well. The duty to cooperate with the Tribunal is thus an international obligation binding upon all States.

The practice of the International Tribunal so far has shown that the importance of cooperation with States can never be overestimated. The Tribunal needs States to assist with the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons and the surrender or transfer of the accused to the Tribunal. In other words, the International Tribunal needs the cooperation of States in all of its tasks. If the Tribunal is to function successfully, States must therefore comply with their obligation under international law to cooperate with it.

2. Steps taken by the International Tribunal to encourage State cooperation

Although the duty to cooperate with the International Tribunal is an international obligation binding upon all States, the obligation laid down in Security Council resolution 827 and in Article 29 of the Statute of the Tribunal is of a general nature. In order to fulfil this obligation, most States have to make adjustments to their national legal systems.

In enacting domestic legislation each State must naturally take account of the particular requirements of its own legal system. The International Tribunal, aware of the necessity and importance of obtaining the cooperation of States, has endeavoured from its inception to encourage them to fulfil this obligation and to help them in so doing. Here I should like to mention the “Tentative Guidelines” and Rule 70 of the Rules of Procedure and Evidence.

2.1 “Tentative Guidelines”

In 1995 the Registry of the International Tribunal compiled “Tentative Guidelines for National Implementing Legislation of United Nations Security Council Resolution 827 of 25 May 1993”¹ (hereinafter “the *Guidelines*”).

The Guidelines indicate areas of domestic law that may need to be revised by States in order to implement the Statute of the International Tribunal. By calling the Guidelines “tentative”, the Tribunal wished to demonstrate its good will and its respect for State sovereignty. The “Guidelines” nevertheless state that the relevant authorities “shall fully cooperate with the International Tribunal in accordance with the provisions of Security Council resolution 827 (1993), the Statute (and this Act)”.²

The obligation under consideration concerns action that a State may take through its various organs, for example when the International Tribunal orders it to produce documents in the possession of one of its officials. The obligation also concerns action that a State may be requested to take with regard to individuals subject to its jurisdiction, such as when the Tribunal orders that a person be arrested, or be compelled under threat of domestic

¹ *Yearbook of the International Criminal Tribunal for the former Yugoslavia* (1995), p. 318.

² Article 2, “The Tentative Guidelines for National Implementing Legislation of United Nations Security Council Resolution 827 of 25 May 1993.”

punishment to surrender evidence, or be brought to the Tribunal to testify. The Guidelines take these situations into account.

It is stipulated in the Guidelines that “without prejudice to the competence of the Ministry of Foreign Affairs, the Ministry of Justice (or any other appropriate Ministry or authority) shall be the central authority responsible for receiving communications and requests from the International Tribunal...”³

Since both the International Tribunal and the national courts have concurrent jurisdiction for prosecution and the Tribunal has primacy over the courts,⁴ the Guidelines provide that whenever criminal proceedings within the jurisdiction of the Tribunal are pending before a State judicial or investigating authority, that authority shall defer to the competence of the Tribunal if the latter so requests.⁵

In line with the Statute and the Rules of Procedure and Evidence of the International Tribunal, the Guidelines also offer advice to States regarding the surrender, arrest and detention of the accused, the provisional arrest of suspects and other forms of cooperation. They provide that an arrest warrant issued by a judge of the Tribunal shall be addressed to the Ministry of Justice, which must make sure that the original documents are properly drawn up and forward a copy of the warrant to the Chief Public Prosecutor for execution. The latter must do everything in his power to ensure the prompt arrest of any person within the State against whom a warrant has been issued. Prior to the execution of the warrant, he must, if possible, inform the Prosecutor of the International Tribunal so that the latter may be present as from the time of arrest.⁶

The Guidelines further provide that requests for assistance addressed through State organs to the police or any judicial bodies must be complied with. Such assistance may include (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; or (c) the service of documents.⁷

Protection of witnesses and victims is a matter to which the International Tribunal has paid great attention. Since the Tribunal does not possess any

³ Article 3, *Ibid.*

⁴ Article 9 of the Statute of the International Tribunal.

⁵ Article 4 of the Guidelines.

⁶ Article 5, *Ibid.*

⁷ Article 8, *Ibid.*

police or territory, effective protection of witnesses depends very much on the cooperation of States. The Guidelines therefore stipulate that, at the request of the Tribunal, the courts and other authorities concerned should provide all necessary assistance for the identification, location and interviewing of witnesses and experts within the State, and that witnesses and experts who attend a trial held before the Tribunal may return to their countries without losing any particular status they might have enjoyed before they left to testify.⁸

After the Registry compiled the Guidelines, the President of the International Tribunal sent a letter and a copy of the document, together with information about the implementing laws of various States, to other States which had indicated their intention to adopt legislation but had not yet undertaken any action in this regard. The information was sent to encourage these States to enact implementing legislation.

2.2 Rule 70

Article 15 of the Statute of the International Tribunal directs its judges to draft rules of procedure and evidence for the conduct of proceedings before the Tribunal. Rule 6(B) states that “an amendment to the Rules may be otherwise adopted, provided it is unanimously approved by the Judges”.

In accordance with the amendment procedure laid down in Rule 6(B), Rule 70(B) was added in October 1994, providing that:

“If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused”.

This amendment was designed to offset a problem encountered by the Prosecutor in the field, namely that investigations were being hampered by the fact that a number of sources, in particular certain States and non-governmental organizations, had information which could help the Prosecutor to identify incidents worthy of further examination, but which they were reluctant to release since it had been provided to them on a confidential basis. The amendment was introduced to protect these sources.

⁸ Article 9, *Ibid.*

The adoption of Rule 70(B) has demonstrated the efforts made by the International Tribunal to encourage cooperation on the part of States and other bodies. In practice, Rule 70 has so far proved very useful to the Tribunal in obtaining information from States that are willing to assist it.

3. How the International Tribunal helps national courts to prosecute those responsible for serious violations of international humanitarian law

Under Article 1 of its Statute, the International Tribunal has criminal jurisdiction over “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” The Tribunal is mandated to prosecute and try all such persons, this is its primary task, although it goes without saying that the Tribunal cannot prosecute everyone who has committed crimes within its jurisdiction. However, Article 9 of the Statute provides that the International Tribunal and national courts “shall have concurrent jurisdiction” to prosecute those persons. National courts therefore also have a role to play in suppressing serious violations of international humanitarian law. In this sense the Tribunal has done its best to cover all cases. I should now like to mention the contribution made by the Office of the Prosecutor to “Rules of the Road”.

The official title, “Rules of the Road”, comes from the “Rome Statement on Sarajevo” (hereinafter “the Statement”), which was signed and approved by all the parties to the Dayton Peace Agreement in Rome on 18 February 1996. In the Statement, there is a section entitled “Cooperation on war crimes and respect for human rights”, wherein the Parties agreed that:

“As part of their obligation to cooperate fully in the investigation and prosecution of war crimes and other violations of international humanitarian law, as provided in Article IX of the General Framework Agreement, the Parties will provide unrestricted access to places, including mass grave sites, relevant to such crimes and to persons with relevant information”.⁹

They also agreed that:

“Persons, other than those who had been already indicted by the International Tribunal, may be arrested and detained for serious

⁹ Rome Statement on Sarajevo, para. 5.

violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action”¹⁰ (emphasis added).

Since this agreement concerns persons other than those “already indicted by the International Tribunal”, it is evident that it does not come within the mandate of the Tribunal, which can do nothing about it. However, with a view to furthering the cause of international peace and justice, the Prosecutor of the International Tribunal has agreed to review cases submitted to her office in order to advise the parties as to whether or not in her opinion the evidence is sufficient by international standards to justify either the arrest or the indictment of a suspect, or the continued detention of a prisoner.

According to the practice developed so far by the International Tribunal and the national courts of the States concerned, a request for review of an order, warrant or indictment submitted to the Prosecutor of the International Tribunal must be accompanied by a case-file containing copies of all witness statements, protocols and other documents forming part of the evidence. After considering the request and the evidence, the Prosecutor normally comments on the following issues:

- (a) whether, consistent with international legal standards, sufficient evidence exists to provide reasonable grounds for believing that a person who is the subject of the request has committed a serious violation of international humanitarian law;
- (b) whether the Prosecutor intends to take steps under the Tribunal’s Rules to secure the arrest or detention of the person who is the subject of the request, or intends to request the national courts to defer to the competence of the Tribunal.¹¹

In light of this, the following points are worth noting:

- (1) The Prosecutor of the International Tribunal acts in these cases in an advisory capacity only, and does not take decisions. Responsibility for

¹⁰ *Ibid.*

¹¹ Since the International Tribunal has primacy over national courts, it may formally request those courts, at any stage of the proceedings, to defer to the competence of the Tribunal, in accordance with its Statute and Rules.

and control over the cases will remain at all times with the authorities of the party concerned, and the cases will be subject to the law of the territory concerned. The Prosecutor of the International Tribunal will not seek to make any recommendation to the parties as to what future action they should take under that law in any individual case.

- (2) Evidence which has been obtained by methods which are contrary to internationally protected human rights or which cast substantial doubt on its reliability will be disregarded by the Prosecutor of the International Tribunal, and the Prosecutor may require additional evidence, if it is not contained in the report submitted, about the circumstances surrounding the obtaining of any evidence, particularly confessions.
- (3) The acts described in the report submitted to the Prosecutor of the International Tribunal must constitute a serious violation of international humanitarian law, i.e. a crime within the Tribunal's jurisdiction, such as a grave breach of the 1949 Geneva Conventions, a violation of the laws and customs of war, genocide or a crime against humanity. Any case which does not fall into this category will be marked accordingly and returned without the Prosecutor having expressed any view as to the sufficiency of evidence.
- (4) When applying international legal standards, the Prosecutor will employ the same criteria as have been formulated and used for the prosecution of cases before the International Tribunal.

The last point is highly significant in that the Prosecutor of the International Tribunal, by providing advice to national courts, has a unique opportunity to help standardize the criteria that are used to define serious crimes under international law. This is no doubt a major contribution to the development of international criminal law.

Rule 47 (A) (i) provides that “if in the course of an investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, he shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material”.

Though the Statute of the International Tribunal does not define or outline the principles to be taken into consideration for submission of an

indictment by the Prosecutor, Rule 47 provides some guidelines in referring to “sufficient evidence” which could legally justify the action to be taken by the latter. The expression “reasonable grounds” is also used to point to “such facts and circumstances as would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime”.¹² For the judges of the International Tribunal, “it is sufficient that from an overall view of the evidence which he has collected and which covers all the ingredients of the offence, including the necessary legal implications [...], a clear suspicion of the accused being guilty of the crime arises”.¹³ Through its practice of more than three years, the Office of the Prosecutor has developed certain principles to be taken into account in preparing or submitting indictments.

In theory, the legal standards applicable to a particular serious crime under international law should always be the same. Thus the criteria defining genocide or crimes against humanity should remain identical whether the crimes in question fall within international or national jurisdiction. However, when similar crimes are prosecuted by different bodies, there is always the risk that variable criteria will be used. The Prosecutor of the International Tribunal, in applying international legal standards, makes a significant contribution to the development of international criminal law since this means transposing the criteria formulated by the Tribunal to the national courts of States of the former Yugoslavia. In this sense, “Rules of the Road” has undoubtedly made a broad impact on the development of an international legal system.

* * * * *

Laïty Kama

President of the International Criminal Tribunal for Rwanda

Mr Kama presented the proceedings of the International Criminal Tribunal for Rwanda and emphasized the obligation for States to cooperate with the Tribunal, though their rules of procedure might not necessarily be the same as those of the Tribunal.

¹² Decision of Judge R. Sidhwa, Case No. IT-95-12-I, 29 August 1995.

¹³ *Ibid.*

The United Nations had determined that the situation in Rwanda posed a threat to international peace and security and recognized the need to put an end to the impunity that prevailed in the country, hoping thus to pave the way towards national reconciliation. National courts had the same objective as the International Tribunal for Rwanda, namely to punish perpetrators of crimes found on their territories. The powers of those courts and those of the International Tribunal must therefore be regarded as complementary, not conflicting. The primacy of the International Tribunal for Rwanda was undisputed, as Article 28 of its Statute made clear. The Tribunal was thus empowered, if it so desired, to request that a State interrupt its inquiries and hand over a case to the Tribunal. Moreover, if a case was tried by a State and the International Tribunal considered that the resulting judgement was biased, it could intervene and try the case itself.

The International Criminal Tribunal for Rwanda, like the International Criminal Tribunal for the former Yugoslavia, was largely dependent on cooperation from States. However, the Tribunal for the former Yugoslavia had more scope for success than its equivalent for Rwanda, because in the former Yugoslavia legislation had been amended to render it compatible with the Statute of the Tribunal. Thus far only a small number of States in the northern hemisphere had amended their legislation with a view to cooperating with the International Tribunal for Rwanda. The Tribunal had benefited from the cooperation of Cameroon, Ethiopia, Kenya and Zambia, in spite of the fact that no African State had officially amended its legislation. Incompatibilities in respect of procedure and the differences between common law and civil law countries constituted the main difficulties facing the International Tribunal for Rwanda. It was also essential to ensure, firstly, that the main culprits were brought to justice as well as other, less well-known individuals responsible for serious violations of international humanitarian law and, secondly, that there was no discrimination in respect of sentencing.

* * * * *

Discussion:

Mr Separovic congratulated the International Criminal Tribunal for Rwanda on its resolve to bring the main culprits to justice. He inquired into the Tribunal's attitude towards the order of subpoena, which some

countries believed should have no place in international criminal law, alleging that it infringed upon the sovereignty of States.

Mr Kama stated that the International Criminal Tribunal for Rwanda had taken no decision to introduce an order of subpoena and had a number of reservations on the matter.

Mr Zhu said that it was difficult to comment on the question of subpoena as the issue was still ongoing. The judge dealing with the matter had said that the International Tribunal should apply rules of international humanitarian law that were part of customary law. Article 29 of the Statute of the International Criminal Tribunal for Yugoslavia made it clear that States had to comply with the orders of the Tribunal.

Mr Potey reminded the meeting that Côte d'Ivoire had already cooperated with the International Criminal Tribunal for Rwanda and that its legislation was compatible with the Tribunal's.

Mr Salinas Burgos recognized that it had been important to set up the ad hoc Tribunals rapidly but considered that cooperative relations between national courts and the Tribunals would have been enhanced if the Tribunals had been set up by the international community as a whole.

Mr Potey thought that more States would have modified their national legislation to allow for cooperation with the Tribunals if the latter had been established on the basis of a consensus in the United Nations General Assembly. The Security Council was not representative of the UN membership as a whole.

Mr Sandoz observed that discussion of the composition of the Security Council was outside the scope of the meeting.

Mr Dubois wondered whether cooperation between the Tribunals and national courts was two-way. In particular, he asked how the Tribunals reacted to requests for assistance from States.

Mr Zhu said that the Security Council had reacted rapidly to emergency situations in setting up the ad hoc tribunals for the former Yugoslavia and Rwanda. It was unrealistic to expect that all the member States of the United Nations could be brought together each time such an urgent decision had to be made. The General Assembly had, moreover, delegated its authority to the Security Council precisely in order to meet such eventualities. While it was true that the Tribunal for the former Yugoslavia

had faced some difficulties in obtaining the cooperation of States, there had been complementarity between the work of the Tribunal for Rwanda and national courts. In the latter case, although many countries had not enacted specific legislation to allow for cooperation with the Tribunal, in practice national courts had provided it with assistance. In general, it was the Tribunals that called upon national courts for assistance, not vice versa. Nevertheless, provided that the principles of independence and confidentiality could be guaranteed, there was no reason for the Tribunals not to respond to requests for assistance from national courts.

Professor Condorelli referred to the difficulty faced both by States and by the International Court of Justice in obtaining access to information held by the Tribunals.

Mr Santorum wondered whether national courts could share the burden of the Tribunal for Rwanda in bringing major criminals to justice.

Mr Zhu said that the Tribunal for Rwanda would not be able to work effectively without the cooperation of the Rwandan government. He doubted, however, whether the Tribunal could share information with the Rwandan authorities, because of the need for the Tribunal to remain independent and impartial. In that respect, he stressed that the role of the Tribunal was not only to see that justice was done, but also to ensure that justice was seen to be done.

Mr Sandoz said that the question of the relationship between international and national jurisdictions also arose in relation to the new international criminal court, and was still under discussion by the international community.

* * * * *

CHAPTER IV

Particular cases and problems: repeated violations, mass violations, violations committed by many perpetrators, and the judicial structures set up to deal with them

- The case of Rwanda

Siméon Rwagasore
*Prosecutor General
of the Supreme Court of Rwanda*

Introduction

Between April and July 1994, the genocide in Rwanda and the massacre of political opponents claimed over a million victims.

Such numbers were made possible by drawing on State personnel, structures, property and laws and by setting up, training and arming many militiamen. Propaganda by the “hate media” and agitation by a number of political parties resulted in massive involvement on the part of the population. The culture of impunity and pillage increased the zeal and boldness of those perpetrating the violence.

The genocide and massacres of 1994 wiped out the institutions of the State. Everything had to be started up again from scratch. The buildings of the public prosecutor’s offices, the courts and the prisons had been wrecked or badly damaged, and their archives destroyed or stolen. On 31 March 1994, there were 235 criminal investigators and 785 judges. After the genocide, there remained only 22 and 144 respectively, with an impossible workload. It was thus necessary to rebuild and refit buildings, and to recruit and train staff.

Despite the upheaval caused by the genocide and other crimes against humanity in 1994, the judiciary was re-established in accordance with the

provisions of the Arusha Protocol of Agreement on Power-Sharing, signed at Arusha on 30 October 1992.

Two judicial bodies deserve special mention: the Supreme Court and the Supreme Council of the Judiciary.

1. The Supreme Court

The Supreme Court is composed of five sections: the Constitutional Court, the Court of Cassation, the Council of State, the Audit Office and the Department of Courts and Tribunals.

The Supreme Court guarantees the independence of the judiciary. It is headed by a president, who is assisted by five vice-presidents. The president and vice-presidents are chosen by the Transitional National Assembly from a list submitted by the government, with two candidates for each post. The present incumbents were appointed by presidential order in October 1995, following a vote in the Assembly, shortly after the appointment of the Prosecutor General and the Principle Advocate-General of the Court.

The appointment of the members of the Supreme Court office was a preliminary to the setting up of another institution, the Supreme Council of the Judiciary.

2. The Supreme Council of the Judiciary

The Supreme Council of the Judiciary comprises:¹

- ♦ the president of the Court;
- ♦ the vice-presidents of the Court;
- ♦ two judges of the Court;
- ♦ one judge for each court of appeal;
- ♦ one judge from the courts of first instance for each court of appeal district;
- ♦ one magistrate from a cantonal court for each court of appeal district.

¹ Conseil supérieur de la magistrature (*le président de la Cour; les vice-présidents de la Cour; deux magistrats du siège de la Cour; un magistrat du siège par Cour d'appel; un magistrat du siège des tribunaux de première instance pour chaque ressort de Cour d'appel; un magistrat de tribunal de canton pour chaque ressort de Cour d'appel*).

The Supreme Council of the Judiciary has the following tasks:

- a) to decide on the appointment, dismissal and, in a general manner, the career management of judges other than the president and vice-presidents of the Supreme Court;
- b) to give advisory opinions, on its own initiative or on request, on any draft law relating to the status of the judicial personnel coming within its purview;
- c) to give advisory opinions, on its own initiative or on request, regarding any issue concerning the administration of justice.

The law on the organization and tasks of the Council was passed in 1995. The president and vice-presidents of the Supreme Court were then able to coopt the 14 other members who, with them, made up the first Council. On 8 May 1996, the Council appointed the first judges to strengthen the existing framework of the 12 courts of first instance, the four courts of appeal and, secondarily, the cantonal courts. Only then did the courts resume hearing ordinary civil and criminal cases, while awaiting specific provisions relating to acts constituting genocide and other crimes against humanity.

3. Organic Law No. 8/96 of 30 August 1996

This law governs the organization of prosecutions for acts constituting genocide or other crimes against humanity.

The Rwandan government felt it had to ask the international community for a collective, public consultation on the best way of handling the enormous consequences of the genocide in terms both of memory and justice. In November 1995 it therefore called an international conference in Kigali on genocide, impunity and responsibility to foster dialogue for the preparation of a response at the national and international levels. The conference drew outstanding contributions from leading figures with particular experience — academic or empirical — in dealing with the aftermath of serious and massive violations of the rights of the individual. The law of 30 August 1996 is broadly inspired by these sympathetic and lucid contributions.

By means of Decree-Law No. 8/75 of 12 February 1975 (Official Gazette 1975, p. 230), Rwanda had acceded to the Convention on the Prevention

and Punishment of the Crime of Genocide, but by 1994 it had not yet enacted “the necessary legislation to give effect to the provisions of the [...] Convention” and in particular to provide for effective punishment of those guilty of genocide or one of the other acts listed in Article 3 (see Article 5 of the Convention).

It should be noted in passing that Rwanda had declared that it did not consider itself bound by Article 9 of the Convention, pursuant to which “disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute” (see the reservation contained in the Decree-Law of 12 February 1975).

For fear of coming up against the rule of non-retroactivity of criminal legislation, the Transitional National Assembly inserted, unchanged, Article 15 of the International Covenant on Civil and Political Rights, of 16 December 1966, into paragraph 4 of Article 12 of the Constitution: “Acts and omissions which did not constitute a criminal offence at the time when they were committed may be prosecuted and punished if they are considered criminal according to the general principles of law recognized by the community of Nations”. In the matter of penalties, it decided to refer to the Penal Code.

The aim of the law, which entered into force on 1 September 1996, is to use justice to bring about reconciliation between the different population groups in the exceptional situation in which Rwanda found itself after the genocide. On many points it innovates and departs from the rules of the Penal Code, the Code of Criminal Procedure and the Code of Judicial Organization and Jurisdiction. It is also the first law introduced by a State with the aim of organizing criminal proceedings against its own rulers and citizens who are suspected of having committed, on its territory, international crimes against part of its population in the course of a non-international conflict.

Without claiming to be exhaustive, this analysis of the law will deal with six aspects.

3.1 The creation of specialized chambers within the courts of first instance and the council of war

At the conference in Kigali, several possibilities were discussed as to how best to organize the prosecution of the many perpetrators, coprinciples and accessories. Should a special court be set up in Kigali (as in Ethiopia) and given responsibility for the enormous genocide-related case load? In addition to the fact that specialized courts were now prohibited by Article 26, para. 2, of the Protocol on Power-Sharing (which forms part of Rwanda's basic law), it was not reasonable to assign only one court jurisdiction to hear all the cases of genocide. Should assize courts be set up in the cantonal courts? It would have been extremely difficult to administer these, and the impartiality of non-professional Rwandans in the prosecution of their compatriots appeared somewhat hypothetical.

It was decided in the end to set up specialized courts within the existing courts of first instance and the council of war. Similarly, within each Rwandan prosecutor's office and military court special sections have been set up, which are attached solely to the specialized courts.

3.2 The substantive jurisdiction of national courts

This is determined by reference to international criminal law.

The first article of Organic Law No. 8/96 states that its aim is to organize the prosecution of persons who have committed, as of 1 October 1990, acts defined in and punishable under the Penal Code which, by notional plurality of offences, constitute genocide or other crimes against humanity as defined in the Convention of 9 December 1948, the Conventions of 12 August 1949 and the Additional Protocols, and in the Convention of 26 November 1968.

In explaining his decision, the judge must therefore make a twofold classification of the offence: first in accordance with domestic law — which is not always easy, owing to the specific nature of the crimes concerned, whose constituent elements have not been included in the Penal Code — and then do the same in accordance with international definitions, paying particular attention to the inevitably collective aspect of these crimes and their particularly abhorrent nature.

3.3 The categorization of perpetrators, coprinciples and accessories, and the application of penalties

If it had simply been decided to apply the penalties provided by the Penal Code for the crimes referred to in Organic Law No. 8/96, virtually only the death penalty would have been pronounced.

It was considered preferable to grade the penalties according to the actual degree of responsibility of the perpetrators, coprinciples in and accessories to the genocide and massacres. This has led to an overall reduction in sentences, except for those principally responsible. The law provides for four categories.

Those whose crimes or help in committing crimes place them in the first category incur the death penalty.

These are first and foremost the planners, organizers, instigators, supervisors and leaders of the genocide or other crimes against humanity. This also applies to those in positions of authority who committed the crimes referred to in the law or who encouraged the crimes to be committed. It also concerns notorious murderers who distinguished themselves by their zeal or their cruelty. Finally, it concerns those who committed acts of sexual torture. The sentences of persons in this category cannot be commuted.

The second category comprises the perpetrators, coprinciples in and accessories to cases of premeditated murder or attacks resulting in death. They incur life imprisonment.

The third category is composed of those who have committed other serious attacks against individuals. They incur the sentences laid down by the Penal Code.

Finally, those accused of offences against property are classed in the fourth category and are not liable to imprisonment. They are liable to pay damages assessed according to amicable settlement and, where no settlement is reached, any ensuing prison sentences are automatically suspended.

3.4 Procedures for confession and guilty pleas

The lawmakers sought to encourage confessions and repentance on the part of those guilty of genocide and/or other crimes against

humanity. Drawing inspiration from practice in the United States, they introduced plea-bargaining — initially for a (renewable) period of 18 months — into Rwandan law (despite its Napoleonic origins).

This constitutes a second technique for reducing sentences. The perpetrators, coprinciples and accessories in the second category, who would normally receive life sentences, can have their sentences reduced to between seven and 11 or between 12 and 15 years' imprisonment, depending on whether they make their confession before or after the proceedings have been instituted against them.

Where confessions are accepted, the sentences in the third category are reduced by half or by one third, depending on when the perpetrators confess.

To be admissible, confessions must include the following:

- (a) a detailed description of all the offences referred to in Article 1 of Organic Law No. 8/96 that have been committed by the applicant, in particular the date, time and place of each offence, as well as the names of the victims and witnesses;
- (b) information regarding coprinciples and accessories and any other information useful for the prosecution;
- (c) an apology for the offences committed;
- (d) an offer to plead guilty to charges for the offences described by the applicant.

This procedure thus has two main objectives: **the swiftness of proceedings and reconciliation between the components of Rwanda's population.**

3.5 Appeal procedures

Organic Law No. 8/96 amends the rules on this subject contained in the Code of Criminal Procedure, taking into account the potentially large number of people to be tried and the need to ensure rapid justice.

Judgements by the specialized courts may be subject to applications to set them aside and to appeals. But only appeals founded on questions of law or flagrant errors of fact are receivable. As to the substance, the

Court of Appeal gives a ruling on the basis of written evidence, and no appeal may be made against its decision.

An exception to this rule exists in cases where, having been referred to after an acquittal in the trial court, the Court of Appeal pronounces the death sentence. The condemned person has a period of 15 days in which to lodge an appeal. The Court of Cassation has the capacity to rule on the substance. In fact, the idea here is to ensure the condemned person the right to two-tier proceedings — the Court of Cassation plays the role of appeal court.

Finally, the Prosecutor General may, on his own initiative but only in the interests of the law, lodge an appeal against any decision handed down at appeal level if he considers it contrary to the law.

3.6 The question of the rights of the defence

Organic Law No. 8/96 reaffirms the rights of the defence, including the right of the accused to be assisted by the lawyer of his choice. It exempts the State, however, from the obligation to pay defence lawyers appointed by the court, no doubt taking into consideration its limited resources and the exceptionally high number of potential applicants for legal aid.

It must be said that for a long time the Rwandan State ignored the rights of the defence and the fundamental principles of justice. Thus it was not until 19 March 1997 that the National Bar Association came into being (Act No. 3/97). The first barristers took their oath and elected the Council of the Bar Association on 30 August 1997.

Act No. 3/97 opened wide the possibility for family members, a legal guardian or a legal representative to defend an accused. In addition, the non-governmental organization *Avocats sans frontières* (Lawyers Without Borders) provides temporary assistance, while waiting for barristers to be trained in sufficient numbers to cope with the enormous needs of the detainees and the victims.

Conclusion

There is a very strong demand for justice in Rwanda. Only justice can allot individual responsibility for offences committed and prevent any

collectivization of guilt, which would be prejudicial to national harmony. Only justice can indemnify direct victims and other claimants. If it is to succeed, the justice system needs resources commensurate with its difficult task, and for the most part it still lacks these.

* * * * *

Discussion

Mr Rodríguez-Villasante y Prieto indicated that the Madrid College of Lawyers and the Spanish Red Cross Centre for the Study of International Humanitarian Law had already trained a group of Spanish barristers to defend detainees in Rwanda. The two-week training session, which 10 French-speaking barristers had attended, took place in June 1997. The participants had received training focused specifically on Rwandan criminal law and law of procedure. They would concentrate primarily on war crimes and genocide, and were due to arrive in Rwanda shortly. The operation was funded by the Madrid Lawyers' Association.

Mr Rwagasore welcomed this initiative and praised the activities already carried out by *Avocats sans frontières*.

Mr Andries said that if some reports were to be believed, Rwanda had hesitated before agreeing to cooperate with the ad hoc United Nations Tribunal. One of the reasons for its reservations was said to have been the refusal of the International Tribunal for Rwanda to pronounce the death sentence, and fears of seeing criminals treated less severely. He asked whether these fears on the part of the Rwandan population had now been assuaged, and whether there was a widespread desire to see the main suspects tried by the International Tribunal or by the Rwandan courts.

Mr Rwagasore reminded participants that Rwanda had never refused to cooperate with the ad hoc United Nations Tribunal, despite the fact that it had voted against its establishment. Although the death penalty did exist in Rwanda, it had not been applied for 10 years. The trials of the major criminals could be used for educational purposes, to show the population that the era of impunity had come to an end.

Mr Sarr asked whether there was a procedure for appealing against decisions handed down by the courts of first instance in Rwanda.

Mr Rwagasore replied that this was possible, but that appeals were receivable only when a flagrant error had been made in submitting evidence or presenting facts. It was advisable to prevent appeal procedures from being abused.

Mr Zhu asked if the Rwandan authorities had a prosecution procedure aimed specifically at persons in a position of responsibility, from the level of *bourgmestre* and *préfet* upwards, where the crime of genocide was concerned. Referring to the activities of the International Tribunal, he also asked whether the Rwandan government was aware of the problems posed by giving evidence in a small country where everyone knew everyone else.

Mr Rwagasore replied that all the former *bourgmestres*, *préfets* and other officials who held office at the time of the events in question had fled the country, but the Rwandan authorities retained the right to prosecute them and international cooperation should make it possible to bring these people to trial. As for the prosecution of those currently detained in Rwanda, there was no specific strategy. The Rwandan government lacked the resources to protect victims and needed international assistance. The mass return of refugees, with major criminals hiding among them, was certainly going to present serious security problems.

Mr Sandoz considered that it would be useful for Rwanda to indicate precisely what type of assistance it wished to receive from the international community.

Mr Rwagasore replied that countries wishing to assist could supply barristers and lawyers who would help plaintiffs to bring civil suits. The country needed lawyers to improve the way in which justice was administered. There was also a lack of judges and officials in the Ministry of Justice. There was a great need for training, but also for vehicles, office equipment and additional personnel, to enable the largest possible number of cases to be dealt with as quickly as possible. The prisoners had to accept the concept of confessing guilt and must be able, if they wished, to engage in plea-bargaining. One of the problems posed by the law on plea-bargaining was that it inspired little confidence. However, if those who were ready to acknowledge their misdeeds could do so and be separated from those who did not wish to do so, the cause of national reconciliation could take a big step forward.

Mr Sandoz asked how the Rwandan authorities were going about verifying information regarding the detainees' identity.

Mr Rwagasore replied that the prosecutor was required to verify all information.

* * * * *

■ The case of Ethiopia

Yosef Gebreegzabher Gebreyohannes
Attorney at Law and Legal Adviser

Allow me, first of all, to express my gratitude to the ICRC for enabling me to take part in this distinguished meeting of experts on national measures to repress violations of international humanitarian law.

As you may already have noted in the agenda of our meeting, the topic of my presentation on this complex and highly abstract issue is the following:

“Particular problems: repeated violations, mass violations, violations committed by many perpetrators, and the judicial structures set up to deal with them — the case of Ethiopia.”

You will no doubt agree that this topic brings to mind the former “Dergue Ethiopian Workers’ party regime”, as it became known after its fall, and the repeated and mass violations of international humanitarian law, within the meaning given to that body of rules by the host of our meeting, that were committed while the regime held sway. These violations cannot be denied since, whatever the particular problems associated with the acts in question, they clearly qualify as violations of humanitarian law, notably as genocide and as other war crimes specified in the law.

Allow me first of all to state the obvious, namely that the topic in question calls for an examination of the relevant norms, if any, contained in Ethiopian criminal legislation, both substantive and procedural, and for an assessment of the institutions and manpower necessary to ensure that these norms are complied with and, more generally, that the rule of law prevails in Ethiopia. To this end, I have divided my presentation into two parts, first of all the basic legal norms for the protection of human rights as embodied by international humanitarian law and the production of evidence, and, secondly the institutions and manpower necessary to ensure the rule of law.

1. Legal norms

Although Ethiopia is one of the oldest countries in the world, codification of its laws did not start until the 1950s. Prior to that date, its legal system was mainly traditional.

Beginning with the promulgation in 1957 of a Penal Code based on the European continental model, however, codification of all branches of the law was carried out by prominent legal scholars versed in both the common law and the civil law legal systems. The country's Penal Code was initially drafted in French by the late world renowned expert in comparative criminal law, Professor Jean Graven, and its Code of Criminal Procedure by the late and equally well-known expert in the field, Sir Charles Mathew.

An examination of the country's Penal Code shows that violations of international law, even when perpetrated in a foreign country, entail criminal sanctions. This is provided for under Article 17 (1) (a) of the general part of the Code, which reads as follows:

“Any person who has committed in a foreign country:

“an offence against international law or an international offence specified in Ethiopian legislation, or in an international treaty or a convention to which Ethiopia has adhered, shall be liable to trial in Ethiopia in accordance with the provisions of this Code...”

Ethiopia, one of the founding members of the United Nations and a country that suffered under the Axis powers during the Second World War, is a signatory to the 1949 Geneva Conventions.

As we all know, incorporation of legal norms into a country's domestic law is a precondition to the effective implementation of treaties and conventions. An examination of Ethiopia's Penal Code shows that Articles 281 to 295 of its special section deal with genocide and other crimes defined as international crimes under the Geneva Conventions. I do not wish to waste this meeting's precious time by going into a detailed discussion of these provisions and shall therefore limit myself to a rapid overview.

An examination of Article 281 of the Penal Code shows that genocide is defined as a crime, irrespective of whether it is committed in time of war or peace. War crimes against the civilian population are defined as criminal offences under Article 282 of the Code; war crimes against prisoners and civilian internees under Article 284; looting and piracy under Article 285;

instigation of and acts preparatory to the commission of the above-mentioned international crimes under Article 286; dereliction of duty towards the enemy under Article 287; use of illegal means of combat under Article 288; breach of armistice or peace treaty under Article 289; activity by irregular forces under Article 290; ill-treatment of or dereliction of duty towards the wounded, the sick or prisoners under Article 291; denial of justice under Article 292; hostile acts against international humanitarian organizations under Article 293; misuse of international emblems and insignia under Article 294; and hostile acts against the bearer of a flag of truce under Article 295 of the same Code.

As regards other international crimes and obligations set out in the conventions concluded after 1957, however, it is regrettable to note that no domestic legislation exists to date for their incorporation into the country's legal system.

An offence being defined under Article 23 (1) of the Penal Code as “an act or omission which is prohibited by law”, it should be pointed out that violations of the crimes specified above can, depending on the nature of each crime, be committed by a positive act or by a failure to act in accordance with the law.

An equally brief examination of Ethiopia's Code of Criminal Procedure, promulgated in 1961, clearly shows that it contains almost all the main procedural safeguards necessary for the protection of human rights found in other modern codes of procedure.

Unfortunately, no Code of Evidence has yet been promulgated. Except for scanty provisions embodied in the Penal Code and the Code of Criminal Procedure, the gap created by the absence of a Code of Evidence in any criminal proceedings makes it very difficult, if not impossible, to carry out an effective trial with all the safeguards necessary to guarantee the basic constitutional principle of the presumption of innocence.

2. Institutions and manpower necessary to ensure the rule of law

As pointed out above, Ethiopia was not, up until the second half of the twentieth century, exposed to modern law as it evolved on this continent from the signature of the Magna Carta in 1215 to the French Revolution in

1789, which relegated to the annals of history the concept of the divine right of the monarchy.

This was a great misfortune for the country. Even today, living conditions in rural Ethiopia, where more than 90% of the population lives, are not that different from those that prevailed in Europe before the French Revolution. At a meeting held by the International Commission of Jurists in New Delhi, India, from 5 to 10 January 1959, it was stated:

“How can the benefits of the rule of law be achieved in the new societies, which have to build up institutions, adopt codes, and, in short, establish within a very short time a legal system to meet the needs of the modern world while they are still struggling to establish a bare minimum of material [...] existence? [...] It is difficult enough in itself to transplant institutions and procedure which derive from the traditional conception of the rule of law, into the [...] societies which are in the process of becoming legally [...] organized...”

Allow me to point out that this statement is true of my country today, as it was true in 1959. We are thus facing a great challenge and one which, I stress, cannot easily be brushed aside.

I am nevertheless confident that, with the cooperation and assistance of the developed world, we shall be able to set up the institutions and marshal all the human and material resources necessary to strengthen the rule of law so that the following statement in the preamble to the 1948 Universal Declaration of Human Rights becomes a reality in my country as well, ushering in an era of lasting peace:

“...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”.

* * * * *

Discussion:

Mr Sandoz asked if it were possible to provide information on the number of people awaiting trial in Ethiopia for serious violations of international humanitarian law and the problems entailed in bringing them to justice.

Mr Gebeegziabher Gebreyohannes stressed that he could only provide the meeting with the viewpoint of a private, practising attorney. Ethiopia did

not have enough resources, defence lawyers, judges and prosecutors with training to deal with genocide. The legal concept of genocide, which had originated with the Nuremberg trials in Europe, involved a complex body of notions that was not easy to grapple with. Although there were fewer people to be judged in Ethiopia than in Rwanda — approximately 3,000 — a lack of resources was common to both countries.

CHAPTER V

Group work

The second part of the meeting was devoted to discussing a number of specific, technical subjects relating to the incorporation of measures to punish violations of international humanitarian law into national legislative systems. These subjects may be classified under three main headings:

- ♦ the content of the national legislation to be adopted and the place of the relevant provisions in the legislative framework (substantive law and legislative approach);
- ♦ the general principles of criminal law, or rather the specific requirements of international humanitarian law in relation to them;
- ♦ jurisdiction and the organization of criminal proceedings (procedural law).

To ensure that as many specific subjects as possible were addressed at the meeting, working groups were set up and each was assigned one of the themes mentioned above.

The discussions were based on background papers – in the form of “fact sheets” drawn up by the ICRC – dealing with the different themes.¹ These papers briefly outlined the current situation regarding a particular matter in international law and identified the issues involved for national lawmakers in the light of the practices observed. Some of the papers contained recommendations or draft wording for legislative provisions.

* * * * *

The reports drawn up by the groups constitute summaries of their discussions and reflect the various points of view expressed. They are not intended to represent common, negotiated positions, either of the groups or of the meeting as a whole.

¹ A revised version of the “fact sheets” appears in *National Implementation of International Humanitarian Law: Annual Report 1997*, Advisory Service on International Humanitarian Law, ICRC.

Introduction to topics put forward for discussion

Cristina Pellandini

*Legal Adviser, ICRC Advisory Service
on International Humanitarian Law*

1. Substantive law and legislative approach

How can and should national lawmakers incorporate into substantive domestic law measures to punish violations of international humanitarian law?

From the legislative point of view, the incorporation into domestic law of punishment for such violations, in particular for those described as *grave breaches*, presents two problems: how to define the offence, and where and how to include it in the legal system.

Different systems of repression were examined, and these showed that various options were open to lawmakers in this regard. The latter may, for example, incorporate punishment for violations of international law by simply mentioning that law in existing legislation or by instructing the implementing entity to be guided by it; they may specifically criminalize these acts by incorporating the acts themselves into existing criminal legislation. Or, again, they may adopt a specific criminal law covering this type of crime. If they opt for incorporation into existing legislation, they are then faced with deciding whether war crimes should be punished by means of ordinary legislation or by military criminal law.

Lawmakers are thus confronted with questions of a wholly technical nature. They must make a choice, which has to be compatible with, and adapted to, the existing legislative system.

2. General principles of criminal law

International humanitarian law lays down a number of specific requirements that may, in some cases, call for a departure from the usual general principles of domestic criminal law. The question for lawmakers is which general principles of criminal law must be taken into account — and how to do this — in order to ensure real and effective repression of violations, in accordance with international humanitarian law.

In relation to violations of the law, some particular problems regarding these principles call for special attention. These include the time-barring of war crimes and other serious violations, the criminal responsibility of superiors for crimes committed by their subordinates, responsibility by omission for a criminal act where there is a duty to intervene, and, finally, the form taken by participation in the criminal act.

3. Jurisdiction and the organization of criminal proceedings (procedural law)

Jurisdiction and the organization of criminal proceedings are of particular importance, as on them depends the effective punishment of perpetrators of serious violations of international humanitarian law.

The 1949 Geneva Conventions place an obligation on the States Parties to apply the principle of universal jurisdiction in repressing violations described by those treaties as *grave breaches*. The question is what form, in practice, this jurisdiction should have in a national legal and legislative system, and what its scope should be.

Many questions arise pertaining to the organization of criminal proceedings (instituting proceedings, courts and other competent bodies, plaintiffs and the rights of parties seeking damages) and to the criminal procedures to be put in place for these types of offence, and the ICRC would like to have expert opinions on these.

- ♦ What courts (ordinary, military or special) should be given jurisdiction for repressing violations of international humanitarian law? Should they differ depending on whether the accused is a civilian or a member of the military?
- ♦ What is the appropriate body or bodies for instituting criminal proceedings? Should proceedings be initiated automatically, or only where a complaint has been lodged? What of the rule whereby the decision to bring a prosecution is left to the discretion of the prosecuting authorities? Should it be possible for the victim(s) to initiate proceedings, and if so, on what conditions?
- ♦ Is there a need to provide for a special procedure to repress violations of international humanitarian law, or does existing (ordinary or military) procedure apply?

As for the criminal procedures to be put in place for the repression of violations, international humanitarian law takes these into consideration by requiring respect for a whole series of judicial safeguards which must be applied to persons accused of having committed breaches of the law, however grave those breaches may be. Provided that these fundamental rules are respected, States are free to choose the rules of procedure and their choices may influence the effectiveness of the system of criminal repression.

The question of judicial cooperation and assistance on criminal matters, both between States themselves and between them and the international courts, is also of great practical importance.

Report of Group I

Substantive law and legislative approach

(French/English)

Chairman Professor Luigi Condorelli
*Professor of Public International Law,
University of Geneva*

Rapporteurs Mr Yves Petermann
Advisory Service, ICRC Moscow
Mr Ameer Zemmali
Advisory Service, ICRC Amman
Ms Cristina Pellandini
Advisory Service, ICRC Geneva

How can and should national legislatures incorporate provisions of international humanitarian law into domestic law? Criminalization of such violations in domestic criminal law (substantive law).

1. General remarks

In his introduction, the Chairman of the working group emphasized that problems of legislative approach arose at a more general level than the repression of grave breaches of international humanitarian law, as was reflected by the Statutes of the International Tribunals for the former Yugoslavia and Rwanda and the statute — currently in preparation — of the permanent international criminal court. Regarding the inclusion of provisions of humanitarian law in domestic legislation, he remarked that international law left the States with a good deal of room for manoeuvre, but that there was nevertheless a lack of modern domestic legislation implementing humanitarian law.

The Chairman observed that, as the Geneva Conventions were not in themselves self-executing, national lawmakers should include the provisions of those treaties in domestic law.

He stressed the need to respect the principle of *nullum crimen nulla poena sine lege*, prescribed not only by domestic law but also by international law (in particular the human rights instruments). Its incorporation in the form of a law should mean that anyone on trial could cite that law before the appropriate courts. It was not sufficient for lawmakers to simply refer to international law, and that could even be detrimental to the principle of legality cited above. Moreover, such reference would merely shift responsibility from lawmaker to judge.

The Chairman observed that the rules in question should be drawn not only from treaty law but also from customary law, especially as major developments in the latter had taken place in the sphere of international humanitarian law.

He added that the State's obligations regarding implementation were not confined to the field of criminal law but also encompassed other spheres, such as administrative and military law (regulations, handbooks on discipline, etc.). As to the definition of international humanitarian law, the Chairman suggested a broad interpretation, in keeping with what is today recognized by the international community.

Finally, the obligation to adopt national implementing measures was binding on States, and those that failed to fulfil this international obligation could be held to account for the consequences. As the guardian of international humanitarian law, the ICRC had to make those consequences clear.

The definition of international humanitarian law in the broader sense was largely shared by the speakers.

2. Violations to be incorporated

A participant asked two questions: What should be incorporated into national legislation? And how should this be done?

Guided by a broad definition of international humanitarian law, the speakers declared themselves in favour of including war crimes, crimes against humanity and genocide. Some participants singled out crimes whose gravity and scale had been universally recognized in recent years, such as "ethnic cleansing" and systematic rape.

Crimes against peace, especially when linked with acts preparatory to breaches, were also mentioned.

3. Forms of incorporation

Concerning the framework for the violations to be included in national law, participants mentioned the penal code, the military penal code and the adoption of a special law.

Regarding the form to be taken by criminalization, a simple clause referring to international law was considered inadequate. It was pointed out that this would cause major problems for a judge, who would be forced to identify the rule of international law applicable, and to interpret it. The clause's conformity with the principle of legality would, moreover, be questionable.

Participants found the form known as "dual criminal liability" rather impractical, as shown by the Rwandan experience.

They felt that the main thing to be borne in mind by national lawmakers was conformity between domestic law and international humanitarian law. The form taken by the incorporation of this law was of secondary importance.

4. Reparation

The speakers embraced the principle of reparation for the victims of violations of international humanitarian law, stressing the obligation to grant this to all victims, without distinction, and to include provision for it in national legislation.

International practice regarding war reparations (the Second World War and the 1991 Gulf War, for example) and the solutions advocated within the United Nations were mentioned in particular, but some participants stressed the need to adopt national rules granting victims the right to reparation in the broad sense. This issue was a highly complex one, however, and went far beyond the scope of the meeting.

5. The role of the ICRC

The participants called on the ICRC to:

- ♦ exert pressure on States to promote legislation covering all the breaches set out in the relevant international instruments;

- ♦ continue with its Advisory Service and its direct contacts with the authorities concerned, as a means of promoting the national implementation of international humanitarian law;
- ♦ provide technical assistance for States by:
 - drafting suitable texts — in particular handbooks, guidelines or directives — containing the provisions to be adopted, and specifying those regarded as the necessary minimum;
 - drafting a model law (while recognizing that creating a uniform model law for all States would be a difficult — if not impossible — exercise);
 - making available to States a list of the breaches of international humanitarian law.

Until the above-mentioned documents were drafted, the working papers prepared by the ICRC — the quality of which was applauded by all speakers, especially that of the second document — could be made available to any national authorities interested.

It was suggested that, in making its representations and proposals, the ICRC should take the sensitivities and specific cultural viewpoint of States into consideration. The ICRC was also called on to inform States of the advantages and disadvantages inherent in the different options open to lawmakers when incorporating international humanitarian law into domestic law.

* * * * *

Discussion

Mr Andries stressed the importance of the form in which violations of international humanitarian law were included as crimes under domestic law. Some argued that certain principles of that body of law were self-evident. However, questions of proportionality or guilt by omission, for example, were open to different interpretations. His own view was that domestic law should be complete and self-explanatory in order to give national courts the power to enforce international humanitarian law, while safeguarding the rights both of victims and the accused. That was the only way to be certain that the provisions of international humanitarian law would really be applied.

Mr Salinas Burgos considered that, while much of *jus in bello* could be incorporated into national law, it was unrealistic to expect that crimes against peace could be so incorporated, because of their highly political nature. Crimes against peace would have to be dealt with at the international level.

Mr Rodríguez-Villasante y Prieto referred to one major problem of international humanitarian law, namely, exactly what could be included under customary law. The Geneva Conventions had been widely accepted, but other treaties had received fewer ratifications. National views of what constituted customary law therefore differed.

Mr Zhu said that consideration of experience in the practical application of international humanitarian law would be helpful in providing useful advice to States. The work of the International Tribunal for Rwanda was based on common Article 3 of the Geneva Conventions and on Additional Protocol II. The United Nations Security Council had established the Tribunal with a view to restoring and maintaining peace and security. Thus, although a number of States had not ratified Protocol II, both common Article 3 and the Protocol could be considered part of customary law, based on the practice of the Tribunal for Rwanda.

Regarding the International Tribunal for the former Yugoslavia, there had been challenges to the argument that universal jurisdiction only applied to grave breaches of humanitarian law committed in the context of international armed conflicts. In particular, in 1994, a Danish court had ruled that a person could be tried for a grave breach, whether the crime had taken place in an international or a non-international armed conflict.

Mr Potey recalled that, in discussing forms of incorporation (point 3 of the report of Working Group I) the group had concluded that a reference to international humanitarian law was inadequate. In Côte d'Ivoire, however, experience had shown that such references were helpful. National legislation should certainly deal specifically with grave breaches, but other lesser breaches could be covered more expediently by reference to international humanitarian law.

Mr Andries argued that full incorporation of international humanitarian law into domestic legislation was necessary to ensure the legality of sentencing. A clear statement of the punishment appropriate to each crime was needed, especially during difficult wartime conditions, to guide the judge faced with a person in the dock.

Mr Potey said that the legality of sentencing was a fundamental principle in Côte d'Ivoire and was enshrined in the Constitution. It was not jeopardized by referral to international humanitarian law in the case of minor breaches.

Mr Sandoz said that the question was interesting and that the ICRC Advisory Service would welcome specific examples of the experience of different countries.

Mr Rodríguez-Villasante y Prieto said that there should be a degree of proportionality between the penalties for grave breaches and those for lesser breaches. In other words, the punishment should in all cases be commensurate with the crime, and there should be no dichotomy between the penalties imposed by an international tribunal and those imposed by a national court. Such consistency required a categorization of crimes according to their gravity. Some crimes should be punished by custodial sentences, while in other cases military disciplinary action might be sufficient.

Mr Sandoz emphasized the need for a broad conception of international humanitarian law, covering non-international as well as international armed conflicts. This approach was essential, for example, to deal adequately with such serious subjects as landmines or genocide. Regarding customary law, he admitted that its scope was not clearly defined. The legal authority to prosecute breaches of humanitarian law would only be weakened by claiming that certain provisions were part of customary law, simply because of wishing them so. The scope of customary law had to be defined on the basis of serious study and expert legal opinion. He agreed with the point made by Mr Salinas Burgos regarding crimes against peace. In general, crimes against peace were covered by *jus ad bellum*, and should not be confused with crimes under international humanitarian law, or *jus in bello*.

* * * * *

Report of Group II

General principles of criminal law

(French/Spanish)

- Chairman Professor Robert Roth
*Professor of Criminal Law,
University of Geneva*
- Rapporteurs Mr M.-C. Djiena-Wembou
Advisory Service, ICRC Abidjan
Mr Claudio Santorum
Advisory Service, ICRC Bogotá
Mr Olivier Dubois
Advisory Service, ICRC Geneva

Which general principles should be taken into account by national legislatures to ensure effective repression at domestic level in keeping with international law?

1. Criminal responsibility of superiors

Participants unanimously emphasized the need to recognize the responsibility of superiors. It was particularly important for criminal legislation to provide for the punishment of a superior who failed to prevent a violation of international humanitarian law from being committed by a subordinate. There was broad agreement that a superior who, through deliberate omission, allowed a crime to be committed should be dealt with in the same way as the actual perpetrator of that crime. It was a question of recognizing commission by omission. In the case of culpable negligence, the majority view which emerged was that the responsibility of a superior was not equivalent to that of the direct perpetrator of the violation. The superior could nevertheless be guilty of the specific offence of failure to fulfil one's official duties, which existed in Spain, for example.

The proposed article relating to the responsibility of superiors as set out in background paper 9/3 was therefore accepted. Its wording could be slightly modified in order to clarify whether or not it included the

responsibility of a superior for an omission resulting from culpable negligence.

The fact that the context might be one of non-international armed conflict did not in any way affect the principle of the responsibility of superiors for acts committed by their subordinates.

One participant stressed that it was possible to envisage the responsibility of a person who failed to act to prevent a war crime from being committed regardless of whether that person was a superior. Belgian and Italian law were mentioned as examples.

2. The law as regards justification

The working group unequivocally rejected the admissibility of an excuse or justification based on obedience to a patently illegal order from a superior to commit an act in violation of international humanitarian law. It was specified, however, that the inadmissibility of this defence left fully open the possibility of having recourse to other excuses, such as duress or error. The rejection of orders from a superior as an excuse must be accompanied by the right of a subordinate to disobey an illegal order.

Regarding admissibility and the effect of duress or error, it appeared that the ordinary rules of general criminal law could continue to be applied. There were national differences in that regard. Duress — depending on whether or not it could be resisted — could either remove all criminal responsibility or merely attenuate it. The question of duress had been illustrated by the Erdemovic case, which was currently before the International Tribunal for the former Yugoslavia. That case underlined the uncertainty surrounding the role of duress as a defence in international criminal law.

The members of the group were unreservedly in favour of rejecting any justification founded on national, political or military interest. Military necessity as a justification for conduct could be taken into account only in the cases expressly provided for in international humanitarian law itself. One participant remarked on the temptation to put forward the notion of national interest in order to justify an amnesty in the name of national reconciliation, following an internal conflict.

Although here one could not speak of a justification or excuse in the strict sense, one member of the group mentioned an obstacle to the application

of criminal law punishing war crimes that existed in the legislation currently in force in Italy. A reciprocity clause prevented the application of this law unless similar criminal provisions existed in the national legislation of the enemy State. It could be most useful for the ICRC to take a stand condemning this requirement of reciprocity.

3. Breaches *sui generis*

The criminalization of acts preparatory to or peripheral to war crimes was discussed. The issue of repressing the instigation, incitement and vindication of war crimes was also raised.

The example of Rwanda, where there had been many instances of instigation and incitement to commit crimes, highlighted the importance of repressing this kind of behaviour.

Several participants stressed the need to respect the principle of legality. This meant defining — or enumerating precisely — acts preparatory to a war crime. Similarly, the notions of instigation, incitement and vindication should be strictly defined. The specific advantage of making such behaviour a criminal offence was to allow the recognition of guilt even where no war crime in the strict sense had been committed.

While such practices must certainly be regarded as reprehensible, some participants were concerned about the danger of over-criminalizing types of conduct that had not actually claimed any victims, that is, where the preparatory act or the provocation had not been followed up. Some participants insisted that the penalty for these types of conduct should be less severe than that inflicted for actually committing a war crime. The possibility of recourse to disciplinary measures was also mentioned.

4. Penalties

War crimes were breaches of international law that must carry severe penalties. Two points of view were put forward in the group. One was that penalties equivalent to those laid down in ordinary criminal law for similar acts should be imposed (for example, murder, assault and battery, etc.). The other view was that war crimes by their very nature should carry more severe penalties than ordinary crimes.

Several members of the group expressed their concern that the principle of the proportionality of punishment should be respected. In this regard, the existence of blanket criminalization of all violations of international humanitarian law, or of residual overall criminalization, was not very satisfactory.

The principle of proportionality should also allow recourse to disciplinary measures for minor violations of international humanitarian law.

All working group participants underlined the importance of secondary penalties, which could play a major role as special preventive measures. Expulsion from the army and exclusion from employment in the public service were mentioned here, but there was not enough time to examine the subject in more depth.

Finally, the question of whether or not to resort to the death penalty should be left up to States to decide, in accordance with their domestic legislation and their international commitments in that regard.

5. Time-barring

The working group encouraged the ICRC to strive for the inclusion in domestic legislation of a provision stating that there was no time-bar for war crimes, whether committed in an internal or an international conflict.

At the same time, attention was drawn to the difficulty of holding a trial over 50 years after the event, as illustrated recently by the Priebke case.

6. Preventive measures

The working group stressed the importance of making sure that bodies in charge of investigating and trying war crimes had the logistic and material resources they needed to function. The preventive role that could be played by legal advisers in armed forces, as provided for in Article 82 of Protocol I, was also emphasized. The main task of these advisers was to make superiors aware of the content of international humanitarian law, thereby enabling them to exert control over their subordinates in accordance with Articles 86 and 87 of the Protocol.

* * * * *

Discussion

Mr Benvenuti referred to the reciprocity clause in Italian law, which curtailed the application of Italian criminal legislation in cases of war crimes, unless similar provisions existed in the national legislation of the enemy State. He recalled that the rules of international humanitarian law, the decisions taken by the International Court of Justice and the provisions of customary law all indicated that no principle of reciprocity should prevent the application of international law.

Mr Salinas Burgos said that the responsibility of a superior officer for a grave breach of international humanitarian law committed by a subordinate was clearly recognized in Additional Protocol I. A superior might fail to act to prevent such a breach either deliberately or through negligence. In the former case, the superior would be guilty of a violation of international humanitarian law and should be punished accordingly. In the latter case, disciplinary action under domestic legislation might be sufficient. Imposing penalties on preparatory or instigating acts was a more difficult matter. Such acts would have to be clearly defined. There was a fine line between instigation and freedom of speech.

Mr Ugrekhelidze said that it was important to determine whether the existing provisions of domestic criminal law were applicable to grave breaches of international humanitarian law. If they were, as for example in the new draft code of Georgia which covered such breaches, it was unnecessary to make reference to humanitarian law. Indeed, such references might weaken application of the law. Domestic law could lay down punishments for specific crimes, whereas the corresponding provisions of humanitarian law might not be well known or might be open to differing interpretations.

The question of crimes committed by omission required careful consideration. All aspects of a case had to be taken into account, but there were evidently instances when negligence had to be categorized as criminal, for example in the case of those responsible for the Chernobyl tragedy.

Mr Andries said that failure to act (omission) through negligence was an offence but, in the absence of criminal intent, could not be considered a crime. Punishment for an offence committed through negligence should therefore be less severe than punishment for a criminal act.

Regarding preparation or incitement to commit grave breaches of international humanitarian law, he called for strong measures to prevent or punish such acts. Experience had shown the difficulty of applying legal remedies once those acts had taken place. It was therefore important to be able to prosecute persons preparing to perpetrate violations, for example by illegally stockpiling weapons, or inciting others to commit crimes. In the latter case, the punishment should be the same whether or not the act was carried out. It would be inequitable to mete out different punishments for incitement, depending on whether another person did or did not carry out the act in question. The guilt of the instigator was constant, irrespective of the outcome, since the outcome depended on another agent and was beyond the control of the instigator.

With respect to the non-applicability of the statute of limitations to war crimes, he recognized the difficulty of holding a trial some 50 years after the event and the fact that the main arguments for embarking on a judicial procedure were irrelevant. There was little likelihood that conditions would arise in which the accused could repeat the crime, so the goal of prevention was not involved. Retribution could only be symbolic. The holding of a public trial was nevertheless important, in justice to the victims, to bring to light what had happened.

Mr Rodríguez-Villasante y Prieto said that while the responsibility of the superior officer under Article 86 of Protocol I had been recognized by the group, there had been a divergence of opinion in terms of the appropriate punishment for failure to act to prevent a war crime from being committed by a subordinate. In his view, the punishment should differ according to whether the failure to act was intentional or a result of negligence. In the former case, the superior should be liable to the same punishment as the subordinate. In the latter case, the negligence of the superior should be subject to military disciplinary procedures. He recognized, however, that it was difficult to determine intention.

With regard to the balance between punishing instigation and preserving freedom of expression, he said that only incitement to commit war crimes should be punishable under international humanitarian law.

Mr Roth observed that Mr Salinas Burgos, Mr Rodríguez-Villasante y Prieto and Mr Andries had repeated arguments that had been expressed during the group meeting. He personally agreed with Mr Andries, although the basis of his argument was different. He saw no reason for negligence

not to be considered a crime, even if there was an absence of criminal intent. For example, under Swiss criminal law, lack of criminal intent was no bar to prosecution for the faulty construction of a nuclear power plant. Article 86 of Protocol I, which referred to “criminal or disciplinary responsibility, as the case may be” was not totally clear. In that respect, he stressed the importance of the comment made by Mr Ugrekhelidze to the effect that there was no necessity to refer to international criminal law if the relevant provisions were embedded in domestic law. In some countries, such a reference raised questions regarding the principle of legality. One topic to be considered, therefore, was the divergence between countries in the way the principles of international humanitarian law were incorporated into domestic legislation. Another important question was that of application. The experience of the past decade made it clear that even where the necessary national legislation was in place, prosecution for war crimes was a rare event. Furthermore, the debates within the European Union concerning the relationship between community law and national law demonstrated that the question of the supremacy of one law over another was complex. Any discussion of international criminal law should be firmly based on an understanding of domestic criminal law.

Mr Gebregziabher Gebreyohannes said that it was important to think about the purpose of penalties. The punishment of negligence would neither prevent further negligence nor discourage others from being negligent. Its only purpose would be one of retribution, surely a concept of days long gone. In his opinion, superiors should only be punished when their failure to act stemmed from criminal intent.

Mr Roth respectfully dissented from that view.

Mr Sandoz, referring to his own experience as a child, thought that a tendency towards negligence could be corrected through punishment. The whole question of the responsibility of superiors, along with that of subordinates who refused to obey orders (including the balance between military discipline and the right to disobey an illegal order) merited further discussion.

* * * * *

Report of Group III

Procedural law: jurisdiction and the organization of criminal proceedings (French)

- Chairman Mr Paolo Bernasconi
Lawyer, member of the International Committee
- Rapporteurs Mr Pierre Apraxine
Advisory Service, ICRC Moscow
Mr Thomas Graditzky
Legal Division, ICRC Geneva
Ms María Teresa Dutli
Advisory Service, ICRC Geneva

Jurisdiction and the organization of criminal proceedings

1. Jurisdiction

The subjects addressed by the working group were many and varied. Among them were universal jurisdiction, organization of the judiciary, the applicable procedure, evidence and judicial cooperation between the States.

■ *Universal jurisdiction*

The group noted that the domestic legislation of States contained major limits regarding universal jurisdiction.

The aim of the principle of universal jurisdiction was to compensate for the lack of a permanent international court with jurisdiction for violations of international humanitarian law, so as to deny impunity to war criminals.

Two schools of thought emerged in the group as to how to interpret the concept of universal jurisdiction. Some felt that universal jurisdiction was an absolute principle which was not open to discussion and could not be limited. According to this position, issues of humanitarian concern were universal in nature and should

not be weighed in terms of judicial concerns against those of national sovereignty. In principle, therefore, an investigation should automatically be held into any violation committed in any international conflict.

If the principle of universal jurisdiction were applied in an absolutely strict fashion, difficulties would arise since many States were unable to bear the financial burden of thorough application. Some participants therefore felt that the concept of universal jurisdiction should be limited by certain criteria (State interest, territorial universal jurisdiction, restriction to the gravest breaches, presence of goods and/or objects of value forming part of a country's national heritage). Although States had ratified the Geneva Conventions, which provided for absolute universal jurisdiction, there was thus a need to think about conditions that should be attached to it, precisely in order to ensure that the mechanism was effective in practice.

The principle of discretionary prosecution concerns the question of whether proceedings should be instituted. There must be a clear distinction between universal jurisdiction and the obligation to prosecute. Universal jurisdiction could be considered only if the principle of discretionary prosecution were recognized. There were concrete considerations regarding the appropriateness of prosecution that determined whether persons outside the territory concerned may be prosecuted. Universal jurisdiction must be understood as the possibility for the national judicial authority to initiate a preliminary investigation, even if the results are subsequently used by other authorities.

Discretionary prosecution did not, of course, mean that proceedings would be instituted arbitrarily. The ability to put together a case and marshal the available evidence would naturally limit the implementation of universal jurisdiction.

Some participants emphasized the risk of jurisdictional conflicts in the event of the correct and widespread application of the principle of universal jurisdiction. The risk of such conflicts, which was quite minor in international criminal law, was perhaps greater in the case of serious breaches of international humanitarian law. For the ad hoc international tribunals, the preferred solution was to recognize their primacy. For the national courts, including in domestic legislation

criteria according to which jurisdictional conflicts could be resolved might give rise to abuses (of authority, etc.). It was stressed that in the draft statute the future permanent international criminal court was not to have priority over national courts. On the contrary, it would have jurisdiction only if no proceedings had been instituted elsewhere.

Today, the principle of universal jurisdiction was compulsory only for international conflicts. There was, however, a growing body of opinion in favour of recognizing it for internal conflicts as well (which was the practice of the ad hoc international tribunals and some new national legislation). Provision should therefore be made for the extension of universal jurisdiction to violations committed in internal conflicts (of the type covered by Protocol II).

- *The principle of non bis in idem*

The principle of *non bis in idem* was recognized by domestic law around the world. The statutes of the ad hoc International Tribunals provided for the possibility of a retrial in exceptional cases. One participant proposed that a fresh trial should be allowed for the most serious offences. Another pointed out that incorporation into national law of the provisions of regional human rights conventions should make this less and less of a difficulty.

- *Amnesty*

Some saw a link between amnesty and time-barring, while others challenged the existence of such a link. It was recalled that the effect of an amnesty was to remove from an act its illegal character.

In any event, it was clear that an amnesty declared in one State was not valid in another State and was not binding on it. A State could therefore institute criminal proceedings in spite of an amnesty declared elsewhere. Its courts maintained their capacity. An amnesty could have effect only in the country in which it was declared.

Moreover, the very question of whether or not war crimes could be amnestied could be regarded as contradicting the fact that these were international crimes and must be viewed in a worldwide context.

- *Which persons are subject to the law?*

All agreed that no one — whatever their status — was above the law.

2. Organization of the judiciary

The court assigned to try war crimes must be both independent and effective, particularly in terms of proximity to the military authorities (so as to be able to establish facts in the field) and its specialization. These two conditions were essential.

Some participants declared themselves in favour of assigning jurisdiction to one single court (so as to ensure thorough knowledge of international humanitarian law and of the situation in the field, and a consistency in the resulting judgements). This court, which would (for budgetary reasons in particular) already exist and would add the jurisdiction for war crimes to its established realms of jurisdiction, would be situated midway up the judicial hierarchy (so as to allow for appeal). It was emphasized that in the event of a massive incidence of war crimes, the creation of *ad hoc* courts might prove necessary, although reservations about this type of court were expressed within the group as uniform case-law would not be ensured, nor would the court's specialization on the basis of experience acquired.

Concerning trial courts, the presence of military judges called upon to hear cases for very short periods could lead to difficulties vis-à-vis their independence. The danger of 'peer justice' had been raised, especially in countries with a professional army. Consequently, ordinary courts were needed — or at any rate mixed courts — whose members were not exclusively military. For investigating courts, the assistance of officers from the field was essential. In Belgium there was a system in which a mobile judiciary team was attached to every battalion.

3. Procedure

It was useful for the judicial guarantees applicable to prosecution for war crimes to be written into domestic legislation. The point was made, however, that most such principles were written into the human rights instruments.

Victims should be allowed to play an active role in instituting criminal proceedings. (In Belgium, it was not until the law of 1993 that victims were

allowed to initiate criminal proceedings before military courts.) Steps must be taken to prevent the victim's ability to do so from being made conditional on the advance payment of court costs (as was the case — subject to the application of a special legal aid mechanism — in Belgium). Should this nevertheless occur, however, victims' associations could act. Advance payment of costs was designed to limit vexatious actions and unmanageable bottlenecks. It was stressed, however, that victims had sometimes lost everything and that they therefore could not be forced to pay costs in advance. Furthermore, libel actions were always possible. It was acknowledged all the same that screening was needed, but not at the start of proceedings. An examining magistrate's ability to dismiss a case quickly, for lack of evidence, could serve as a potential filter.

There was a need to be aware that access to a case-file during an investigation could lead to private reprisals or leaks to the media.

Who were the victims? For international crimes, was the victim not the international community as a whole? One participant proposed distinguishing between different categories of victim (direct, indirect and ultimate). It should not be forgotten, however, that humanitarian values were at stake. The international community was also affected by war crimes. Public criminal trials were needed.

Compensation for damages should be guaranteed, to be borne either by the perpetrator or by the State for acts committed by its agents or in the event of an omission on its part. Victims must be able to seek damages before either civil or criminal courts. In some countries, there were systems providing compensation in the form of pensions.

Witnesses had to be protected. This was a relatively recent problem, and could apply to victims — and in some cases defendants — threatened with reprisals. One participant said that the duty to protect victims and witnesses should be recognized at the international level. A person should be able to ask for protection from another country or from a national or international organization. Official monitoring of witnesses at risk could afford them a degree of protection. Before giving evidence, witnesses should be informed of the rules of procedure that would be applied. And as long as it was necessary to protect them, they should be allowed to remain on the territory. A clash could arise between the rights of a defendant and those of a victim. Measures to protect endangered witnesses should respect the rights of the defence.

Bodies like South Africa's Truth and Reconciliation Commission should be looked into, at least for cases of large-scale violations.

4. The conduct of proceedings

Gathering evidence sometimes presented few problems (in cases of particularly massive and visible violations), but difficulties emerged when it came to forwarding the information for use by a foreign court. These difficulties were due to distance, the time that had elapsed since the acts were committed, sometimes the different languages and cultures of the people involved, the lack of specialization of the investigators, etc.

The methods for gathering evidence should be left up to the States. The different forms of evidence (testimony, documents, etc.) could in any case be falsified or distorted. National lawmakers should be allowed considerable flexibility when it came to assessing evidence. Measures should be taken to spare courts from finding themselves without any evidence simply because it was not possible to consider certain forms of evidence following an investigation abroad.

One of the key guarantees needed in the context of procedure was the possibility for all parties to be heard. It should not be possible to cite military secrecy before the courts as grounds for not giving evidence. The various interests should in any case be weighed up (proceedings *in camera* might be considered).

In practice, translation difficulties might emerge (sound recordings of original statements could be useful here).

A handbook designed for examining judges could usefully be prepared on the basis of experience. In any case, investigators needed specialized training.

5. International cooperation

In practice, there were different ways of handling the problem of extradition at the national level. Bilateral agreements were sometimes supplemented by domestic laws. In any case, blocking extradition for war crimes on political grounds should be ruled out. In addition, dual criminal liability should not be a precondition for extradition (which would be

tantamount to allowing a State to put forward its own national shortcomings as a means of preventing extradition).

Where an investigation in another country was necessary, there were two options: either it could be conducted directly by the foreign investigator with the consent of the country in which the act had been committed, or it could be conducted with the active participation of people on the spot. There were advantages to both formulas. In practice, the two could be combined. The problem of testimony by humanitarian personnel was raised, but it was emphasized that in principle this should not be required lest it jeopardize their work.

A foreign investigator could not in any case serve coercive notices.

National legislation on the repression of war crimes should recognize provisions on cooperation in investigations in order to limit the conditions placed on the work of foreign investigators and to ensure the impartiality of an investigation carried out as a cooperative venture.

Cooperation by national courts with the International Criminal Tribunals posed no particular problem, thanks to the clear obligation deriving from the international bodies' respective statutes. Questions emerged as to assistance from the International Tribunals for the national courts. While certain precautions had to be taken regarding the procedures (confidentiality and protection of witnesses), cooperation had to remain broad and reciprocal. The problems were the same for both types of court.

* * * * *

Discussion

Mr Sarr emphasized that many countries, especially Third World countries, did not have the financial resources to apply the principle of universal jurisdiction. In some cases, national legislation even prevented the application of universal jurisdiction. For example, his own country did not allow extradition to another country unless a bilateral agreement existed with that country. Regarding procedure, he considered that war criminals should be tried by ordinary rather than military courts. The proceedings should, however, have the benefit of military expertise. Protection of the victims should be primordial. Witnesses to genocide were often afraid to testify for fear of reprisals. State protection during and after the trial might be necessary.

Mr Andries said that universal jurisdiction applied to grave breaches of international humanitarian law committed during international armed conflicts. That principle should not be weakened by making any exceptions to its application. Furthermore, the likelihood of a conflict of jurisdiction between States was negligible. Universal jurisdiction did not obviate the need for due legal processes, and a State could only prosecute on the basis of evidence. The question of competence was therefore self-regulating.

Mr Zhu said that, as could be seen from experience, the system of ad hoc international tribunals did not guarantee uniform application of international humanitarian law. Ideally, the tribunal should be able to call on the cooperation of the court of first instance. Unfortunately, that had not been possible in the former Yugoslavia. He stressed that the ICRC was recognized as an authority on international humanitarian law, and could play an important role in achieving uniform standards in application. The ICRC provided useful training in humanitarian law, and he recalled an example of its benefit to an experienced lawyer called upon to serve on an international tribunal.

Mr Cerdá, referring to compensation for victims of war crimes, drew attention to Article 91 of Protocol I which recognized State responsibility for acts committed by its armed forces. Under international humanitarian law, the responsibility of the State was subsidiary to that of the perpetrator of the act, thus victims had to take legal action to seek compensation first from the perpetrator and then, in the absence of satisfaction, from the State. In order to help and protect victims, Spanish law allowed proceedings against the individual perpetrator and the State to take place simultaneously.

Mr Rwagasore regretted that the ad hoc Tribunals did not deal with civil suits. In the case of Rwanda, victims had to go through the lengthy process of submitting their claims for compensation to the International Court in The Hague.

Mr Zhu said that the ad hoc Tribunals had limited power and, moreover, could not tell national courts what to do. For example, the ad hoc Tribunals could not impose the death penalty, but the national courts of some countries could. Thus persons guilty of serious crimes might receive lighter sentences from the Tribunals than the sentences handed down by the national courts in cases of less serious crimes.

Mr Bernasconi agreed with Mr Andries that the principle of universal jurisdiction was naturally regulated by the opportunity to institute proceedings. A case could only be brought to trial if a preliminary hearing showed that a complainant had sufficient justification. Access to evidence was therefore a prerequisite to the exercise of universal jurisdiction. An argument could be made for special courts to deal with breaches of international humanitarian law, by analogy with, say, juvenile courts. It would be difficult to offer protection to victims in ordinary criminal courts. In cases such as genocide, victims of civil wars should clearly have the same protection as victims of international armed conflicts. Regarding compensation, where there were hundreds or thousands of victims, a State fund should be established and victims should be treated equally. The inability of certain victims to institute legal proceedings should not put them at a disadvantage.

* * * * *

CHAPTER VI

Closure of the meeting

Yves Sandoz

ICRC Director for International Law and Policy

The time has now come to end our meeting, and I would like to begin my closing remarks by thanking you. From my point of view at any rate, our meeting has been an extremely useful one. It has sparked off highly productive discussions and has clearly shown how much you invested in your preparatory work, your reports and your active participation in the deliberations. I think it has also shown how useful it is to place our efforts in context. As I mentioned already in my introduction, two major trends are developing today: that of defending the victims of war and their rights, and that of fighting impunity.

I am convinced — and it is important to emphasize this — that what we are doing here today is complementary to the work of those bringing assistance to victims, visiting prisoners and treating the wounded. We must remember that it is another way, albeit less visible, of helping these victims, and that is why we do it.

This activity also contributes to the struggle against impunity for those guilty of the major international crimes, and that struggle is paving the way for the creation of an international criminal court; that struggle is helping to boost respect for a degree of international morality.

It is not always easy to decide where to stop our discussion and on what we should focus our efforts. As I said, we felt that abolition of the distinction regarding war crimes — i.e. the distinction between internal and international conflicts — had a good chance of being supported and accepted by States. Should we go beyond the framework of humanitarian law in certain cases, such as those where genocide might not constitute an armed conflict? I think that here too, common sense itself dictates that the problems relating to genocide should be included among the issues having to do with serious violations of international humanitarian law. One could ask more open-ended questions about crimes against humanity, insofar as these crimes have not yet been very clearly defined in the work currently being done. And we should launch an even more wide-ranging study of

crimes against peace — not, of course, because the crimes themselves do not also deserve to be repressed, but because they are of a different kind and should be the subject of different proceedings.

So from our point of view, and bearing in mind the resources available to us, our task is to avoid dissipating our energies and to fully achieve the objectives we set ourselves, in order to remain credible. We cannot, for example, speak lightly of customary law. If we mention customary law, we must be able to speak about it with full knowledge of the facts, for customary law is not just what we would *like* to see exist, but what the practice and *opinio juris* of States actually represent. Credibility is all the more important if we then wish to develop standards, something which must be done with the support of States and with experts — not in an ivory tower. I think that this meeting has been guided entirely by the philosophy of the ICRC, which in no way claims to act alone, but rather seeks to take into account the opinions of experts such as yourselves.

In our relationship with States, we feel justified in staunchly defending our principles and reminding States of their duties, but without lapsing into arrogance. I think we must make an effort (something we have realized during this meeting) to fully understand the national systems, the reasons why they are the way they are and the environments in which they operate.

It is crucial too to confront theory with practice, to face the concrete problems. The presence of eminent jurists from Rwanda and Ethiopia, who have made clear their views and shared their experience, thus seems to me extremely useful and a valuable complement to discussions of an academic nature. This should help us to avoid discussions that miss the point. And I am thinking here, in particular, of those that have occurred in connection with the preparatory work for an international criminal court, during which the fear of competition between the International Tribunals and national legislation has been raised, or concern about protecting national sovereignty. Here we must remember what was said at the start of this meeting, in the early statements: by far the greatest danger today is not overzealousness but a vacuum. No one is fighting over the privilege of trying war criminals, and it is important to remember that.

And without dodging real questions either, the Rwandan Prosecutor General reminded us in particular that in some cases this problem of competition between an international tribunal and national jurisdiction may nonetheless exist, as it undoubtedly can exist between some States, and that

these exceptional — if spectacular — cases should not be overlooked. We had occasion, in fact, to emphasize the fact that the International Tribunals and the punishment of war criminals certainly also aim to set an example, to serve a didactic purpose.

Moreover, I am coming out of this meeting strengthened in my conviction that it is worthwhile to continue working together to advance the efforts being made in all these spheres. I think that in this respect it was valuable to hear the report and recommendations from the Athens meeting, brought to us by Mr Andries, to hear a report on the work done in the Syracuse meeting organized by Professor Bassiouni, which I had the good fortune to attend, and, above all, to have the benefit of the experience of a president and practitioners from the ad hoc International Tribunals. It is important to listen to one another, to see what is being done and to seek maximum synergy from all these efforts. In this regard, we have perhaps made the mistake of neglecting somewhat the work currently being done in the Human Rights Sub-Commission, which will be submitted to the Commission — I refer to the Joinet report on issues relating to impunity for perpetrators of violations of civil and political rights. This report (which I have had a chance to see) deals with certain aspects of humanitarian law, and I think that it too is a worthwhile effort that deserves to be followed.

Finally, I would like to say that we have embarked on a marathon rather than on a hundred-metre sprint; we are by no means claiming that with help from our Advisory Service all problems can be solved by next year! This is clearly a long-term effort, so it is important to keep up our enthusiasm, to develop the discussion, and probably also to use other events to keep it going. Domestic legislation is not perhaps a field that excites politicians, but the fact that an international criminal court is in the process of being created and the practical questions being asked in some States about the presence of war criminals have generated interest among the public and the media, and I am convinced that we must exploit this interest. The Milan Congress is a very good example. Next year, Italy will have the privilege of hosting the conference to set up an international criminal court, and there is no doubt that the Milan meeting — which brought together a great many Italian and foreign criminal law experts to discuss Italian law — would not have been such a success had it not been for this prospect.

You have voiced your expectations of the ICRC and you have said very kind things about it. I thank you for that, but I would say to you that here too there is a question of resources. It is no easy task. We can see that from

everything that the Rwandan Prosecutor General told us — it is not easy, as I say, to attract the interest of States or financing from them for enterprises of this kind, which are not very spectacular in the short run. I think, however, that we must continue to try to persuade States to give this type of project the necessary resources, which are in any case ludicrously small compared with those that have to be deployed when massive violations of humanitarian law occur. Prevention is far less expensive and yet far more difficult to finance, simply because it does not seem spectacular. We must repeatedly point out to States, and sometimes even within our own organizations, that a consultative committee like the one we have set up is a useful preventive tool, and we must support it.

We have embarked on a process and it is therefore important to be able to build a network of competent people of goodwill. This meeting and the report we will publish and send you will not, I sincerely hope, signal the end of our cooperation with you but rather the start of a long-term project. And this network must expand and must enable us to share our problems and exchange our views. In this way we may hope to persuade the States as a whole to deal seriously with the problem of impunity on both the national and the international levels.

It remains for me to thank you once again for your participation, especially those who wrote the reports and the presentations, the Chairmen, the rapporteurs and also all those who took such an active part in our discussions. Another word of thanks to those who organized this meeting, the team from the Advisory Service and, last but not least, our interpreters, whose accuracy and skill enabled them to make sense of it all. A warm thank-you to you all, and may you have a safe journey home.

The meeting is closed.

Annex I

Agenda

Chairman: Yves Sandoz,
ICRC Director for International
Law and Policy

Tuesday, 23 September 1997

- 10.30 - 11.00 a.m. Arrival and registration of participants
- 11.00 - 11.15 a.m. Opening of the meeting by the Chairman
- 11.15 - 11.35 a.m. The importance of complying with international humanitarian law
ICRC President, Mr Cornelio Sommaruga
- 11.35 - 11.50 a.m. The repression of violations of international humanitarian law at national level and the work of the ICRC Advisory Service
Ms María Teresa Dutli, head of the ICRC Advisory Service
- 11.50 - 12.30 p.m. The need for international accountability
Prof. M. Cherif Bassiouni, DePaul University, Chicago
- 12.30 - 02.00 p.m. *Lunch*
- 02.00 - 03.30 p.m. Presentation of some national systems of enforcement through criminal legislation
- | | |
|-------------|---|
| Belgium | <i>Mr Damien Vandermeersch,
Investigating Judge, Brussels</i> |
| Switzerland | <i>Prof. Robert Roth, University of Geneva</i> |
| Germany | <i>Prof. Horst Fischer,
Ruhr University of Bochum</i> |

03.30 - 03.45 p.m. *Coffee break*

03.45 - 05.15 p.m. Second part of the presentation,
followed by discussion

Spain *Mr José-Luis Rodríguez-Villasante
y Prieto,
Judge Advocate General, Madrid*

Croatia *Prof. Zvonimir Separovic,
University of Zagreb*

05.15 - 05.45 p.m. Relations between national courts and the *ad hoc*
Criminal Tribunals for the former Yugoslavia and
Rwanda

– *Mr Wen-qi Zhu, Legal Adviser, Office of the Prosecutor,
International Criminal Tribunal for the former Yugoslavia*

– *Mr Laïty Kama, President of the International Criminal
Tribunal for Rwanda*

Dinner hosted by the ICRC

Wednesday, 24 September 1997

09.00 - 09.20 a.m. The work of the Athens Congress (May 1997) of the
International Society for Military Law and the Law of
War on national measures to repress violations of
international humanitarian law

*Mr André Andries, Director of the documentation centre of the
International Society for Military Law and the Law of War,
Brussels*

09.20 - 09.35 a.m. Introduction to the day's work and the topics to be
discussed

*Ms Cristina Pellandini, Legal Adviser,
ICRC Advisory Service*

09.35 - 12.30 p.m. Group work (*coffee break included*)

Group I

How can and should national legislatures incorporate provisions of international humanitarian law into domestic law? Criminalization of such violations in domestic criminal law (substantive law)

Group II

Which general principles should be taken into account by national legislatures to ensure effective repression at domestic level in keeping with international law?

Group III

Jurisdiction and the organization of criminal proceedings

12.30 - 02.00 p.m. *Lunch*

02.00 - 04.00 p.m. Group work (continued)

04.00 - 04.30 p.m. *Coffee break*

04.30 - 05.30 p.m. Particular cases and problems: repeated violations, mass violations, violations committed by many perpetrators, and the judicial structures set up to deal with them

– The case of Rwanda

*Mr Siméon Rwagasore, Prosecutor General
of the Supreme Court of Rwanda*

– The case of Ethiopia

*Mr Yosef Gebreegziabber Gebreyohannes,
Attorney at Law, Ethiopia*

From 5.30 p.m. on *Preparation of working group reports*

Evening free

Thursday, 25 September 1997

- 09.15 - 11.15 a.m. Presentation of working group reports,
followed by discussion
- 11.15 - 11.30 a.m. *Coffee break*
- 11.30 - 12.15 p.m. Conclusions presented by the Chairman
- 12.30 - 02.00 p.m. *Buffet lunch*
- 2.45 p.m. Visit of the International Red Cross and Red Crescent
Museum (*optional*)

Annex II

List of participants

- Mr André Andries**, Director of the documentation centre of the International Society for Military Law and the Law of War (SIDMDG), Belgium
- Mr M. Cherif Bassiouni**, Professor of Law, International Human Rights Law Institute, DePaul University, Chicago, USA
- Mr Paolo Benvenuti**, Professor of Public International Law, Cesare Alfieri Faculty of Political Science, Università degli studi, Florence, Italy
- Mr Jaime Sergio Cerdá**, Consul General; member of the Legal Advisory Service of the Ministry of Foreign Affairs, International Trade and Worship; member of the Argentine Commission for the Implementation of International Humanitarian Law, Argentina
- Mr Luigi Condorelli**, Professor of Public International Law, University of Geneva, Switzerland
- Mr Yuri Georgievich Demin**, Deputy Prosecutor General, Russian Federation
- Mr Horst Fischer**, Professor of International Law, Institute for International Law of Peace and Armed Conflict, Ruhr University of Bochum, Germany
- Mr Yosef Gebreegziabher Gebreyohannes**, Attorney at Law and Legal Adviser, Ethiopia
- Mr Marc Henzelin**, Assistant Lecturer, Centre for Legislative Studies, Methods and Evaluation (CETEL), Faculty of Law, University of Geneva, Switzerland
- Ms Akila Jarraya**, Judge, Court of Cassation, Tunis, Tunisia
- Mr Laïty Kama**, President of the International Criminal Tribunal for Rwanda, Senegal
- Mr Warawit Kanithasen**, Deputy Director-General of the Treaties and Legal Affairs Department, Ministry of Foreign Affairs, Thailand
- Mr Giuseppe Mazzi**, Judge Advocate, Rome Military Court, Italy

- Mr Eliam Monsedjoueni Potey**, Magistrate, Deputy Director of Criminal Affairs and Pardons, Ministry of Justice, Côte d'Ivoire
- Rear Admiral José Reilly**, Judge Advocate General of the Argentine armed forces, Argentina
- Mr Yesid Reyes Alvarado**, Professor of Criminal Law, Universidad Autónoma de la Sabana, Colombia
- Major General José-Luis Rodríguez-Villasante y Prieto**, Judge Advocate General; Director of the Spanish Red Cross Centre for the Study of International Humanitarian Law, Spain
- Mr Robert Roth**, Professor of Criminal Law, Director of the Centre for Legislative Studies, Methods and Evaluation (CETEL), University of Geneva, Switzerland
- Mr Peter J. Rowe**, Professor, Department of Law, University of Lancaster, United Kingdom
- Mr Siméon Rwagasore**, Prosecutor General of the Supreme Court of Rwanda
- Mr Hernán Salinas Burgos**, Legal Deputy Director, Ministry of Foreign Affairs, Chile
- Mr Oumar Sarr**, Magistrate, *auditeur* at the Court of Cassation, Senegal
- Mr Zvonimir Paul Separovic**, Professor of Law and Ethics, University of Zagreb, Croatia
- Mr Bernhard Sträuli**, Assistant Lecturer, Faculty of Law, University of Geneva; Investigating Judge, Divisional Military Court No. 2, Switzerland
- Mr Jae Ho Sung**, Professor of Law, Sung Kyun Kwan University, Republic of Korea
- Mr Mindia Ugrehelidze**, Professor of Law, President of the Supreme Court of Georgia, Georgia
- Mr Damien Vandermeersch**, Investigating Judge, Court of First Instance, Brussels; Assistant Professor, Catholic University of Louvain, Belgium
- Brigadier Jürg Van Wijnkoop**, Judge Advocate General, Federal Military Department, Switzerland
- Mr Wen-qi Zhu**, Legal Adviser, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, Netherlands

International Committee of the Red Cross

Mr Cornelio Sommaruga, President of the ICRC

Mr Paolo Bernasconi, member of the ICRC

Ms Anne Petitpierre, member of the ICRC

Mr Yves Sandoz, ICRC Director for International Law and Policy

Ms María Teresa Dutli, Head of the ICRC Advisory Service

Mr Paul Berman, legal adviser, ICRC Advisory Service

Ms Cristina Pellandini, Legal adviser, ICRC Advisory Service

Mr Olivier Dubois, research assistant, ICRC Advisory Service

Mr Thomas Graditzky, research assistant, ICRC Advisory Service

Ms Monika Cometti, documentalist, ICRC Advisory Service

Mr Michel-Cyr Djiena-Wembou, legal adviser, ICRC Abidjan

Mr Ameer Zemali, legal adviser, ICRC Amman

Mr Claudio Santorum, legal adviser, ICRC Bogotá

Mr Pierre Apraxine, legal adviser, ICRC Moscow

Mr Yves Peterman, legal adviser, ICRC Moscow

**Recommendations of the International Society
for Military Law and the Law of War
on the essential principles related
to the national repression of grave breaches
of the law of armed conflict***

At their Congress in Athens held from 10 May to 15 May 1997, the members of the International Society for Military Law and the Law of War have, after examining the problems resulting from the investigation and prosecution of the violations of the law of armed conflict, adopted the following recommendations for the people in charge of the development and application of national legislations related to the repression of these violations in order to promote a more efficient execution of the universal obligation to carry out the criminal sanction of the war crimes in a co-ordinated way.

Considering that war criminality nowadays causes losses to humanity which are as worrying as ordinary criminality; that the principle of universal jurisdiction, which the national courts can exercise under the Geneva Conventions of 1949 in order to prevent war criminals from remaining unpunished, has so far not been implemented satisfactorily; the Athens Congress of the International Society especially draws the attention of the national responsible authorities to the following points it considers as the prerequisites for a better efficiency of the system for the national repression of war crimes.

**A. With Respect to the General Characteristics
of the National Implementation Legislations**

1. As far as international crimes are concerned interfering with global law and order, it is appropriate for the national legislations organising the repression of these crimes to make up a body of rules including not

* *The following text has been reproduced from Acts of the Athens Congress: 10-15 May 1997, issued by the International Society for Military Law and the Law of War.*

only their incriminations but also the principles of material and formal criminal law in conformity with the specificities of international criminal law in this respect, and differing about important points of the principles of common criminal law intended to maintain internal law and order.

2. Taking into account the difficulties of all kinds which are at the basis of the application, often deficient, of the criminal law of armed conflict by the national responsible authorities, it is useful for the national legislators to clearly express their will to apply this law in an efficient way both through the quotation and the clear definition of all rules related to criminal liability in this respect and through rules of procedure intended to fight against unjustified abstention of the people in charge of prosecutions.

B. With Respect to Incriminations and Penalties

1. Legal security which is particularly indispensable to the matters of criminal law, both important and sophisticated, implies (among others on the basis of the general principle “*nullum crimen, nulla poena sine lege previa*”) that the incriminations should be as explicit and accessible as possible both for those to be tried and for the judicial authorities, and that the penalties applicable to these incriminations should be determined as specifically as possible for each offence.

2. Since the incriminations of the unintentional offences existing in the systems of common criminal law of most countries in the world (such as homicide or bodily harm due to a lack of foresight and precaution) are general incriminations applicable to all situations, the explicit quotation of this applicability in the body of rules especially devoted by the national parliaments to the criminal law of armed conflict, makes it possible to better fight against the faulty mistakes about the legality of a decision or of an order infringing the prohibitions of this part of criminal law.

3. Considering that the most prejudicial violations of the criminal law of armed conflict are currently committed within the framework of non-international armed conflicts, the national legislators would to a

large extent contribute to the confirmation of a common-law principle related to criminal liability within the framework of these conflicts through the extension, to the extent compatible with international law itself, of the incriminations of their national legislations to the situations of internal armed conflicts.

4. The scarcity of the incriminations, under the domestic law of genocide and of the attacks aimed at cultural property in case of armed conflicts leads us to insist on the obligation for the States, which are parties to the Conventions of 1948 and 1954 in this respect, to also provide for the national repression of these international crimes.

5. Considering the importance of prevention, already in peacetime, of extremely destructive international crimes of which we know they are only rarely repressed once committed, the explicit incrimination of the preparatory actions is to be promoted as a tangible sign of the will of the national parliaments to enforce the law of armed conflict.

C. With Respect to the General Rules of Criminal Liability

1. Since the humanitarian law of armed conflict or Geneva law has deliberately chosen to attach more importance to the superiors' "criminal liability than to the subordinates", domestic law provisions clearly defining the liability of the superior who, has either ordered to commit a war crime (even if this order has not had any effect), or has not prevented a war crime which his subordinates planned to commit or were committing, whereas he had the necessary information and means, are part of the specificities of criminal liability within the framework of the international criminal law of armed conflict.

2. Since the rejection of the justifying reason of the superior's order only leaves room for an excuse or extenuating circumstances, as defined in the Nuremberg law and integrated in almost the majority of the domestic criminal law systems, it leaves the criterion open on the basis of which the illegality of the order must be taken into account by the person who carries it out: since the national legislations are divided between an objective criterion (obvious illegality) and a subjective criterion (knowledge and personal recognisability) the harmonisation

looked for recommends the concurrent adoption of both criteria in the national legislations on the criminal law of armed conflict.

The regulations of military discipline should provide a procedure allowing the subordinates to exercise, without harm for themselves and with respect for the discipline, their right and their duty not to obey the orders of which the execution would be obviously committing a war crime.

3. The fact that the extent to which the national interest of the military necessity can justify an operational decision is determined by the international law of armed conflict itself, is not always underscored in the national implementation legislations; therefore it is up to the parliaments of the States, which are parties to the conventions, to remedy more explicitly the improper interpretations which are sometimes noticed in this respect by both theoreticians and practitioners by stressing more in particular the limits to the proportionality principle fixed by the “Martens” clause (see commentary on the Additional Protocols of 1977 by the ICRC, Geneva 1986, p. 1020, note 19).

D. With Respect to the Organisation and the Jurisdiction of the National Courts Entrusted with Repression

1. The efficient working of the system of the national repression of war crimes is directly linked to the introduction, into the domestic law systems, of the rule of the universal jurisdiction of the national courts in this respect, which is the condition for the actual cancellation of the impunity of war criminals: consequently, this rule must be integrated into the domestic law systems as it results from international law, i. e. the authority given to these courts to judge any war crime without any restriction with respect to the place of the perpetration of the crime or with respect to the nationality of the perpetrator. Taking into account the particularly problematic nature of the repression of the violations of the law of armed conflict by the courts of the States involved in internal conflicts, the progress of the international legal order recommends that this universal jurisdiction should be extended to the grave violations of the law of armed conflict.

2. The new function of the courts consisting of the criminal sanction of the violations of the international legal order requires from them a very clear independence in relation to the national political and military interests.

3. The criminal control of the application of the law of armed conflict remains uncertain insofar as judicial authorities which are in all respects independent of the military command are not in a position to carry out, in the area of operations, the findings and the investigations with respect to the violations of this law.

The efficiency of this judicial personnel is linked to its specialised training related to the criminal law of armed conflict.

E. With Respect to Procedure

The attention of the national legislators will more in particular concentrate on the following points:

1. The problem of the criminal immunity of the members of the executive power with respect to the decisions related to the combat methods and means imposed on the Armed Forces;

2. The safeguard against the compulsory or optional interventions of the operational military command in the decisions to start legal proceedings with respect to violations of the law of armed conflict;

3. The proceedings like these in camera make it possible to reconcile the protection of the military secret with the disclosure of the truth within the framework of the trials related to war crimes;

4. The rule related to the imprescriptibility of war crimes, which is part of the international law standards beyond the particular grievances the States can legitimately have against the wording of the 1968 United Nations Convention;

5. The part which can be recognised to the victims in the procedure and the ban on punishing these crimes through the simple internal discipline of the Armed Forces.

* * * * *

PART TWO

**Case studies
of systems
for national repression**

Belgian legal system for the repression of crimes under international law

Damien Vandermeersch

Investigating Judge, Brussels

Assistant Professor, Catholic University of Louvain

1. National legislation for the repression of violations of international humanitarian law

1.1 Prosecution under national law

The repression of grave breaches of the international law of armed conflict is set out as far as Belgium is concerned in the Act of 16 June 1993 on the repression of grave breaches of the Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977 additional to these Conventions.¹

Belgium has ratified the four Geneva Conventions of 1949² and their two Additional Protocols.³

As the above international instruments are not self-executing and in view of the constitutional principle of *nullum crimen, nulla poena sine lege*, national legislation was needed to establish penalties and set up prosecution procedures.⁴ It was decided to draw up a special act separate from the ordinary and Military Penal Codes.

The Act of 16 June 1993 is innovatory in several different ways: it constitutes a coherent and autonomous body of provisions relating to both substantive criminal law and criminal procedure; it introduces significant departures from ordinary criminal law (comprehensive list of specifically

¹ The Act came into force on 15 August 1993 (*Moniteur Belge* of 5 August 1993, p. 11751).

² Act of 3 September 1952 approving the four Geneva Conventions of 12 August 1949 (*Moniteur Belge* of 26 September 1952, p. 6822).

³ Act of 16 April 1986 approving the two Protocols additional to the Geneva Conventions of 12 August 1949 (*Moniteur Belge* of 7 November 1986, p. 15196).

⁴ Under said Geneva Conventions, the Contracting Parties undertake “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches [...] defined [...]” (Articles 49, 50, 129 and 146 of the First, Second, Third and Fourth Conventions, respectively).

defined breaches, types of participation, etc.) and from usual procedure (universal jurisdiction, no statutory time-bar, etc.).

1.1.1 Scope of the Act

Under the Geneva Conventions and Additional Protocol I, the obligation of the States Parties to enact the legislation needed to ensure the repression of grave breaches is limited to international armed conflicts.⁵

An original feature of the Act of 16 June 1993⁶ is that its scope has been extended to include armed conflicts not of an international character, and that this extension goes beyond the obligations deriving from the ratification of the Geneva Conventions and their Additional Protocols. By including Protocol II in the title and body of the law, the Belgian legislature decided to apply the offences relating to violations of international humanitarian law committed during international armed conflicts also to acts committed during non-international armed conflicts and prohibited but not defined as constituting violations under Protocol II.⁷

The extension of the scope of the Act to include non-international armed conflicts⁸ is significant in view of the fact that the Belgian courts have universal jurisdiction in this respect (see below).

⁵ For more information on the notion of international armed conflict, see A. Andries, E. David, C. Van Den Wijngaert and J. Verhaegen “Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire”, *Revue de droit pénal et de criminologie*, 1994, pp. 1125 to 1132.

⁶ Belgium is thus reported to be the first State specifically to characterize as “war crimes” certain serious violations of international humanitarian law committed during non-international armed conflicts (*ibid.*, p. 1133).

⁷ Justice Committee of the Senate, *Doc. parl.*, Senate, 481-4, S.E., 1991-1992, p. 2 (*ibid.*, p. 1121).

⁸ Article 1 of Protocol II additional to the Geneva Conventions defines non-international armed conflicts as follows:

“1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

1.1.2 Substantive criminal law

Grave breaches of international humanitarian law are defined as offences under national law because of the specificity of the law of armed conflict and because the provisions of ordinary criminal law do not provide an adequate response to this type of offence.

Belgium has opted for a comprehensive classification of specifically defined breaches covered by international humanitarian law.⁹

The Act of 16 June 1993 thus introduces a complete set of specifically defined breaches, independent of offences covered by ordinary criminal law, even though assassination and assault and battery, for example, are punishable under both the Act and the Penal Code.

A reading of Article 1 of the Act gives an indication of the fairly wide range of breaches defined as “crimes under international law”. They concern “grave” breaches directly covered by international law (Articles 50, 51, 130 and 147 of the Geneva Conventions and Article 85 of Protocol I) and the corresponding violations of international law which the Belgian legislature decided to declare punishable within the context of non-international armed conflicts.

The field of application of Article 1 covers participation both by “commission” and by “omission”. The term “omission” in this case does not mean failing to fulfil a specific duty to act¹⁰ or refraining from taking action in such a way as to prevent a grave breach from being committed,¹¹ but intentional failure to act that constitutes a form of participation in a criminal act.¹² This particular type of participation is not admissible under the Belgian Penal Code.

⁹ For an overview of alternatives chosen by other States (overall criminalization by reference to international provisions, or specific criminalization in whole or in part), see A. Andries, *et al.*, *op. cit.*, pp. 114 to 1184.

¹⁰ This type of failure is made a breach under Article 1, para. 9, of the Act of 16 June 1993.

¹¹ Such acts are made breaches under Article 4 of the Act of 16 June 1993.

¹² A. Andries *et al.*, *op. cit.*, pp. 1138 and 1139.

To be punishable, participation by omission must be such that it favours the commission of a grave breach, i.e., that it constitutes both an approval and an incentive or incitement.¹³

Under the terms of Article 1, the following are crimes under international law:¹⁴

1. Wilful killing.
2. Torture or other inhuman treatment, including biological experiments.
3. Wilfully causing great suffering or serious injury to body or health.
4. Forcing a prisoner of war, a civilian protected by the Convention relative to the Protection of Civilian Persons in Time of War or a person protected under Protocols I and II additional to the Geneva Conventions of 12 August 1949 to serve in the armed forces of the enemy power or the adverse party.
5. Depriving a prisoner of war or a civilian protected by the Convention relative to the Protection of Civilian Persons in Time of War or a person protected under Protocols I and II additional to the Geneva Conventions of 12 August 1949 of the rights of fair and regular trial in accordance with the provisions of these instruments.
6. The unlawful deportation, transfer, displacement or detention of a civilian protected by the Convention relative to the Protection of Civilian Persons in Time of War or a person protected under Protocols I and II additional to the Geneva Conventions of 12 August 1949.
7. The taking of hostages.
8. The unlawful, arbitrary and widespread destruction and appropriation of property not justified by military necessity, as stipulated in public international law.
9. Any act or omission which is not legally justified and is likely to endanger the physical or mental health or integrity of persons

¹³ *Ibid.*, p. 1139. Examples of homicide by omission are: refusal to provide care for the wounded or food for prisoners, or an order not to rescue the shipwrecked.

¹⁴ For a commentary on the definitions of these breaches, see *ibid.*, pp. 1141-1161.

protected under one of the Conventions relative to the protection of the wounded, sick and shipwrecked, especially any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards.

10. Carrying out on persons described in para. 9 above, even with their consent, physical mutilations, medical or scientific experiments, or removal of tissue or organs for transplantation, except where such acts are justified in conformity with the conditions provided for in said para. 9. Exceptions are donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily, with the donor's consent and for therapeutic purposes only.
11. Making the civilian population or individual civilians the object of attack.
12. Launching an indiscriminate attack affecting the civilian population or civilian objects, in the knowledge that such an attack will cause loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose adverse effects, even if proportional to the military advantage anticipated, are incompatible with the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.
13. Making non-defended localities and demilitarized zones the object of attack.
14. Making a person the object of attack in the knowledge that he is *hors de combat*.
15. The perfidious use of the distinctive emblem of the red cross or red crescent or of other protective signs recognized by the Conventions and Protocols I and II additional to the Conventions;
16. The transfer by the occupying power, in the case of an international armed conflict, or by the occupying authority, in the case of a non-international armed conflict, of parts of its own civilian population into the territory it occupies.
17. Unjustifiable delay in the repatriation of prisoners of war or civilians.

18. The practice of apartheid and other inhuman and degrading practices based on racial discrimination and involving outrages upon personal dignity.
19. Making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and for which special protection is afforded the object of attack, where there is no evidence of the violation by the adverse party of the prohibition to use such objects in support of the military effort, and when such objects are not located in the immediate proximity of military objectives.

It should be noted that the acts described under paras 11 to 15 above are considered grave breaches under the Act only if they cause the death or seriously endanger the physical integrity or health of one or more persons.

Depending on the gravity of the breach, penalties range from the most severe punishment provided for in the Military Penal Code (life imprisonment) to between 10 and 15 years of imprisonment.¹⁵

Articles 3 and 4 of the Act of 16 June 1993 define certain preparatory acts or other types of behaviour preceding a war crime (regardless of whether said crime has been committed) as offences to be considered as crimes under international law. Such acts are not listed as grave breaches in the Conventions or in Protocol I and are thus an original feature of Belgian national legislation.

Under Article 3, anyone who manufactures, is in possession of or transports an implement, machine or any other object, or builds a structure or transforms an existing structure, and who does so in the knowledge that the implement, machine, object or construction or transformation of the structure will be used to commit one of the breaches set out in Article 1 of the Act or will facilitate the perpetration of that breach, is liable for the same penalty as that stipulated for the breach whose perpetration was made possible or facilitated.

In accordance with Article 4, the following acts are defined as crimes under international law and are punishable by the same penalties as those stipulated for accomplished breaches:

¹⁵ See the penalties provided for in Article 2 of the Act.

- ♦ an order to commit one of the breaches set out in Article 1, even if the order in question was not carried out;
- ♦ instigation or the offer to commit such a breach, and the acceptance of said instigation or offer;
- ♦ an incitement to commit such a breach, even if the incitement in question had no effect;¹⁶
- ♦ participation, within the meaning of Articles 66 and 67 of the Penal Code,¹⁷ in such a breach, even if the participation in question had no effect;
- ♦ failure to act, within the range of their capacity, on the part of those who had knowledge of orders given for such a breach to be committed or of the acts initiating the commission of that breach, and who could have prevented or stopped it from being perpetrated;
- ♦ an attempt, within the meaning of Articles 51 to 53 of the Penal Code, to commit such a breach.

The Act of 16 June 1993 is thus extremely strict with regard to persons whose behaviour, though peripheral to the central act, favours or facilitates the commission of a breach or enables it to be committed. The coprincipals in and accessories to a breach are thus treated in exactly the same way as the principal perpetrators. The Belgian legislature has gone even further by also providing for punishment of acts such as orders, instigation, offers, acceptance, incitement and complicity, even if the acts in question had no effect, that is, if the breach was not actually perpetrated. Likewise, any

¹⁶ Incitement is punishable without any distinction being made between private and public incitement (A. Andries *et al.*, *op. cit.*, p. 1166).

¹⁷ Article 66 of the Penal Code provides for the punishment, as a perpetrator of a crime or other serious offence, of anyone who:

- committed such an offence or was directly involved in its execution;
- assisted in the execution of the offence in such a way that without such assistance it would not have been possible to commit it;
- directly engaged in incitement to commit the offence.

Article 67 of the Penal Code provides for the punishment, as an accessory to a crime or other serious offence, of anyone who:

- gave instructions for such an offence to be committed;
- procured weapons, implements or any other means whereby the offence was committed, in the knowledge that they would be used for that purpose;
- provided help or assistance in the acts which led up to or facilitated the offence, or in those which constituted it.

attempt to commit a breach is punishable to the same degree as an accomplished breach.

Failure to act on the part of those who are capable of preventing or putting a stop to a breach and who refrain from doing so is also punishable under the Act. In a sense, the Act develops, in its section on persons in a position of authority, the notion of courage to deal with crimes under international law, by compelling those in authority to take action when confronted with situations that are constituent of grave breaches of international humanitarian law and by penalizing failure to act (cowardice) on the part of superiors who render themselves guilty by remaining passive in the face of such crimes.

In addition, the Act¹⁸ excludes political, military or national requirements or interests, such as the vital needs of the nation or military imperatives, as grounds for exemption from responsibility or as grounds for excuse. By unambiguously dismissing the theory of military necessity as a justification, it thus re-emphasizes the inalienable nature of the binding provisions of humanitarian law.¹⁹

Similarly, carrying out an order issued by a superior or by the government does not absolve a person from his responsibility if, under the circumstances prevailing at the time, that order could clearly have resulted in the perpetration of a crime under international law.²⁰ Article 6 of the Act logically states that Article 70 of the Penal Code does not apply to crimes under international law, the latter setting out the objective grounds for justification deriving from an order, legal authorization or instructions issued by the competent authority.

Belgium has also ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.²¹ In the absence of any national legislation similar to the Act of 16 June 1993, we consider that the provisions of the Convention are not self-executing, however, with the exception of that which excludes political interests as grounds for refusing

¹⁸ Article 5, para. 1, of the Act of 16 June 1993.

¹⁹ A. Andries *et al.*, *op. cit.*, p. 1168.

²⁰ Article 5, para. 2, of the Act of 16 June 1993.

²¹ Act of 6 September 1951 (*Moniteur Belge* of 11 January 1952).

extradition. These provisions are therefore not applicable as they stand by the Belgian courts, notably because of the principle of *nulla poena sine lege*.²²

1.2 Rules of criminal procedure

1.2.1 Universal jurisdiction

The rule of universal jurisdiction is an exception to the principle of territoriality in criminal law, under which a person who commits an offence on the territory of a given State is prosecuted by the authorities of that State, sentenced by its courts in accordance with the law applicable in that State and serves his sentence there. If national courts in principle have no jurisdiction with regard to offences committed abroad, it is, on the one hand, because of the advantage offered by the *forum delicti commissi* in terms of the management of evidence and, on the other, because the judgement in such cases is of lesser interest in terms of Belgian public policy.²³

The introductory section of the Code of Penal Procedure lists different cases of extraterritorial jurisdiction; some are based on the nationality principle (offences committed abroad by a Belgian national),^{24,25} others on the passive personality principle (the victim of an offence committed abroad is a Belgian national), and others still on the subject-matter of the offence (especially in the case of offences against State security).

These provisions should be interpreted in the narrow sense,²⁶ and the rule of *non bis in idem*, set out in Article 13 of the above section, generally applies

²² See, in this connection, M.A. Swartenbroeckx, "Moyens et limites du droit belge", in *De Nuremberg à La Haye et Arusha*, compiled under the supervision of Alain Destreuxhe and Michel Foret, Bruylant, Brussels, 1997, p. 124.

²³ C. Henneau and J. Verhaegen, *Droit pénal général*, Bruylant, Brussels, 1995, p. 77.

²⁴ Because as a matter of principle Belgium does not extradite its nationals, it is responsible for the prosecution of offences committed abroad by Belgian nationals found on Belgian territory.

²⁵ A Belgian citizen who has committed a criminal offence outside the national territory can be prosecuted in Belgium, in particular if he has perpetrated an act defined as a crime or other serious offence under Belgian law, if the act is punishable under the laws of the country where it was committed and if the perpetrator is found on Belgian territory. If the victim is a foreign national, he (or his family) is required to lodge a complaint, or official notice has to be given by the authorities of the place where the offence was committed, and prosecution can take place only on application by the Public Prosecutor's Office (Articles 7 and 12 of the introductory section of the Code of Penal Procedure).

²⁶ Under the terms of Article 4 of the Penal Code, Belgian courts have extraterritorial jurisdiction only in exceptional circumstances, limited to cases determined by the law. It is subordinate to the requirement of dual criminal liability (in the territory where the offence was committed and in Belgium).

in such situations. In addition, prosecution is optional.²⁷ Finally, it should be added that a non-Belgian coprincipal in or accessory to a serious offence committed by a Belgian national outside Belgian territory may be prosecuted in Belgium either at the same time as the Belgian national or after he has been sentenced.

Before the Act of 16 June 1993 came into force, several international conventions and provisions in national legislation had already established the universal jurisdiction of Belgian courts, in certain matters and under certain conditions, to prosecute alleged perpetrators of offences who had been arrested in Belgium, irrespective of their nationality and that of their victims and regardless of where the offences were committed.²⁸

In the case of humanitarian law, the legislature wanted to depart from the principle of territoriality in criminal law, in line with the provisions of the Geneva Conventions and Protocol I additional thereto.²⁹ Universal jurisdiction flows from the principle of *aut dedere aut judicare*, under which a State is required either to extradite or hand over to an international court perpetrators of grave breaches, or to prosecute and sentence them itself.

Under Article 7 of the Act of 16 June 1993, perpetrators of violations of international humanitarian law covered by the Act fall under Belgian

²⁷ F. Tulkens and M. Van De Kerchove, *Introduction au droit pénal*, Story-Scientia, Brussels, 1991, p. 152.

²⁸ See C. Henneau and J. Verhaegen, *Droit pénal général*, Bruylant, Brussels, 1991, p. 74.

Here we should like to cite in particular:

- the violations covered in Article 1 of the European Convention on the Suppression of Terrorism of 27 January 1977;
- acts of piracy on the high seas (Geneva Convention on the High Seas of 29 April 1958);
- the violations set out in the international conventions on offences committed on board aircraft (Tokyo, 14 September 1963), on the suppression of the unlawful seizure of aircraft (The Hague, 16 December 1970) and on the suppression of unlawful acts against the safety of civil aviation (Montreal, 23 September 1971);
- offences regarding nuclear material (Article 12(b) of the introductory section of the Code of Penal Procedure, and the Conventions of Vienna and New York on the protection of nuclear material);
- offences related to narcotic drugs (Article 36 of the Single Convention of New York of 30 March 1961 and approved by the Act of 20 August 1969);
- offences related to sexual abuse of minors and the slave trade (offences provided for in Articles 372, 373, 375, 376 and 377 of the Penal Code, if the act was committed on a person under the age of 16; in Articles 379, 380(b), 381(b), paras 1 and 3, of the same Code; in Article 77(b), paras 2 and 3, of the Act of 15 December 1980 on access to the territory, residency and the rights of aliens to enter and leave Belgian territory; and in Articles 10 to 13 of the Act of 9 March 1993 on marriage brokerage).

²⁹ Articles 49, 50, 129 and 146, respectively, of the First, Second, Third and Fourth Geneva Conventions, and Article 85, para. 1, of Protocol I additional thereto.

jurisdiction, irrespective of their nationality or that of their victims. By virtue of the principle of universal jurisdiction, the question of whether the accused is a civilian or a member of foreign armed forces, either national or multinational,³⁰ does not affect the jurisdiction of Belgian courts.³¹

On several points, universal jurisdiction over crimes under international law differs with respect to the usual conditions determining the extraterritorial jurisdiction of Belgian courts:

- ♦ with the exception of violations of Protocol II, the requirement of dual criminal liability does not apply;³²
- ♦ if a breach involves a foreign national and was committed abroad by a Belgian, the victim or his family are not required to lodge a complaint, nor does official notice have to be given by the authorities of the country where the breach was committed;³³
- ♦ in a departure from the provisions of the rule set out in Article 12 of the introductory section of the Code of Penal Procedure,³⁴ Belgian courts have jurisdiction even if the accused (whether Belgian or of another nationality) is not found on Belgian territory.³⁵ This is an extremely important extension of the jurisdiction of Belgian courts over violations of humanitarian law, especially because the field of application of the Act of 16 June 1993 includes non-international conflicts.

³⁰ It should be recalled, however, that members of international forces may be granted immunities. For example, the United Nations signed an agreement with the Rwandan government on the status of the United Nations Assistance Mission for Rwanda (UNAMIR), under which members of UNAMIR enjoyed immunity with regard to jurisdiction: States deploying troops for the Mission had exclusive jurisdiction over their nationals for any criminal offence they might commit in Rwanda while forming part of the Mission.

³¹ A. Andries *et al.*, *op. cit.*, p. 1124.

³² *Ibid.*, pp. 1172 and 1175. The requirement of dual criminal liability would apply in the case of violations committed during non-international armed conflicts (Protocol II), but this remains somewhat of a theoretical issue because practically all grave breaches of humanitarian law are, in some form or another, classified as offences in the domestic legislation of every State.

³³ Article 7, para. 2, of the Act of 16 June 1993.

³⁴ This provision makes the jurisdiction of Belgian courts in most cases of extraterritoriality subject to the condition that the accused (Belgian or foreign) is found on Belgian territory.

³⁵ Justice Committee of the Senate, *Doc. parl.*, Senate, 1317-1, 1990-1991, p. 16 (A. Andries *et al.*, *op. cit.*, p. 1173).

1.2.2 Time-limit for prosecution and enforcement of sentence

Article 8 of the Act of 16 June 1993 departs from the provisions of the ordinary Code of Penal Procedure and stipulates that there is no time-limit on the crimes under international law covered by the Act. This applies both to the prosecution and to the sentence.

This is the sole exception in Belgian law to the rule that all offences are time-barred.³⁶

1.2.3 Rules of national jurisdiction

To determine whether the ordinary courts or the military courts have jurisdiction over a case, the Act establishes a *ratione temporis* distinction, depending on whether or not Belgium is at war.

When Belgium is at war,³⁷ the military courts have jurisdiction over crimes under international law.³⁸ The reason for this decision is that a trial before an assize court with a jury is inappropriate in times of war.³⁹

In contrast, when Belgium is not at war the general rules of *ratione personae* jurisdiction apply.

Therefore, anyone included in the armed forces (officers and civil servants deemed to be part of the army and all persons who have been enlisted, whether by legal obligation or as volunteers, and who are engaged in active service)⁴⁰ is subject to the jurisdiction of the military courts⁴¹ for offences under either military law or ordinary law.⁴² Other persons accused (Belgian or foreign civilians, foreign military personnel) are subject to the jurisdiction of the ordinary courts.

³⁶ H.D. Bosly, *Éléments de droit de la procédure pénale*, Bruylant, Brussels, 1995, p. 53.

³⁷ By times of war is meant the period defined as such by royal decree, in accordance with Article 58 of the Code of Military Penal Procedure (A. Andries *et al.*, *op. cit.*, p. 1178).

³⁸ Article 9, para. 1, of the Act of 16 June 1993.

³⁹ Statement of reasons, *Doc. parl.*, Senate, 1317-1, 1990-1991, p. 17.

⁴⁰ Belgian soldiers forming part of United Nations international forces remain subject to jurisdiction *ratione personae* of the Belgian military courts (A. Andries *et al.*, *op. cit.*, p. 1179).

⁴¹ Senior officers fall directly under the jurisdiction of the military courts, which try cases at first and final instance, without the possibility of appeal.

⁴² Articles 1 and 21 of the Code of Military Penal Procedure.

However, if proceedings are instituted simultaneously against persons subject to the jurisdiction of a military court and others subject to the jurisdiction of an ordinary court, either because they are principals or coprincipals in or accessories to an offence under criminal law, or because they are accused of related offences, the ordinary court has jurisdiction over all proceedings.⁴³ In such cases, the ordinary court also has jurisdiction over related offences falling under the jurisdiction of the military court and applies military law to the person subject to the jurisdiction of the military court.⁴⁴

Ratione loci, Article 7 of the Act of 16 June 1993, which establishes the universal jurisdiction of the Belgian courts over grave breaches of international humanitarian law, irrespective of the place where they were committed, does not depart from the rules relating to the territorial jurisdiction of the criminal courts and of investigating judges, when that jurisdiction is determined by the place of residence of the accused or by the place where he is located.⁴⁵

Under the terms of Articles 23, 62(b) and 69 of the Code of Penal Investigation, the crown public prosecutor (or the investigating judge) of the place where the crime or other serious offence was committed, of the place where the accused resides and of the place where the accused is located, all have jurisdiction. If the act was committed abroad and if the suspect does not reside in Belgium and cannot be located there, any public prosecutor (or investigating judge) can deal with the case.

Ratione materiae, the assize court has exclusive jurisdiction over crimes under international law for which the penalty exceeds 20 years of imprisonment. Under Article 2 of the Act of 16 June 1993, this category includes all of the most serious breaches defined by the Act. The other offences fall under the jurisdiction of regional criminal courts which try misdemeanours (*tribunal correctionnel*), provided that the offence has been downgraded.⁴⁶

⁴³ Article 26 of the above Code.

⁴⁴ Article 44 of the above Code. Mons (Indictment Division), 4 May 1993, *Revue de droit pénal et de criminologie*, 1993, p. 901.

⁴⁵ Court of Cassation, 31 May 1995, *Bull.*, 1995, p. 582, *Revue de droit pénal et de criminologie*, 1996, p. 198.

⁴⁶ See the Act of 4 October 1867, providing for the courts to take account of mitigating circumstances.

1.2.4 Applicable rules of procedure

The rules of procedure applicable to ordinary offences⁴⁷ govern proceedings brought in application of the Act of 16 June 1993.

The rules set out in the Code of Penal Investigation and in specific Acts⁴⁸ apply in the case of proceedings brought before the ordinary courts.

In Belgian law, the preliminary stage of criminal procedure, i.e., the stage at which the case-file is put together, mostly follows the inquisitorial system, whereas the trial stage is based on the accusatory system. Thus, the judicial inquiries and investigation conducted in preparing the case are, with a few exceptions, a unilateral and confidential process involving only written documents.

The crown public prosecutor is responsible for bringing a prosecution and for instituting criminal proceedings before the courts. In cases where the prosecutor believes that a judicial investigation is not required, he may himself carry out an “inquiry” and put together the case-file. He is also entitled to exercise discretion as to whether a prosecution should be brought at all (except in cases where the injured party brings a suit for damages).

When a judicial investigation appears necessary, either because of the gravity or complexity of the case, or because there is a need to take coercive steps or measures affecting personal rights and freedoms, the crown public prosecutor may refer the case to the investigating judge and instruct him to conduct such an investigation. The case may also be referred directly to the investigating judge where a suit is brought by an injured party claiming damages.⁴⁹

Once the judge has completed his investigation, the *Chambre du Conseil* of the court of first instance (i.e., the court judge who determines what should be done regarding the investigation) decides on the following step to be taken. If it establishes that the case should be brought before the assize court, it will forward the file to the head of the prosecution department at the court of appeal (*procureur général*) for examination by the court's

⁴⁷ For an overview of Belgian legislation governing penal procedure, see H.D. Bosly, *Eléments de droit de la procédure pénale*, Bruylant, Brussels, 1995, 312 pp.

⁴⁸ For example, the Act of 20 July 1990 relative to pre-trial detention, the Act of 4 October 1867 on mitigating circumstances, the Act of 8 April 1965 relative to the protection of young people, etc.

⁴⁹ By applying to join the proceedings as a civil party, the injured party can set a prosecution in motion. When criminal proceedings are instituted in this way, the injured party is required to deposit at the court registry the estimated amount required to cover court fees.

indictment division, which alone can take the decision to commit the accused for trial at the assize court.

In military criminal procedure, a judicial committee, made up of the judge advocate and two officers, constitutes the investigating body.⁵⁰ Only the judge advocate has the function of investigating judge — the officers serving as assistants and sometimes no more than simple witnesses to the measures of investigation taken by the judge advocate.⁵¹ Within the scope of its jurisdiction, the committee carries out all tasks assigned by law to an investigating judge, except for searches in the case of offences not discovered *in flagrante delicto* and if the person concerned does not fall under the jurisdiction of the military courts. In the latter case, the search is carried out by an investigating judge on the judge advocate's request.⁵² The investigating judge is also required to intervene if telephone calls are to be traced or if telephone calls or other communications are to be intercepted or recorded.

As a rule, a prosecution cannot be set in motion before the military judicial authorities by application of an injured party seeking damages. The Act of 16 June 1993 created an exception to this rule by allowing an injured party to make such an application to the president of the judicial committee and thus bring a prosecution before the military courts.

2. Recognition of and cooperation with the International Tribunals

The Act of 22 March 1996⁵³ is the legislative instrument necessary to incorporate into domestic law the prosecution by national courts of crimes under international law and the administration of justice rendered in the

⁵⁰ Article 35 of the Code of Military Penal Procedure.

⁵¹ Court of Cassation, 20 February 1922, *Pas.*, 1922, I, 167; for more information on the functioning of the judicial committee, see F. Bogaert, "De rechterlijke commissie in de militaire strafrechtspleging", *R.W.*, 1966-1967, col. 539 ff.

⁵² Article 44 of the Code of Military Penal Procedure.

⁵³ Act of 22 March 1996 relative to the recognition of the International Tribunals for the former Yugoslavia and Rwanda and to cooperation with said Tribunals, *Moniteur belge* of 27 April 1996, p. 10260. The Act came into force the day it was published (Article 15). For a more detailed commentary, see D. Vandermeersch, "La loi du 22 mars 1996 relative à la reconnaissance du Tribunal international pour l'ex-Yougoslavie et du Tribunal international pour le Rwanda et à la coopération avec ces Tribunaux", *Revue de droit pénal et de criminologie*, 1996, pp. 855-888.

name of the international community by the International Tribunals for the former Yugoslavia and for Rwanda.

2.1 Creation of the International Tribunal for the former Yugoslavia and the International Tribunal for Rwanda

Confronted with the crimes committed in the former Yugoslavia and in Rwanda, the United Nations Security Council established the International Tribunal for the former Yugoslavia and the International Tribunal for Rwanda by resolutions 827 of 25 May 1993 and 955 of 8 November 1994, respectively,⁵⁴ the objective being to try persons allegedly responsible for crimes against humanity or other grave breaches of international humanitarian law.⁵⁵

The above resolutions were adopted as coercive measures, in accordance with Chapter VII of the United Nations Charter, for the purpose of maintaining or restoring international peace and security as a matter of urgency.^{56,57}

⁵⁴ The respective Statutes of the two Tribunals are attached to the resolutions that created them. The full texts of these documents were published in the *Moniteur belge* of 27 April 1996.

⁵⁵ Unlike the military tribunals of Nuremberg and Tokyo, which were set up by decision of the victorious powers, the International Tribunals for the former Yugoslavia and Rwanda are civil courts, established by the United Nations.

⁵⁶ These resolutions are the result of a political and diplomatic compromise which is far from being unanimously accepted by internationalists. However, an attempt to create this type of international jurisdiction by way of a treaty would have carried the risk of significant delays, owing to lengthy negotiations at diplomatic conferences and the problems associated with the ratification of the treaty by the relevant States. On the question of the establishment and legal foundation of the International Tribunals for the former Yugoslavia and Rwanda, see in particular E. David, "Le Tribunal international pénal pour l'ex-Yougoslavie", *Rev. b. dr. intern.*, 1992/2, pp. 588 ff.; A. Andries, "Les aléas juridiques de la création du Tribunal international pour les crimes de guerre commis depuis 1991 sur le territoire de l'ex-Yougoslavie", *Journal des Procès*, No. 239, 14 May 1993, pp. 16-18; A. Pellet, "Le tribunal criminel international pour l'ex-Yougoslavie : poudre aux yeux ou avancée décisive", *Rev. gén. dr. inter. publ.*, 1994, pp. 7-59; H.D. Bosly, "Actualité du tribunal international pénal", *Annales de droit de Louvain*, 1-2/1995, pp. 1-18; M. Mubiala, "Le Tribunal international pour le Rwanda : vraie ou fausse copie du Tribunal pénal international pour l'ex-Yougoslavie", *Rev. gén. dr. inter. publ.*, 1995, pp. 929-954.

⁵⁷ "The approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty [but] as has been pointed out in many of the comments received, the treaty approach incurs the disadvantage of requiring considerable time to establish an instrument [...]. In the light of [...] the need indicated in resolution 808 (1993) for an effective and expeditious implementation of the decision to establish an international tribunal, the Secretary-General believes that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter" (United Nations, *Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808* (1993), Doc. S/1993/25704, 3 May 1993, pp. 6 and 7).

In the context of the aforesaid resolutions, the International Tribunals are regarded as subsidiary bodies of the Security Council which, at the institutional level, form part of the United Nations. This means that not only the decisions whereby these International Tribunals were established but also their Statutes, annexed to resolutions 827 and 955, and the actual decisions adopted by the Tribunals, in particular the Rules of Procedure and Evidence drawn up by said Tribunals, take immediate effect.⁵⁸

Ratione loci and *ratione temporis*, the International Tribunal for the former Yugoslavia has jurisdiction over persons allegedly responsible for crimes against humanity or other grave breaches of international humanitarian law committed in the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council following the restoration of peace. The International Tribunal for Rwanda has jurisdiction, on the one hand, over persons allegedly responsible for crimes against humanity or other grave breaches of international humanitarian law committed in Rwanda between 1 January 1994 and 31 December 1994 and, on the other, over Rwandan citizens who, during the same period, allegedly committed grave breaches of humanitarian law on the territory of neighbouring States.⁵⁹

Ratione materiae, the Statute of the International Tribunal for the former Yugoslavia provides that the Tribunal shall have jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2), violations of the laws or customs of war (Article 3), the crime of genocide (Article 4), and crimes against humanity (Article 5). The Statute of the International Tribunal for Rwanda provides that the Tribunal shall have jurisdiction over acts of genocide (Article 2), crimes against humanity (Article 3), and violations of Article 3 common to the Geneva Conventions of 12 August 1949 and of Additional Protocol II of 8 June 1977. This last point is remarkable insofar as this is the first time that the international community has provided for the prosecution of breaches of the law of war committed in internal conflicts.⁶⁰

⁵⁸ Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, No. 1-247/3, p. 8.

⁵⁹ The International Tribunal for Rwanda therefore does not have jurisdiction over crimes that may have been committed by the new Kigali regime after 31 December 1994, or over acts by which the genocide was planned and which were carried out before 1 January 1994.

⁶⁰ "Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time, criminalizes violations of common article 3 of the four Geneva Conventions" (United Nations, *Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955* (1994), Doc. S/1995/134, 13 February 1995, pp. 1 and 2).

The personal jurisdiction of the International Tribunals extends to any natural person, irrespective of nationality, who is suspected of having planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime falling under the jurisdiction of the Tribunals. Public-law or private-law corporations do not come under the jurisdiction of the International Tribunals.

2.2 Recognition of the International Tribunals in national law

The Act of 22 March 1996 provides for the implementation of the international obligations entered into by Belgium when it became a member of the United Nations. The two Security Council resolutions establishing the International Tribunals both provide that “all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 (respectively 28) of the Statute”.⁶¹ The temporary and *a posteriori* nature of the two International Tribunals nonetheless constitutes an anomaly in regard to domestic legal custom.⁶²

In accordance with Article 25 of the United Nations Charter,⁶³ the resolutions establishing the two International Tribunals were immediately binding on all member States of the organization, without any requirement for ratification.⁶⁴

However, even though the decisions of the United Nations Security Council are directly binding on member States, in our opinion they do not

⁶¹ Operative para. 4 of resolution 827 of 25 May 1993, *Moniteur Belge*, 27 April 1996, p. 10265, and operative para. 2 of resolution 955 of 8 November 1994, *Moniteur Belge*, 27 April 1996, p. 10274.

⁶² The creation of a permanent international criminal court responsible for trying crimes against humanity and other grave breaches of international humanitarian law would certainly make it possible to improve the prevention of grave breaches of international humanitarian law and to combat them more effectively; furthermore, from a legal point of view, a permanent court would avoid the problems associated with courts created *ad hoc* and *post factum*.

⁶³ Article 25 states that “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

⁶⁴ Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, No. 1-247/3, p. 5.

appear to have the same effect regarding individuals⁶⁵ and, in the absence of any domestic legislative instrument, the Belgian courts have no obligation, in our view, to enforce decisions taken by the International Tribunals pursuant to Security Council resolutions.⁶⁶ This is why the Act of 22 March 1996 was necessary in order to transfer the necessary jurisdiction to bodies established under international law.

2.3 Judicial cooperation with the International Tribunals

Article 4 of the Act sets out the obligation for the Belgian authorities to offer their “full and complete judicial cooperation”⁶⁷ to the International Tribunals in all procedures carried out under their jurisdiction.

This obligation is founded on the resolutions that established the two International Tribunals and in the Statutes annexed to said resolutions:

- “1. States shall cooperate with the International Tribunal [...] in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal”.⁶⁸

⁶⁵ Belgian members of parliament regarded the fact that the Security Council resolutions and the decisions taken to implement these resolutions were not published in the *Moniteur Belge* as an additional argument (Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, No. 1-247/3, p. 9).

⁶⁶ See also H.D. Bosly, “Actualité du tribunal international pénal”, *Ann. dr.*, Bruylant, Brussels, 1-2/1995, pp. 16 and 17.

⁶⁷ Cooperation on the part of the police was not explicitly provided for in the Act because the legislature wanted any request for cooperation, including police cooperation, to go through judicial channels so as to ensure respect for procedural safeguards (Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, No. 1-247/3, p. 30).

⁶⁸ Article 29 of the Statute of the International Tribunal for the former Yugoslavia and Article 28 of the Statute of the International Tribunal for Rwanda.

The concept of judicial cooperation is used here in the widest sense: it includes the identification and examination of persons charged, the location of persons for whom a warrant of arrest has been issued, the identification, examination and confrontation of witnesses, searches and attachments, expert opinions, the tracing and tapping of telephone calls, bank inquiries, the forwarding of case-files and evidence, the dispatch of documents, and so forth. In contrast, the arrest and transfer of suspects are subject to a special rule, which is dealt with in Chapter IV of the Act.

In accordance with the principles governing international judicial cooperation in criminal cases, requests for cooperation can be granted only within the framework of Belgian legislation. Letters rogatory requesting measures unlawful under domestic legislation are therefore inadmissible.⁶⁹

Article 5 of the Act stipulates that the Minister of Justice shall be the central contact for the International Tribunals. Requests for judicial cooperation should be addressed to him and he will ensure that they are followed up.⁷⁰ Letters rogatory can thus be addressed directly to the Minister, without any need to use diplomatic channels.

Requests for judicial cooperation can be issued both by the Prosecutors of the International Tribunals⁷¹ and by the Tribunals themselves, and will be granted in conformity with the rules of Belgian law. If the request concerns a coercive measure,⁷² it will be executed, in accordance with ordinary criminal procedure, by the investigating judge of the place where the measure is to be carried out.

⁶⁹ On this question, see the Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, No. 1-247/3, pp. 32 and 33.

⁷⁰ This provision does not violate the principle of separation of powers insofar as the administration of the Ministry of Justice only acts as a "letter box" in cases where the measure taken falls under the jurisdiction of the judicial authorities (Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, No. 1-247/3, p. 34).

⁷¹ "In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned" (Article 17, para. 2, of the Statute of the International Tribunal for Rwanda and Article 18, para. 2, of the Statute of the International Tribunal for the former Yugoslavia).

⁷² The notion of "coercive measure" must be understood in the widest sense as any infringement on personal liberty (Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, No. 1-247/3, p. 54).

2.4 Deferral of competence from Belgian courts to the International Tribunals

The concurrent jurisdiction of Belgian courts over some crimes falling under the jurisdiction of the International Tribunals for the former Yugoslavia and Rwanda is set out in the Act of 16 June 1993.⁷³

The positive conflict of jurisdiction between international and national courts, which is liable to arise under a system of concurrent jurisdiction, has been settled in favour of the International Tribunals: under Article 9 of the Statute of the International Tribunal for the former Yugoslavia and Article 8 of the Statute of the International Tribunal for Rwanda, the International Tribunals have primacy over national courts; in addition, at any stage in the procedure,⁷⁴ the International Tribunals can formally request national courts to defer to their competence.⁷⁵

The Court of Cassation⁷⁶ is responsible for ordering the Belgian courts to relinquish their jurisdiction if a request to this effect has been made by one of the International Tribunals. The Court has to check three aspects: it is responsible for verifying the identity of the person charged, the correctness of the alleged facts and the jurisdiction of the relevant International Tribunal.⁷⁷

⁷³ The Statutes of the International Tribunals establish this system of concurrent jurisdiction by providing that “The International Tribunal [...] and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia [respectively, Rwanda]” (Articles 9 and 8 of the respective Statutes).

⁷⁴ Under the rule *non bis in idem*, confirmed in the Statutes of the International Tribunals, a person already tried before a national court for acts constituting serious violations of international humanitarian law may subsequently be tried by one of the International Tribunals in only two cases: “[if] (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted” (Article 10 of the Statute of the International Tribunal for the former Yugoslavia and Article 9 of the Statute of the International Tribunal for Rwanda).

⁷⁵ By decree of 2 October 1995, the Appeals Chamber of the International Tribunal for the former Yugoslavia confirmed the primacy of the International Tribunal over national courts. The primacy of the rule of international law and of international courts constitutes the essence of the two resolutions establishing the two International Tribunals. These Tribunals supersede State courts, which are to be considered as subordinate courts, auxiliary and subsidiary to the International Tribunals (International Tribunal for the former Yugoslavia (Appeals Chamber), 2 October 1995, in *D. Tadić*, case No. IT-94-1-AR72).

⁷⁶ A similar solution has been adopted in France (Article 4 of Act 95/1 of 2 January 1995).

⁷⁷ Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, No. 1-247/3, p. 35.

The power of the Court of Cassation to ascertain whether the relevant International Tribunal has jurisdiction seems illogical given that international courts have primacy over national courts, as implied by the recognition of the two International Tribunals under domestic law.⁷⁸

In conformity with Rule 10 of the Rules of Procedure and Evidence of the two Tribunals, deferral of competence includes a request “that the results of the investigation and a copy of the court’s records and the judgement, if already delivered, be forwarded”.⁷⁹

If a decision is taken that jurisdiction should be relinquished, the procedure before the Belgian court is suspended as of the date of the decision.⁸⁰ If the International Tribunal refers the case back to the national courts without having tried it, it is up to the Court of Cassation to decide whether proceedings before the national court should be resumed, taking into consideration that decisions adopted by the International Tribunal are binding on national courts.

2.5 Arrest and detention of a person at the request of one of the International Tribunals⁸¹

Article 12 of the Act distinguishes between two situations in which the arrest of a person can be ordered at the request of either of the International

⁷⁸ Should the Court decide that the International Tribunal did not have jurisdiction over a case in which a national court was requested to defer to the competence of the Tribunal, this decision would have primacy over that of the International Tribunal (which, by requesting that competence be deferred, had declared its own competence in the matter), and would prevent the case being transferred to the International Tribunal. Such a situation would put Belgium in a difficult position on the international level: indeed, Rule 11 of the Rules of Procedure and Evidence of the two Tribunals provides that: “If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the order, the Trial Chamber may request the President to report on the matter to the Security Council”.

⁷⁹ In its decision of 11 January 1996, in which the International Tribunal for Rwanda asked that the proceedings brought against three out of the four suspects in a case prepared in Belgium be transferred to its jurisdiction, the Belgian government was requested to forward to the Tribunal the results of the investigations and copies of the case-files prepared by the national court.

⁸⁰ It should be noted that the International Tribunal’s request for jurisdiction to be relinquished has no effect in national law as long as it is not declared admissible by the Court of Cassation.

⁸¹ The provisions of Chapter IV of the Act relative to arrests and transfers are in line with resolution 978 of 27 February 1995, adopted by the United Nations Security Council at its 3504th session, in which the Council “urges States to arrest and detain, in accordance with their national law and relevant standards of international law, [...] persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda”.

Tribunals: firstly,⁸² if an urgent request for arrest is issued by the Prosecutor,⁸³ and, secondly,⁸⁴ if a warrant of arrest has been issued by the Tribunal.⁸⁵ Before the warrant can be issued the Prosecutor has to draw up a formal indictment.

In the first situation, i.e., where a warrant has not yet been issued by the International Tribunal, the provisional arrest of a person on Belgian territory can be requested, in case of urgency, by the Prosecutor of the Tribunal.⁸⁶ The arrest is carried out on the basis of a warrant issued by the investigating judge of the place where the person resides or of the place where he has been located.⁸⁷

In this situation, the judge is required to verify the identity of the person, whether a warrant of arrest has been issued by the Prosecutor of the International Tribunal, and whether the requirement of urgency has been fulfilled.

A provisional warrant of arrest, confirmed by the investigating judge, is valid for three months from the date of service.⁸⁸ Within this period a warrant issued by the International Tribunal must be served on the person concerned,⁸⁹ failing which he will be released.⁹⁰ Thereafter, the latter

⁸² Article 12, para. 2, of the Act.

⁸³ Under Rule 40 of the Rules of Procedure and Evidence of the two Tribunals, the Prosecutor may, in case of urgency, request any State to arrest a suspect provisionally and to take all necessary measures to prevent the escape of a suspect or an accused.

⁸⁴ Article 12, para. 1, of the Act.

⁸⁵ If the judge of the Trial Chamber has confirmed the indictment, he may, at the request of the Prosecutor, issue orders and warrants for the arrest, detention or surrender or transfer of persons (Article 18 of the Statute of the International Tribunal for Rwanda and Article 19 of the Statute of the International Tribunal for the former Yugoslavia). See also Rule 55 of the Rules of Procedure and Evidence of the two Tribunals.

⁸⁶ Article 12, para. 2, of the Act. As in the case of extradition, the Prosecutor's request need not take any particular form. An official notice issued by the Prosecutor is sufficient.

⁸⁷ When a person is already detained at the time the Prosecutor's request is issued, the judge of the place where the person is being held has jurisdiction.

⁸⁸ This period is equivalent to the one provided for in the case of extraditions from non-European countries. It was justified by the need to give the Prosecutor time to conduct his investigations and draw up an indictment, and to enable the International Tribunal to confirm the indictment and issue a warrant of arrest (Statement of reasons, *Doc. parl.*, Senate, 1995-1996, No. 1-247/1, p. 5).

⁸⁹ Under Rule 55 of the Rules of Procedure and Evidence of the two Tribunals, a copy of the indictment, a statement of the rights of the accused and a reminder of the right of the accused to remain silent and that any statement he makes shall be recorded and may be used in evidence, must be read to the accused in a language he understands when the warrant of arrest issued by the International Tribunal is served on him.

⁹⁰ Article 12, para. 2, sub-para. 4.

warrant must be made final by the *Chambre du Conseil* and the official notice served on the person within the month in which the warrant issued by the International Tribunal was served. Failing this, the person will be released.

This takes us to the second situation as set out in Article 12: when the judge of the International Tribunal has issued a warrant for the arrest of a person located in Belgium, the warrant is made final by the *Chambre du Conseil* in the person's place of residence or the place where he has been located. This procedure is *ex parte* and takes place *in absentia*.⁹¹

In this situation, the *Chambre du Conseil* is required to ascertain whether the acts alleged in the warrant fall under the jurisdiction of the International Tribunal and whether there is no mistake as to the identity of the person.

The time schedule set down in the Act for the provisional arrest of a person with a view to his transfer to one of the International Tribunals may be summarized as follows:

- ♦ within 24 hours of the arrest or of the Court of Cassation's decision that jurisdiction be relinquished, a provisional warrant of arrest (based on a request by the Prosecutor of the International Tribunal) is issued by a Belgian investigating judge and served on the person concerned;
- ♦ this warrant must be confirmed by the *Chambre du Conseil* within five days;
- ♦ the warrant issued by the International Tribunal must be served on the accused within three months of service of the provisional warrant of arrest;
- ♦ the warrant of the International Tribunal is made final by the *Chambre du Conseil*, whose decision must be served on the accused within one month of service of the Tribunal's warrant;
- ♦ transfer of the person must take place no later than three months after the date on which the warrant issued by the Tribunal became final.

⁹¹ Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, No. 1-247/3, pp. 58, 63 and 68.

2.6 Transfer of a person arrested at the request of one of the International Tribunals

The concept of transfer refers to the handing over of a person accused or sentenced by a State to a supranational authority, whereas extradition is a horizontal procedure between States. In addition, as the International Tribunals are regarded as part of the national legal system, there can, strictly speaking, be no question of extradition.⁹²

The provisions of the Act of 22 March 1996 differ in several points from the rules governing extradition.

The question arises as to whether a Belgian national may be transferred to one of the International Tribunals even though Article 1 of the Act of 15 March 1874 on extraditions does not provide for the possibility of extraditing a Belgian national.⁹³ Article 13 of the Act of 22 March 1996 does not exclude this possibility, and an amendment tabled to exclude the arrest and transfer of Belgian nationals was rejected.⁹⁴ Because of the supranational nature of the courts concerned and the gravity of the violations over which these Tribunals have jurisdiction, there was no reason for Belgian nationals to be treated differently from foreign nationals.⁹⁵ In addition, since the adoption of the Act the International Tribunals have been considered part of the national legal system.⁹⁶

The political nature of a violation is not an obstacle to the transfer of the alleged perpetrator.⁹⁷

⁹² *Ibid.*, p. 66.

⁹³ In the case of the International Tribunal for Rwanda, the question has moved from the theoretical to the practical sphere, since a judicial investigation was opened in Belgium concerning the Belgian announcer on *Radio Télévision Mille Collines* (RTLM) on a count of violation of the Act of 16 June 1993 (*ibid.*, p. 3).

⁹⁴ *Ibid.*, p. 82.

⁹⁵ During sessions of parliament, a request was formulated that transferred Belgian nationals should be assured that they would be able to serve their prison sentences in Belgium (*ibid.*, p. 16).

⁹⁶ *Ibid.*, pp. 65 and 66.

⁹⁷ M.A. Swartenbroeckx, "The International Tribunal for Rwanda", in *La justice internationale face au drame rwandais*, Karthala, Paris, 1996, p. 103. See also Rule 58 of the Rules of Procedure and Evidence of the two Tribunals and Article 7 of the Convention on the Prevention and Punishment of the Crime of Genocide (in our opinion, the latter is self-executing).

The government⁹⁸ transfers the arrested person, in conformity with the rules of the International Tribunal concerned, within three months from the time when the Tribunal's warrant of arrest became final.

Transfer to the seat of the International Tribunal⁹⁹ is arranged by the national authorities concerned in cooperation with the authorities of the host country and the Registrar.¹⁰⁰ After transfer to the seat of the Tribunal, the person is placed under arrest, in execution of the warrant issued in his name, and detained in the facilities provided by the host country or another country. One of the parties may submit to the President of the Tribunal a request for the modification of the conditions of detention.¹⁰¹

3. Mode of operation and assessment of the Belgian legal system

3.1 National legislation

3.1.1 *Proceedings instituted following the Rwandan tragedy*

Owing to the special links between Rwanda and Belgium, citizens of both countries living in Belgium were directly affected by the crimes committed in Rwanda from 6 April 1994 onward, particularly by the loss of close relatives.

Furthermore, when numerous Rwandans fled the country after the events of 1994, some of those suspected of having taken part in certain crimes took refuge in Belgium. As it was impossible to extradite these persons to Rwanda, a number of complaints were lodged with the crown public prosecutor in Brussels, starting in July 1994. However, these were simply reports — no actual civil proceedings were brought.¹⁰²

⁹⁸ As agreements must be concluded with the host country of the International Tribunal to ensure the transfer, this task was assigned to the government rather than the Minister of Justice.

⁹⁹ The seat of the International Tribunal for the former Yugoslavia is in The Hague in the Netherlands; that for Rwanda is in Arusha, Tanzania.

¹⁰⁰ Rule 57 of the Rules of Procedure and Evidence of the two International Tribunals.

¹⁰¹ Rule 64 of the Rules of Procedure and Evidence of the two International Tribunals.

¹⁰² M.A. Swartenbroeckx, "Détentions et poursuites judiciaires en Belgique", in *La Justice internationale face au drame rwandais*, Karthala, Paris, 1996, p. 143.

The Belgian population had become very aware of the situation in Rwanda following the killing of 10 Belgian blue helmets in the Kigali military camp on 7 April 1994.

In February 1995 the Belgian Minister of Justice decided to exercise his right to instruct¹⁰³ the head of the prosecution department at the Court of Appeal in Brussels to set in motion proceedings against persons who were suspected of having committed crimes in Rwanda in 1994 and who had been located on Belgian territory.

Starting on 2 March 1995, the first investigations were opened in Brussels on the basis of the Act of 16 June 1993. This was the first time the Act had been applied.¹⁰⁴ Other investigations were opened subsequently and entrusted to the same investigating judge. In total, 10 files implicating more than 20 individuals were investigated in Brussels. As part of the process, three rogatory commissions conducted investigations in Rwanda, and a fourth one in Togo and Ghana.¹⁰⁵

The military judicial authorities, for their part, instituted proceedings against a senior Belgian officer on the count of negligent homicide and failure to exercise due care in the matter concerning the death of the 10 Belgian blue helmets. The officer was acquitted by the military court.

Finally, complaints were lodged by private individuals against the Belgian Minister of National Defence¹⁰⁶ in office at the time of the events for failure to take action in accordance with the Act of 16 June 1993.

The International Tribunal issued an order for the transfer of all or part of three case-files investigated by Belgian courts. The other investigations are still under way in Belgium.¹⁰⁷ When one of the investigations was closed, the Brussels *Chambre du Conseil* ordered that the case-file of the accused be

¹⁰³ Under Belgian law, the Public Prosecutor's Office is relatively independent from the executive. The Minister of Justice does not have the right to give directions to prevent proceedings although he is entitled to give instructions for the institution of proceedings.

¹⁰⁴ Rwanda Commission of Inquiry, summary record of hearings, *Doc. parl.*, Senate, 1996-1997, COM-R 1-43, p. 414.

¹⁰⁵ For more details on how these investigations were carried out, see Rwanda Commission of Inquiry, summary record of hearings, *ibid.*, pp. 414 ff.

¹⁰⁶ Belgian ministers enjoy special privileges with regard to jurisdiction and are subject to the jurisdiction of the Court of Cassation.

¹⁰⁷ To appreciate the slow pace of proceedings, see Rwanda Commission of Inquiry, summary record of hearings, *Doc. parl.*, Senate, 1996-1997, COM-R 1-43, pp. 417 and 418.

transferred to the head of the prosecution department at the court of appeal with a view to referring the case to the assize court.¹⁰⁸

3.1.2 Field of application of the Act of 16 June 1993 and substantive criminal law

The extension of the law's scope of application to include internal armed conflicts, as provided for in the Act of 16 June 1993, combined with the universal jurisdiction of Belgian courts, saw its first application in 1995, when a case relating to the events that took place in Rwanda in 1994 was brought before a Belgian court.

In our opinion, the massacres of Rwandan civilians by elements of the armed forces, the *gendarmérie* and armed militias occurred within the context of a non-international conflict, namely the conflict between the Rwandan armed forces and the Rwandan Patriotic Front. These events therefore fall under the Act of 16 June 1993, which encompasses internal armed conflicts (Protocol II).

The killing of 10 Belgian blue helmets in the Kigali military camp can be considered as an act that took place within the context of an international armed conflict, namely between an international armed force (the United Nations Assistance Mission for Rwanda, UNAMIR) and the Rwandan armed forces. This situation falls within the purview of the Geneva Conventions and Protocol I.

The first few cases in which the Act of 16 June 1993 was applied in Belgium in relation to the events in Rwanda revealed its considerable potential in terms of the various forms of conduct classified as breaches.

It should be mentioned first of all that, as regards the applicability of the Act, it was held that the trial courts had final decision on whether the crimes of which a person stood accused constituted grave breaches within the meaning of the Act of 16 June 1993.¹⁰⁹

¹⁰⁸ *Chambre du Conseil, Tribunal correctionnel*, Brussels, 22 July 1996, *Journ. Procès*, No. 310, 20 September 1996, pp. 28-31. The case still has to be heard before the indictment division of the Brussels Court of Appeal, which will decide whether it should be referred to the assize court.

¹⁰⁹ Brussels (Indictment Division), 17 May 1995, *J.T.*, 1995, p. 542.

In view of the extent and atrocity of the crimes committed in Rwanda, numerous types of breach were declared admissible: premeditated homicide (Article 1, para. 1), torture and other inhuman treatment (Article 1, para. 2), wilfully causing great suffering or serious injury to body or health (Article 1, para. 3), making the civilian population or individual civilians the object of attack (Article 1, para. 11), making non-defended localities and demilitarized zones the object of attack (Article 1, para. 14), making a person the object of attack in the knowledge that he is *hors de combat* (Article 1, para. 15), the practice of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination (Article 1, para. 19), and so forth.

The different forms of participation and acts treated in the same way as accomplished criminal offences under the Act of 16 June 1993 also proved adequate in classifying the diverse and complex types of conduct of which certain persons — in particular persons with decision-making powers — stood accused. These included:

- ♦ The order to commit a breach. It appears that in Rwanda, with its extremely hierarchical social structure, a multitude of precise instructions to commit breaches were given during the period in question. Should the hypothesis that the genocide was planned be shown to be true, this would mean that the massacres were the result of a chain of well-planned orders.
- ♦ Incitement to perpetrate a breach. This applies notably to the management and presenters of *Radio des Mille Collines* (RTLM) as well as to political leaders suspected of having delivered speeches in which they incited the population to commit massacres.
- ♦ Failure to take action within the range of one's possibilities. This could apply to all political and military leaders who remained in the country during the events of 1994 and who retained a measure of power to act but failed to use this power to put an end to the massacres.

The fact that Article 4 of the Act treats an order, instigation, incitement, participation as coprincipal or accessory, or an attempt to commit a breach in the same way as the actual breach, irrespective of whether the act in question had a practical effect or not, is of special interest in terms of the production of evidence. For the courts it is sufficient to demonstrate that the accused perpetrated one of the above acts, without it being necessary to

prove either the actual breach to which the act gave rise or which it facilitated, or any causal link between the behaviour of the accused and the actual execution of the crime under international law. In the framework of the events that took place in Rwanda, it is especially difficult in some cases to establish the exact identity of the victims and the precise circumstances in which they died. In contrast, it is far easier to prove, with the help of witnesses, written evidence, sound recordings, etc., that acts constituting a breach (orders, incitements, instigation, and so forth) were carried out.

As explained above, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide could not be implemented in the absence of national legislation defining offences and penalties. Although it is regrettable that the symbolic dimension of the crime of genocide was not mentioned in the descriptions of breaches specified in the various case-files opened in Belgium, it should be pointed out that proving genocide in court is no easy task for the national judicial authorities and may give rise to extensive debate.

The exception to Article 70 of the Penal Code, which is set out in Article 5 of the Act of 16 June 1993 and excludes military necessity and orders arising under the law or issued by a higher authority as grounds for justification, also facilitates the bringing of evidence by the prosecution. Traditionally the courts have adopted the position that when the accused puts forward grounds for justifying his actions and if his allegations appear not to be entirely unfounded, it is up to the prosecution to prove that the grounds for justification do not exist.¹¹⁰

In our view, however, the legislature went too far in treating complicity or failure to act in the same way as an actual breach. The legal profession is uncomfortable with the idea that someone accused of not taking action when he was in a position to prevent or put a stop to the breach should be subject to the same repressive mechanisms as the principal perpetrator.

In our opinion it is unreasonable to apply the same penalty for a form of failure to assist someone in danger as for the breach itself. Excessive severity towards persons who remained passive while an offence was being committed, even though they were in a position to intervene, may lead the courts to refrain from referring such persons to the assize court, where the procedure is particularly cumbersome (see below).

¹¹⁰ Court of Cassation, 4 May 1976, *Par.*, 1976, I, 951.

3.1.3 Procedural law

Questions of procedure, especially those relative to jurisdiction and the management of evidence, are of particular importance with respect to the topic under discussion. The involvement of nationals from various countries and the confrontation of different independent legal systems are factors inherent in the repression of crimes under international law and can give rise to difficulties when proceedings are brought under national law.

As was pointed out above, one of the original aspects of Belgian law is the extension of the scope of the law to encompass non-international as well as international armed conflicts. In a sense the law confers upon Belgian courts a right (or even a moral obligation) to intervene at the international level or in the internal affairs of a sovereign State, in the matter of war crimes.

Universal jurisdiction poses the question of the extent of a State's responsibility when grave breaches of humanitarian law have been committed beyond its national borders.

In our opinion, the aim is not for a State to declare itself the world's policeman or for its courts to become international tribunals, but national judicial authorities should be permitted to assume their responsibilities when there are objective reasons for them to take action. Universal jurisdiction does not imply a general obligation to prosecute all violations of the international law of armed conflicts perpetrated in the world; it should, however, be left to the discretion of the national authorities to decide whether a prosecution should be brought so that the judicial authorities can act responsibly if evidence comes to light that justifies practical steps on their part.

In the judicial investigations conducted in connection with the events in Rwanda, the following criteria were used as grounds for setting a prosecution in motion on the basis of the Act of 16 June 1993:¹¹¹

- ♦ The presence of the suspects on Belgian territory: as there is no extradition treaty between Rwanda and Belgium,¹¹² the Belgian

¹¹¹ Rwanda Commission of Inquiry, summary record of hearings, *Doc. parl.*, Senate, 1996-1997, COM-R 1-43, p. 414.

¹¹² The existence of a reciprocal treaty as a prerequisite for extradition is provided for in Article 1 of the Belgian Act of 15 March 1874 on extraditions.

authorities were legally unable to respond favourably to extradition requests submitted by the Rwandan authorities.¹¹³ The only alternative was to initiate proceedings under national law.

- ♦ The Belgian nationality of the victims, regardless of whether or not the suspects were on Belgian territory.¹¹⁴ Several Belgian nationals had been killed during the events, and two investigations were opened in this connection.¹¹⁵
- ♦ The Belgian nationality of alleged perpetrators not located on Belgian territory.¹¹⁶ This was the case with one of the announcers on *Radio des Mille Collines* (RTLM), who was a Belgian citizen.
- ♦ The Belgian nationality of the civil parties or their presence on Belgian territory, although in fact only one investigation was opened on the basis of this criterion.

The obvious conclusion to be drawn from the above is that the universal jurisdiction enjoyed by Belgian courts facilitates prosecution under national law, the more so since the law does not require the suspect to be located in Belgium.

Although some persons brought suits for damages in Rwanda cases already opened by the public prosecution, no investigations were actually opened at the initiative of injured parties, even though the law affords this possibility to any person who claims to have been wronged. It should be noted, however, that when a prosecution is set in motion in this way, the civil party is required to deposit at the Registry the amount deemed necessary to cover court fees, unless it is placed at the benefit of cost free procedure. Owing to

¹¹³ It should be noted that the Act of 16 June 1993 establishes no exceptions to the general rules on extradition, which would have resolved the problems created by the absence of an extradition treaty or the defence that an offence was political in nature.

¹¹⁴ If the suspect had been located on Belgian territory, Belgian courts would also have had jurisdiction on the basis of Article 10 of the introductory section of the Code of Penal Procedure (see above).

¹¹⁵ The first case concerned the murder of the 10 Belgian blue helmets in the Kigali military camp on 7 April 1994; the second was the assassination, on the same date, of three Belgian volunteer workers in the prefecture of Gisenyi (Rwanda Commission of Inquiry, summary record of hearings, *Doc. parl.*, Senate, 1996-1997, COM-R 1-43, p. 414).

¹¹⁶ If he had been located on Belgian territory, proceedings could also have been brought on the basis of the jurisdiction provided for in Article 7 of the introductory section of the Code of Penal Procedure (see above).

the complexity of the cases involved and the need to conduct rogatory commissions abroad, the deposit might well exceed the civil party's means. While the requirement of an initial deposit to cover court fees is clearly an obstacle to the institution of proceedings at the initiative of civil parties, it is still too early to assess what role such parties might nevertheless play.

It should also be pointed out that the applicable rules of territorial jurisdiction may result in a multitude of separate proceedings relative to one particular armed conflict. Even though Belgium is a small country, it has 27 different judicial districts. It is therefore highly likely that different suspects reside in different judicial districts and that proceedings relative to one and the same armed conflict will therefore be conducted by different judicial authorities.¹¹⁷ *De lege ferenda*, it would be desirable to establish rules providing for all case-files relating to one particular armed conflict to be centralized in the hands of the same investigating judge, without regard to the rules of territorial jurisdiction.

Most crimes under international law fall within the jurisdiction of the assize court. However, in our opinion the procedure followed in the assize court is not well suited for trying crimes under international law committed abroad. Indeed, the Court is made up of a jury of 12 Belgian citizens drawn by lot, a presiding judge and two associate judges who are professionals. As a rule, the jury deliberates on its own as to whether the accused is guilty or innocent. Proceedings before the Court consist entirely of oral hearings which, in principle, means that all witnesses have to be heard in court. The jury does not have access to the written record of the proceedings until it withdraws to deliberate. Under such conditions it is easy to picture the enormous practical difficulties arising from the need to call and hear all witnesses in court when the acts in question were committed 6,000 kilometres away.

The production of evidence to prove acts that took place outside the national boundaries remains a key issue. It requires the dispatch of international letters rogatory and the full cooperation of the authorities of the country where the acts were committed. In the case of the Rwanda files, the Rwandan authorities gave the widest possible assistance, even though there was no judicial cooperation agreement between Belgium and

¹¹⁷ Since there were close connections between some of the suspects, it was possible to centralize in Brussels the different case-files relating to the 1994 Rwanda events.

Rwanda. The international rogatory commissions were conducted by local judicial police officers, in the presence and with the assistance of Belgian magistrates and investigators, and were carried out according to Rwandan rules of procedure and in compliance with the principle of *locus regit actum*.¹¹⁸

The unilateral nature of the execution of these letters rogatory raises a number of questions with regard to the management of evidence and the rights of the accused and the civil party. There is a wealth of information to be drawn from the evidence gathered by the rogatory commissions in the places where the acts were committed. Even though the fact that the relevant obligations were discharged in the presence of the Belgian investigating magistrate who had submitted the request constitutes a certain safeguard, it is nonetheless very difficult for the accused and the civil party to exercise their rights of examination *a posteriori* during proceedings held in Belgium.

3.2 Cooperation with the International Tribunals

The principle of universal jurisdiction confirmed in the Act of 16 June 1993 and the establishment of the International Tribunals creates a concurrent jurisdiction of international and national courts.

If we compare the field of application of the Act of 16 June 1993 with the provisions of the Statutes of the International Tribunals for the former Yugoslavia and Rwanda, we can see that the jurisdiction of the Tribunals overlaps to a large extent with that conferred by the Act on Belgian courts.¹¹⁹

By decision of 11 January 1996,¹²⁰ the International Tribunal for Rwanda formally requested the Kingdom of Belgium to transfer criminal proceedings brought by its national courts against three Rwandan nationals, and asked it to take any legislative or administrative measures necessary to

¹¹⁸ On this subject see Rwanda Commission of Inquiry, summary record of hearings, *Doc. parl.*, Senate, 1996-1997, COM-R 1-43, pp. 414 and 415.

¹¹⁹ See in particular Article 5 of the Statute of the International Tribunal for the former Yugoslavia relative to crimes against humanity and Article 4 of the Statute of the International Tribunal for Rwanda, which refers explicitly to violations of Article 3 common to the Geneva Conventions of 1949 for the protection of war victims and of Additional Protocol II of 8 June 1977.

¹²⁰ International Criminal Tribunal for Rwanda, 11 January 1996, *Revue de droit pénal et de criminologie*, 1996, p. 904.

comply with this formal request and to inform the Registry of the International Tribunal of the measures taken.¹²¹

On 15 May 1996, the Court of Cassation was called upon, under the terms of the new Act of 22 March 1996, to reach a decision on the above request. Its conclusions were that when the facts of a case that falls under the jurisdiction of the International Tribunal for Rwanda are investigated by both the Prosecutor of the Tribunal and an investigating judge in Belgium, the Court of Cassation, pursuant to the Tribunal's request, will terminate the authority of the investigating judge in Brussels, after hearing the persons concerned and ascertaining that the case-file does not indicate that there could be a mistake as to their identities.¹²² The Court has since removed two other case-files from the jurisdiction of the Belgian investigating judge.¹²³

On 24 January 1996, the Prosecutor of the International Tribunal for Rwanda had also requested the Kingdom of Belgium to proceed with the provisional arrest of the three Rwandan nationals concerned, pending their formal indictment. Following the decision of the Court of Cassation to terminate the authority of the Belgian court, the three individuals were provisionally arrested, in conformity with the new provisions of the Act, with a view to their transfer to the International Tribunal. Two of them have since been transferred to Arusha.

The International Tribunal for Rwanda thus issued three transfer orders concerning investigations opened in Belgium and succeeded in having the cases removed from the jurisdiction of the relevant Belgian investigating judge.

The removal of cases from the jurisdiction of Belgian courts raises several questions regarding the different rules of procedure governing the International Tribunals.

On 11 February 1994, the International Tribunal for the former Yugoslavia established its Rules of Procedure and Evidence, which have been

¹²¹ New, similar requests have since been issued by the International Tribunal for Rwanda to the Belgian government in relation to other investigations opened in Belgium.

¹²² Court of Cassation, 15 May 1996, *Revue de droit international pénal et de criminologie*, 1996, p. 906.

¹²³ The cases in question are the Bagosora file and the case concerning the RTLM (Rwanda Commission of Inquiry, summary record of hearings, *Doc. parl.*, Senate, 1996-1997, COM-R 1-43, pp. 414 and 415).

amended several times since. On 29 June 1995, the International Tribunal for Rwanda adopted Rules of Procedure and Evidence which are similar in all aspects to the Rules applicable to the Tribunal for the former Yugoslavia.¹²⁴ The Rules of Procedure and Evidence of the two Tribunals draw on both the common law system and the civil law system, with a marked preference, however, for the Anglo-American system.¹²⁵

What will happen to the suits for damages which are regularly brought before the national courts?¹²⁶ In the case of the International Tribunals, only the Prosecutor can open a judicial investigation, and he alone can institute a prosecution before the relevant Tribunal. At most the injured party can submit to the Prosecutor “information” on the basis of which the Prosecutor decides independently whether or not to set a prosecution in motion.¹²⁷ Civil parties cannot appeal against a decision to take no further action and are not recognized as parties to the proceedings, since they are not entitled to claim damages before the Tribunal. If one of the parties deems it useful, it may call the civil party as a witness.

In conformity with Rule 74 of the Rules of Procedure and Evidence of the two Tribunals, the civil party may be asked, as *amicus curiae*, to appear before the Tribunal to make submissions on any issue the Tribunal deems useful. The Rules of Procedure and Evidence also provide for the establishment of a Victims and Witnesses Unit to give counselling and support to the latter (Rule 34).

In national law, the fact that the authority of the court has been removed does not terminate the right of a civil party to claim damages before a Belgian court. However, this right cannot be exercised while the case is pending before one of the International Tribunals.¹²⁸ If at a later stage the

¹²⁴ These documents were published in the *Moniteur Belge* of 27 April 1996, as an annex to the Act of 22 March 1996 (see footnote 1). The fact that the Tribunals establish rules of procedure reflects the Anglo-Saxon influence over the way the Tribunals function.

¹²⁵ H.D. Bosly, “Actualité du tribunal international pénal”, *Ann. dr.*, Bruylant, Brussels, 1-2/1995, p. 12.

¹²⁶ It is possible to bring a suit for damages in criminal proceedings for acts defined as offences in the Act of 16 June 1993 before both ordinary and criminal courts (see above).

¹²⁷ Article 18 of the Statute of the International Tribunal for the former Yugoslavia and Article 17 of the Statute of the International Tribunal for Rwanda.

¹²⁸ Article 7, para. 2, of the Act. It was absolutely essential to settle the question of whether victims have the right to sue for damages, notably because of the temporary nature of the existing international courts.

case is not referred back to a criminal court by the Court of Cassation, in conformity with Article 8 of the Act, the only recourse left to a civil party which has already instituted a suit for damages is to start proceedings before a civil court.

Another consequence of the removal of the authority of a Belgian court is that it is impossible to try a fugitive *in absentia*. The Statutes of the International Tribunals stipulate that the accused has the right to be present at the trial and to defend himself in person.¹²⁹ According to the interpretation adopted by the Secretary-General in his report, this provision precludes trial *in absentia* if the accused has never appeared before the Tribunal. At most, the Tribunal could issue an international warrant of arrest, valid worldwide, with a view to having the person arrested and brought before it.¹³⁰

Once the authority of the national courts has been removed and the case-files prepared by them have been transferred to the relevant International Tribunal, the latter will have to address the question of compatibility of proceedings conducted in the States concerned in conformity with their national legislation with the rules of accusatory procedure applicable at the International Tribunal. In other words, will the investigations carried out by the national authorities be recognized by the International Tribunal, if these investigations do not conform with the Tribunal's rules of procedure?¹³¹

From the point of view of the effectiveness of the repression of grave breaches, it should be possible to bring before an International Tribunal evidence already gathered in different States. The worldwide authority of the International Tribunals speaks for the admissibility of evidence lawfully assembled by national authorities in conformity with their domestic legislation, provided that this is effected in compliance with the general

¹²⁹ Article 21, para. 4(d), of the Statute of the International Tribunal for the former Yugoslavia and Article 20, para. 4(d), of the Statute of the International Tribunal for Rwanda.

¹³⁰ E. David, "Le Tribunal international des Nations Unies pour le Rwanda", *Revue Dialogue*, 1995, No. 186, p. 46. In our view, the willingness of the accused not to exercise his right to be present at the trial should not constitute an obstacle to trial *in absentia*: the symbolic importance of a judgement on the merits of the case, even if rendered *in absentia*, is much stronger than that of an international arrest warrant. Furthermore, the inability to try a fugitive *in absentia* can be viewed as an incentive for the accused to elude justice.

¹³¹ Relevant examples would be the right of a suspect to legal counsel during interrogations, the obligation to inform the suspect of his right to remain silent, the obligation to record the interrogation of suspects, and so forth.

principles of respect for the rights of the accused. Rule 5 of the Rules of Procedure and Evidence of the two Tribunals provides the following common-sense solution: “Any objection by a party to an act of another party on the ground of non-compliance with the Rules shall be raised at the earliest opportunity; it shall be upheld, and the act declared null, only if the act was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice”.

Nonetheless, this wish does not seem to translate into reality: the fact that the Rules of Procedure and Evidence are predominantly Anglo-Saxon in nature appears to lead the Chambers of the International Tribunals to dismiss evidence gathered by national courts, and in particular hearings of persons accused and witness statements obtained in the course of proceedings held in national courts which are subject to different rules of procedure.¹³² One has the impression that once an investigation has been removed from a national court the Chambers of the relevant International Tribunal start the investigation procedure from square one, so as to conform strictly with the rules of the Tribunal. It is regrettable that there is so little flexibility in the coordination of procedures, as there can be no doubt that this is a waste of both time and energy. The International Tribunals’ cumbersome rules of procedure also appear seriously to hamper their work and jeopardize their effectiveness.

As regards judicial cooperation, the Belgian authorities have received a number of requests from the Prosecutor of the International Tribunal for Rwanda and have always shown themselves to be flexible in responding to them. Requests for cooperation are fulfilled in accordance with the procedures provided for under Belgian legislation, and in compliance with the principle of *locus regit actum* and the provisions of the Act of 22 March 1996. Owing to the largely accusatorial nature of the Rules of Procedure and Evidence of the Tribunal, some exceptions or procedural amendments are effected to ensure that acts carried out in Belgium in compliance with the requests are lawful in regard to the procedural requirements to be met by the requesting authority. In this respect, the Act of 22 March 1996 stipulates that the Prosecutor of the International Tribunal or the judge submitting the request may be present when the

¹³² The following differences in procedure can be quoted as examples: under Belgian law, there is no provision for legal counsel to be present at the hearing of the accused, and the hearings of the accused and witnesses are not recorded.

required measure is carried out and, as a result, must be informed by the Belgian judicial authorities of the date and place of its execution.¹³³ In addition, nothing prevents the investigating judge concerned from approving, in agreement with the competent crown public prosecutor, the presence of defence counsel during the execution of certain obligations in Belgium or at the recording of hearings of persons accused, in conformity with the rules of procedure of the International Tribunal.¹³⁴

Conclusions

Experience has shown that the very broad scope of the Act of 16 June 1993 (extension to include internal armed conflicts, universal jurisdiction, diversity of breaches and forms of participation, and so forth) greatly facilitates the work of the legal profession by eliminating at the beginning of the investigation a series of technical and procedural questions, and helps focus the debate more on substantive issues, in other words on the establishment of the guilt or innocence of persons accused of crimes under international law.

Even though problems of interpretation and technical and procedural difficulties have often been cited in the past, perhaps they are really pretexts for adopting a policy of abstention which flagrantly contradicts the declarations of intent made in international instruments.¹³⁵ The establishment of the International Tribunals also carries the risk of creating an alibi for national courts, which would then hide behind these Tribunals or place the ball in their courts, so to speak, so as not to have to take action themselves.

The application of the law and the conduct of proceedings to repress crimes under international law still depend to a considerable extent on the mentality and culture of the judiciary, however: the concepts of war crimes, unlimited universal jurisdiction, extension of the scope of the law to include internal armed conflicts, the extent to which some forms of participation have been defined as breaches, etc., are all new concepts. It will take time for them to become an integral part of judicial custom.

¹³³ Article 10 of the Act of 22 March 1996.

¹³⁴ This is current practice during the execution of international letters rogatory at the request of countries in which both parties have to be heard during preliminary investigations.

¹³⁵ A. Andries *et al.*, *op. cit.*, 1994, p. 1122.

We also need to be realistic: many procedural pitfalls remain. Any inquiry into crimes under international law committed outside Belgian borders will always be an arduous process, especially as regards the production of evidence. It is not easy *a posteriori* to prove in court acts which took place abroad in a conflict situation and the specificities of which are sometimes not fully appreciated by a national court.

We should also recognize the limits of action taken under humanitarian law: the need, for the purposes of producing evidence, to secure the cooperation of the authorities of the State where the events in question took place means that the prosecution of grave breaches of humanitarian law is all too often confined to the losers' side. This situation, inherent as it is in the balance of power prevailing at a given time, is unfortunate. On the other hand, there is no way of predicting how those who are in power and the alliances they form will change. Proceedings that cannot be brought today may become possible tomorrow when the balance of power has shifted.

One of the objectives of the Act of 16 June 1993 and of the establishment of the International Tribunals is that perpetrators of crimes against humanity should no longer be certain they can enjoy total impunity and lead a peaceful existence, anywhere in the world, without the threat of criminal proceedings.¹³⁶ But national and international judicial authorities still have to live up to the high hopes placed in them. Sadly, this has yet to be demonstrated.

¹³⁶ See the parliamentary documents on the Act of 22 March 1996 relative to the recognition of the International Tribunal for the former Yugoslavia and the International Tribunal for Rwanda and to cooperation with these Tribunals (Report of the Justice Committee of the Senate, *Doc. parl.*, Senate, 1995-1996, p. 20).

The repression of violations of international humanitarian law in Switzerland

Robert Roth

Professor of Criminal Law, University of Geneva

Marc Henzelin

Assistant Lecturer, Law Faculty, University of Geneva

1. Introduction

Since 1851 the Swiss legislature has adopted, with respect to violations of the law of war, the technique of referring to the applicable provisions of international law. Thus, the Swiss Military Penal Code refers to international treaties on the conduct of hostilities and those on the protection of persons and property, and even to the recognized “laws and customs of war”.¹ The question that arises in Swiss law is therefore not so much whether or which provisions of the law of war (both customary and treaty-based) have been incorporated into it, as what is the *scope* of the Military Penal Code. That is why we felt it reasonable to alter slightly the order in which the questions were set out.

2. Scope of the Military Penal Code

The Swiss Military Penal Code (*Code pénal militaire*, hereinafter referred to as the “CPM”), which is separate from the ordinary Penal Code, stipulates in Article 218 that anyone subject to military law comes under the jurisdiction of the military courts.

The general part of the CPM (Articles 1 to 60) permits no reference to the general provisions of the ordinary Penal Code unless expressly stipulated otherwise.² The special part of the CPM, on the other hand, is a *lex specialis* in relation to the ordinary Penal Code.³ Therefore, the special provisions of

¹ Article 109, point 1, of the CPM.

² For example, Articles 13, para. 2, 14 and 14 (a), para. 2, of the CPM, which deal with children, adolescents and young adults, and Article 30 (b), para. 1, of the CPM, which concerns security measures; all these articles refer to specific provisions in the general part of the ordinary Penal Code.

³ Article 7 of the CPM.

the CPM prevail over those of the ordinary Penal Code in cases where both could apply.⁴ Where no provision in the special part of the CPM (Articles 61 to 179 (a)) applies, the special part of the ordinary Penal Code may be invoked.⁵

2.1 *Ratione materiae*

The offenses covered under the CPM are those specifically linked to military life and general offences that run contrary to military interests.⁶

According to the Swiss Federal Council, “military courts are [reserved] for a distinct field of activity. They owe their existence to the very nature of the cases they deal with, i.e., cases connected with military service. This concerns not only specifically military offences, but also those relating to the circumstances of life in general. [...] Their expertise gives them knowledge of the particular circumstances of military service and, in order to establish the truth, they can accurately assess not only the external factors that constitute an offence but also, and primarily, the psychological aspects involved.⁷ When under arms, military personnel inevitably find themselves in situations in which they have to endure psychological pressures to which they would not be exposed in civilian life or would then face of their own accord. If all ordinary offences were removed from the CPM, an offender would have to answer for his actions before an ordinary criminal court that would provide him with the possibility, though not the guarantee, of a trial which would take fair account of all the circumstances of military life”.⁸

2.2 *Ratione personae*

2.2.1 *Categories of person subject to the CPM*

The greater the threat to Switzerland, the greater the number of persons and the broader the range of offences concerned. The *ratione personae* scope

⁴ Amberg, *Grenzlinien zwischen militärischem und bürgerlichem Strafrecht*, thesis, Bern, 1975, p. 12; Bendel, “Das materielle Militärstrafrecht”, in *ZStrR*, 88, 1972, p. 187.

⁵ See Hauri, *Militärstrafgesetz, Kommentar*, Stämpfli, Bern, 1983, concerning Article 7 of the CPM.

⁶ In theory the Swiss legislature had four options: to include typically military offences, mixed offences, offences against military interests or all civil offences. The third option was the one chosen (Schmuacher, *Die Geltungsbereich des schweizerischen Militärstrafgesetzes*, thesis, Fribourg, 1954, pp. 36 ff; Amberg, *op. cit.* [footnote 4], p. 14, footnote 6).

⁷ Federal Gazette [*Feuille fédérale*, hereinafter “*FF*”] 1949-II, pp. 13 and 14.

⁸ *FF* 1977-II, p. 20.

of the CPM varies according to the degree of threat to the country: it encompasses normal times, active service, and wartime, which Amberg refers to as “the three concentric circles”⁹.

Thus, in normal times, persons subject to the CPM are primarily those required to perform military service,¹⁰ those who find themselves in comparable situations,¹¹ and those forming part of the professional armed forces;¹² such persons fall within the scope of the CPM in terms of both general offences and specific offences.

Civilians are subject to military law only where they commit serious offences against national security. This concerns in particular officials, employees and workers in the military administration responsible for offences involving matters of national defence.¹³ It also applies to civilians generally, in the event of offences such as treason through breach of secrecy in matters of national defence, sabotage, and offences against collective security, such as violations of international law in situations of armed conflict.¹⁴

When the threat becomes more tangible and the Federal Council decides to institute active service, further categories of officials, employees and workers necessary for national defence¹⁵ become subject to military law, in this instance irrespective of the offence committed.¹⁶ Military internees, in the broad sense, of belligerent States, civilian internees and refugees under the responsibility of the armed forces also come within the purview of military law.¹⁷ This is, moreover, the case for civilians who commit specifically defined, relatively serious offences.

⁹ Amberg, *op. cit.* (footnote 4), p. 17.

¹⁰ Article 2, points 1, 3 and 4, of the CPM.

¹¹ Namely, “persons required to present themselves for recruitment, in respect of the duty to present oneself, and for the duration of the recruitment [...]” (Article 2, point 5, of the CPM), and “civilians employed on a long-term basis by the armed forces or who are so employed for the performance of special duties” (Article 2, point 7, of the CPM).

¹² Article 2, point 6, of the CPM.

¹³ Article 2, point 2, of the CPM.

¹⁴ The armed conflict in question need not involve Switzerland.

¹⁵ Such as those who are employed by the railways, waterworks, hospitals, etc.

¹⁶ Article 3, point 5, of the CPM.

¹⁷ Article 3, point 4, of the CPM.

In wartime,¹⁸ persons who service the armed forces without directly forming part thereof¹⁹ are subject to military law, irrespective of the offence committed. Moreover, civilians who commit certain specific offences in wartime or who cause injury or damage to objects used by the armed forces²⁰ may be prosecuted under military law. Prisoners of war, enemy negotiators and the persons who accompany them in certain circumstances, and civilian internees in war zones or occupied territory, are also subject to military law.²¹

2.2.2 Nationality of offenders

The CPM contains no reference to the nationality of offenders. In particular, in the use of the terms “persons”, “persons compelled to perform military service”, “officials”, “civilians”, “prisoners of war”, “negotiators” and “civilian internees”, Articles 2 to 4 do not specify any particular nationality.

Furthermore, there is no equivalent in the CPM to Articles 5 and 6 of the ordinary Penal Code, which deal with jurisdiction based on the passive personality principle and the nationality principle, respectively.

The only *ratione loci* provision of the CPM is Article 9, which covers offences committed in Switzerland and those committed abroad, but without any reference to the nationality of either the victim or the perpetrator of an offence.²² Article 8 of the CPM, which deals with *ratione temporis*, stipulates that “any person who commits an offence following the entry into force of this Code shall be tried in accordance therewith”.

Although none of the *ratione loci* or *ratione temporis* provisions of the CPM refers to the nationality of either the victim or the perpetrator, it should be noted

¹⁸ That is, only when Switzerland itself is at war or when the Federal Council, in the event of a threat of imminent war, puts into effect the provisions laid down for wartime (*FF* 1967-I, p. 611). The CPM refers not only to cases of open war between two or more States, but also to cases of non-declared war and even war of decolonization or civil war (Article 108 of the CPM); see Popp, *Kommentar zum Militärstrafgesetz*, Dike, St Gallen, 1992, concerning Article 108, No. 6.

¹⁹ Article 4, point 1, of the CPM.

²⁰ Article 4, point 2, of the CPM.

²¹ Article 4, points 3 to 5, of the CPM.

²² However, as far as Amberg is concerned, Article 9 of the CPM is designed to permit prosecution of both *Swiss military personnel* who have committed offences abroad and offences committed abroad *against the Swiss State* (Amberg, *op. cit.* [footnote 4], p. 38).

that Article 40 of the CPM does allow Swiss courts to expel from Swiss territory *any foreign national* sentenced to imprisonment under the CPM, thus clearly demonstrating that the scope of the CPM is not restricted to Swiss nationals alone. However, that article, which governs a question of ancillary penalty, still provides no indication as to whether the sentenced foreign national should have been prosecuted on the basis of the nationality principle.

In the absence of a general provision relating to the nationality of offenders, the issue therefore has to be examined in the light of each specific provision.

Thus, some of the provisions of Articles 2 to 4 of the CPM apply solely in cases where the offenders are Swiss nationals, in particular where they refer to “officials, employees and workers in the military administration of the Confederation and the cantons”²³ or to members of the *federal* corps of border guards.²⁴

Conversely, certain provisions apply only where the offenders are foreign nationals, i.e., those which refer to military internees of *belligerent States* who belong to *the latter’s* armed forces (etc.),²⁵ *enemy* negotiators,²⁶ and *prisoners of war*.²⁷

Therefore, the prosecution of war criminals in Switzerland should be examined in the light of the provisions of military law specifically applicable to them.

3. Criminalization of violations of the law of war

3.1 The principle of reference to the existing provisions of international law

War crimes are covered in Chapter VI (violations of international law) of the CPM.²⁸ However, this chapter contains, in addition to the relevant special provisions and in spite of its position in the special part of the CPM,

²³ Articles 2, point 2, and 3, point 5, of the CPM.

²⁴ Article 2, point 6, of the CPM.

²⁵ Article 3, point 4, of the CPM.

²⁶ Article 4, point 4, of the CPM.

²⁷ Article 4, point 3, of the CPM. Indeed, it is impossible to see how Switzerland could exercise jurisdiction over Swiss prisoners of war abroad.

²⁸ With regard to the incorporation of breaches of international humanitarian law into the CPM, see Eugster, “La protection pénale des conventions internationales humanitaires”, report submitted to the International Association for Criminal Law, *Revue internationale de droit pénal*, 1953, vol. 24, pp. 53-67.

a provision which in itself constitutes a general part in miniature, i.e., Article 108, which deals with the scope of application of Chapter VI. Since this article covers all cases of declared or non-declared war, international war, war of decolonization and internal conflict,²⁹ we do not propose to dwell on it here other than to note that, in conformity with humanitarian law proper, it does not apply to situations of internal unrest or tension or in peacetime. Thus, the manner in which the conflict is defined by the courts before which a case is brought will be decisive.

Unlike the practice in ordinary criminal law, which is generally not very inclined to proceed by reference, but consistent with that of accessory criminal law, Chapter VI of the CPM does not list all hypothetical cases which may constitute war crimes but refers instead to the “requirements of international treaties”. That is because the Federal Council considered that the list would have been particularly lengthy and might perhaps not even have encompassed all cases.³⁰ That method is not a recent one as it dates back as far as the first Swiss CPM of 1851, Article 45 of which already provided for the punishment of “any act contrary to international law”.³¹

Returning to the present, Article 109, paras 1 and 2, of the CPM read as follows:

- “1. *Anyone who contravenes the requirements of international treaties on the conduct of hostilities and on the protection of persons and property, anyone who violates other recognized laws and customs of war, shall, except where more stringent provisions apply, be punishable by imprisonment. In serious cases the penalty shall be long-term incarceration.*
2. *Minor breaches shall be punished by disciplinary measures.”*

First, it must be noted that the article makes direct reference to the *requirements* of international treaties and not to the treaties themselves.³²

²⁹ In particular the Official notice of the Federal Council specifically provides for the application of the CPM “during conflicts which are not international in nature in cases where the Conventions also apply (Article 3 common to the four Geneva Conventions and Article 19 of the Hague Convention)”, *FF* 1967-I, p. 610.

³⁰ *FF* 1967-I, p. 611.

³¹ Clerc, “Le code pénal suisse et le droit pénal international”, in *Recueil de travaux publiés par la faculté de droit de l’Université de Neuchâtel à l’occasion de la fondation de l’Académie*, Neuchâtel/Paris, 1938, p. 6.

³² Regarding the technique whereby the domestic legal system refers to the international system, see Morelli, “Cours général de droit international public”, in *Recueil des cours de l’Académie de droit international*, 1956-I, Vol. 89, The Hague, A. W. Sijthoff, Leyden, pp. 490-498.

What remains to be established is which of the requirements of those treaties or other recognized laws and customs of war are referred to in the above provision.

3.2 The laws and customs of war referred to in Article 109, para. 1, of the CPM

In defining the meaning of the expression “laws and customs of war”, as set out in Article 109, para. 1, of the CPM, the Federal Council referred primarily to the *Manual on the Laws and Customs of War* published by the Swiss army.³³ In that respect the Federal Council was clearly referring only to Swiss military personnel fighting a war in which Switzerland was involved. However, reference to the *Manual* cannot be used as the sole basis for describing the laws and customs of war.³⁴

This article obviously does not aim to define the laws and customs of war at the international level.

3.3 The international treaties referred to in Article 109, para. 1, of the CPM

3.3.1 *The need for said treaties to have been ratified by Switzerland*

The international treaties in question must be understood as those which had been ratified by Switzerland at the time a violation was committed, in particular the Geneva Conventions,³⁵ Protocols I and II additional thereto,³⁶ the 1954 Hague Convention for the Protection of Cultural

³³ *FF* 1967-I, p. 610.

³⁴ On the other hand, it must be acknowledged that, with respect to Swiss military personnel, an offence not covered by the *Manual* could give rise to problems in terms of the principle of legality.

³⁵ First Convention: Compendium of Swiss federal laws (*Recueil systématique du droit fédéral*, hereinafter “*RS*”) 0.518.12.
Second Convention: *RS* 0.518.23.
Third Convention: *RS* 0.518.42.
Fourth Convention: *RS* 0.518.51, all of which entered into force for Switzerland on 21 October 1950.

³⁶ Protocol I: *RS* 0.518.521.
Protocol II: *RS* 0.518.522, both of which entered into force for Switzerland on 17 August 1982.

Property in the Event of Armed Conflict,³⁷ and the 1972³⁸ and 1980 weapons conventions (including the four Protocols to the latter).³⁹

The question is whether reference could be made to treaties that were not binding upon Switzerland at the time the violation was committed. Probably not.

Indeed, the incorporation of requirements into Swiss legislation by reference to treaties not ratified by Switzerland would be contrary to Article 85, point. 5, of the Constitution, which stipulates that the ratification of treaties with foreign States comes within the purview of the two Federal Chambers. This is, moreover, consistent with the Official Notice of the Federal Council, which, in dealing with Article 109 of the CPM, referred to “the agreements under public international law [which have], in Switzerland, the status of laws and [are] published and disseminated as appropriate by the armed forces”.⁴⁰

What remains to be established, however, is whether such requirements can derive from international treaties ratified by Switzerland but not signed or ratified by the country of which an offender is a national.

3.3.2 *Treaties not ratified by the State of which the offender is a national*

It is important to determine whether the international requirements in question were recognized as customary law at the time the acts were committed or whether they were solely treaty-based.

Where the treaties reflected customary law at the time⁴¹ or have become customary law in the meantime,⁴² as is the case with most prescriptions of

³⁷ RS0.520.3: entered into force for Switzerland on 15 August 1962.

³⁸ RS0.515.07: entered into force for Switzerland on 4 May 1976.

³⁹ RS 0.515.091: entered into force for Switzerland on 2 December 1983. The 1993 Chemical Weapons Convention was ratified by Switzerland in 1995 and will enter into force this year, according to the Federal Department of Foreign Affairs.

⁴⁰ FF 1967-I, p. 611.

⁴¹ “The incorporation in a treaty of a customary rule does not prevent the latter from continuing to serve as a customary rule and from governing, in particular, the relations between States party to that treaty and relations between those States and third States”, Reuter, *Introduction au droit des traités*, PUF, Paris, 3rd ed., 1995, No. 165.

⁴² Article 38 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the “Vienna Convention”) stipulates that “nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State [or organization] as a customary rule of international law, recognized as such”.

the Hague Conventions of 1899 and 1907 and of the four Geneva Conventions of 1949, the first and second phrases of Article 109, para. 1, of the CPM overlap, and the international requirements apply automatically.⁴³

If, on the other hand, the treaties were not recognized as part of customary law at the time the acts were committed, a distinction must be drawn between the approach of Swiss criminal law and that of international law.

- (a) From the standpoint of Swiss criminal law, Article 9, para. 1, of the CPM expressly stipulates that:

“This Code shall be applicable to offences committed in Switzerland and to those which have been committed abroad.”

In theory, a Swiss military court could therefore sentence a foreign national for committing an act prohibited by Switzerland but not by the States directly involved in the armed conflict, particularly if one considers that Article 109 of the CPM refers to the *requirements* of international treaties rather than to the international treaties themselves.⁴⁴

In our view, however, such extraterritorial application is contrary to the general principles of criminal law, including the principle of *nullum crimen sine lege*, set out in this instance in Article 1 of the CPM, which stipulates that “no one may be punished unless he has committed an act expressly punishable by law”.⁴⁵ A foreign national thus being prosecuted in Switzerland could consequently raise objections before a Swiss military court as to the validity of the latter’s jurisdiction.

⁴³ This view is held in particular by Andries, Van den Wijngaert, David and Verhaegen, “Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire”, in *Revue de droit pénal et de criminologie*, 1994, Vol. 74, p. 1124; similarly, Randall, “Universal jurisdiction under international law”, in *Texas Law Review*, 1988, Vol. 66, p. 824: “The Geneva Conventions’ penal provisions might once have had legal implications for a non-party’s exercise of jurisdiction over a war crime with which it had no connection. But today virtually all States are parties to the Geneva Conventions and thus are bound directly”.

⁴⁴ We proceed from the principle that the domestic law of the country concerned properly reflects the instruments of international law to which it is party. In particular, we shall not deal with the case where the domestic law of the offender’s country prohibits a certain type of behaviour without such prohibition being imposed by international customary or treaty law. Regarding the technique whereby the domestic system refers to the international system, see Morelli, *op. cit.* (footnote 32), pp. 490-498.

⁴⁵ Same provision as Article 1 of the ordinary Penal Code.

(b) From the international standpoint, the extraterritorial scope of a country's criminal law was examined by the Permanent Court of International Justice in the *Lotus* case.⁴⁶ Many learned publications have been devoted to that ruling, but the purpose of the present document is not to offer a summary thereof. We would point out, however, that some authors argue in favour of straightforward acceptance of the extraterritorial effect of national criminal law, except where there is an express prohibition at the international level.⁴⁷

Others have doubts as to the legitimacy of this extended scope,⁴⁸ while still others view the problem solely from the angle of the status of the norm being relied upon.⁴⁹

3.3.3 *Treaties not ratified by the State of which the victim is a national or in which the offence was committed*

In this case, as in the situation where the relevant treaties have not been ratified by the offender's State, the international treaties do not apply to the State of which the victim is a national, or to that in which the offence was committed. Consequently, reference to the sole *requirements* of international treaties also poses a problem that has yet to be resolved in terms of the extraterritorial application of Swiss criminal law. However, that leaves the case of a State whose domestic criminal law has incorporated criminal provisions of international treaties which are not applicable to a specific

⁴⁶ PCIJ, 1927, Series A, No. 10, p. 23.

⁴⁷ An approach advocated in particular by Cowles, "Universality of jurisdiction over war crimes", in *California Law Review*, 1945, Vol. 33, pp. 177-218, p. 180: "The holding is that an independent State has legal power to vest jurisdiction in its courts to hear and determine any criminal matter which is not prohibited by international law. [...] An independent State has legal power to vest jurisdiction in its courts to hear and determine alleged war crimes unless it is prohibited from doing so by international law. In order to establish that, under international law, the principle of universality does not apply to the trial and punishment of such war crimes, it is necessary to show that States generally, as a matter of practice expressing a rule of law, have consented not to exercise jurisdiction in such cases. As independent States are involved, any such restriction must be conclusively proved, and to do this municipal law and practice must not be divided".

⁴⁸ See in particular Brownlie, *Principles of Public International Law*, Clarendon Press, Oxford, 4th edition, 1990, pp. 302 and 303.

⁴⁹ In that respect, see Randall, *op. cit.* (footnote 43), pp. 821 and 822, according to whom "the legitimacy of a jurisdictional challenge, in part, will depend upon which multilateral convention the prosecuting State has relied. The wider the acceptance of a treaty by members of the world community, the more likely that it has created customary norms binding upon non-parties that have not persistently objected"; and Weil, "Towards relative normality in international law", in *American Journal of International Law*, 1983, Vol. 77, pp. 413-442.

conflict.⁵⁰ In this instance the argument of the principle of *nullum crimen sine lege* appears to us to be less relevant. On the other hand, the State in question might also raise objections to the extraterritorial application of Swiss criminal law.

3.3.4 Conclusion

To date State practice does not provide any clear solution regarding the legality of the extraterritorial application of criminal law.⁵¹ However, cases of such application unquestionably pose significant diplomatic problems.⁵² Moreover, the technique of referring to the provisions of international law creates confusion with respect to the substantive law in question.

3.4 Criminalization of specific acts

In addition to general reference to the requirements of international treaty and customary law, the CPM also defines certain specific acts as offences, i.e., misuse of an international emblem (Article 110 of the CPM), hostile acts against persons and objects protected by an international organization (Article 111), failure to discharge duties towards enemies (Article 112), the breaking of an armistice or the peace (Article 113), and offences against negotiators (Article 114).

It should also be noted that the Swiss approach does not make the distinction provided for in the Geneva Conventions between grave breaches and “less serious violations”,⁵³ as the CPM authorizes prosecution irrespective of the gravity of the offence. On the other hand, it does make a distinction between offences classified as “minor”,⁵⁴ and

⁵⁰ In particular where the other belligerent State has not itself ratified the treaties in question.

⁵¹ As for a recent debate on the question, see the works of the XIX Commission of the Institute for International Law, *Annales de Droit International*, vol. 65, Milano session, T.I, 1993 pp. 14-188 and T.II, 1994, pp. 133-273.

⁵² As evidenced by the tensions which arose between the European Union and the United States following the adoption by the latter of the Helms-Burton and D’Amato laws concerning investments in Cuba and Iran.

⁵³ Articles 49 and 50 of the First Convention, 50 and 51 of the Second Convention, 129 and 130 of the Third Convention, 146 and 147 of the Fourth Convention, and 85 of Protocol I.

⁵⁴ The term “minor” in the CPM does not refer to the Geneva Conventions or the Protocols additional thereto, but has a scope of its own derived from the special part of the CPM. Thus, instances of straightforward physical injury or assault may, depending on the case, be classified as “minor” offences (Article 124, para.1, of the CPM).

other offences in terms of the method of prosecution. “Minor” offences are still punishable, but by troop commanders rather than the military courts (Article 109, para. 2, of the CPM).

4. Prosecution of war criminals

4.1 Civilian Swiss and foreign war criminals

Civilians who do not come under any of the specific categories provided for in Articles 2 to 4 of the CPM may be prosecuted in Switzerland for violations of international law (Articles 108 to 114 of the CPM) on the basis of Article 2, point 9, of the CPM, which stipulates that the following shall be subject to military law:

“Civilians who, during an armed conflict,⁵⁵ commit violations of international law.”

The prosecution of civilian war criminals by Switzerland therefore poses no problem.

4.2 Swiss military war criminals

Swiss military war criminals are covered by Article 2, point 1, of the CPM, which stipulates that the following shall be subject to military law:

“Persons required to perform military service, when they are on military duty, with the exception of those on leave who commit offences such as the ones set out in Articles 115 to 137 and 145 to 179, where such offences bear no relation to their military duties”.

It should be noted that violations of international law are not among the exceptions provided for with respect to military personnel on leave. Therefore, those on leave who commit such violations come within the scope of the CPM and are subject to the jurisdiction of the Swiss military courts.

⁵⁵ “Armed conflict” within the meaning of Article 2, para. 9, of the CPM must be understood as referring to conflicts such as those covered by Article 108 of the CPM and not to “wartime” within the meaning of Article 4 of the CPM.

4.3 Foreign military war criminals

4.3.1 *In the context of a war involving Switzerland*

In the case of a war involving Switzerland,⁵⁶ Article 4, point 3, of the CPM stipulates that the following persons shall be subject to military criminal law:

“Prisoners of war, with respect to offences such as those set out in this Code, including those committed in Switzerland or abroad, during wartime and prior to the commencement of their captivity, against the Swiss State or armed forces or against persons belonging to the Swiss armed forces”.

Should this provision be understood as authorizing the prosecution of prisoners of war in Switzerland for any offence set out in the CPM or only for those committed against the Swiss State or armed forces or against persons belonging to the Swiss armed forces? Hauri is clearly inclined to favour the second interpretation.⁵⁷ We prefer the first one, which is more consistent with Switzerland’s international obligations.

4.3.2 *In the context of a conflict not involving Switzerland*

Article 4 of the CPM does not apply in the event of a conflict to which Switzerland is not party. It is therefore necessary to examine whether foreign military war criminals could come within the scope of Article 2, point 9, of the CPM, through the incorporation of *foreign military personnel* in the term “*civilian*”.

According to the *Petit Larousse* [dictionary], the term “civilian” means “devoid of military or religious character”.⁵⁸ This suggests that “civilian” should be viewed as the antithesis of “military”, and the term could therefore not include certain specific categories of military personnel.

The antithesis also clearly emerges from certain provisions of the CPM. For example, Article 3, point 4, of the CPM makes a clear distinction between *military* internees and *civilian* internees.⁵⁹ Moreover, Article 4, point 3, of the

⁵⁶ See footnote 18 above.

⁵⁷ See Hauri, *op. cit.* (footnote 5), concerning Article 4 of the CPM, No. 13.

⁵⁸ *Petit Larousse illustré*, 1997.

⁵⁹ See Eugster, *op. cit.* (footnote 28), p. 62

CPM, which deals with prisoners of war, cannot, as a rule, be applied to civilians, on account of Article 4 of the Third Geneva Convention. We also note that Article 4, point 5, of the CPM refers to interned *civilians* within the meaning of Articles 41 to 43 and 68 and 78 ff. of the Fourth Geneva Convention,⁶⁰ which lay down the extent to which and the conditions under which protected persons may be interned. *Belligerent military personnel* come under the Third Geneva Convention and are specifically excluded from the category of protected persons within the meaning of the Fourth Geneva Convention and therefore from the category of *civilians* within the meaning of Article 2, point 5, of the CPM.⁶¹

Furthermore, and by a process of *reductio ad absurdum*, if the term “civilians” encompassed “foreign military personnel” it would have to be acknowledged that non-Swiss military personnel would be subject to Swiss military law in the event of the use of explosives causing damage to objects used by the Swiss armed forces (Article 4, point 2, of the CPM). However, not only is such activity not contrary to the law of war in the event of conflict, it is also a perfectly permissible military aim.

If Article 2, point 9, of the CPM were to cover foreign military personnel as well, the terms “*civilians*” and “*military personnel*” would have to be given different meanings depending on whether they were used in Article 2, point 9, or in other provisions of the CPM.

In this regard it is stated in the Official Notice of the Federal Council of 1967 that foreign military personnel could come within the scope of the CPM for breaches of the law of nations. CPM Article 109 indicates this in a somewhat unclear way: “*violations of international treaties shall be punished when committed by civilians or foreign persons*”. Yet it concludes that CPM Article 2 “*should be completed with provisions which stipulate that persons who commit breaches of international humanitarian law during armed conflicts come within the scope of application of the CPM.*”⁶²

The legislature may have committed a mistake (*erreur de plume*) when drafting Article 2, point 9, of the CPM. We doubt it, however, as the

⁶⁰ See Hauri, *op. cit.* (footnote 5), concerning Article 4, para. 5, of the CPM, N19.

⁶¹ Article 4, para. 4, of the Fourth Geneva Convention; Pictet, *Commentary, IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, 1958, pp. 50 and 51.

⁶² *FF* 1967 I, p. 613.

German and Italian versions of this provision of the CPM also specifically mention the word “civilian”.⁶³ Article 2, point 9, of the CPM thus does not appear *a priori* to apply to foreign military personnel.

This intermediary conclusion is strengthened by the fact that, unlike in present days, the original aim of prosecuting breaches of the law of nations under the CPM is not so much to help safeguard international peace or to combat international crime, but to protect Switzerland’s neutrality. That goal is clearly described in two extracts from Official Notices issued by the Federal Council:

*“Thus, in order that the majority of citizens should not have to suffer from the negligence or ill will of certain individuals, it is essential to enact penalties for infringements of international law which might mar the favourable relations which exist between Switzerland and other countries;”*⁶⁴ and

“military law should apply only where military grounds so require”.⁶⁵

In that sense, violations committed abroad by foreign military personnel against foreign nationals are not really relevant in terms of the absolute requirement of protecting the Swiss Confederation vis-à-vis foreign powers. However, that argument is not conclusive as it still fails to explain why the legislature would have permitted the prosecution of foreign civilians if the aim were not solely to protect Swiss interests. On the other hand, it supports a relatively restrictive approach to the application of the CPM in the event that Switzerland’s interests are not directly affected.

An interpretation according to which the word “civilians” includes foreign military personnel could only be considered valid in light of the principle whereby domestic law must be interpreted in conformity with the applicable provisions of international law.⁶⁶ This does not appear to us to apply in the field of criminal law, however, on account of the latter’s very strict requirements in terms of legality and prediction.

⁶³ “Zivilpersonen”, “Le persone di condizione civile”.

⁶⁴ FF 1852-II, p. 569, in Clerc, *op. cit.* (footnote 31), p. 8.

⁶⁵ FF 1967 I, p. 613; FF 1977-II, 1, p. 21.

⁶⁶ As would be required, in particular, by Article 27 of the Vienna Convention. The Federal Court deals with the matter by establishing a hierarchy of rules between international law and federal laws. However, its practice appears to be rather inconsistent (Wilhelm, *Introduction et force obligatoire des traités internationaux: dans l'ordre juridique suisse*, thesis, Lausanne, 1992, pp. 177 ff.). For a recent analysis of the problem, see Ziegler, “Auslegung internationaler Verträge im Licht späterer Verträge (...)”, *PJA* 1997, pp. 755-758, and Hangartner, “Ende oder Weiterführung der Schubert-Praxis?”, *PJA* 1997, p. 634.

We are thus forced to acknowledge that the term “civilians” within the meaning of Article 2, point 9, of the CPM does not cover foreign military personnel and that such persons are therefore not subject to prosecution in Switzerland for violations of international law committed abroad in a war which does not involve Switzerland.⁶⁷

5. Supplementary applicability of the ordinary Penal Code

In view of the foregoing, a foreign military serviceman who commits a crime under international law abroad does not come within the scope of the CPM. Therefore, it remains to be considered whether the ordinary Penal Code applies in this case.

Article 7 of the CPM specifies that:

“persons to whom military law applies shall remain subject to ordinary criminal law with respect to offences not covered by this Code”.

However, the article provides no indication regarding those to whom the CPM does not apply.

It must first of all be noted that the special part of the ordinary Penal Code does not contain any specific provisions relating to war crimes, nor does it contain a general reference to the requirements of international law similar to that found in Article 108 of the CPM. It remains to be established to what extent a foreign military serviceman may be prosecuted for committing or having ordered someone else to commit a crime or serious offence, such as murder (Article 111 of the ordinary Penal Code) or rape (Article 190 of the same Code), coming within the scope of Article 6 bis of the ordinary Penal Code, which stipulates that:

“1. This Code shall apply to anyone who has committed a crime or other serious offence abroad which the Confederation, by virtue of an international treaty, has undertaken to prosecute, where such an act is also punishable in the State in which it was committed and where the perpetrator is present in Switzerland and has not been extradited abroad”.

The question that then arises is whether common Article 1 and Articles 49 and 50 of the First Geneva Convention, 50 and 51 of the Second

⁶⁷ *Contra*: Popp, *op. cit.*, (footnote 18), *ad* Article 108N 6, note 4; Popp does not justify his position however.

Convention, 129 and 130 of the Third Convention, 146 and 147 of the Fourth Convention and 85 of Protocol I – which set out the obligation for the Confederation to prosecute certain specific breaches, such as wilful killing, torture and inhuman treatment – do not concern precisely the crimes and other serious offences laid down in Article 6 bis of the ordinary Penal Code.⁶⁸

In support of the application of the ordinary Penal Code to war crimes it can be mentioned that the legislature decided to include in 1981 a specific provision⁶⁹ on the non-applicability of time-barring to grave breaches of the Geneva Conventions. We do not understand, in fact, why this provision would have been adopted if only the CPM was applicable to those breaches.⁷⁰

It should, however, be emphasized that the scope of the Geneva Conventions and their Additional Protocols is much more restricted,⁷¹ as violations of international humanitarian law may not be prosecuted at any time and under any circumstances. Their specific feature is precisely that they can be committed in wartime only.⁷²

As was pointed out earlier,⁷³ the very purpose of military courts is to try cases related to the specific features of military life. Yet under our hypothesis a foreign civilian who committed a violation of international law would be subject to the CPM and to the jurisdiction of the military courts, whereas a foreign military serviceman who committed a violation of the

⁶⁸ A comparison may be made with the instrument at the source of the establishment of Article 6 (a), namely the European Convention on the Suppression of Terrorism (RS0.353.3). Under Article 6 of that Convention, the Contracting States undertake to prosecute (in cases where they do not extradite the suspected offenders) the perpetrators of acts classified as acts of terrorism in Article 1; the prosecution is conducted on the basis of the ordinary provisions relating to murder, the taking of hostages or the use of explosives.

⁶⁹ Article 75 bis, para. 1, point 5 of the Penal Code.

⁷⁰ It should be noted that Articles 75 bis of the Penal Code and 56 bis of the CPM on the exclusion of time-barring for certain crimes have been incorporated through Article 109 of the Federal Law on international cooperation in criminal matters (EIMP) rather than by amendment of substantive law.

⁷¹ Application of the ordinary Penal Code, however, is limited under Article 6 bis by the requirements of *dual criminal liability*, *the presence of the accused on Swiss territory* and *bis non extradition*, requirements which do not exist based in the CPM.

⁷² As clearly indicated in the title of Chapter VI of the CPM (“Violations of international law *in the event of armed conflict*”) and in Article 108 of the CPM.

⁷³ See heading 2.1 above.

same type, but in circumstances specific not only to military life but also to war, would be subject to the ordinary Penal Code and to the jurisdiction of the ordinary Swiss courts.

The legislature certainly did not intend to create such a situation. Consequently, we are of the opinion that it is not possible – by default so to speak – to prosecute a military war criminal on the basis of ordinary law, and that Article 2, point 9, of the CPM should be amended to include foreign military personnel.

6. *Ratione loci*

Article 9, point 1, of the CPM stipulates that:

“This Code shall apply to offences committed in Switzerland and to those which have been committed abroad.”

The CPM therefore establishes, as a general rule, extraterritorial jurisdiction over all violations of the law of war. As we have seen, however, that jurisdiction is not completely universal since it is restricted, in certain cases, by the nationality of the perpetrator or the victim, or the interest being protected.⁷⁴ Moreover, doubts may be expressed as to the universal application of the provisions of treaties which have not been recognized by the State of which a non-Swiss perpetrator is a national.

As regards the specific case of foreign military personnel responsible for violations of international law within the context of a conflict that does not involve Switzerland, these persons are also subject to the jurisdiction of the Swiss military courts and to Swiss ordinary criminal law, irrespective of the places where the violations were committed, in accordance with Article 6 bis of the ordinary Penal Code.

7. Conclusion

A war crime may be prosecuted in Switzerland regardless of the place where it was committed and the nationality of the perpetrator or that of the victim. The technique of referring to the provisions of international law is not an easy one to use, however, especially since it can give rise to serious

⁷⁴ See Hauri, *op. cit.* (footnote 5), Article 9, point 1.

problems from the standpoint of legal safeguards and from that of international law. As for the case of foreign military war criminals – which should, in theory, arise most frequently – matters are, at the very least, unclear. The CPM therefore warrants serious amendment if the contentious issues raised in this article are to be resolved before a specific case of application arises and reveals the weakness of the existing provisions.

The prosecution of presumed war criminals in Switzerland

Jürg van Wijkoop

Judge Advocate General, Swiss Federal Military Department

1. Legal basis

1.1 Development

Although the Military Penal Code¹ of 13 June 1927 contained provisions for the punishment of violations of international humanitarian law, they were applicable only in wartime.² With Switzerland's ratification of the Geneva Conventions³ in autumn 1950, if not already before, the provisions became obsolete. The legislature then took immediate action to adapt them to the Conventions during a revision of the Military Penal Code⁴ that was already under way.

Switzerland acted fast but half-heartedly, for it merely rendered violations of international agreements on the conduct of war and for the protection of war victims punishable as a dereliction of duty under Article 72 of the Military Penal Code. This solution failed to take into account two considerations:

With a maximum sentence of six months' imprisonment in peacetime, the range of penalties for dereliction of duty was obviously inadequate for the sentencing of grave breaches of the Conventions⁵ – such as those in question.

The offence of failure to comply with service regulations (dereliction of duty) can, as a matter of principle, be committed only by members of the Swiss army,⁶ an even more serious drawback.

¹ *BBI (Federal Gazette) 1918 V 337, AS (Official Compendium of Swiss Laws and Regulations) 43 359*; now *SR (Systematic Compendium of Swiss Federal Laws) 321.0*. [ed. note: abbreviations refer to the German titles].

² See F.H. Comtesse, *Das Schweizerische Militärstrafgesetz*, Schulthess Verlag, Zurich, 1946, Art. 108 N 3.

³ *SR 0.518.12, 0.518.23, 0.518.42, 0.518.51*; came into force for Switzerland on 21 October 1950.

⁴ Federal Law of 21 December 1950, in force since 1 July 1951 (*AS 1951 437 453, BBI 1949 II 137*).

⁵ See e.g. Art. 50 of the First and Art. 51 of the Second Geneva Conventions.

⁶ Peter Popp, *Kommentar zum Militärstrafgesetz*, Dike Verlag, St. Gallen, 1992, Art. 72 N 3.

Adaptation of Swiss legislation to the Convention for the Protection of Cultural Property⁷ provided an opportunity to remedy the shortcomings of the well-meaning but over-hasty amendments of 1950. The Military Penal Code⁸ revised under the Swiss Federal Act of 5 October 1967 came into force on 1 March 1968.

1.2 The Federal Act of 5 October 1967

Unlike the unsatisfactory solution of 1950, the Official Notice issued by the Swiss Federal Council this time clearly and unequivocally proclaimed the intention of lawmakers to adapt national legislation fully to the requirements of the international conventions, thus allowing for the prosecution of violations of the law of war wherever and by whomsoever they were committed. The parliament endorsed the Federal Council's intentions almost without discussion. It is thus evident that:

- ♦ Switzerland has deliberately⁹ departed from the principle that it will prosecute and punish violations of the Conventions only when Switzerland itself is in a state of, or under threat of, war.
- ♦ The scope of national criminal provisions has been extended to cover *all* armed conflicts;¹⁰ in particular, violations of international agreements are now punishable when the latter's scope of application goes beyond declared wars and other armed conflicts. This fact is significant in the case of non-international conflicts, such as the one in Rwanda in 1994.
- ♦ Civilians who violate international law in the event of armed conflict have been expressly made subject to the Military Penal Code (Article 2, para. 9); it clearly follows that Switzerland and more specifically the military judicial authorities, must prosecute violations of the law of war even if the offence was committed by foreigners (civilians or members of the armed forces) abroad.¹¹

⁷ *SR* 0.520.3; came into force for Switzerland on 15 August 1962.

⁸ *AS* 1968 212 222; *BBI* 1967 I 581.

⁹ *BBI* 1967 I 587.

¹⁰ *BBI* 1967 I 586; see also Article 3 common to the four Geneva Conventions and Article 19 of the Hague Convention for the Protection of Cultural Property.

¹¹ *BBI* 1967 I 588; every person who does not belong to the Swiss army, thus also a member of foreign armed forces, must be considered a civilian.

It should, however, be noted that this obligation is of a subsidiary nature; extradition to another State takes precedence over trial in Switzerland. The Federal Council nonetheless rightly points out in its Official Notice¹² that extradition is not admissible or possible in all cases. It should be added that a State basically interested in prosecution might in some circumstances, for instance for political reasons or because it has no satisfactorily functioning judicial system of its own, decide not to submit a request for extradition. At decisive moments Bosnia-Herzegovina, for example, was unable to make such a request because there was no national legal basis for doing so. As for Switzerland, it could not comply with a Rwandan request for extradition because Rwanda's legislation provides for the death penalty.

1.3 Application of the law

Under Article 109 of the Military Penal Code, anyone contravening the provisions of international agreements on warfare and on the protection of persons and property or violating other acknowledged laws and customs of war will be punished by imprisonment and in serious cases long-term incarceration.

While I do not wish to give a lecture here on criminal law, I should nonetheless like to point out that in applying the provisions of criminal law in force since 1968 the courts are breaking new ground, and that a whole series of sensitive legal issues may consequently have to be examined and decided when encountered in a specific case.

The question may arise, for instance, when and under what conditions an international conflict or conversely a civil war can be assumed to exist.

Article 109, para. 1, of the Military Penal Code is a blanket criminal provision; the Official Notice¹³ refers to a general clause. This raises the question of whether the rule with its general formulation, which also comprises customary international law,¹⁴ takes due account of the principle *nulla poena sine lege*, which demands a very precise definition of punishable conduct. The answer is yes, it does. Some imprecision is admissible in national law, according to legal opinion and practice, which merely rule out

¹² BBI 1967 I 589.

¹³ BBI 1967 I 587.

¹⁴ BBI 1967 I 586.

imprecise criminal law provisions. Moreover, criteria¹⁵ valid at national level cannot automatically be applied to international criminal proceedings. The criteria to be adopted should instead be sought in the general principles of international law, which have developed from customary law and continue to do so. A formalistic approach in this regard would render any progress in international criminal law virtually impossible.

It should be noted that the grave breaches of the law of war which are referred to in the Conventions generally also constitute punishable offences under domestic law. The specific description of these offences can be consulted by the court in order to interpret the relatively openly formulated provisions of the Conventions. A clear definition for the term “wilful killing” used in the Conventions¹⁶ is found, for instance, in Article 116 of the Military Penal Code; it may at most be asked whether the concept of killing in the Conventions also includes premeditated murder within the meaning of Article 115 of the Military Penal Code.¹⁷

Questions also arise in terms of criminal proceedings. What happens when a court reaches the conclusion that the killing of a civilian by a foreigner abroad has nothing to do with an act of war, but is quite simply a criminal offence? This conclusion means that military justice is no longer competent to try the case. If there is neither a request for extradition nor an international warrant of arrest, Switzerland may find itself entirely unable to bring a criminal to justice, because any justification for doing so under Article 4 ff. of the Swiss Penal Code is lacking.

2. Practice

2.1 Pandora’s box

While welcoming the fact that war criminals could not escape justice by fleeing the country, the author of an article in the *Neue Zürcher Zeitung* of 5 April 1994 commented that in future, looking beyond the former Yugoslavia, Swiss jurisdiction as set forth in a study by the Federal Office for Police Matters might prove to be a veritable Pandora’s box. He added

¹⁵ See *inter alia* Hans Schultz, *Strafrecht*, 4th edition, AT Vol. 1, p. 53 ff., Günther Stratenwerth, *Strafrecht*, AT I p. 75 ff., Walter Meier, *Die Bestimmungen über das Kriegsverbrechens- und Besatzungsstrafrecht*, Verlag Keller, Winterthur, 1964 (Diss. ZH), p. 28 ff.

¹⁶ As e.g. in Art. 50 of the First Geneva Convention.

¹⁷ Para. (a) of Article 3 common to the four Geneva Conventions bans “murder of all kinds”.

that for Swiss military justice to have jurisdiction over foreigners for criminal offences that had occurred abroad somehow seemed to be a very broad interpretation of a law that was created for situations internal to or involving the Swiss army.

What prompted the *Neue Zürcher Zeitung* to make such a comment? The main reason probably is that for almost 20 years the legislative amendment of 1967 — which was hardly discussed in parliament and went virtually unnoticed by the general public — remained a dead letter. It was not until 1994 that the first criminal proceeding for a presumed violation of the law of war was instituted in Switzerland. So it is hardly surprising that the newspaper's editor was not familiar with the intentions of the legislature. Nor was it surprising that by writing a few lines to him I was able to set him on the right track.

I could not, however, answer his query with regard to the competence of military justice. Neither the Federal Council's Official Notice nor other legal documents give any information as to why military justice and not the ordinary courts should prosecute violations of the law of war. The main emphasis at that time was obviously placed on ensuring that prosecution *was* possible, and not too much thought was given to *who* should prosecute. And because the Military Penal Code already contained elements that could be taken as a starting point, that is what was done. Further consideration will have to be given to the advantages and disadvantages of this solution.¹⁸

2.2 Proceedings

Proceedings are conducted according to the rules of the Code of Military Criminal Procedure. We thus fortunately have a modern procedural law that is standardized for the whole of Switzerland and meets the requirements of a State under the rule of law. I should like to draw attention here to the fact that defence counsel is compulsory and to the well-developed system of legal redress (appeal with full devolution effect, cassation procedure).

Under Swiss military criminal law,¹⁹ proceedings are instituted either by the competent commander or, if the offence was committed outside military

¹⁸ See section 4 below.

¹⁹ Art. 101 Military Criminal Procedure [hereinafter "MCP"] (SR 322.1) together with Art. 39, para. 1, of the Regulations for Military Criminal Procedure (SR 322.2).

service, by the Judge Advocate General. Competence for the case in point — presumed war crimes — rests with the latter. By the way, the Judge Advocate General is totally independent from political or military influences.

The text of Article 103, para. 1, of the Code of Military Criminal Procedure might give the impression that, contrary to ordinary criminal law, the principle that *ex officio* action must be taken when a crime is suspected does not apply in military justice. But this impression is erroneous. In accordance with the principle of legality, an order *must* be given for an investigation to be carried out if the Judge Advocate General hears of a criminal offence and there are sufficient objective grounds for suspicion.

Moreover, practical experience has shown that in certain cases preliminary clarification is indispensable before an actual criminal proceeding is instituted. There are, for example, denunciations without any factual basis, or cases which, for want of any conclusive evidence, are hopeless from the start, but also occasionally accusations of quite “ordinary” criminal offences unrelated to any violation of the law of war.

For the pre-trial investigation, the military investigating judge has two courses of action open to him, namely the *provisional gathering of evidence* (*vorläufige Beweisaufnahme*) and the *pre-trial hearing* (*Voruntersuchung*). The provisional gathering of evidence²⁰ serves to establish the facts discreetly and if necessary without the knowledge of the person concerned. This is warranted, for instance, when the evidence is as yet inconclusive or the suspicion itself is largely unsubstantiated. The pre-trial hearing²¹ is ordered when the suspicion is or has become firm enough for the suspect to be confronted outright with the evidence against him.

Previous experience has shown that even when there are strong grounds to suspect that a grave breach of the Conventions has been committed, the provisional gathering of evidence is — contrary to usual practice — more appropriate than the preliminary hearing, namely in the interest of the suspect. Presumed war criminals generally have no roots in Switzerland and thus may leave our country the moment they hear that an investigation is in progress. The provisional gathering of evidence enables (additional)

²⁰ Art. 102 MCP.

²¹ Article 103 MCP.

witnesses and other evidence to be comprehensively sought without time pressure and without having to confront the suspect with the already known grounds for suspicion; at this stage of the proceedings he is not yet the accused. An arrest can thus be deferred until sufficient evidence against him has been gathered. Conversely, if the initial suspicion cannot be substantiated, it may be decided to refrain from making an arrest.

If, however, a suspicion becomes common knowledge prematurely, for whatever reason, the arrest must be made immediately even if the evidence is still inadequate, so that the investigating authority cannot be reproached for having “simply” let a war criminal get away. In such a case there is obviously a great risk of having to keep someone in investigatory custody for quite a long time because of a suspicion which ultimately cannot be proved or even turns out to be completely unfounded. But it is thus also clear that during the first phase of the procedure the investigating judge has to tread very carefully, constantly considering whether or not he can take the risk of not, or not yet, arresting the suspect.

3. Particular problems in the clarification of war crimes

3.1 Evidence in general

Criminal prosecutions as customarily carried out in Switzerland for serious offences normally begin with the recording of facts by the police. Clues are secured, photographs taken, diagrams drawn, witnesses heard and all other appropriate measures adopted. The hunt for the perpetrator can then begin. The most modern methods of criminal investigation are used and international cooperation usually works extremely well. Hence one knows the crime and one is searching for the delinquent.

In the prosecution of presumed war criminals the starting point is completely different. In a nutshell, *the perpetrator is known or believed to be known, and the attempt is made to prove that he did indeed commit a crime*. In such cases most of the usual means of clarifying a crime are not available:

- ♦ It is impossible to secure clues on the spot because years have passed since the alleged crime took place and at that time — in the chaos of war — it was obviously out of the question to do so.
- ♦ There are no diagrams, photographs, videos or films available.

- ♦ Impoundment, a thorough search and similar measures are not possible as nothing is left to search for.
- ♦ Security reasons often preclude an inspection on the spot, and as a retrospective measure it may in any event be useless. However, the case of Rwanda has made us aware of the importance of a visit in order to gain a better understanding of the local context, the customs and traditions of the population through our own eyes and to check the credibility of witnesses' statements (would it be at all possible, from the specified location, to have observed an event that the witness claims to have seen?).

In addition, there are so-called *lists of war criminals* that have been and continue to be issued by public authorities and private institutions. These are generally lists of names of people accused — mostly in summary terms — of having violated provisions of the law of war. The lists certainly do not constitute evidence and, as mere indications, must on principle be approached with care.

Neither lists issued by the authorities nor those from non-governmental organizations can automatically be assumed to be objective. Furthermore, the facts given in such lists must first be checked against evidence obtained in accordance with the principles of a State where the rule of law prevails.

3.2 Witnesses

In the case of presumed war crimes, the presentation of evidence is thus confined almost entirely to the examination of witnesses. Even in normal circumstances, testimony by witnesses is considered a problematic form of evidence. The element of uncertainty with which we are familiar in our daily work is increased by other factors:

- ♦ The time lapse between the event and a hearing is usually great.
- ♦ Many witnesses are traumatized by the events and have difficulty in giving an objective account of what they experienced.
- ♦ Witnesses may be anxious and fear reprisals; they avoid giving any specific testimony by claiming to know nothing, or simply refuse to testify.
- ♦ Witnesses may be induced by feelings of revenge to make biased or even untrue statements.

- ♦ Witnesses can make mistakes, for instance by confusing one person with another.
- ♦ Witnesses can be misled (e.g. the perpetrator then had a beard and is now clean shaven, or vice versa).

Other reasons, too, make it harder to elucidate the facts. Accusations based on pure hearsay are not rare; once the person who is supposed to have said something is found, he or she either knows nothing, cannot or does not want to remember, or has merely heard about the whole affair from other people who in turn cannot be found.

Wartime events may have widely dispersed, or led to the death of witnesses of a grave breach of international law. It may consequently prove impossible to have a basically credible testimony confirmed by anyone. On the other hand, the suspect (who perhaps played only a passive role in the events) may be unable to name anyone who could exonerate him. In court it is then simply the defendant's word against that of the plaintiff.

The course and outcome of the first trial in Switzerland of a presumed war criminal (before Divisional Court No. 1 in Lausanne) clearly showed the difficulties involved in proceedings for which testimonies by witnesses constitute the sole evidence available. The testimonies proved to be contradictory, there were no reliable means of checking their credibility, the possibility that the accused had been confused with another person could not be ruled out beyond a shadow of a doubt, and to some extent direct witnesses of the events in question were lacking. As a result, the Public Prosecutor's Office was unable to establish the guilt of the accused with the certainty required by law.

The court — contrary to the otherwise strict confidentiality of the judgement process — let it be known that its decision had not been reached unanimously; this shows what a struggle it had to evaluate the witnesses' testimonies. As a lawyer I have to welcome the fact that the principles of justice in a State under the rule of law prevailed, i.e. that the accused was acquitted in accordance with the principle *in dubio pro reo*; yet the uneasy feeling that no amount of discussion can dispel in any trial based on circumstantial evidence, whatever its outcome, persists in this case as well.

But we also realized — and here I mean everyone who worked on the case, in particular I myself — that despite serious efforts certain, though by no means decisive, deficiencies and shortcomings had not been avoided. The

same can incidentally be said of the case against a presumed Rwandan war criminal that was recently transferred to the jurisdiction of the International Criminal Tribunal for Rwanda.

Lessons were drawn from this. First of all a handbook was developed for investigating judges. Besides an introduction into the (for us) alien worlds of the former Yugoslavia and Rwanda and advice, drawn from previous experience, on how to deal with suspects and witnesses, it also contains purely technical recommendations — ranging from vaccinations before an assignment and important contact addresses to replacement batteries for the laptop and the use of satellite telephones.

The course taken by the trial in Lausanne was also analyzed and the problem areas and possibilities for improvement, which the members of the court itself and my own observers there identified, were examined and evaluated. Matters such as the translation and interpretation service, techniques used in questioning, care of witnesses and security measures for their protection were discussed as well.

3.3 Protection of witnesses

For subjectively understandable and often objectively entirely realistic reasons, some witnesses of war crimes are afraid of endangering themselves or members of their families back home in their own countries by making statements to the investigating judge which subsequently become known to the suspect, and especially by testifying during a public hearing. The obligation to find out the truth may therefore render steps to ensure that witnesses can testify without risk imperative.

In terms of procedural law, this raises the question of how far an investigating judge or a court can or must go, on the basis of the present legal rules, to protect a witness. If a witness demands with adequate justification to remain anonymous, investigating judges and courts must at present have recourse to the means developed by the Swiss Federal Court and the Court of Human Rights in Strasbourg and also protect police officers engaged in covert criminal investigations.²² The personal details of

²² See Arthur Häfliger, *Die Europäische Menschenrechtskonvention und die Schweiz*, Verlag Stämpfli, Bern 1993, pp. 157 and 196, BGE (Swiss Federal Court decision) 118 Ia 457 ff., 118 Ia 461 ff.; Stefan Wehrenberg, *Schutz von Zeugen und Opfern im Militärstrafverfahren*, published by the Swiss army, and literature cited therein.

a witness can, for instance, be recorded by the investigating judge separately from his testimony and sealed for consultation by the court only. During the trial itself the witness can be optically and acoustically shielded from identification. It must however be realized that such measures have the simultaneous effect of restricting the defence rights of the accused. Orders for measures to protect witnesses may therefore be given only after careful consideration of all relevant circumstances. In particular, such measures may go no further than appears absolutely necessary in each specific case.

The importance of this issue justifies legislation to settle it, and an amendment to that effect of the Code of Military Criminal Procedure is currently being prepared. In the light of previous experience it can, however, be expected to take years before all administrative, executive and parliamentary hurdles have been overcome.

3.4 Additional problems

The use of an *interpreter* for hearings is usually unavoidable. This makes the work of the investigating judge and/or the court more difficult not only because it is more time-consuming, but also because the direct verbal contact with the witness or victim of war crimes that is particularly important here is impaired. The use of an interpreter also makes it harder to establish a certain confidence between the judicial authorities and the suspect. Particular care must be taken in choosing an interpreter; if he belongs to a political, religious or ethnic group other than that of the person to be questioned, this fact alone can make a hearing impossible or distort the outcome of it.

Tape recordings²³ are of particular significance for all hearings; for example, they alone enable the accuracy of a translation to be checked afterwards. Video recordings were initially avoided as far as possible, as they sometimes tended to inhibit witnesses. In hearings abroad they have, however, sometimes proved very useful if not absolutely essential; for instance, if a witness is no longer available for the actual trial, there is at least a document giving a completely authentic reproduction of the testimony.

Witnesses and victims of grave breaches of the law of war are mostly traumatized by the events they have experienced. The hearing is therefore

²³ Under Article 38, para. 4, MCP, they are admissible with the consent of all concerned and in practice also include video recordings, which were not in use when the law was enacted.

conducted by the military investigator in civilian clothing. He allows himself sufficient time, ensures as far as possible that it takes place in relaxed surroundings without an “official” atmosphere, avoids any outside disturbances, gives the witness the opportunity to gain confidence and have his say and may also allow people trusted by the witness²⁴ to be with him during the hearing and support him by their presence.

3.5 Legal assistance

Cooperation with the cantonal and the federal police authorities presents no problems at the national level.

Until 1994 international legal assistance, which cannot be claimed for military offences, was virtually unknown territory for the military judicial authorities. International cooperation is, however, indispensable to clarify presumed war crimes; it should be recalled that there are for instance refugees from the former Yugoslavia and from Rwanda in almost all European States. It is commendable that all States which were or are not involved in some way in the hostilities have unreservedly provided any legal assistance requested.

The same cannot be said of States directly or indirectly affected by the events. Experience there has shown that in certain cases requests for legal assistance were simply disregarded for political reasons, or could not be met, despite the best of intentions, because the legal system had been destroyed. But it must also be noted that Rwanda, for instance, not only authorized investigations on the spot by Swiss military judicial authorities but also actively supported them to the best of its abilities, and that States within the territory of the former Yugoslavia are also increasingly providing legal assistance. Depending on local circumstances and political conditions, the investigating judge must moreover take special care when requesting assistance in legal matters: relatives of witnesses or suspects living in the country to which the request is addressed must not be indirectly endangered by it (because of indiscretions, for instance, or for political reasons).

The search for witnesses requires cooperation by the military judicial authorities with all other appropriate Swiss authorities, including the

²⁴ Article 79, para. 1, MCP, excludes only the participation of other witnesses in the hearing.

Federal Office for Refugees and the Federal Office for Aliens. The unconditional support we receive from the Federal Department for Foreign Affairs, both from its headquarters in Bern and the relevant branch offices abroad, is of outstanding importance to our work.

For information that may help in finding witnesses, contact is also maintained with non-governmental organizations in Switzerland and abroad.

4. How is military justice organized?

As I have already indicated, military justice was not necessarily prepared for its “new” task but was at least able to acquire some initial experience during the enquiries conducted in 1993²⁵ among refugees.

Now each divisional court has at least one or two specialized investigating judges to deal with presumed war crimes. They are kept constantly informed of the latest developments and receive special training at centralized courses.

Thanks to these measures, the military justice authorities are now able to perform the task incumbent upon them. As their competence is not confined within the cantonal borders, they can work throughout Switzerland without any loss of time (e.g. in requesting intercantonal legal assistance). It has proved very effective to form teams consisting of two or more investigating judges, thus not only avoiding language problems within Switzerland itself but also sharing out the burden of work – an important consideration, among others, because all members of the military judiciary belong to Switzerland’s militia army. Teamwork also compensates for the fact that the military investigator, whose civilian career is often not primarily concerned with criminal law, has less experience than the professional civilian investigating judge. Lastly, it enables young investigating judges to learn their tricky task on the job alongside an older or more experienced colleague.

²⁵ At the request of the Federal Department of Foreign Affairs and in response to a request from the United Nations, law officers asked refugees from the former Yugoslavia about presumed war crimes.

5. Cooperation with the United Nations Tribunals

An urgent federal decree on cooperation with international courts of law set up to prosecute serious violations of international humanitarian law²⁶ created a legal basis for Switzerland to cooperate with them, and hence to pass on information and evidence obtained by Swiss prosecuting authorities during their own criminal investigations to the International Tribunals for the Former Yugoslavia and Rwanda. The existence of this legal basis not only facilitates the use of such material in pending or new proceedings, but also the handling of requests by the Tribunals to Switzerland for assistance in legal matters.

The urgent federal decree also gives the International Tribunals the possibility of demanding that proceedings pending in Switzerland for violations of international humanitarian law *be transferred to their jurisdiction*. The Swiss courts must comply with such a request if it relates to the same offences for which criminal proceedings were instituted in Switzerland, and if the offence falls within the jurisdiction of the International Tribunal in question. The Military Court of Cassation is responsible for checking these two points. A further check is made by the Federal Police Bureau when issuing the *transfer order*, which can itself be contested by means of an administrative complaint to the Swiss Federal Court.²⁷

Cooperation with the United Nations Tribunals has developed well and is particularly close and constructive with the International Tribunal for the former Yugoslavia in The Hague; initial misgivings about handing over information needed in specific cases by a national prosecuting authority have completely disappeared.

The International Tribunal for Rwanda in Arusha, Tanzania, is still being built up and is beset by serious administrative and organizational problems. For this reason, and because of the great distance involved, the mutual contacts, though friendly and without particular problems, are not yet especially productive.

²⁶ AS 1996 I 2.

²⁷ With its decision of 8 July 1996 the Military Court of Cassation complied with a request by the International Criminal Tribunal for Rwanda for transfer to its jurisdiction; the transfer was then authorized by the Swiss Federal Court.

Conclusion

I am occasionally asked why Switzerland takes any part at all in the prosecution of presumed war criminals. Some people feel that events abroad have nothing to do with us, that trials cost a lot and achieve little or nothing, that only individuals who are caught by chance can be prosecuted, that the small offenders are prosecuted whereas the big offenders get away scot free, and all kinds of other objections.

The easiest answer to such criticism is certainly to point out that the task of prosecuting presumed war criminals has been assigned by Swiss law to the military judicial authorities and must therefore be carried out. But a lot more is at stake, namely the performance of an obligation under international law and the credibility of our country as the depositary of the Geneva Conventions. We cannot afford to play a decisive part in bringing international conventions into being and bask in their reflected glory, only to shirk responsibility when things get serious.

Lastly, the creation of the two UN Tribunals combined with steadfast criminal prosecution at the national level may help to smooth the arduous way towards the establishment of a permanent international court of justice. The fact that certain States perform their obligations half-heartedly or not at all, that we can only follow up isolated cases, that we all too often lack the necessary evidence, must not deter us from doing everything we possibly can to help international humanitarian law prevail.

The repression of violations of international humanitarian law in Switzerland

Aspects of criminal procedure

Bernhard Sträuli

Assistant Lecturer, University of Geneva

Investigating Judge, Divisional Military Court No. 2

1. The competent authorities and applicable procedural law

In Swiss law the prosecution, investigation and trial of (both grave and minor) breaches of international humanitarian law¹ are generally the responsibility of the federal military judicial bodies.² Where the acts in question fall within the scope of Articles 108 to 114 of the Military Penal Code [*Code pénal militaire*, hereinafter referred to as the “CPM”]³ and even Articles 138 to 140 thereof,⁴ and where the perpetrators fall within the *ratione personae* scope of the law, as laid down in Articles 2 to 6 of the CPM, these acts come under the jurisdiction of the military courts.⁵ Articles 108 to 114 of the CPM cover not only individuals required to perform military service (in Switzerland), where such persons are on duty or in uniform off duty,⁶ but also “civilians who, during an armed conflict, are guilty of violations of international law”.⁷ In addition, and since in this respect criminal law is intended to ensure compliance with the rules governing the

¹ Principal sources: Hague Convention of 29 July 1899 (*Recueil systématique / Systematic Compendium of Swiss Laws*, hereinafter “RS”, 0.515.111); Hague Convention and Annexed Regulations of 18 October 1907 (RS 0.515.112); Geneva Protocol of 17 June 1925 (RS 0.515.105); the four Geneva Conventions of 12 August 1949 (RS 0.518.12, 0.518.23, 0.518.42 and 0.518.51); Protocols I and II of 8 June 1977 additional to the Geneva Conventions (RS 0.518.521 and RS 0.518.522); Hague Convention of 14 May 1954 (RS 0.520.3).

² Official Notice of the Federal Council of 18 October 1995 concerning the Federal Order relating to cooperation with the international tribunals for the prosecution of serious violations of international humanitarian law, Federal Gazette (*Feuille fédérale*, hereinafter “FF”) 1995-IV, p. 1077; Schouwey, *Crimes de guerre; un état des lieux du droit suisse*, RICPT, 1/1995, p. 49; see also ATF (Federal Court Decision) 123-II, pp. 180 and 181, ground 3, and p. 182, ground 4 (b).

³ Military Penal Code of 13 June 1927 (RS 321.0).

⁴ See Hauri, *Militärstrafgesetz, Kommentar*, Bern, 1983, introduction to Article 108, N 3; Popp, *Kommentar zum Militärstrafgesetz, Besonderer Teil*, St Gallen, 1992, introduction to Articles 108, N 4, and 109, N 42.

⁵ Article 218, para. 1, of the CPM: see Hauri, *op. cit.* (footnote 4), Article 218, N 3; Popp, *op. cit.* (footnote 4), introductory comments N 4.

⁶ Article 2, points 1 and 3, of the CPM; see Hauri, *ibid.*, introduction to Article 2, N 4.

⁷ Article 2, point 9, of the CPM.

conduct of hostilities, Swiss military jurisdiction extends to all persons, in Switzerland or abroad⁸ and irrespective of their nationality, who “*are responsible for the conduct of hostilities in the broadest sense of the word*”, that is to say “*primarily military personnel [...], but also State employees entrusted with duties relating to the conduct of hostilities [...], the administration of occupied territories and the running of internee and prisoner-of-war camps, and the police, the judiciary, etc.*”.⁹

The rules of procedure applicable to the prosecution, investigation and trial of breaches of Articles 108 to 114 of the CPM by the Swiss military courts are also military in nature. They are derived from the Military Penal Procedure [*Procédure pénale militaire*, hereinafter referred to as the “PPM”],¹⁰ which is itself supplemented by the Order on military judicial organization [*Ordonnance concernant la justice pénale militaire*, hereinafter referred to as the “OJPM”].¹¹ Far from establishing special courts and a special procedure, these provisions simply charge specialist authorities with ruling on offences specifically connected with military life, in accordance with procedural requirements which differ little from those binding upon ordinary courts, particularly with respect to judicial guarantees.

Though apparently theoretical at first glance, a situation could arise whereby a court other than a military court is (also) called upon to deal with a breach of Articles 108 to 114 of the CPM. In the event that such a breach were committed jointly with an ordinary offence (i.e., covered by the ordinary Penal Code [*Code pénal suisse*, hereinafter referred to as the “CP”]¹² or other federal legislation),¹³ which falls within the scope of the ordinary courts,¹⁴ the Federal Council could instruct the latter to rule on all the charges made.¹⁵ Therefore, the applicable procedure would be that

⁸ Article 9, point 1, of the CPM; see Hauri, *op. cit.* (footnote 4), introduction to Article 108, N 5; Popp, *op. cit.* (footnote 4), introduction to Article 108, N 5.

⁹ Popp, *ibid.*, introduction to Article 108, N 6. The following apparently favour an even broader scope: Official Notice of the Federal Council of 6 March 1967 concerning a partial revision of the CPM, *FF* 1967-I, p. 613 (“Consequently, Article 2 must be supplemented by a provision under which ‘persons guilty of violations of international law during an armed conflict [Articles 108 to 114] are also subject to military law.’”); Wehrenberg (footnote 83), pp. 4 and 5; see also Schindler, “Fremde Kriegsverbrecher vor Schweizer Militärgerichten? Konsequenz einer völkerrechtlichen Verpflichtung”, *Neue Zürcher Zeitung*, 86/14 April 1994, p. 24; Schouwey, *op. cit.* (footnote 2), p. 49.

¹⁰ Military penal procedure of 23 March 1979 (*RS* 322.1).

¹¹ Order on military judicial organization of 24 October 1979 (*RS* 322.2).

¹² Swiss Penal Code of 21 December 1937 (*RS* 311.0).

¹³ See Article 333 of the Swiss Penal Code.

¹⁴ Articles 340 to 344 of the Swiss Penal Code.

¹⁵ Article 221 of the CPM; see Official Notice of the Federal Council of 18 October 1995 (footnote 2), p. 1077.

provided for in the Federal Law on penal procedure¹⁶ or one of the 26 cantonal codes of criminal procedure.

As an extension to the foregoing, it should also be noted that persons who escape the CPM (in particular Articles 108 to 114),¹⁷ because they do not fall within the personal scope thereof, remain subject to ordinary criminal law¹⁸ and to the jurisdiction of the ordinary courts. That probably explains why Article 75 bis, para. 2, point 1, of the CP, which stipulates that certain crimes are not time-barred, also contains¹⁹ a specific reference to the instruments of international humanitarian law. Charges of homicide, acts of torture and various forms of looting made, for example, against a foreign national in the conduct of hostilities will, where appropriate, fall within the scope of Articles 111 ff., 122 ff. and 137 ff. of the CP,²⁰ provided that there is a sufficient nexus in international law.²¹

Where they call for the application of non-military rules of procedure, however, the latter two cases referred to above remain marginal. This document will therefore focus on a few aspects of Swiss military criminal procedure, which is the principal procedure involved here.

2. Military judicial bodies

The head of the Swiss military judiciary is the Judge Advocate General, who holds the rank of brigadier²² and administers military justice under the supervision of the Federal Military Department. He also has supervisory duties in relation to the work of the judges advocate and investigating judges.²³ He is a professional judge, unlike other officers, non-commissioned officers and rank-and-file service personnel – who are, of necessity, lawyers by training or profession²⁴ – integrated into the military administration of justice (presiding judges, judges advocate, investigating

¹⁶ Federal Law on penal procedure of 15 June 1934 (*RS* 312.0).

¹⁷ Article 2, point 9, of the CPM cited above.

¹⁸ Article 7 of the CPM.

¹⁹ See Article 56 bis, para. 2, point 1, of the CPM.

²⁰ Popp, *op. cit.* (footnote 4), introduction to Article 108, N 6.

²¹ Articles 3 to 7 of the Swiss Penal Code, and in particular Article 6 bis.

²² Article 17, para. 2, of the PPM.

²³ Articles 16 of the PPM and 20 of the OJPM.

²⁴ Article 2, paras 1 and 2, of the PPM.

judges and registrars) and simply fulfilling their duty to serve²⁵ by dealing with criminal cases subject to the jurisdiction of the military courts.

The preliminary investigation in such cases is conducted by an investigating judge, who generally holds the rank of captain, is attached to a divisional military court (*tribunal de division*)²⁶ and enjoys an independence from the military hierarchy safeguarded by law.²⁷ The preliminary investigation can take two distinct forms: an investigation to produce further evidence is ordered in particular where the perpetrator of an offence is unknown and the case proves to be confused or complicated,²⁸ and an ordinary investigation is ordered where the person identified is suspected of a criminal offence that cannot be dealt with by means of disciplinary procedures.²⁹ As the investigating judge is required to gather all evidence available – whether favourable or unfavourable to the suspect – he proceeds as provided for in law (questioning of the suspect, examination of the witnesses, expert reports, inspections of the scene of the offence, etc.) and has recourse, where appropriate, to the coercive measures available to him (pre-trial detention, entry and search, seizure, monitoring of postal correspondence and telecommunications, etc.). He is empowered to seek the intervention of the cantonal criminal police³⁰ and the military police. A complaint may be lodged with the Judge Advocate General regarding the decisions, actions and omissions of the investigating judge.³¹ However, with respect to pre-trial detention, the presiding judge of the divisional military court is responsible for examining the complaint.³²

Each divisional military court³³ also has a judge advocate, who generally holds the rank of major, representing the prosecution. At the end of the ordinary investigation he takes cognizance of the file prepared by the investigating judge and may then order further investigations,³⁴ issue a

²⁵ First sentence of Article 18, para. 1, of the Constitution, the provision on which is based the system of militia forces practised in Switzerland.

²⁶ See Article 106, para. 1, of the PPM.

²⁷ Article 107 of the PPM.

²⁸ Article 102, para. 1a, of the PPM.

²⁹ Article 103, para. 1, of the PPM.

³⁰ Second sentence of Article 62 of the PPM.

³¹ Articles 166, para. 1, and 167 (b) of the PPM.

³² Articles 166, para. 1, and 167 (a) of the PPM.

³³ See Articles 8, para. 3, and 12, para. 3, of the PPM, and Article 19 of the OJPM.

³⁴ Article 113 of the PPM.

discharge order³⁵ or an order for conviction,³⁶ or draw up a formal indictment.³⁷ The judge advocate argues the case for the prosecution before the trial courts.³⁸

The twelve³⁹ divisional military courts function as trial courts of first instance. Each court is composed of a presiding judge holding the rank of colonel or lieutenant-colonel, two further judges who are officers and two judges who are non-commissioned officers or rank-and-file service personnel.⁴⁰ The latter four judges are not integrated into the military judicial system and in general have no legal training; on the other hand, they bring “experience of the forces” to the court. Proceedings before the divisional military courts, which are oral, public and adversarial in nature, have no significant distinctive features, except that the accused must, of necessity, be represented by a defence counsel.⁴¹ Each court freely assesses the evidence in accordance with the view it reaches in the course of the proceedings.⁴² An order may be made for proceedings to be conducted *in camera* in the interest of national defence, State security, public policy, public morality or in the interest of a party or another person.⁴³ Even where the judges’ deliberations and voting are secret,⁴⁴ the judgement is always delivered in open court.⁴⁵

Appeals against adversarial judgements of the divisional military courts may be made to the military courts of appeal.⁴⁶ There are three such trial courts

³⁵ Article 116, para. 1, of the PPM.

³⁶ Article 114, para. 2, of the PPM.

³⁷ Article 114, para. 1, of the PPM.

³⁸ Articles 8, para. 3, and 12, para. 3, of the PPM.

³⁹ Article 13, para. 1, of the PPM.

With respect to the designation of the competent court, see Articles 26 to 32 of the PPM, Articles 14 and 26 of the OJPM and Annex I to the OJPM. In the case of violations of international humanitarian law committed abroad, the competent divisional military court will be that in whose judicial district the perpetrator was domiciled or arrested (Article 29, paras 1 and 2, of the PPM); see Schouwey, *op. cit.* (footnote 2), p. 49.

⁴⁰ Article 8, paras 1 and 2, of the PPM.

⁴¹ Article 127, para. 1, of the PPM.

⁴² Article 146, para. 1, of the PPM.

⁴³ Article 48, para. 2, of the PPM.

⁴⁴ Article 48, para. 1, of the PPM.

⁴⁵ Article 48, para. 3, of the PPM.

⁴⁶ Article 172, para. 1, of the PPM; with regard to the question as a whole, see Bollinger, *Die Appellation im Militärstrafprozess*, thesis, Zurich, 1989.

of second instance in Switzerland (one per linguistic region),⁴⁷ and they have the same composition as the divisional military courts.⁴⁸ They freely review the cases before them both in fact and in law,⁴⁹ in accordance with a procedure which is almost identical to that of the courts of first instance.⁵⁰ The judgement of a divisional military court may not be amended to the detriment of the accused on the sole basis of the latter's appeal.⁵¹

The Military Court of Cassation, which is charged with ensuring uniform application of substantive and procedural military law throughout the territory of the Confederation, deals mainly with appeals on points of law against inquisitorial judgements of the divisional military courts and judgements of the military courts of appeal.⁵² The jurisdiction of the Court, which is composed of a presiding judge with the rank of colonel, two officers and two non-commissioned officers or rank-and-file service personnel,⁵³ all of them lawyers by training,⁵⁴ is restricted to questions of law, including the arbitrary assessment of the facts.⁵⁵ The Court gives a ruling at the end of written proceedings.⁵⁶ Once again, where the accused alone wins the case he is protected by the prohibition on *reformatio in pejus*.⁵⁷

When conducting hearings the investigating judges and the courts are each assisted by a registrar,⁵⁸ who records the proceedings and, under the supervision of the presiding judge, draws up the judgements.

⁴⁷ Article 17, para. 1, of the OJPM.

⁴⁸ Article 12, paras 1 and 2, of the PPM.

⁴⁹ Article 182, para. 1, of the PPM.

⁵⁰ See Article 181, paras 2 and 3, of the PPM.

⁵¹ Article 182, para. 2, of the PPM.

⁵² Article 184, paras 1 (a) and (c), of the PPM; with regard to the question as a whole, see Hauser, "Die Kassationsbeschwerde im Militärstrafprozess", in *Strafrecht und Öffentlichkeit, Festschrift für Jörg Rebberg*, Andreas Donatsch/Nikolaus Schmid (publishers), Zurich, 1996, pp. 151-170.

⁵³ Article 15, paras 1 and 2, of the PPM.

⁵⁴ First sentence of Article 14, para. 2, of the PPM.

⁵⁵ Article 185, para. 1, of the PPM.

⁵⁶ Article 189, para. 1, of the PPM.

⁵⁷ Article 192, para. 2, of the PPM.

⁵⁸ Articles 8, para. 1; 12, para. 1; 15, para. 1 and second sentence of Article 106, para. 1, of the PPM.

3. The institution of criminal proceedings

With the exception of offences such as defamation,⁵⁹ all breaches of the CPM are prosecuted automatically, that is to say without the injured party having to lodge a complaint in the technical sense in order to enable the institution of criminal proceedings. Of course, that does not prevent anyone who has suffered injury as a result of an alleged offence or any third party from bringing facts to the attention of (i.e., respectively, lodging a complaint — in the non-technical sense — with, or laying an information before) the competent authority in order to institute proceedings.

Prosecution is triggered by means of an order to conduct an investigation to produce further evidence or an ordinary investigation, which leads to the case being brought before an investigating judge.⁶⁰ With respect to offences committed on duty (in Swiss forces), the order is issued by the commander of the military formation in question;⁶¹ in all other cases, in particular those relating to violations of international humanitarian law committed in the recent past in the former Yugoslavia and Rwanda, the order is issued by the Judge Advocate General.⁶² Where the latter declines to issue such an order, an appeal may be submitted to the head of the Federal Military Department (Minister of Defence), who will give a final ruling.⁶³

4. Mandatory prosecution

Since the procedural regulations (the PPM and the OJPM) contain no provision which permits the authority responsible for ordering an investigation not to institute criminal proceedings or the judge advocate to terminate such proceedings on the basis of the discretionary principle, it is generally recognized that military criminal procedure is governed by the principle of mandatory prosecution.⁶⁴

⁵⁹ Articles 145 to 148 (b) of the CPM; see also Articles 91 to 93 of the OJPM.

⁶⁰ Article 105, paras 1 and 2, of the PPM; see also Article 41 of the OJPM.

⁶¹ For details, see Articles 101, para. 1, of the PPM and 38 of the OJPM.

⁶² Article 101, para. 3, of the PPM *cum* Article 39, para. 1, of the OJPM; see Schouwey, *op. cit.* (footnote 2), p. 49.

⁶³ Article 39, para. 2, of the OJPM.

⁶⁴ See Haefliger, *Kommentar zur Militärstrafgerichtsordnung*, Bern, 1959, p. 127 (concerning Article 109 of the Federal Law on judicial organization and penal procedure for the federal armed forces of 28 June 1889 [*Loi fédérale sur l'organisation judiciaire et la procédure pénale pour l'armée fédérale* - OJPM] repealed by the PPM).

The sole exception to the above rule arises out of substantive law. Under Article 47 (a), para. 1, of the CPM, the judge advocate may in fact decline to refer the perpetrator of an offence to a trial court where the person concerned has been directly affected by the consequences of his actions to the extent that punishment would be inappropriate. Moreover, where the investigation to produce further evidence reveals that the conditions necessary for the application of Article 47 (a), para. 1, have been fulfilled,⁶⁵ the practice is to allow the competent authority not to order the ordinary investigation and thus to abandon proceedings.

5. The rights of the injured party and the victim in criminal proceedings

An injured party may bring before the military courts a civil suit against the accused for an offence punishable under the CPM; within those limits the injured party exercises the rights attributed to a party to the proceedings.⁶⁶ When the ordinary investigation is opened the injured party may set out his civil claims (damages, compensation for non-pecuniary injury, etc.), request that the investigating judge take the investigatory measures required to establish his rights and inspect the file insofar as is necessary to establish those rights.⁶⁷

The injured party, who must be informed of the completion of the ordinary investigation,⁶⁸ may appeal to the divisional military court for a reversal of the judge advocate's decision in the event that the accused is discharged.⁶⁹

Where the accused is convicted,⁷⁰ the injured party has an automatic right to have the trial court rule on his civil claims.⁷¹ He has the same right as the accused and the judge advocate to apply for a review of the judgement on merits of the divisional military court and the military court of appeal, but

⁶⁵ See Article 104, para. 2 (c), of the PPM.

⁶⁶ Article 163, para. 1, of the PPM.

⁶⁷ Article 164, para. 1, of the PPM.

⁶⁸ Second sentence of Article 112 of the PPM.

⁶⁹ Article 118, para. 1, of the PPM.

⁷⁰ Article 165 of the PPM.

⁷¹ For details, in particular those relating to the options available to the court to refer the injured party to a civil court, see Article 164, paras 4 and 5, of the PPM; see also *ATF* 122-IV, pp. 40-44, ground 2 (concerning Article 9 of the LAVI).

only if the decision made during the criminal proceedings is likely to affect the assessment of his civil claims.⁷²

A victim in the technical sense of Article 2, para. 1, of the Federal Law on aid for victims of offences [*Loi fédérale sur l'aide aux victimes d'infractions*, hereinafter the "LAVI"],⁷³ that is to say a "person who has suffered, as a result of an offence, direct injury to his physical, sexual or mental integrity [...] irrespective of whether or not the perpetrator has been identified or the conduct of the latter was to blame",⁷⁴ has the same rights as the (straightforward) injured party, since any victim according to the above definition is also an injured party.⁷⁵ However, in relation to the latter the victim enjoys the privilege of being able to challenge a refusal on the part of the competent authority to open an ordinary investigation at the end of an investigation to produce further evidence,⁷⁶ and thus to pave the way for an appeal to the divisional military court against any subsequent order to discharge the accused issued by the judge advocate.⁷⁷

Furthermore, the victim enjoys certain procedural safeguards specifically linked to his status, namely the protection of privacy (preservation of anonymity, proceedings *in camera*, restrictions on confrontation with the perpetrator of the offence),⁷⁸ the involvement of a victim support centre,⁷⁹ the presence of a trustworthy person during questioning, the right to refuse to make a statement on matters of an intimate nature,⁸⁰ information as to his rights,⁸¹ and the composition of the trial court⁸².

⁷² Articles 173, para. 1 (a), and 186, para. 1 (a), of the PPM.

⁷³ Federal Law on aid for victims of offences of 4 October 1991 (*RS* 312.5); see Gomm/Stein/Zehntner, *Kommentar zum Opferhilfegesetz*, Bern, 1995.

⁷⁴ For the sake of convenience, persons whom the law (Article 2, para. 2, of the LAVI) places on the same footing as victims within the meaning of Article 2, para. 1, of the LAVI are disregarded here.

⁷⁵ See, for example, Article 118, para. 2, of the PPM concerning the victim's right to appeal against a discharge order issued by the judge advocate.

⁷⁶ See Article 42 (a) of the OJPM.

⁷⁷ See Article 8, para. 1 (b), of the LAVI.

⁷⁸ Article 5 of the LAVI *cum* Article 84 (a) of the PPM.

⁷⁹ Article 6 of the LAVI *cum* Article 84 (a) of the PPM.

⁸⁰ Article 7 of the LAVI *cum* Article 84 (a) of the PPM.

⁸¹ Article 8, para. 2, of the LAVI *cum* Article 84 (a) of the PPM.

⁸² Article 10 of the LAVI *cum* Article 84 (a) of the PPM.

6. Witness protection

The problem of witness protection is especially acute when it comes to the prosecution, investigation and trial of violations of international humanitarian law. In that respect it must be acknowledged that the PPM, like most other federal and cantonal laws relating to criminal procedure, has a few weaknesses. A legislative review aimed at remedying the shortcomings of the *lex lata* is currently in preparation. This document by no means claims to deal with the matter exhaustively⁸³ and simply sets out the options provided by existing law.

At the stage of the investigation to produce further evidence or the ordinary investigation, the investigating judge has the right to restrict the adversarial nature of the investigation — in particular the questioning of witnesses — and access to the file, if these could compromise the aim or outcome of his investigations.⁸⁴ The law, duly interpreted in accordance with the rule *a maiore ad minus* and the principle of proportionality, enables the investigating judge to preserve, for example, the anonymity of witnesses being heard by withholding their identities from the parties.⁸⁵

Matters become complicated at the end of the ordinary investigation, since at that stage the law grants the defence, at least formally, a right of completely unrestricted access to the file.⁸⁶ Within the limits laid down by federal⁸⁷ and European case-law⁸⁸ certain exemptions from the strict letter of the law, such as keeping particularly sensitive facts secret until the trial — and even beyond, are as essential for the administration of justice as they are permissible from the angle of Article 4 of the Constitution⁸⁹ and Article 6 of the European Convention on Human Rights⁹⁰.

⁸³ With regard to the question as a whole, see the very detailed and well-documented study by Wehrenberg, *Schutz von Zeugen und Opfern im Militärstrafverfahren*, 1996.

⁸⁴ See the second sentence of Article 79, para. 1, Article 108, para. 3, and the second sentence of Article 110, para. 1, of the PPM, and Article 43, para. 3, of the OJPM.

⁸⁵ See the decision of the Judge Advocate General of 12 May 1997 in case N.

⁸⁶ First sentence of Article 110, para. 3, of the PPM.

⁸⁷ *ATF* 121-I, pp. 306 ff., 118-Ia, pp. 462 ff., 118-Ia, pp. 457 ff., 118-Ia, pp. 327 ff., 116-Ia, pp. 85 ff., 112-Ia, pp. 18 ff., etc.

⁸⁸ With further references, see in particular the judgements of the European Court of Human Rights of 26 March 1996 in the case of *Doorson versus the Netherlands* (*Judgements and Decisions* 1996-II, pp. 446) and of 15 June 1992 in the case of *Lüdi versus Switzerland* (Series A, No. 238).

⁸⁹ Federal Constitution of the Swiss Confederation of 29 May 1874 (*RS* 101).

⁹⁰ European Convention on Human Rights of 4 November 1950 (*RS* 0.101).

7. Time-bar on the prosecution of violations of international humanitarian law

In Swiss law the question of statutory limitation, in particular that of the possible non-applicability of statutory limitation to violations of international humanitarian law, is dealt with as follows by substantive law. Under the terms of Article 56 (a), para. 2, point 1, of the CPM and Article 75 (a), para. 2, point 1, of the CP, which have exactly the same wording, the following offences are not time-barred: “serious crimes covered by the Geneva Conventions of 12 August 1949⁹¹ and other international treaties relative to the protection of war victims to which Switzerland is party, where the breach in question is particularly serious on account of the conditions in which it was committed”.

Therefore, exemption from statutory limitation of grave breaches of international law committed during an armed conflict is not automatic. The above provision is restricted to “cases which appear to be particularly serious on account of the manner in which those crimes were committed, that is to say to cases which go substantially beyond the usual events of war in terms of atrocity”.⁹²

Where prosecution would be time-barred under the ordinary regime,⁹³ the judge may reduce the penalty at his discretion.⁹⁴

⁹¹ In the order of the four Conventions, see respectively Articles 50, 51, 130 and 147 thereof.

⁹² Supplementary Official Notice of the Federal Council of 6 July 1977 concerning the draft federal law on mutual international assistance in criminal matters, *FF* 1977-II, pp. 1225.

⁹³ Articles 51 to 53 of the CPM and Articles 70 to 72 of the CP.

⁹⁴ Article 56 bis, para. 2, of the CPM and Article 75 bis, para. 2, of the CP.

The repression of violations of international humanitarian law under German domestic law

Sascha Rolf Lüder *under the supervision of Horst Fischer*
Institute for International Law of Peace and Armed Conflict,
Ruhr University of Bochum, Germany

Historical development

Since the end of the Second World War, numerous armed conflicts have been waged across the planet. With the fall of the Iron Curtain, these conflicts have been fought more and more frequently within national borders and have become increasingly cruel. The conflict in the former Yugoslavia is only one among many.

All armed conflicts, whatever their nature, are characterized by violations of international humanitarian law, and the rules of this law therefore need to be enforced. One way of doing this is by adopting criminal and disciplinary measures.

For a long time, the work of the International Military Tribunals of Nuremberg and Tokyo seemed to herald the development of an international legal order. But after the judges had sentenced the criminals of the Second World War, international criminal law began to lose ground. When investigating and prosecuting military offences committed in armed conflicts, States reverted to applying their national rules. Although the United Nations International Law Commission has prepared several draft documents with a view to establishing an international legal order, neither an international criminal court nor an international criminal code has yet been agreed upon by the community of States.

It was not until the UN Security Council set up the International Criminal Tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively, that the discussion about individual responsibility for violations of international humanitarian law received a new impetus.¹

¹ On the development of an international legal order after the Second World War, see M. Cherif Bassiouni (ed.), *Commentaries on the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993; Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Humanitarian Law*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1996; Gerd Hankel and Gerhard Stuby (eds), *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberg Prozessen*, Hamburger Edition, Hamburg, 1995.

Nowadays, both national and international courts are responsible for the prosecution of violations of humanitarian law. But how do States punish such violations at the level of domestic law?²

Answers to the questionnaire

1. National legislation to repress violations of international humanitarian law

1.1 Substantive criminal law: What is the current state of criminal law relating to the repression of violations of international humanitarian law? Specifically:

1.1.1 *As regards grave breaches of the 1949 Geneva Conventions (Articles 49, 50, 129 and 149, respectively, of the four Conventions)*

The Federal Republic of Germany has been a State party to the 1949 Geneva Conventions since 1955.

Serious violations of international humanitarian law are covered by the German Penal Code, which includes provisions concerning offences against life (Articles 211 ff.), physical integrity and health (Articles 223 ff.), individual liberty (Articles 234 ff.), public and private property (Articles 242 ff., 249 ff. for theft and 303 ff. for destruction), offences constituting a public danger (Articles 306 ff.) and those committed in the performance of official duties (Articles 331 ff.).

Rules concerning grave breaches of the Geneva Conventions are thus generally to be found in the Penal Code. As for the injury and killing of civilians and the seizure or destruction of property during armed conflicts, these acts contravene numerous criminal provisions. All crimes involving death are covered by Articles 211 ff. of the Penal Code, including those whose victims are protected persons. If the above-mentioned acts cause non-fatal personal injury, they are classified as offences against physical

² See Jörg Bettendorf, “New Yorker Konferenz über die Rezeption von Entscheidungen Internationaler Tribunale durch nationale Gerichte”, 29 *Zeitschrift für Rechtspolitik*, 1996, pp. 150 ff.; Karin Oellers-Frahm, “Zusammenarbeit der Staaten mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien nach Art. 29 des Statuts — Durchführungsregelung Italiens”, 7 *Humanitäres Völkerrecht — Informationsschriften*, 1994, pp. 60 ff.; especially compare with Horst Fischer, *Investigation and Prosecution of Violations of the Law of Armed Conflict: German National Report for the XIVth International Congress of the International Society for Military Law and the Law of War*, 1997.

integrity (Articles 223 ff.). The relevant provisions apply whether the effects of the violations are physical or psychological in nature.

Compelling prisoners of war and civilians to serve in the armed forces of the adversary is an offence under Article 240 of the Penal Code. Deportation, illegal transfer and confinement of civilians are punishable under Article 239. The same is true of undue delay in the repatriation of prisoners of war or civilians. For hostage-taking, which is prohibited under international humanitarian law, Articles 239 (b) applies.

The destruction of private and public property and its unjust expropriation, neither of which is permissible under international humanitarian law, are punishable under Articles 242 ff., 249 and 303 of the Penal Code. For the destruction of property, Articles 306 ff. also apply.

Certain acts may be justified if committed as part of a military operation. If they are permissible under international humanitarian law, they cannot be punished under domestic criminal law. In this regard, humanitarian law plays a key role in determining whether or not an act is considered criminal under the German Penal Code.³

Apart from criminal provisions for the repression of violations of international humanitarian law, mention should be made of Article 125 of the Administrative Offences Act, which punishes by fine any misuse of the emblem of the red cross or of the heraldic emblem of Switzerland. An offence is also committed under the Act whenever the emblem of the red cross is used without permission. Lastly, misuse of distinctive emblems or names which, according to the rules of international law, are equal in status to the emblem of the red cross may be prosecuted as an administrative offence under Article 125, para. 4, of the Act.

1.1.2 As regards grave breaches of 1977 Protocol I additional to the Geneva Conventions (Articles 11, 85 and 86)

Germany has been a party to 1977 Additional Protocol I since 1990.

The German legislature did not, either during the ratification process or subsequently, adopt new rules of domestic criminal law regarding the war

³ See Dieter Walz, "Der völkerrechtswidrige Befehl – Dogmatische Fragen des Zusammenwirkens von humanitärem Völkerrecht, nationalem Strafrecht und soldatischen Dienstrecht", 3 *Humanitäres Völkerrecht – Informationsschriften*, 1990, pp. 191 ff.; Heinrich Amadeus Wolff, "Gewaltmassnahmen der Vereinten Nationen und die Grenzen der strafrechtlichen Rechtfertigung der beteiligten deutschen Soldaten", 38 *Neue Zeitschrift für Wehrrecht*, 1996, pp. 9 ff.

crimes explicitly mentioned in Articles 11, 85 and 86 of Additional Protocol I. It is the government's view that no new legislation is needed, as these crimes are covered by existing rules of the Penal Code.

1.1.3 As regards other violations of these treaties which do not qualify as grave breaches

The relevant provisions of the Penal Code do not refer to the definition of "grave breaches" provided in the Geneva Conventions and Additional Protocol I. Theoretically, every breach of the Geneva Conventions or of Additional Protocol I could be considered an offence under the above-mentioned provisions.

1.1.4 As regards violations of international humanitarian law applicable in non-international armed conflicts (Article 3 common to the four Geneva Conventions and Additional Protocol II)

The relevant provisions of the Penal Code refer neither to the definition of "grave breaches" nor to that of an "armed conflict" given in the Geneva Conventions and in Additional Protocol I. Theoretically, any breach of the Geneva Conventions or of their Additional Protocols in an armed conflict, whether international or non-international, could be considered an offence under these provisions. In this respect, the definition of a "non-international armed conflict" given in Article 1 of Additional Protocol II is of no relevance with respect to prosecution.

It is never easy, however, to deal with breaches of international humanitarian law and the justifications which may be put forward for them. The rules of international law concerning crimes committed in non-international armed conflicts are somewhat unclear and are still being developed. It is therefore much more difficult to prove that a violation has been committed in a non-international than in an international armed conflict, whether or not a justification was given for the act.

Furthermore, domestic criminal law may provide for the justification of certain acts and thus constitute an obstacle to punishment. It is nevertheless clear that certain acts, such as those mentioned in Article 3 common to the four Geneva Conventions, can never be justified. In the

Djajic case, the Bavarian Supreme Court applied the law of international armed conflicts.⁴

1.1.5 As regards violations of the provisions of the other treaties governing the law of armed conflict: the Hague Conventions of 1899 and 1907, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the weapons conventions of 1972, 1980 and 1993

Germany is party to the Hague Conventions of 1899 and 1907, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1972, 1980 and 1993 weapons conventions. However, the Penal Code contains no explicit provisions on the repression of violations of these conventions. Thus, the general rules apply.

1.2 Legislative approach: How are the violations incorporated in national legislation?

1.2.1 Are they part of the ordinary Penal Code, the Military Penal Code, both, or a law specifically designed for this purpose?

The position of the German government is that the Penal Code provides for the punishment of all grave breaches mentioned in the Geneva Conventions. These instruments do not specify which procedural approach should be taken to comply with the general obligation to make grave breaches punishable at the domestic level. It is thus up to the States party to the Conventions to comply with this obligation as they see fit.

1.2.2 What wording is used in the relevant national law? (Has the wording been drawn from the Conventions or have the acts in question been reworded? Is there a general clause referring to international law?)

Germany does not follow the system that consists in adopting specific domestic criminal legislation to describe international crimes in detail. The rules of its Penal Code are worded broadly enough to cover acts committed in wartime.

⁴ With regard to the general problem, see Christopher Greenwood, "International Humanitarian Law and the Tadic Case", 7 *European Journal on International Law*, 1996, pp. 265 ff.; Wolff Heitschel v. Heinegg, "Zur Zulässigkeit der Errichtung des Jugoslawien: Strafgerichtshofes durch Resolution 827", 1993, 9 *Humanitäres Völkerrecht – Informationsschriften*, 1996, pp. 75 ff.

According to Article 25 of the Constitution, some of the general rules of international law are part of German domestic law. This article furthermore contains specific references to customary international law.⁵ However, in keeping with the principle of legality stated in Article 103, para. 2, of the Constitution and in Article 1 of the Penal Code, no rule pertaining to individual criminal responsibility under international law may be derived from Article 25.

1.3 Jurisdiction: Does national legislation recognize extraterritorial jurisdiction for some or all of the violations? Is this jurisdiction universal (and if so, is it conditional upon the presence of the accused on the national territory), or is it based on the nationality principle, the passive personality principle or the protective or security principle (which relates to matters affecting State security)?

All jurisdiction clauses relating to international application are contained in Articles 3 to 7 of the Penal Code. Reference is made in particular to the nationality principle (Article 3), the passive personality principle (Article 7) and the protective principle regarding State security (Article 5).⁶

Article 6, para. 9, of the Penal Code does not explicitly mention jurisdiction for war crimes. However, humanitarian law is based on international treaties within the meaning of this provision and jurisdiction can therefore be considered to exist for war crimes even where they are committed on the territory of a foreign State or by a non-national. Article 6 is silent regarding crimes against humanity.

In keeping with the principle of legality, punishment cannot be based on customary law or case law. Crimes against humanity can nevertheless be prosecuted by German courts if they correspond to a specific offence mentioned in the Penal Code.

Under Article 6 of the Penal Code, jurisdiction for violations of international humanitarian law is universal. However, the Federal Supreme

⁵ Christina Gloria, in Knut Ipsen, *Völkerrecht*, 3rd ed., Verlag C.H. Beck, Munich, 1990, Article 74, para. 2.

⁶ See Leslie C. Green, "Die Bundesrepublik Deutschland und die Ausübung der Strafgerichtsbarkeit", 5 *Humanitäres Völkerrecht — Informationsschriften*, 1992, pp. 32 ff.; Dietrich Oehler, *Internationales Strafrecht*, 2nd ed., Carl Heymanns Verlag, Munich, 1983, Article 1; Peter Wilkitzki, "Die völkerrechtlichen Verbrechen und das staatliche Strafrecht (Bundesrepublik Deutschland)", 99 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1987, pp. 445 ff.

Court in Karlsruhe has limited the jurisdiction of German courts in so far as it requires a special link between Germany and the offence which has been committed abroad.⁷ The judgement of the Federal Supreme Court refers explicitly to genocide, but it remains to be seen whether this limitation also applies to crimes against humanity.

1.4 Legal procedure: What is the procedure regarding investigation, prosecution and judgement of violations of international humanitarian law? Specifically:

1.4.1 *Which body is competent to initiate criminal proceedings? Is this body legally bound to prosecute, or does it have discretionary power to decide whether or not a case should be brought to court?*

Article 152, para. 2, of the Code of Criminal Procedure stipulates that only the State may initiate proceedings. In keeping with that principle, the public prosecutor must initiate an investigation if sufficient grounds for suspicion exist.

No other authority is allowed to intervene in the decisions of the judiciary, which performs its tasks with all due respect for the principle of the separation of powers, as prescribed by Article 20, para. 2, of the Constitution.⁸

Political concerns may be taken into account by the public prosecutor in deciding upon the investigations mentioned in Articles 153 (c) and 153 (d) of the Code of Criminal Procedure. These rules thus constitute exceptions to the principle of legality. Article 153 (c), para. 1, point 1, of the Code gives the public prosecutor this right with respect to offences committed outside German territory. He may, for example, abandon investigations if the proceedings could have a serious detrimental effect on the country. In such a case, the public prosecutor must cooperate with the Federal Minister of Justice, who supplies information regarding the international treaties pertinent to the investigated offences (point 94, para. 2, of the Guidelines for Criminal Procedure and the Procedure in Respect of Administrative

⁷ Federal Supreme Court, 14 *Neue Zeitschrift für Strafrecht*, 1994, p. 232.

⁸ See, in particular, Theodor Kleinknecht and Lutz-Meyer Gossner, *Strafprozessordnung*, 42nd ed., Verlag C.H. Beck, Munich, 1995, Article 120 GVG, notes 1 ff.; Claus Roxin, *Strafverfahrensrecht*, 23rd ed., Verlag C.H. Beck, Munich, 1993, pp. 44 ff.

Offences). According to point 94, para. 3, of the Guidelines, the prosecutor must apply for a decision by the chief public prosecutor of the higher regional court if the suspect is not a German citizen.

Article 154 (b), para. 1, of the Code of Criminal Procedure also contains an exception to the principle of legality since it allows the public prosecutor to abandon investigations if the suspect is to be extradited to another country or transferred to an international tribunal or an international organization. However, the article only refers specifically to the suspect being handed over to a “foreign government”. It is thus unclear whether the provision indeed covers the transfer of a suspect to the International Criminal Tribunals for the former Yugoslavia and Rwanda in The Hague and Arusha, respectively.

1.4.2 Can the victims of violations themselves initiate such proceedings, (i.e. denunciation, lodging of complaint, summons before the competent court)?

Under Article 395 of the Code of Criminal Procedure, the victim of an offence is allowed to initiate an accessory prosecution. Furthermore, under Article 374 of this Code, the victim may initiate a private prosecution. However, accessory and private prosecution are not possible against every offence listed in the Penal Code. They are admissible, for example, in the case of offences against physical integrity and health, individual liberty and destruction of property (Articles 223 ff., 234 ff. and 303 ff., respectively, of the Penal Code).

1.4.3 Which courts have jurisdiction in such cases (ordinary, military, federal or regional, special courts)? Does this depend on whether the defendant is a civilian or a member of the military? What are the characteristics of these courts?

Special military courts may be set up under Article 96, para. 2, of the Constitution. However, Germany has not yet made use of this option. Ordinary courts are competent to try offences which constitute violations of international humanitarian law.⁹

However, both regional courts and higher regional courts have primary jurisdiction over the above-mentioned offences. If such an offence constitutes a breach of international humanitarian law only, the regional courts have primary jurisdiction and it is the public prosecutor responsible for the court concerned who handles the case (Articles 142, para. 1, point 2, and 74, para. 1, of the Constitution of Courts Act).

Notwithstanding this regulation, the higher regional courts have primary jurisdiction if a person is accused of genocide (Article 120, para. 1, point 8, of the Constitution of Courts Act) or if other offences of which the person is accused have a factual link to genocide. The higher regional courts may thus be required to try violations of international humanitarian law other than genocide. Under the primary jurisdiction of these courts, it is the Federal Chief Public Prosecutor in Karlsruhe who is responsible for the case (Articles 142 (a), para. 1, and 120, para. 1, point 8 of the Constitution of Courts Act).

1.4.4 Are there any provisions for exceptional procedures in such cases, or is the regular criminal procedure applicable?

As stated above, there are no special military courts in Germany. Thus, the rules of the Code of Criminal Procedure apply.

⁹ Moreover, under Article VII, para. 1, of the Agreement between the Parties of the North Atlantic Treaty Regarding the Status of their Forces (NATO SOFA), military authorities of the sending State have the right to establish their own criminal and disciplinary courts in the receiving State. NATO member States have thus set up special military courts in Germany to repress breaches of military law and thus of international humanitarian law committed by members of their armed forces. For further developments of the law governing foreign forces stationed in Germany, see Dieter Fleck, "Zur Neuordnung des Aufenthaltsrechts für ausländische Streitkräfte in Deutschland", 46 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1996, pp. 389 ff.; Eckhard Heth, "Das Streikräfteaufenthaltsgesetz", 38 *Neue Zeitschrift für Wehrrecht*, 1996, pp. 1 ff.

The Code of Criminal Procedure admits four categories of evidence in a court trial. The most important category in respect of war crimes is testimony. Testimony given by witnesses in a foreign country is admissible as evidence under the Code of Criminal Procedure provided that it has been taken down in accordance with the domestic law of that country, in particular the procedural law and all the other relevant obligations under international law, including those relating to human rights.

The Act on International Assistance in Criminal Matters is primarily concerned with providing judicial assistance for other States. However, it was amended by the 1995 Act on Cooperation with the International Criminal Tribunal for the former Yugoslavia.¹⁰ Under Article 67 (a) of the Act on International Assistance in Criminal Matters, the rules contained in Part V (dealing with the permissibility of legal assistance in matters other than transfer and assistance in the execution of foreign judgements) are also applicable in respect of international and supranational organizations. Furthermore, Article 74 (a) of this Act allows the German authorities to address requests for legal assistance to those organizations.¹¹

According to a decision by the German Federal Constitutional Court in Karlsruhe, the rule *non bis in idem* does not prevent prosecution of a person who has already been convicted for violations of international humanitarian law, crimes against humanity or genocide in another country.¹² However, any previous penalty must be taken into account when a new sentence is passed. This option for German courts is now somewhat restricted since, under Article 10, para. 1, of the Statutes of the International Criminal Tribunal for the former Yugoslavia, persons who have already been convicted by the Tribunal cannot be prosecuted for the same act by a German court.

Lastly, Article 6 of the Act on International Assistance in Criminal Matters provides for an exception with regard to political acts. However, the character of this exception is not absolute. Transfer shall be granted if the

¹⁰ See Wolfgang Schomburg, "Jugoslawien-straengerichtshof-Gesetz", 15 *Neue Zeitschrift für Strafrecht*, 1995, pp. 428 ff.; Thomas Trauwein, "Zum Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien", 48 *Neue Juristische Wochenschrift*, 1995, pp. 1658 ff.

¹¹ Sigmar Uhlig, Wolfgang Schomburg and Otto Lagodny (eds.), *Gesetz über die internationale rechtshilfe in Strafsachen*, 2nd ed., Verlag C.H. Beck, Munich, 1992, Appendix, pp. 1 ff.

¹² German Federal Constitutional Court, *Official Records*, Vol. 12, pp. 66 ff.; in this context, see *Eduard Dreher and Herbert Tröndle, Strafgesetzbuch*, 47th ed., Verlag C.H. Beck, Munich, 1995, Article 51, note 16 (a).

accused is being prosecuted or has been sentenced for having committed or attempted to commit genocide, murder or manslaughter. If the accused was an accessory to such acts, transfer is also possible.¹³

A specific problem arises in connection with the transfer of Germans to the International Criminal Tribunal for the former Yugoslavia.¹⁴ Indeed, Article 16, para. 2, of the Constitution stipulates that no German citizen may be extradited to another country. Yet Article 29 of the Statute of the International Tribunal obliges States to cooperate with the Tribunal. Notwithstanding this obligation, the Constitution does not allow German courts to transfer a citizen to the Tribunal. By the *ratio legis* of Article 16, para. 2, of the Constitution, no German citizen may be removed from German territory and placed under the authority of any other sovereign power. Thus it is of no relevance to German law whether that power represents a State, a supranational organization or, in the case of the Tribunal, an organ considered to be a sovereign power *sui generis*. Even in respect of a principle that allows the easy incorporation of international rules into German domestic law,¹⁵ the transfer of a German citizen to the Tribunal is prohibited by domestic law despite the fact that Germany itself is, as a member of the community of States, part of that sovereign power.¹⁶

1.4.5 Does the procedure involve any special features, such as hearings in camera, appeals, etc.?

Under Articles 296 ff., the Code of Criminal Procedure offers legal remedies against the decisions handed down by criminal courts. In particular, the accused can lodge an appeal in two ways. Articles 312 ff. of the Code provides for *revisio in jure et in re* against the decisions of courts of

¹³ Wolfgang Schomburg, in Sigmar Uhlig, Wolfgang Schomburg and Otto Lagodny (eds.), *op. cit.*, Article 6, notes 19 ff.

¹⁴ For the transfer of suspects to the International Criminal Tribunal for the former Yugoslavia, see, in general, Carsten Hollweg, "Der praktische Fall – Internationales Öffentliches Recht: Auslieferung eines bosnischen Serbenführers an das UN Tribunal", 34 *Juristische Schulung*, 1994, pp. 409 ff.

¹⁵ See Christian Tomuschat, "Die staatsrechtliche Entscheidung für die internationale Offenheit", in Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. vii, C.F. Müller Juristischer Verlag, Heidelberg, 1992, Article 172.

¹⁶ In this context, see Burkhard Schöbener and Winfried Bausback, "Verfassungs- und völkerrechtliche Grenzen der 'Überstellung' mutmasslicher Kriegsverbrecher an den Jugoslawien-Strafgerichtshof", 49 *Die Öffentliche Verwaltung*, 1996, pp. 621 ff.

first instance and Articles 333 ff. provide for *revisio in jure, sed non in re* against the decisions of regional courts and higher regional courts.

1.4.6 Is prosecution of violations in any way time-barred under national legislation (for example, by a statute of limitations)?

Germany is not party to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. However, Article 78, para. 2, of the Penal Code explicitly excludes murder and genocide from the general rules on time-barring.

2. Assessment of national legislation

2.1 Legal precedents and case law: Has the national system for the repression of violations ever been put to use (specific cases, case law)?

The national system for the repression of violations of international humanitarian law has been put to use several times. First of all, in prosecuting violations committed during the Second World War. The Ministry of Justice has established central investigation bureaus for the prosecution of war crimes in the various German states. For example, the main bureau for the prosecution of mass crimes committed under the National Socialist regime, set up in the state of Northrhine-Westphalia within the Dortmund Public Prosecutor's Office, has conducted several investigations of war criminals. At present, the Head Office has requested the extradition of the suspects Hass and Priebke from Italy to Germany. The two suspects have been accused of murder in connection with the killing of 335 civilians during the war.¹⁷

German courts have also prosecuted offences committed in present-day armed conflicts. Several persons accused of genocide have been indicted by the Bavarian Supreme Court in Munich and the Higher Regional Court in Dusseldorf.

¹⁷ See Sascha Rolf Lüder, "Die Auslieferung des mutmasslichen Kriegsverbrechers Erich Priebke durch Argentinien an Italien", 9 *Humanitäres Völkerrecht – Informationsschriften*, 1996, pp. 32 ff.

2.2 Assessment: How would you assess your country's legislation? What are its strong points and its weaknesses? What were the considerations underlying its adoption?

Although a number of war criminals have been prosecuted by national courts, German legislation for the repression of violations of international humanitarian law nevertheless presents certain weaknesses.

The German government considers that the existing Penal Code provides for the punishment of all the grave breaches mentioned in the Geneva Conventions and their Additional Protocols. Efforts to establish specific criminal legislation concerning violations of international law have thus been undertaken so far without success. Moreover, the German government did not feel the need, either during the long ratification process for the Additional Protocols or subsequently, to adopt new legislation covering the war crimes mentioned in Articles 11, 85 and 86 of Protocol I. Even after the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda, neither the German government nor the opposition in Parliament sought to resume discussions on such legislation. The amendment of the Act on International Assistance in Criminal Matters refers only to cooperation with the international Criminal Tribunal for the former Yugoslavia; an amendment concerning cooperation with the International Criminal Tribunal for Rwanda has not yet been adopted.

As already mentioned, despite Germany's obligation to cooperate with the Tribunals, Article 16, para. 2, of the Constitution stipulates that no German citizen may be extradited to another country. Moreover, the amendment of the Act on International Assistance in Criminal Matters contains no provisions guaranteeing the security of witnesses.¹⁸

However, since the establishment of the two ad hoc Tribunals and the participation of German armed forces in multilateral military operations, the interest of legal scholars has grown steadily and led to the recent publication of a number of articles on the subject.¹⁹

¹⁸ See Sascha Rolf Lüder, "Rechtsfragen im Zusammenhang mit dem Schutz von Zeugen in Verfahren des Internationalen Strafgerichtshofes für das ehemalige Jugoslawien", 9 *Humanitäres Völkerrecht — Informationsschriften*, 1996, pp. 134 ff.

¹⁹ Kai Ambros, "Zum Stand der Bemühungen um einen ständigen Internationalen Strafgerichtshof und ein Internationales Strafgesetzbuch", 29 *Zeitschrift für Rechtspolitik*, 1996, pp. 263 ff.; Herwig Roggemann, "Auf dem Wege zum ständigen Internationalen Strafgerichtshof", 29 *Zeitschrift für Rechtspolitik*, 1996, pp. 388 ff.

Lastly, ratification of the Convention on the Safety of United Nations and Associated Personnel by Germany in 1997 has presented the country's legislature with a new challenge. Indeed, Articles 9 to 18 of the Convention contain criminal measures regarding violations of its provisions. Under the terms of the Convention, German lawmakers must make sure that these provisions, which are close to the general rules of international humanitarian law, are incorporated into German criminal law.

The protection of war victims under the 1995 Spanish Penal Code

Offences against persons and objects protected in the event of armed conflict

José-Luis Rodríguez-Villasante y Prieto¹
*Director of the Spanish Red Cross Centre
for the Study of International Humanitarian Law*

1. Introduction

In 1989, the Spanish Red Cross Centre for the Study of International Humanitarian Law appointed a commission of experts to prepare a draft amendment to the Military Penal Code with a view to adapting Spanish criminal legislation to the obligations entered into by Spain, which, in April of that year, had ratified the 1977 Protocols additional to the Geneva Conventions of 1949.

The commission of experts was chaired by Mr Pérez González, professor of international law, and composed of the following members: J. Sánchez del Río Sierra, Supreme Court judge, J. L. Rodríguez-Villasante y Prieto, Judge Advocate General, F. Pignatelli Meca, F. Pulgarim de Miguel, who acted as secretary, and M. Antón Ayllón, the secretary of the Centre itself.

When the commission had completed its work — which took almost two years — it submitted a voluminous report entitled *Una propuesta de modificación del ordenamiento penal español como consecuencia de la ratificación por España de los Protocolos de 1977, adicionales a los Convenios de Ginebra de 1949* (“Proposed amendment of Spanish criminal legislation following Spain’s ratification of the 1977 Protocols additional to the 1949 Geneva Conventions”).

¹ Major General José-Luis Rodríguez-Villasante y Prieto, who holds a Ph.D. in law from the *Universidad Autónoma de Madrid*, is Director of the Spanish Red Cross Centre for the Study of International Humanitarian Law, legal adviser to the Military Legal Corps and Judge Advocate General at the Central Military Court. He has published many monographs on international humanitarian law and was a member of the commission of experts set up within the Spanish Red Cross to adapt Spanish criminal legislation following Spain’s ratification of the 1977 Protocols additional to the 1949 Geneva Conventions. The commission’s proposed amendment was incorporated into the text of the 1995 Penal Code, which is currently in force.

The Spanish Red Cross submitted its report, together with its proposals, to the government, which forwarded it to the drafting committee within the Ministry of Justice that was preparing the preliminary draft of the Penal Code. The report was subsequently incorporated, largely unaltered, into the 1995 Code.

Chapter III of Title XXIV of the Spanish Penal Code, entitled *De los delitos contra las personas y bienes protegidos en caso de conflicto armado* (“Offences against persons and objects protected in the event of armed conflict”) and approved by Organic Law No. 10 of 23 November 1995, comprises seven articles (608 to 614), to which should be added two common provisions (Articles 615 and 616). This chapter is particularly characteristic of our Penal Code in that it begins by defining the persons protected in the event of armed conflict (Article 608) and ends with a general, residual clause (Article 614) punishing all other breaches and all other acts contrary to the treaties of the law of armed conflict (law of war and international humanitarian law).

The other articles, according to which any person (“*el que*” — he/she who) can be the perpetrator of a violation, define — in a logical order and on the basis of the legal values protected — the different types of conduct that constitute grave breaches or war crimes. Attacks on the life, physical or mental integrity, or survival of war victims, the use of illegal methods or means of warfare, very serious violations committed against protected persons, serious violations of international humanitarian law and attacks on cultural and civilian property are all described in this manner (Articles 609, 610, 611, 612 and 613 respectively).

The characteristic of this group of offences is that they follow a mixed system that includes:

- ♦ the definition of persons protected in the event of armed conflict, a definition that determines the chapter’s field of application in relation to the relevant international conventions;
- ♦ a list of specific provisions relating to the most serious war crimes, classed according to the type of legal values protected and in a logical sequence in accordance with the treaties of the law of armed conflict (law of war and international humanitarian law);
- ♦ a final general residual clause;

- ♦ provisions common to all of Title XXIV (offences against the international community), which are logically applicable to this chapter.

The definition of “offences against persons and objects protected in the event of armed conflict”, as set out in the 1995 Penal Code, represents considerable progress in at least three respects over the precarious situation that existed before the legislation was adopted. Firstly, this chapter fills an obvious gap in Spanish criminal legislation in which — owing to the failure to prohibit such conduct in the Penal Code — war crimes were not specifically punished when the perpetrator did not have military status. The promulgation of the Military Penal Code in 1985 would have been a good opportunity to fill this gap but, although it represented real progress, it confined itself to defining the “violations of the laws and customs of war” committed by the military.

In addition, the framers of the 1995 Penal Code must be congratulated on having decided to outlaw in this chapter not only the “grave breaches” defined by international humanitarian law, but also other violations of international rules which that body of law does not describe as grave.

But extending the protection through criminal law to persons or objects protected in non-international armed conflict undoubtedly represents the most laudable contribution to the codified prohibition of these crimes and the greatest innovation of the 1995 Penal Code. Victims of war thus enjoy specific protection through criminal law in all circumstances, even in the event of internal armed conflict. In other words, the protected persons and objects enjoy the same special protection, whatever the nature of the armed conflict. Such protection is not guaranteed by Protocol II additional to the Geneva Conventions (hereafter referred to as “Protocol II”), which does not require repression of its violations. For this reason, the Spanish Penal Code marks a step forward in the endeavour to ensure that international humanitarian law protects the individual in as complete and egalitarian a fashion as possible, in all circumstances.

The perpetrator of these crimes can be anyone, as indicated by the Spanish expression “*el que*” (he/she who), which begins, as for any other common crime, the description of the conduct that constitutes the offences defined in Articles 609 to 614. This peculiarity serves to differentiate between offences that can be committed by anyone and offences that can be committed only by military personnel, which are set out in Part 2, Title II

(Articles 69 to 78) of the Military Penal Code (violations of the laws and customs of war).

The title of the chapter under study here (“Offences against persons and objects protected in the event of armed conflict”) explicitly describes the legal values protected vis-à-vis this category of breaches, which may be divided into two groups:

- ♦ legal values concerning persons;
- ♦ legal values concerning objects.

Where people are concerned, the legal values protected are life, physical and mental integrity, health, inviolability of the individual, sexual freedom, survival, liberty, honour, criminal and procedural guarantees, and individual dignity. The prohibited acts are as much those that undermine these legal values as those that endanger certain objects deserving protection by criminal law.

Regarding the objects whose protection under criminal law is dealt with in this chapter, as F. Pignatelli Meca has so rightly noted, they (or the objects whose physical preservation and guarding from theft is the purpose of the protection) are neither all the objects one possesses nor even those which are used specifically to attain particular objectives different from those attained in the private domain, but only those objects (movable or immovable property) that have certain particular characteristics: cultural objects (in other words, historical, artistic, religious or cultural objects or property that belong to the spiritual heritage of peoples), religious sites, medical facilities, medical transports, other specially protected places and means of transport, objects indispensable to the survival of the civilian population, works or installations containing dangerous forces, the private belongings of a protected person, civilian objects that do not constitute a military objective, property belonging to others which does not represent a military necessity, and the natural environment.

2. Definition of protected persons (Article 608 of the Penal Code)

In the 1995 Penal Code, the legislature judged it necessary to define the concept of a person protected in the event of an armed conflict (international or internal), thereby demarcating the field of application of the protection under criminal law covered by the chapter in question. Apart

from anything else, the usefulness of the definition is clear from the simple fact that the technical description of the breaches makes it unnecessary to tediously repeat the definition of all the persons protected for each type of conduct prohibited.

The list of protected persons is not restrictive since the final paragraph gives the option of extending the definition provided that the status of protected person derives from any other international treaty to which Spain is party.

The following are regarded as protected persons:

1. the wounded, sick or shipwrecked and medical or religious personnel, protected by the First and Second Geneva Conventions or by Additional Protocol I (hereafter referred to as “Protocol I”);
2. the prisoners of war protected by the Third Geneva Convention or by Protocol I;
3. the civilian population and civilians protected by the Fourth Geneva Convention or by Protocol I;
4. persons placed *hors de combat* and the personnel of the protecting power and its substitute protected by the Geneva Conventions or by Protocol I;
5. members of parliament and those accompanying them, protected by the Hague Convention of 1899;
6. all other persons having this status by virtue of Protocol II or any other international treaty to which Spain is party.

This definition is clearly founded on the rules contained in the law of armed conflict (international humanitarian law and law of war), essentially on Article 13 common to the First and Second Geneva Conventions, Article 4 common to the Third and Fourth Geneva Conventions, Articles 2 (c) and (d), 8 (a) to (d), 41, para. 2, 44, 50, and 90 of Protocol I, Articles 2, 4, paras 1 and 3, and 5, paras 1 and 3, of Protocol II, and Article 32 and the corresponding articles of the Hague Convention of 1899 respecting the Laws and Customs of War on Land, and its annexed Regulations.

3. Definitions of the offences (Article 609 to 614 of the Penal Code)

3.1 Attacks on the life, physical or mental integrity or survival of protected persons (Article 609 of the Penal Code)

This category of offences covers grave breaches of international humanitarian law (First Geneva Convention, Article 50; Second Convention, Article 51; Third Convention, Article 130; Fourth Convention, Article 149; and Protocol I, Articles 11, paras 1 to 5, 85, para. 2, and 85, para. 3, committed against any protected person.

The legal values protected are, variously, life, physical and mental integrity, health, personal dignity, and the survival and inviolability of the individual.

The following specific acts constitute offences under Article 609:

- ♦ ill-treatment;
- ♦ any act that endangers the life, health or physical or mental integrity of a protected person;
- ♦ torture or inhumane treatment, including biological experiments;
- ♦ causing great suffering to a protected person;
- ♦ subjecting a protected person to a medical procedure that is not indicated by his state of health.

Of these types of conduct, some have harmful consequences for a person's mental or physical integrity (ill-treatment, torture, inhumane treatment, great suffering). Other prohibited acts are offences that represent a danger (serious threat to the life, health or physical or mental integrity of protected persons, biological experiments or medical procedures not indicated by their state of health).

Article 609, inspired by the prohibition laid down in Article 11, para. 1, of Protocol I, describes in precise terms the punishable act consisting in subjecting protected persons to a medical procedure that is not indicated by their state of health and is not consistent with generally accepted medical standards which would be applied by the side carrying out the procedure under similar medical circumstances to its own nationals who are not deprived of their liberty. According to Article 11, para. 2, of the same text, it is prohibited in particular to carry out on these persons — even with their consent — physical mutilations, medical or scientific experiments, or the removal of tissue or organs for transplantation, except where these acts are

justified from the medical point of view. Exceptions to this prohibition may be made in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes.

The drafters of the 1995 Penal Code did not wish to classify these violations of international humanitarian law on the basis of their consequences, and confined themselves to punishing the types of criminal conduct described therein by imposing a severe penalty involving imprisonment (four to eight years). The consequences of such acts are the subject of a separate penalty added to the one imposed for the crime described, and Article 609 uses the expression: "...without prejudice to the penalty corresponding to the harmful effects produced". The last sentence in Article 609 (as the last in Article 610, whose terms are identical) shows clearly that the rules of "notional plurality of offences" (*concurso ideal y medial*, Article 77 of the Penal Code) and of "continuous offence" (*delito continuado*, Article 74 of the Penal Code) do not apply. These are excluded by separating each individual act, and more specifically any possible link between the criminal act and its harmful consequences, thus preventing the favourable effects of the application of these rules. The drafters opted instead for the rule of plurality of offences (dealt with in the same proceedings) (*concurso real*, Article 73 of the Penal Code).

3.2 Illegal conduct of hostilities: the use of prohibited means or methods (Article 610 of the Penal Code)

The limitation of the means and methods of warfare is one of the fundamental principles of the law of armed conflict. The United Nations General Assembly has affirmed this in resolution 2444/XXIII (1968), which accords with the tradition of the law of The Hague and draws inspiration from Resolution XXVIII of the 20th International Conference of the Red Cross (Vienna, 1965), as follows: "(...) *the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited*".

The limitation of the means and methods employed in the conduct of hostilities — a basic principle of the classical law of war and the law of The Hague — is today supplemented by prohibitions stemming from international humanitarian law and which, in Protocol I, extend in practical terms the field of application of protection for conflict victims.

In this way, the traditional criteria of prohibiting the causing of superfluous injury and unnecessary suffering, and prohibiting the use of indiscriminate methods or means of warfare have been supplemented by an ecological criterion, which is the prohibition on causing widespread, long-term and severe damage to the natural environment. These three criteria underpin the specific description of the precept under analysis here, which is based on Articles 1, 35, paras 2 and 3, 52 and 55 of Protocol I.

This article also covers the commission of two offences when the first is necessary in order to commit the second.

Article 610 punishes any person who uses or orders the use, in an armed conflict (whether international or internal, let it not be forgotten), of methods or means of warfare that are:

- ♦ prohibited;
- ♦ of a nature to cause superfluous injury or unnecessary suffering;
- ♦ intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment, thereby compromising the health or survival of the population.

It should be noted that to repress the act as an offence, Article 610 requires that the methods or means of warfare that are intended to cause (or that may be expected to cause) damage to the natural environment must meet two conditions. They must:

1. cause widespread, long-term and severe damage (Article 35, para. 3, of Protocol I);
2. compromise the health or survival of the civilian population.

The breach includes use of prohibited methods in the conduct of hostilities, such as perfidy (Article 37), the use of recognized protective emblems or signs (Article 38), the use of the insignia of neutral or adverse parties (Article 39), ordering that there shall be no survivors (Article 40), attacking an enemy *hors de combat* (Article 41), using terrorist methods (Article 51, para. 2) or the starvation of civilians (Article 54). All the articles quoted belong to Protocol I.

In principle, the severity of the punishment, which is the same as that provided for homicide (Article 138 of the Penal Code), merits attention as this crime is punished by a prison term of between 10 and 15 years. One must, however, bear in mind the serious consequences of prohibited means

and methods of warfare, which cause superfluous injury and unnecessary suffering, or serious damage to the natural environment. We must think of the collateral and direct damage caused by the massive use of conventional weapons in a bombardment, of the misuse of anti-personnel mines, the use of chemical, incendiary or biological weapons or a nuclear weapons attack.

Be that as it may, we refer to a comment that has been made on the preceding article, regarding its last sentence, i.e. “(...) without prejudice to the penalty corresponding to the harmful effects produced”.

3.3 Very serious breaches against protected persons (Article 611 of the Penal Code)

The seven paragraphs in this long article describe, in turn, the different types of conduct that may be described as very serious breaches of the law of armed conflict vis-à-vis protected persons, mainly prisoners of war and civilians. This is why the sentence specified is 10 to 15 years' imprisonment, without prejudice to the penalty corresponding to the consequences of the act.

Basing ourselves on the excellent remarks made by F. Pignatelli Meca, we can say that Article 611, para. 1, punishes indiscriminate or excessive attacks and also the subjection of the civilian population to attacks, reprisals and violence or threats of violence whose main purpose is to spread terror. It is consequently a question of prohibiting both breaches of the rules on the conduct of hostilities and acts of violence not confined to legitimate objectives, but which are indiscriminate attacks or ones that fail to respect the principle of proportionality. Article 611, para. 1, is based on Articles 41, 49, 50, 51, paras 2, 4, 5 and 6, 57, paras 1 to 4, and 85, paras 3 (a) to (c) of Protocol I.

Article 611, para. 2, has to do with conduct peculiar to maritime or aerial warfare, in relation to destruction of or damage to the non-military ships or aircraft (terms which designate, respectively, merchant ships and commercial aircraft) of an adverse or neutral party. Such conduct constitutes a breach of the rules of international law applicable to armed conflict if:

- ♦ the destruction or damage is pointless;

- ♦ not enough time is given or the necessary steps are not taken to ensure the safety of the people on board or to safeguard the logbook and other documents.

The codified international rules are Article 22 of the Treaty for the Limitation and Reduction of Naval Armaments (London, 1930), the 1936 Protocol (also signed in London) and the 1937 Nyon Agreement, all regulating submarine warfare, enshrined in the decisions of the Nuremberg Tribunal and today recognized as the customary law applicable to armed conflict at sea. Much more recently, a group of naval experts and jurists drafted the San Remo Handbook (June 1994) which, while not having the status of a treaty, contains the rules accepted by States on the international law applicable to armed conflict at sea.

Article 611, para. 3, defines two different types of conduct, although in both cases the victim is either a prisoner of war or a civilian. This provision is based on Articles 99 to 108 and 130 of the Third Convention, 71 to 75, 126 and 147 of the Fourth Convention, 4, 43, 45, 75, paras 4 and 7, and 85, para. 4 (e), of Protocol I, and 6 of Protocol II.

The first type of criminal conduct consists in forcing a prisoner of war or a civilian to serve, in one way or another, in the armed forces of the adverse power. This renders illegal any unwilling support for the adversary's war effort. Referring to the adversary rather than the enemy constitutes an allusion to international conflicts that are not between States, but rather involve resistance movements, for example, or colonial liberation struggles or struggles against a foreign occupying force.

Depriving a prisoner of war or a civilian of his right to be tried impartially in a duly constituted court constitutes a violation not only of international humanitarian law, but also of the Spanish Constitution itself (Articles 24 and 25), the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

Article 130 of the Third Geneva Convention, Articles 34, 41, 42, 43, 49, 68, 78, 79 and 147 of the Fourth Convention, 75 and 85, para. 4 (a), of Protocol I, and 4 of Protocol II constitute the treaty-law basis necessary for describing as war crimes such breaches as the deportation, forced transfer, hostage-taking or illegal detention of any protected person. These are crimes punished by Article 611, para. 4.

All these types of conduct — which constitute crimes, let us not forget, in both international and internal conflicts — presuppose a serious violation of the personal freedom of individuals who find themselves in the power of the adverse party. That said, while the deportation and forced transfer of protected persons (usually civilians) may — in exceptional cases — be justifiable on military grounds or to guarantee the safety of such persons in the event of armed conflict, by definition the taking of hostages and illegal detention cannot under any circumstances be justified under international humanitarian law, which unconditionally condemns such acts in the event of armed conflict, whether international or internal.

The transfer by the occupying power of part of its own population into the territory it occupies and its settlement there with a view to permanent residence is addressed by Article 611, para. 5. Such action is regarded as a grave breach of Article 85, para. 4 (a) of Protocol I.

Article 611, para. 6, of the Penal Code punishes any person who commits one of the following acts against any protected person, or who orders it to be committed or causes it to continue (commission of a crime by omission):

- ♦ racial segregation;
- ♦ other inhuman or degrading practices based on other adverse distinctions and whenever such conduct gives rise to outrages upon personal dignity.

Article 75, para. 1, of Protocol I establishes the principle that no adverse discrimination may be practised against victims or persons protected by international humanitarian law, who come within the scope of this article, without any distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Article 85, para. 4 (c), of this Protocol regards as grave breaches *apartheid* and other inhuman and degrading practices based on racial discrimination that involve outrages upon personal dignity.

Finally, Article 611, para. 7, renders illegal the unjustified delaying or prevention of the release or repatriation of prisoners of war or civilians, a breach described as grave in Article 85, para. 4 (b), of Protocol I. That said, the essential rules of international humanitarian law prohibiting such conduct are Articles 109, 110, 118 and 119 of the Third Geneva

Convention, 35, 132, 133, and 134 of the Fourth Convention and 75, para. 3, of Protocol I.

Let us consider two situations relating to Article 611, para. 7. The first concerns wounded or sick prisoners of war who must be repatriated or hospitalized in a neutral country if they fulfil the conditions laid down in Article 110 of the Third Geneva Convention and in all cases after the cessation of active hostilities (Articles 118 and 119 of the Third Convention), with the exception of those against whom criminal proceedings for an indictable offence are pending (they may be detained until the end of such proceedings). In the second, civilians may abandon the territory of the adverse party at the start of or during the hostilities (except where their departure would be damaging to national interests) and civilian internees — in particular children, pregnant women and mothers with infants and young children, the wounded and sick, and internees who have been held for a long time — must be released, repatriated or hospitalized in a neutral country (Article 132 of the Fourth Convention) or their internment must cease as soon as possible after the close of hostilities (Article 133 of the Fourth Convention).

3.4 Grave breaches and acts contrary to international humanitarian law (Article 612 of the Penal Code)

This article is a heterogeneous mix of various grave breaches, though less serious than those addressed in the preceding article. It defines different acts which are contrary to the rules of international humanitarian law, mainly laid down by the four Geneva Conventions and their Additional Protocols. As in the preceding articles, the conduct prohibited is punished by a prison sentence of between three and seven years, with the phrase previously cited: “(...) without prejudice to the penalty corresponding to the effects produced”.

The lack of homogeneity between the provisions grouped together in the article under analysis becomes clear if we consider that they protect places, units and transports as well as individuals who themselves enjoy protection or whose role it is to protect persons protected by international humanitarian law, and that at the same time they prohibit the misuse of the emblems and protective signs referred to in the law of armed conflict.

- (a) The first sub-category punishes violations of the protection conferred by international humanitarian law on medical units and transports, and

protected places, provided that they are marked by the appropriate distinctive signs or signals. Naturally, they lose their protection when combatants use them to commit hostile acts by sheltering behind their immunity or if they contribute to the war effort. This sub-category is based on Articles 14 and 15 of the Fourth Convention and 8 (e) to (m), 59 and 60 of Protocol I.

In the wider sense, the expressions “medical units” and “medical transports” are intended to cover and confer protection on all units and transports so defined in Article 8 (e) of Protocol I (establishments and other units, whether military or civilian, organized for medical purposes, whether they are fixed, mobile, permanent or temporary, including hospitals and medical stores), Article 8 (f) (conveyance by land, water or air of protected wounded, sick and shipwrecked persons, medical personnel, religious personnel and medical equipment), Article 8 (g) (medical transports, that is, any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively for medical purposes), Article 8 (h) (medical vehicles, that is, any medical transports by land), Article 8 (i) (medical ships and craft), Article 8 (j) (medical aircraft) and Article 8 (k) (medical personnel, medical units and medical transports, whether permanent or temporary).

The specially protected places — provided they are duly marked — are prisoner-of-war camps (Articles 21 ff. of the Third Convention), hospital and safety zones and localities established to protect and shelter the most vulnerable civilian groups and the wounded and sick from the armed forces (Articles 23 of the First and 14 of the Fourth Convention), neutralized zones (established under an agreement between the parties in the areas where fighting is taking place, in accordance with Article 15 of the Fourth Convention), places of internment for civilians (Article 83 and following of the Fourth Convention), undefended localities (which have been unilaterally declared as such, in accordance with Article 59 of Protocol I, and must fulfil specific conditions) and, finally, demilitarized zones (established under the terms of an agreement and which must meet certain conditions stipulated in Article 60 of Protocol I).

- (b) Regarding the protection of protectors (various categories of medical personnel, religious personnel, and others belonging to a medical mission or relief organizations), the verb used in the provision

indicates that a broad act is prohibited: “perpetrating violence”. But more serious violent conduct is in fact addressed, as we have seen, in Article 609 and punishment is provided independently for the harmful consequences of such violence “(...) without prejudice to the penalty corresponding to the effects produced”.

Article 8 (c) of Protocol I defines medical personnel and enumerates the various categories covered by this term:

- (i) the medical personnel, whether military or civilian, of a party to a conflict;
- (ii) the medical personnel of National Red Cross and Red Crescent Societies and other, duly recognized, national voluntary aid societies;
- (iii) the medical personnel of medical units or transports. (No distinction is drawn between the various classes or categories of medical personnel insofar as the degree of protection is concerned. International humanitarian law requires that the persons belonging to these categories be assigned exclusively to medical duties, whether permanently or temporarily.)

Paragraph (d) of the same provision defines religious personnel, whose members — whether military (chaplains) or civilian — are exclusively engaged in the work of their ministry.

- (c) Although any protected person can be subjected to most of the acts prohibited by Article 612, para. 3, there is no doubt that this provision confers special protection on persons in the power of a party to a conflict, as they are more exposed than others to the wrongful acts which are frequently committed in wartime. The following acts committed against them are punishable:
 - ♦ gravely insulting them;
 - ♦ giving them insufficient food or none at all;
 - ♦ removing from them the medical assistance they may require, or failing to give it to them;
 - ♦ subjecting them to humiliating or degrading treatment;
 - ♦ subjecting them to forced prostitution or any other form of indecent assault;

- ♦ neglecting to inform them of their situation in a comprehensible fashion and without unjustified delay;
- ♦ imposing collective punishment on them for individual acts;
- ♦ violating the prescriptions on accommodation for women and families;
- ♦ regarding other categories of specially protected persons: violating the prescriptions on the special protection to which women and children are entitled under the international treaties to which Spain is party.

These fundamental guarantees — the breach of which is prohibited by law — are provided by Articles 13, 14, 26, 30 and 52 of the Third Convention, 27 of the Fourth Convention, 75, 76 and 77 of Protocol I and, for internal armed conflicts, 3 common to the four Conventions of 1949. The provisions of the Third Convention protect prisoners of war, while those of the Fourth Convention and of Protocol I (in particular, Articles 72 ff. of Section III: “Treatment of persons in the power of a party to the conflict”) protect the civilian population. In this regard, Article 75 of Protocol I sets out the fundamental guarantees enjoyed by persons in the power of one of the parties to the conflict.

Women and children deserve specific mention and, as particularly vulnerable persons, are accorded special protection under Protocol I (Articles 76-78). Women are thus entitled to special respect and protection in particular against rape, forced prostitution and any other form of indecent assault. The authorities must examine as an absolute priority the cases of pregnant women and mothers of dependent infants who are arrested, detained or interned, endeavouring to prevent the death penalty from being pronounced on them and, where it is, endeavouring to ensure that it is not carried out (Article 76).

Article 77 of the same Protocol I protects children. The parties to the conflict are required to take all possible measures to ensure that children under the age of 15 years do not take direct part in the hostilities and, in particular, must refrain from recruiting them into their armed forces. The death penalty pronounced against persons under the age of 18 years must not be carried out and, when arrested, children must be held in quarters separate from those of adults.

- (d) Article 612, paras 4 to 6, render illegal specific acts of perfidy that are prohibited by international humanitarian law. To begin with, the improper or perfidious use of protective or distinctive signs, emblems or signals recognized by the international treaties — especially the distinctive red cross and red crescent emblems — is made punishable. These signs may naturally be those provided by any treaty of the law of armed conflict: the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949 (Articles 38, 39 and 44 of the First Convention) and their annexes, the Hague Convention of 1954 or the Additional Protocols of 1977 (Articles 18, 37, 38, 56, 59, para. 6, 60, para. 5, 66 and 85, para. 3 (f), of Protocol I) and their annexes (Articles 6, 7 and 8).
- (e) Article 612, para. 5, punishes the perfidious or improper use of flags, uniforms, insignia or distinctive emblems of neutral States, the United Nations, other States not party to the conflict or adverse parties, each time these objects are used during attacks or to shield, further, protect or hinder military operations.

Such conduct — the use of a false flag in war at sea, the impunity of a spy once he has rejoined the army to which he belongs, etc. — is rarely mentioned expressly by international treaties, and then to indicate extraordinary exemptions. These exemptions are based on Articles 37 to 39 and 85, para. 3 (f), of Protocol I.

- (f) Article 612, para. 6, defines perfidy (criminal conduct known as “improper use” or “use in a perfidious manner”), which is prohibited by the law of The Hague. The following acts are thus rendered illegal: improper or perfidious use of a flag of truce or feigned surrender (white flag) (Articles 23 and 32 to 35 of the Hague Convention of 1899 Respecting the Laws and Customs of War on Land, and its Annexed Regulations, Articles 37, para. 1, and 41 of Protocol I), violation of the inviolability of a parlementarian or anyone accompanying such a person (Articles 32 to 34 of the above-mentioned Hague Convention of 1899), the personnel of the protecting power (Article 2 of Protocol I) or its substitute (normally the International Committee of the Red Cross) or a member of the International Fact-Finding Commission (Article 90 of Protocol I), or their improper detention.
- (g) The final paragraph in Article 612 punishes the theft of the belongings of a dead, wounded or shipwrecked person, a prisoner of war or a civilian internee. In these cases, it will be noted that the lawmakers did

not wish to specify a protected person (defined in Article 608), whoever it might be, as the victim of the breach, so the specific act of appropriating the victim's personal effects may also be committed against a person's mortal remains. In the case of living civilians, they must be internees (deprived of freedom). This paragraph is based on Article 15 of the First Geneva Convention, 18 of the Second Convention, 13 of the Third Convention and 97 and 147 of the Fourth Convention.

3.5 Protection of certain objects in the event of armed conflict (Article 613 of the Penal Code)

This provision punishes with a prison sentence of between four and six years any person who, in the course of an international or internal armed conflict, launches attacks, carries out reprisals or commits acts of hostility, or destroys, damages, steals, renders useless or appropriates the following specially protected objects:

- ♦ cultural property or places of worship;
- ♦ civilian objects belonging to the adverse party;
- ♦ objects indispensable to the survival of the civilian population;
- ♦ works and installations containing dangerous forces;
- ♦ objects belonging to another person;
- ♦ cultural objects placed under special protection.

In the case of this last category of objects, or in extremely serious situations, Article 613, para. 2, authorizes the court to impose a higher penalty. This is, certainly, a severe measure, though justified in view of the importance of the legal value protected and the circumstances of armed conflict, which make such acts of depredation, pillage or unwarranted destruction even more reprehensible.

Article 613 (a) makes it illegal to launch attacks, carry out reprisals or commit acts of hostility against cultural property or places of worship if the consequence of such acts would be to cause serious damage. Other specific circumstances, however, must also exist:

1. the cultural property or places of worship must be clearly recognized (that is, duly marked);

2. these objects must form part of the cultural or spiritual heritage of peoples;
3. these objects must have been given special protection by special arrangement.

In addition:

- (a) the objects must not be located in the immediate proximity of military objectives;
- (b) they must not be used for the purpose of supporting the adversary's war effort.

If either or both of these is the case, no breach is committed.

The prohibition indicated and its specific description are based on the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and the Regulations for its Execution, and on Articles 53 and 85, 4 (d), of Protocol I.

In principle, civilian objects belonging to the adverse party do not constitute military objectives and cannot be made the object of attacks, reprisals or acts of hostility. For this reason, Article 613, para. 1 (b), punishes these acts when they cause the destruction of such objects. That said, civilian objects become military objectives (which may legally be attacked) when their destruction in fact presents a specific military advantage or when they make an effective contribution to the adversary's military operations. These two circumstances also feature as specific negating elements, their *raison d'être* lying in the definition of military objectives set out in Article 52 of Protocol I.

Article 613, para. 1 (c), protects objects indispensable to the survival of the civilian population and punishes anyone who attacks, destroys or removes them or renders them useless. It adds a specific negative element: "... except where the adverse party is using these objects to directly support its military operation or for the subsistence solely of the members of its armed forces." (*ICRC translation*). The exception is based on Article 54, para. 3, of Protocol I, even though this rule does not render illegal measures taken in relation to objects indispensable to the survival of the civilian population that may be expected to leave the population so little food or water that it will be reduced to starvation or forced to move away.

This provision is deliberately inspired by Article 54 of Protocol I, an important rule prohibiting the use of starvation as a method of warfare against civilians, and enumerates the objects indispensable to the survival of the civilian population, i.e. foodstuffs and the agricultural areas that produce them, crops, livestock, drinking water installations and supplies, and irrigation works.

The protection under criminal law of works and installations containing dangerous forces is the subject of Article 613, 1 (d), which has the following particular features:

- ♦ the acts prohibited are attacks directed against such works and installations, or any reprisals that may be carried out on them;
- ♦ the works and installations containing dangerous forces which are the subject of prohibited acts are enumerated in Article 56 of Protocol I (dams, dykes and nuclear electricity-generating stations);
- ♦ the acts described (attacks or reprisals) must be of such intensity that they may cause the release of these forces and consequent severe losses among the civilian population, whose inviolability is the ultimate and principal legal value protected;
- ♦ in addition, these works and installations must not be used “in regular, significant and direct support of military operations” and the special protection provided shall cease “if such attack is the only feasible way to terminate such support” — a provision taken verbatim from Article 56, para. 2, of Protocol I.

Article 613, para. 1 (e), punishes a classic crime in the law of war known as pillage. The verbs used in this connection denote the clear intention to destroy, damage or appropriate objects, force another person to give them up or commit acts of pillage. In practice, three types of conduct are prohibited:

1. Destroying, damaging or appropriating property that does not belong to the perpetrator of the crime, where these acts are not justified by military necessity. No breach is committed where these acts are legitimized by military necessity, such as in the case of destruction or damage justified by an act of war directed against a military objective or the appropriation of an object during a requisition.

2. Forcing another person to hand over to the perpetrator of the breach objects that do not belong to him.
3. Committing any other act of pillage. Three rules of the law of armed conflict define and prohibit acts of pillage: Article 28 of the Hague Convention of 1899 Respecting the Laws and Customs of War on Land and its Annexed Regulations, Article 4, para. 3, of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954) and Article 147 of the Fourth Geneva Convention.

3.6 Residual offences (Article 614 of the Penal Code)

We have noted that in defining offences committed against persons and objects protected in the event of armed conflict, Spanish criminal law had opted for a mixed system of prohibition, beginning by describing grave breaches and ending by grouping together in a general provision “other breaches or acts contrary to the law, whatever they may be”. We may thus describe Article 614 of the Penal Code as a general and residual provision that — though accompanied by a penalty involving loss of freedom — provides for less severe punishment (between six months’ and two years’ imprisonment) since the other penalties set by the new Penal Code were not judged to be adequate in wartime.

Logically enough, this provision also requires that the illegal nature of these breaches or acts contrary to the law arise from the rules laid down by the international treaties to which Spain is party — not in all the treaties, but only in those that may be regarded as concerning the following:

- ♦ the conduct of hostilities (law of war);
- ♦ protection of the wounded, sick and shipwrecked, the treatment of prisoners of war and the protection of civilians (First, Second, Third and Fourth Geneva Conventions and their Additional Protocols);
- ♦ the protection of cultural property (Hague Convention of 1954 and its Regulations).

Thus, breaches or acts contrary to the provisions of, for example, new treaties or conventions ratified by Spain which could be included without difficulty among these subjects — such as the Convention on the

Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on their Destruction (Paris, 1993) — would be considered punishable by this provision.

It should be stressed that, from the point of view of treaty law, the obligation to punish violations exists to an adequate extent only for grave breaches or war crimes, while for other breaches or acts contrary to international law, the State party to the international humanitarian law instruments is required only to take the measures necessary to stop them.

4. The common provisions (Articles 615 and 616 of the Penal Code)

Because they are the expression of a clear intention, Article 615 makes incitement, conspiracy and instigation to commit crimes against the international community an offence and it imposes a penalty for such behaviour that is between one and two times less severe than that which should be applied to the actual criminal act. Article 17 of the Penal Code defines conspiracy and instigation, which are punishable only in those cases specified by the law. Article 18 of the Penal Code defines incitement and apology, which it considers a form of incitement, punishing them only in those cases specified by the law.

As regards offences against persons and objects protected in the event of armed conflict, there is no doubt that punishing acts constituting conspiracy, instigation or incitement broaden in a thoroughly consistent manner the scope of protection afforded war victims under criminal law. This is amply justified by the gravity of such breaches.

To the punishments provided for offences against persons and objects protected in the event of armed conflict, the equally commendable Article 616 of the Penal Code adds an additional, compulsory punishment: a prohibition on taking employment in the public service for those who have committed these breaches in their capacity as public authorities or civil servants (Article 24 of the Penal Code). The Penal Code specifically confers on judges and courts the option of imposing an additional punishment, consisting of a prohibition on employment in the public service for a period of between one and 10 years for private individuals who commit such serious crimes.

5. Commission of a crime by omission and command responsibility

Under Spanish criminal law, a superior who actively allows or fails to prevent the commission by his subordinates of serious violations of the law of armed conflict does not go unpunished.

We must remember that Article 86, para. 2, of Protocol I stipulates that “the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach”.

The specific duties of military commanders as regards the measures they are required to take to prevent, suppress and report breaches of the Conventions or of the Protocols are set out in Article 87 of Protocol I. Commanders have a duty of prevention (to avert or put a stop to violations of international humanitarian law) and a duty of repression (to punish war crimes or to report them).

Although commission of a crime by omission is not expressly described in the Penal Code as itself constituting a crime, officers may be held criminally responsible as violators since this constitutes a form of participation in a crime. We are speaking here of a category of acts that falls under the criminal law — commission by omission — according to which failure to prevent an act (omission to act on the part of a superior) is comparable to having caused it. As stipulated in Article 11 of the 1995 Penal Code, “breaches which produce a result shall be considered to have been committed by omission only when failure to prevent them, where the violator has not respected a specific legal obligation, is equivalent, in the spirit of the law, to having committed them. For this purpose, omission is equivalent to a crime (a) where there exists a specific obligation to act, whether legal or contractual; (b) where the person who fails to act creates a danger for the legally protected value by an act or a preceding omission” [*ICRC translation*].

The specific treaty obligation to act laid down in Article 87 of Protocol I was established with superiors in mind. Disregard for this obligation is equivalent to commission of the crime itself where failure to prevent the

result is tantamount to having caused it. This happens only when the damage committed by the superior includes the harmful result (at least in terms of potential damage), with the exclusion of culpable behaviour.

In addition, Article 137 of the Military Penal Code of 1985 imposes a prison sentence of between three months plus one day and four years for superiors who tolerate on the part of their subordinates the commission of an abuse of power, whatever it may be, that exceeds the latter's authority, or who do not display the forcefulness needed to prevent a military crime, in particular "violations of the laws and customs of war". This is a specific prohibition of such conduct, which may result from recklessness, and it constitutes a residual provision in relation to crimes that fall into the category of "commission by omission" and to which more severe punishments apply.

Violations of international humanitarian law Questionnaire

Colonel Fernando Pignatelli and Lieutenant Colonel García Labajo, *under the supervision of Major General José-Luis Rodríguez-Villasante y Prieto and the coordination of Manuel Fernández Gómez, Spanish Red Cross Centre for the Study of International Humanitarian Law*

1. National legislation to repress violations of international humanitarian law

1.1 Substantive criminal law: What is the current state of criminal law relating to the repression of violations of international humanitarian law? Specifically:

1.1.1 *As regards grave breaches of the 1949 Geneva Conventions (Articles 49, 50, 129 and 146, respectively, of the four Conventions)*

Grave breaches of the 1949 Conventions are not set out in the articles mentioned in the question but in Articles 50, 51, 130 and 147, respectively.

In the Spanish Penal Code, approved by Organic Law No. 10 of 23 November 1995, Articles 609, 611, paras 3 and 4, 612, para. 7, and 613, para. 1 (e), cover grave breaches under the aforesaid Conventions and impose penalties as stipulated in these instruments. To be precise, Article 609 covers the grave breaches set out in Articles 50 of the First Convention, 51 of the Second Convention, 130 of the Third Convention and 147 of the Fourth Convention; Articles 611, para. 3, and 611, para. 4, cover the grave breaches set out in Articles 130 of the Third Convention and 147 of the Fourth Convention, and Article 612, para. 7, covers a grave breach specified in Article 147 of the Fourth Convention. The Penal Code thus provides for punishment of said breaches regardless of whether the perpetrator is a civilian or a member of the military.

The Spanish Military Penal Code, approved by Organic Law No. 13 of 9 December 1985, also covers grave breaches under the 1949 Conventions. Such breaches are punishable, as stipulated in the Conventions, under Article 69 of the Code (providing for punishment of military personnel

committing the grave breaches set out in Articles 50 of the First Convention and 51 of the Second Convention) and Articles 73 and 74, para. 1 (providing for punishment of military personnel committing the grave breach set out in Article 147 of the Fourth Convention), 76 (providing for punishment of military personnel committing the grave breaches set out in Articles 50 of the First Convention, 51 of the Second Convention, 130 of the Third Convention and 147 of the Fourth Convention) and 77, paras 5 and 6 (providing for punishment of military personnel committing the grave breach set out in Article 130 of the Third Convention and that set out in Article 147 of the Fourth Convention, respectively). The aforesaid breaches are punishable under the Military Penal Code only if the perpetrator is a member of the military.

1.1.2 As regards grave breaches of 1977 Protocol I additional to the Geneva Conventions (Articles 11, 85 and 86)

It should be stated at the outset that Article 86 of Protocol I additional to the 1949 Conventions does not contain or specify any particular grave breach, but it includes a rule whereby the States party to the Protocol undertake to repress grave breaches and take measures necessary to suppress all other breaches of the Conventions or of the Protocol itself; another rule therein concerns the responsibility of superiors for any act constituting a breach that is committed by a subordinate, if they did not take all feasible measures within their power to prevent the breach from being committed or, once it was completed, to repress or punish that breach.

The 1995 Penal Code provides for punishment of the aforementioned grave breaches, as follows:

- ♦ Article 609 provides for punishment of grave breaches of Article 11, paras 1, 2, 3, 4 and 5, of Additional Protocol I.
- ♦ Article 611, para. 1, provides for punishment of grave breaches of Article 85, para. 3 (a), (b) and (c), of Additional Protocol I; Article 611, para. 3, provides for punishment of the grave breach set out in Article 85, para. 4 (e), of Additional Protocol I; Article 611, paras 4 and 5, provides for punishment of grave breaches of Article 85, para. 4 (a), of Additional Protocol I; Article 611, para. 6, provides for punishment of the grave breach set out in Article 85, para. 4 (c), of Additional Protocol I.

- ♦ Article 611, para. 7, provides for punishment of the grave breach set out in Article 85, para. 4 (b), of Additional Protocol I.
- ♦ Article 612, para. 1, provides for punishment of grave breaches of Article 85, paras 2 and 3 (d), of Additional Protocol I; Article 612, para. 2, provides for punishment of grave breaches of Articles 85, para. 2, and 8 (c) and (d) of Additional Protocol I, and Article 612, paras 4, 5 and 6, provides for punishment of grave breaches of Article 85, para. 3 (f), of Additional Protocol I.
- ♦ Article 613, para. 1 (a), provides for punishment of grave breaches of Article 85, para. 4 (d), of Additional Protocol I; Article 613, para. 1 (b), provides for punishment of grave breaches of Article 85, para. 3 (b), of Additional Protocol I; and Article 613, para. 1 (d), provides for punishment of grave breaches of Article 85, para. 3 (c), of Additional Protocol I.

Since Spain did not become a party to the Protocols until 21 April 1989 and the latter only took effect in Spain on 21 October 1989, the breaches set out in Articles 11 and 85 of Additional Protocol I were obviously not covered by the Military Penal Code of 1985. Nonetheless, in that same year the Spanish military criminal legislature took into account the content, or at least the spirit, of Additional Protocol I in Articles 69 (which is based on Article 85, para. 3 (e), of Additional Protocol I), 70 (which is based on Articles 1, 35, paras 2 and 3, 52 and 55 of Additional Protocol I), 73 (which is based on Article 85, para. 3 (b), of Additional Protocol I), 75, para. 1 (which is based on Article 85, para. 3 (f), of Additional Protocol I), 76 (which is based on Articles 11, paras 1 and 2 (a) and (b), and 85, para. 4 (c), of Additional Protocol I) and 77, paras 4, 5, 6 and 7 (which is based on Article 85, paras 2, 4 (e), 4 (a) and 4 (d), respectively, of Additional Protocol I).

1.1.3 As regards other violations of these treaties which do not qualify as grave breaches

Under the term “specific offences” in the 1995 Penal Code:

- ♦ Article 610 provides for punishment of simple violations or infringements of Articles 1, 35, paras 2 and 3, 52 and 55 of Additional Protocol I.
- ♦ Article 611, para. 1, provides for punishment of simple violations or infringements of Articles 41, 49, 50, 51, paras 2, 4, 5 and 6, and 57,

paras 1 to 4, of Additional Protocol I; Article 611, para. 2, provides for punishment of simple violations or infringements of Article 2 (b) of Additional Protocol I; Article 611, para. 3, provides for punishment of simple violations or infringements of Articles 99 to 108 of the Third Convention, 71 to 75 and 126 of the Fourth Convention, and 4, 43, 45 and 75, paras 4 and 7, of Additional Protocol I; Article 611, para. 4, provides for punishment of simple violations or infringements of Articles 34, 41, 42, 43, 49, 68, 78 and 79 of the Fourth Convention and 75 of Additional Protocol I; Article 611, para. 5, provides for punishment of simple violations or infringements of Article 49 of the Fourth Convention; Article 611, para. 6, provides for punishment of simple violations or infringements of Articles 12 common to the First and Second Conventions, 16 of the Third Convention, and 13 and 27 of the Fourth Convention, and of Articles 10, 69, 70 and 75, para. 1, of Additional Protocol I; and Article 611, para. 7, provides for punishment of simple violations or infringements of Articles 109, 110, 118 and 119 of the Third Convention, 35, 132, 133 and 134 of the Fourth Convention, and 75, para. 3, of Additional Protocol I.

- ♦ Article 612, para. 1, provides for punishment of simple violations or infringements of Articles 8 (e) to (m), 12, 21 to 31, 59 and 60 of Additional Protocol I, 21 to 23 *et seq.* of the Third Convention, and 14, 15 and 83 *et seq.* of the Fourth Convention; Article 612, para. 2, provides for punishment of simple violations or infringements of Articles 8 (c) and (d), 13, 15, 16, 17 and 18 of Additional Protocol I, 18, 21, 22 and 26 of the First Convention and 19 of the Fourth Convention; Article 612, para. 3, provides for punishment of simple violations or infringements of Articles 75 to 77 of Additional Protocol I, 3 common to the four Conventions, 13, 14, 15, 26, 30, 52 and 87 of the Third Convention, and 27, 76, 82 and 100 of the Fourth Convention; Article 612, para. 4, provides for punishment of simple violations or infringements of Articles 18, paras 5 and 8, 37, 38, 56, 59, para. 6, 60, para. 5, and 66 of Additional Protocol I, and 38, 39 and 44 of the First Convention; Article 612, para. 5, provides for punishment of simple violations or infringements of Articles 37, para. 1 (d), 38, 39 and 46 of Additional Protocol I; Article 612, para. 6, provides for punishment of simple violations or infringements of Articles 2 (c) and (d), 5, 7, 33, 37, para. 1 (a), 41, 45, 78, 84 and 90 of Additional Protocol I, 52 of the First Convention, 53 of the Second Convention, 132 of the Third Convention and 149 of the Fourth Convention; Article 612,

para. 7, provides for punishment of simple violations or infringements of Articles 15 of the First Convention, 18 of the Second Convention, 13 of the Third Convention, and 97 and 147 of the Fourth Convention.

- ♦ Article 613, para. 1 (a), provides for punishment of simple violations or infringements of Article 53 of Additional Protocol I; Article 613, para. 1 (b), provides for punishment of simple violations or infringements of Articles 51, para. 5 (b), 52 and 57 of Additional Protocol I; Article 613, para. 1 (c), provides for punishment of simple violations or infringements of Article 54 of Additional Protocol I; and Article 613, para. 1 (d), provides for punishment of simple violations or infringements of Article 56 of Additional Protocol I.

Following the same system, the 1985 Military Penal Code, in Articles 70, 74, paras 1 and 2, 75, para. 1, and 77, paras 1 to 4, provides for punishment, as specific offences, of simple violations or infringements of the 1949 Conventions.

Lastly, Article 614 of the 1995 Penal Code contains a general residual clause providing for punishment, as an offence, of any other violations of or infringements of the Conventions or Protocols or other international treaties (concerning the conduct of hostilities, protection of the wounded, sick and shipwrecked, the treatment of prisoners of war and protection of civilians and protection of cultural property in the event of armed conflict) to which Spain is party, which are not set out individually and for which punishment is not specifically provided for under Articles 609 to 613.

Along those same lines, Article 78 of the 1985 Military Penal Code contains a general residual clause providing for punishment, as an offence, of minor violations of international humanitarian law committed by members of the military, where no individual punishment is stipulated in the specific rules contained in Articles 69 to 77 of the Military Penal Code.

1.1.4 As regards violations of international humanitarian law applicable in non-international armed conflicts (Article 3 common to the four Geneva Conventions and to Additional Protocol II)

As indicated in its very heading, Chapter III of Title XXIV, Volume 2, of the 1995 Penal Code, (“Concerning offences against persons and property protected in the event of armed conflict”), enables conduct considered criminal under Articles 609 to 614 to be covered regardless of whether such conduct is committed during an international or an internal armed conflict.

- ♦ Article 611, para. 3, provides for punishment, as specific offences, of violations of Article 6 of Additional Protocol II; Article 611, para. 4, provides for punishment, as specific offences, of violations of Article 4 of Additional Protocol II;
- ♦ Article 612, para. 3, provides for punishment, as specific offences, of violations of Article 3 common to the four 1949 Conventions.

Under the 1985 Military Penal Code, it would only be possible (and then purely theoretically) to punish such acts if they could be subsumed under Article 78, i.e., in the general residual clause, since the wording of the article would suggest that one of the international conventions ratified by Spain to which it might apply would be Additional Protocol II, although in fact the heading of Title II, Volume 2, of the Military Penal Code rules out that possibility from the technical and legal standpoints.

1.1.5 As regards violations of the provisions of the other treaties governing the law of armed conflict: the Hague Conventions of 1899 and 1907, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the weapons conventions of 1972, 1980 and 1993.

Under the 1995 Penal Code:

- ♦ Article 612, para. 4, provides for punishment of violations of Articles 6, 16 and 17 of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict; Article 612, para. 6, provides for punishment of violations of Articles 23 (f), 32 to 35 of the Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention No. II of 29 July 1899, respecting the Laws and Customs of War.

- ♦ Article 613, para. 1 (a), provides for punishment of violations of Articles 3, 4 and 9 of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict; Article 613, para. 1 (e), provides for punishment of violations of Article 4, para. 3, of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict and of Article 28 of the Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention No. II of 29 July 1899, respecting the Laws and Customs of War.
- ♦ Article 613, para. 2, provides for punishment of violations of Articles 8 to 11 of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, and Articles 11 to 17 of the Regulations for the Execution of the Hague Convention of 1954.

Under the 1985 Military Penal Code:

- ♦ Article 69 provides for punishment of violations of Article 23 (c) of the Regulations annexed to Hague Convention No. II of 1899.
- ♦ Article 70 provides for punishment of violations of Article 23 (e) of the same Regulations.
- ♦ Article 72 provides for punishment of violations of Articles 35 to 41 of the same Regulations.
- ♦ Article 73 provides for punishment of violations of Articles 23 (g), 28 and 47 of the same Regulations.
- ♦ Article 75, para. 1, provides for punishment of violations of Article 23 (f) of the same Regulations.
- ♦ Article 75, para. 2, provides for punishment of violations of Articles 32 to 34 of the same Regulations.

1.2 Legislative approach: How are the violations incorporated in national legislation?

1.2.1 Are they part of the ordinary Penal Code, the Military Penal Code, both, or of a law specifically designed for this purpose?

In Spain, punishment by appropriate criminal sanctions of violations of the law of armed conflict (international humanitarian law and the law of war) is provided for in the ordinary Penal Code of 1995, approved by Organic Law No. 10/1995 (Chapter III, Title XXIV, “Offences against persons and property protected in the event of armed conflict”), and in the 1985 Military Penal Code, approved by Organic Law No. 13/1985 (Chapter II, “Offences against the laws and customs of war”), which applies solely when the person guilty of such an offence is a member of the military. No special law has been enacted.

1.2.2 What wording is used in the relevant national law? (Has the wording been drawn from the Conventions or have the acts in question been reworded? Is there a general clause referring to international law?)

The system followed in Spanish criminal legislation, both in the 1995 Penal Code and in the 1985 Military Penal Code, may be qualified as mixed because, after expressly classifying the most serious forms of criminal conduct, it adds at the end a residual clause which classifies as an ordinary or a military offence any other violations of or acts contrary to the stipulations of international treaties or conventions to which Spain is party, relating to the conduct of hostilities, protection of the wounded, sick and shipwrecked, treatment of prisoners of war, and protection of civilians and of cultural property.

The first articles classifying the most serious offences are based on the definitions, concepts and descriptions of the grave breaches set out in the relevant international instruments, although naturally they have been drafted in the legal terms required for defining forms of conduct that constitute offences, precisely describing all the elements that make up a criminal offence so as to meet the constitutional requirement of abidance by the principle of legality as regards the classification of offences (Article 25 of the Spanish Constitution of 1978). In particular, the establishment of penalties had to be brought into line with the provisions of the ordinary

Penal Code or the Military Penal Code, notably taking into account the total abolition of the death penalty, even in time of war and in military criminal legislation.

The ordinary Penal Code also expressly provides for punishment of any instigation, conspiracy or incitement to commit such offences.

1.3 Jurisdiction: Does national legislation recognize extraterritorial jurisdiction for some or all of the violations? Is this jurisdiction universal (and if so, is it conditional upon the presence of the accused on the national territory), or is it based on the nationality principle, the passive personality principle or the protective or security principle (which relates to matters affecting State security)?

Under the provisions of Article 23, para. 4 (g), of Organic Law No. 6 of 1 July 1985 on the organization of justice, the Spanish courts have jurisdiction over acts committed by Spanish citizens or aliens outside the national territory, if under Spanish criminal legislation such acts can be characterized as any of the offences which, according to international treaties or conventions, must be prosecuted in Spain. In that connection, since Spain is party to the 1949 Geneva Conventions and the 1977 Additional Protocols, the provisions of the second paragraphs of Articles 49 of the First Convention, 50 of the Second Convention, 129 of the Third Convention and 146 of the Fourth Convention and those of Articles 85, para. 1, and 86, para. 1, of Additional Protocol I are fully applicable under Spanish domestic legislation, pursuant to Articles 96, para. 1, of the Constitution and 1, para. 5, of the Civil Code. Such offences may therefore be prosecuted in Spain wherever they are committed and whatever the nationality of their alleged perpetrators, although the presence of the suspect on the national territory is required for the trial proceedings (at least for the actual passing of the sentence) since Article 75, para. 4 (e), of Additional Protocol I sets out the obligation for the accused to be present for his or her trial, which appears to rule out sentencing by default or *in absentia*).

The extraterritorial jurisdiction in question refers to all violations covered in Articles 609 to 614 of the 1995 Penal Code and in Articles 69 to 78 of the 1985 Military Penal Code.

1.4 Legal procedure: What is the procedure regarding investigation, prosecution and judgement of violations of international humanitarian law? Specifically:

1.4.1 *Which body is competent to initiate criminal proceedings? Is this body legally bound to prosecute, or does it have discretionary power to decide whether or not a case should be brought to court?*

The authority competent to initiate criminal proceedings is the investigating judge responsible for conducting the inquiry, acting either *ex officio*, on the basis of a report by the judicial police, or by virtue of a denunciation or complaint. In the latter cases, Spanish law provides for an admissibility procedure whereby the judge may declare the denunciation or complaint inadmissible only if the facts do not bear the hallmarks of an offence or are manifestly false; otherwise the judicial authority is under the obligation to carry out the appropriate inquiries, which means that the discretionary principle does not apply.

1.4.2 *Can the victims of violations themselves initiate such proceedings (i.e., denunciation, lodging of complaint, summons before the competent court)?*

Yes, as just stated, by denunciation or lodging of complaint; both are acts which initiate criminal proceedings but they differ fundamentally, *inter alia* in that the denouncing party merely supplies the *notitia criminis* whereas the one lodging the complaint appears as a party in the trial, together with the public prosecutor.

1.4.3 *Which courts have jurisdiction in such cases (ordinary, military, federal or regional, special courts)? Does this depend on whether the defendant is a civilian or a member of the military? What are the characteristics of these courts?*

As mentioned earlier, the investigating judge of the place where the offence was committed has jurisdiction in the initial phase of pre-trial proceedings and the appropriate Provincial High Court for the plenary phase or trial proper. Both are judicial organs of State jurisdiction, which is the only one in Spain. Offences committed outside the national territory fall under the jurisdiction of bodies — the central examining courts and the National

High Court — based in Madrid and having jurisdiction throughout the nation.

Offences termed as being “against the laws and customs of war”, which are classified in the Military Penal Code and require commission by a member of the military, fall under the jurisdiction of the military courts. Different judicial authorities are involved, depending on the rank of the accused: from private to captain, the Territorial Judge Advocate for the pre-trial proceedings and the Territorial Military Court for the trial proper; and from major upwards, the Central Judge Advocate and the Central Military Court, respectively. There is provision for military judicial services to accompany expeditionary forces in the event of an armed conflict in which Spain intervenes.

Both the ordinary criminal courts and the military courts are composed of professional judges and magistrates, the latter belonging to the military legal corps with military rank and competence; both are independent, irremovable, responsible and subject solely to the rule of law.

1.4.4 Are there any provisions for exceptional procedures in such cases, or is the regular criminal procedure applicable?

Only in time of war is a special, extremely summary procedure applied by the military courts for certain categories of serious offence so declared by the government, which may or may not concern violations of international humanitarian law. Other cases are governed by the general procedural rules.

1.4.5 Does the procedure involve any special features, such as hearings in camera, appeals, etc.?

No. Such matters are governed by the general procedural rules even in the extremely summary military procedure in time of war.

1.4.6 Is prosecution of violations in any way time-barred under national legislation (for example, by a statute of limitations)?

Only the crime of genocide is not time-barred under Spanish domestic legislation.

2. Assessment of national legislation

2.1 Legal precedents and case law: Has the national system for the repression of violations ever been put to use (specific cases, case law)?

There are no precedents to report because Spain's national system has never been put to use.

In the case of the breaches covered by Articles 609 to 614 of the 1995 Penal Code, however, the procedure to be followed would be the one set out in the law of criminal procedure, as for other offences contained in the Penal Code. At the time of prosecution, specific issues deriving from any question of jurisdiction or the severity of the punishment to be applied by the public prosecutor, etc., are naturally the same as for other offences covered by the Penal Code, so there is no special feature of jurisdiction or procedure to distinguish this category of infringement, at the time of prosecution, from any other common crime.

The ordinary military procedure defined in Part 2 ("Concerning ordinary military procedure") of Organic Law No. 2 of 13 April 1989 would be followed for prosecuting the violations covered by Articles 69 to 78 of the Military Penal Code.

2.2 Assessment: How would you assess your country's legislation? What are its strong points and its weaknesses? What were the considerations underlying its adoption?

The Spanish system in general merits an extremely favourable assessment and may be qualified as one of the most perfect, modern and progressive in the light of comparative law. In accordance with continental criminal procedure, it is also particularly respectful of the principle of legality in the classification of offences and penalties, as required under the Constitution.

Its main advantages are the following:

1. Definition of protected persons (Article 608 of the Penal Code) in accordance with international humanitarian law.
2. Identical protection, by means of penalties, for victims of non-international armed conflicts and international armed conflicts.
3. Total abolition of the death penalty.

4. Punishment of grave breaches of the law of war, law of The Hague or law on the conduct of hostilities, and of international humanitarian law or the law of Geneva, encompassing the law of armed conflicts in its entirety.
5. Classification of a series of forms of conduct as constituting offences, punishing each category of offence according to its gravity with penal sanctions differing in severity.
6. Coverage of the precepts contained in the 1977 Protocols additional to the Geneva Conventions.
7. Punishment of any instigation, conspiracy or incitement to commit such offences.
8. Protection, by means of penalties, of the red cross/red crescent emblem and of other protective humanitarian signs.
9. Residual clause providing for the punishment of other violations and acts contrary to the precepts of international law applicable in armed conflicts, even where they do not constitute grave breaches.

The weaknesses of the system stem from the fact that the dual manner of establishing offences (under the ordinary Penal Code and the Military Penal Code), determined by the military status or otherwise of the person guilty of the offence, suffers from the shortcomings of the 1985 Military Penal Code, which was unable to take into account Spain's ratification in 1989 of the 1977 Protocols. As a result, the military text contains many more flaws than the ordinary Penal Code and cannot be regarded as fully reflecting the desired development of international humanitarian law.

A profound reform of the Military Penal Code is now under way, however, to align the criminal treatment of the offences in question with that in force under the ordinary Penal Code.

This dual system, under the ordinary Penal Code and the Military Penal Code, was adopted in order to comply with the constitutional requirement of confining jurisdiction of the military courts strictly to the military sphere (Article 117, para. 5, of the Constitution of 1978).

The mixed system for establishing offences was adopted to ensure proportionality between the severity of punishments (degree of guilt) and the gravity of the different forms of conduct described, from major to

minor criminal liability, and provides for a residual category of offences to which minor penalties apply.

The rules in the Penal Code that provide for punishment of the different acts constituting offences (homicide, bodily injury, material prejudices, duress, theft) have been regarded as inadequate because the sanctions prescribed do not take account of the “extra degree” of criminal liability which must be established when punishing crimes committed during an armed conflict, because of the particular vulnerability of the victims entitled to protection.

The essential consideration in classifying these offences in Spanish criminal legislation was to ensure full compliance with the commitments made when the country ratified the various instruments of international humanitarian law applicable in armed conflicts, and to enhance protection of the individual (particularly victims of conflict) in all circumstances.

Comparative study of some national systems of repression

Summary prepared by the ICRC Advisory Service on International Humanitarian Law

1. Mechanisms for the repression of violations of international humanitarian law

1.1 Repression of violations of international humanitarian law

The main instruments of international humanitarian law, also known as the law of war or law of armed conflict, deal with issues that are of vital importance in times of armed conflict. They provide *inter alia* for the protection of the wounded, the sick and the shipwrecked, prisoners of war, civilian internees and, indeed, the civilian population as a whole.

International humanitarian law not only lays down rules for protecting the victims of armed conflict and limiting the means and methods of warfare, but it also contains important mechanisms for guaranteeing compliance with its provisions. In particular, it recognizes the individual criminal responsibility of any person for any grave breach he or she may have committed or ordered to be committed.

The provisions relating to the criminal repression of violations of international humanitarian law reaffirm that certain acts are prohibited even in war. As criminal repression is based on the idea that punishment forms an integral part of any comprehensive legal system — whether national or international — and that the threat of punishment also constitutes a major deterrent, it is crucial in ensuring respect for humanitarian law.

The upsurge in the number of armed conflicts over the past few years, coupled with manifest violations of international humanitarian law, has rekindled among States and public opinion an interest in appropriate mechanisms for achieving greater respect for the law by means of criminal sanctions. The creation of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, the increased efforts to establish a

permanent international criminal court and the growing number of prosecutions brought by national authorities against suspected perpetrators of war crimes, in several European countries in particular, bear ample witness to this revival of interest.

1.2 Obligations of States regarding violations of international humanitarian law

Many of the rules relating to international armed conflicts are set out in the four Geneva Conventions of 1949 and their Additional Protocols I and II of 1977. It is primarily up to the States Parties to respect the treaties by which they are bound and to take the necessary steps to ensure that these are respected. The obligation to respect and ensure respect for the rules of international humanitarian law is explicitly mentioned in the texts themselves, which further require each State to put a stop to any act contrary to their provisions and to provide for the criminal repression of the most serious offences, which are termed “grave breaches” in the humanitarian treaties¹ and are regarded as war crimes.

As laid down in the rules of international humanitarian law dealing with repression mechanisms, each State Party is more specifically required to:

- ♦ search for any person alleged to have committed or ordered the commission of any such breach, regardless of the person’s nationality or the place where the breach was committed;
- ♦ pursuant to the principle of *aut dedere aut judicare*, bring the person before its own courts or extradite that person to another State Party that has an interest in instituting criminal proceedings;
- ♦ instruct its military commanders to prevent the commission of grave breaches, to put a stop to any breach being committed and to take action against anyone under their command who is guilty of such a breach;
- ♦ extend judicial assistance to other States Parties in any proceedings brought in respect of grave breaches;

¹ Articles 49, 50, 129 and 146, respectively, of the four Geneva Conventions of 1949, and Articles 11 and 85 of Additional Protocol I of 1977.

- ♦ adopt all the legislative measures necessary for meeting its obligations and duly punish persons responsible for committing grave breaches of international humanitarian law.

The national legislation to be enacted by States must, in particular, prohibit the grave breaches listed in the treaties and provide for punishment thereof by establishing effective criminal sanctions. It must cover all persons — whether civilians or military personnel and irrespective of their nationality — who commit or order the commission of any of the aforementioned grave breaches, including breaches resulting from failure to act where there was a duty to take action. It must also encompass both acts perpetrated on the national territory and those committed abroad.

The said treaties also require each State Party to take appropriate measures to prevent or put a stop to all other acts contrary to their provisions that are not specifically defined as *grave breaches*, yet without specifying how the States should proceed.

Other humanitarian law instruments also make it an obligation for States Parties to provide for the criminal repression of certain offences, by requiring them to adapt their criminal legislation accordingly. These include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict² and Protocol II to the 1980 Convention on Conventional Weapons, as amended in 1996.³

In view of the increasing number of non-international armed conflicts, steps taken at the national level for the criminal repression of violations of the law applicable to such situations are of considerable interest. Although the relevant treaty law, with the exception of revised Protocol II to the 1980 Conventional Weapons Convention, does not state any explicit obligation to provide for penalties, States are nonetheless required to put a stop to any violation of that law.

The obligations deriving from international humanitarian law are clear and precise. It must be noted, however, that the measures taken so far by States in order to meet those obligations are still largely inadequate. Efforts must therefore be stepped up if the repression of violations of international humanitarian law is to become truly effective.

² Article 28.

³ Article 14.

2. Experience of various States concerning national measures to repress violations of international humanitarian law

2.1 Approach and method chosen

When dealing with the repression of crimes under international law at the domestic level, both legislatures and implementing authorities are faced with a number of difficulties that arise from the specific nature and characteristics of that law. Some of the problems encountered are the requirement of universal jurisdiction in respect of certain serious offences, the fact that such offences were committed in exceptional situations such as war, and the fact that the concepts and sometimes imprecise language of international law differ from those of domestic law, which are more familiar to judges handling cases at the national level.

In order to demonstrate how legislatures in different countries can meet the specific features and requirements of international humanitarian law in terms of enforcement through criminal legislation, studies of a few national systems for the prosecution of suspected perpetrators of violations of humanitarian law have been drawn up at the request of the ICRC. The countries selected were Germany, Belgium, Spain and Switzerland, i.e., countries which belong to the same geographical region and already have such systems, but have opted for different mechanisms.

Lawmakers seeking to meet their country's treaty obligations to the full are faced with a daunting list of issues and questions, some of them so complex as to merit detailed examination in themselves. As it would be impossible to cover all the subjects involved, a selection had to be made for the meeting of experts. The comparative presentation below will therefore be confined to a few questions considered so essential in the setting-up of repression mechanisms that they require discussion as a matter of priority.

2.2 Comparative presentation of a few national systems for the repression of violations of international humanitarian law

The presentation will follow the order of questions set out in the questionnaire⁴ drawn up by the ICRC Advisory Service on International Humanitarian Law for those preparing the studies. The aim of the summaries by country is to provide a concise account of the reports drafted by outside experts, whose texts are available *in extenso* to participants in the meeting.

⁴ See Annex I.

2.2.1 Substantive law

Description of the systems

■ Germany

Germany is party to both the 1949 Geneva Conventions and their 1977 Additional Protocols but has not deemed it necessary to adopt specific legislation for the repression of violations of those treaties.

Violations of international humanitarian law are covered by various provisions of the ordinary Penal Code, which, according to the German authorities, provides for punishment of all serious violations of that law, regardless of whether they are defined as “grave breaches” or “other violations” and whether they are committed in an international or a non-international armed conflict. Germany’s Penal Code makes no reference to the term “grave breaches” as used in the Geneva Conventions, or to the definition of armed conflict appearing therein.

The provisions of the Penal Code are worded broadly enough to cover all acts committed in war situations, whatever the type of conflict involved. Many violations of the law of armed conflict are also offences against Germany’s criminal law (dual criminal liability). A particular act committed within the context of an armed conflict constitutes a serious offence under German criminal law if such an act is not justified. According to Article 25 of the Constitution (*Grundgesetz*), the provisions of international law binding upon Germany take precedence over its national law, and this principle determines whether an act is justified or constitutes an offence punishable under the Penal Code. Consequently, acts authorized by international humanitarian law are not punishable under German criminal law.

Violations of other humanitarian treaties by which Germany is bound are covered in the same way.

■ Belgium

Belgium is party both to the 1949 Geneva Conventions and to Additional Protocols I and II.

The Act of 16 June 1993 on the repression of grave breaches of the Geneva Conventions of 1949 and Protocols I and II of 1977 additional to the

Conventions not only provides for the repression of what those texts define as grave breaches, but also extends application of the law to violations committed in a non-international armed conflict as defined in Article 1, para. 1, of Additional Protocol II. The Act does not apply, however, to non-international armed conflicts governed by Article 3 common to the Geneva Conventions, and violations committed in such situations remain subject to the provisions of ordinary criminal law.

Article 1 of the Act lists all the grave breaches specified in Articles 49, 50, 129 and 146, respectively, of the four Geneva Conventions and Articles 11 and 85 of Protocol I, and defines them as “crimes under international law”. Articles 3 and 4 of the Act classify certain preparatory acts or forms of conduct preceding a war crime (regardless of whether the crime has in fact been committed) as offences to be considered, in terms of punishment, as crimes under international law. In criminalizing this type of act, the Belgian legislature has gone beyond the country’s treaty obligations, as such offences are not mentioned in the humanitarian treaties themselves. Article 4, para. 5, of the Act relates to the acts covered by Article 86 of Protocol I.

Depending on the gravity of the breach, punishment varies from the highest sentence provided for in the Military Penal Code (life imprisonment) to 10 to 15 years’ imprisonment.

Violations which are not held to be “grave breaches” of the humanitarian treaties are not covered by the Act — except for behaviour analogous to grave breaches that is engaged in during a non-international armed conflict — nor are they explicitly classified as offences under Belgian criminal law. However, ordinary criminal law may be applied to them provided that the constituent elements of the violations in question match those of any offence punishable under ordinary criminal law.

Breaches of the 1899/1907 Hague Conventions, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Weapons Conventions of 1980 and 1993 have not been specifically defined as offences under Belgian law.⁵ However, the ordinary Penal Code provides to a large extent for the repression of such breaches.

⁵ The Belgian laws approving the 1972 Convention on Bacteriological Weapons and the 1976 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques provide for punishment in respect of acts prohibited by these Conventions.

■ Spain

Spain is party both to the 1949 Geneva Conventions and to Additional Protocols I and II.

In Spain, violations of international humanitarian law are specifically covered by the ordinary Penal Code, approved by Organic Law No. 10 of 23 November 1995 (Chapter III of Title XXIV, “*Offences against persons and property protected in the event of armed conflict*”, Articles 609 to 614), on the one hand, and, on the other, by the Military Penal Code of 9 December 1985 (Volume II, Title II, “*Offences against the laws and customs of war*”, Articles 69 to 78).

The aforementioned articles (in particular Articles 609 to 613) of the Penal Code provide for punishment of grave breaches of the Geneva Conventions and Additional Protocol I and other violations of or acts contrary to those treaties which involve some degree of gravity, irrespective of who perpetrated them. A general residual clause also provides for punishment — though the penalties are less severe — of any other type of conduct contrary to the stipulations of international treaties and conventions to which Spain is party, relating to the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, and the protection of civilians and of cultural property.⁶

The Military Penal Code, which applies solely where the perpetrator of an offence is a member of the military, recognizes only grave breaches and other violations of or acts contrary to the Geneva Conventions, because it was adopted before Spain ratified the Additional Protocols. However, the acts defined as offences in the Code already take account of the content or at least the spirit of the provisions concerning grave breaches of Additional Protocol I. As in the ordinary Penal Code, a general residual clause supplements the relevant part of the Military Penal Code (Article 78) and provides for punishment of minor violations of the humanitarian treaties.

As indicated by the title of the relevant chapter of the Penal Code, acts that can be identified as violations of international humanitarian law are punishable regardless of whether they were committed in the context of an international armed conflict or in that of a non-international armed conflict.

⁶ See Article 614 of the Penal Code.

Violations of the law of non-international armed conflicts could also be punished under the Military Penal Code by means of the residual clause in Article 78, barring the possible obstacle arising from the very title of the relevant part of the Code.

The above-mentioned provisions of the ordinary Penal Code further provide for punishment of violations of the Hague Conventions respecting the Laws and Customs of War, including the annexed Regulations, and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Military Penal Code also covers violations of the law of The Hague, as indicated in the title of the relevant part of the Code. No specific classification of violations has been introduced in connection with the 1980 and 1993 Weapons Conventions.

■ Switzerland

Switzerland is party both to the 1949 Geneva Conventions and to Additional Protocols I and II.

Violations of the humanitarian treaties are punishable under Chapter VI (Articles 108 to 114) of the Military Penal Code, entitled “*Violations of international law*”. Apart from defining certain specific acts as offences (i.e., misuse of the emblem, hostile acts against persons and property protected by an international organization, failure to discharge duties towards enemies, breaches of an armistice or the peace, and offences against negotiators), Chapter VI contains a generic clause referring to the requirements of international treaties on the conduct of hostilities and on the protection of persons and property, and to other recognized laws and customs of war. The provisions in the special part of the Military Penal Code are regarded as *lex specialis* in relation to those of the ordinary Penal Code. They thus take precedence over the latter in cases where both could apply; where no provision in the special part of the Military Penal Code applies, the special part of the ordinary Penal Code may be applied.

The purpose of Chapter VI of the Military Penal Code is not to uphold international law, although Switzerland’s interest in ensuring compliance with the obligations set out in the Code derives from international law. The personal scope of the Chapter therefore covers both Swiss citizens and foreign nationals and has been expressly extended to civilians who, during an armed conflict, are guilty of violations of international law (Article 2, para. 9).

The Military Penal Code provides for punishment of violations of international humanitarian law irrespective of the gravity of the violations and the manner in which they are defined in international law, and it makes no distinction between grave breaches and other violations. Minor violations are, however, subject to disciplinary measures.

The law encompasses all cases of declared or undeclared war, international war, war of decolonization and internal conflict. In particular, it stipulates that the violation of international agreements is also punishable where the scope of those instruments extends beyond declared wars or other armed conflicts.

Breaches of all humanitarian law treaties other than the Geneva Conventions and their Additional Protocols by which Switzerland is bound at the time such breaches are committed are also covered by the aforementioned provisions (in particular Article 109 of the Military Penal Code). Implementing legislation for the 1980 and 1993 Weapons Conventions is currently being drafted.

Assessment

The systems described above take a differing approach to the repression of violations of the rules contained in the humanitarian treaties. Belgium, Spain and Switzerland either explicitly or implicitly provide for the punishment of acts defined in the treaties as *grave breaches*. In the case of Germany, the system does not offer all the guarantees required to ensure the repression, at the domestic level, of all *grave breaches*. Spain and Switzerland provide for punishment of all serious violations of the treaties irrespective of whether or not they are classified as *grave breaches*. Under the Belgian (save for violations of 1977 Additional Protocol II) and German systems, violations not qualified as *grave breaches* appear to be punishable under ordinary criminal law in so far as their constituent elements match those of acts classified as offences under domestic law. It is interesting to note that, with a few exceptions, all four systems also permit the repression of violations of the rules of law applicable to non-international armed conflicts, either explicitly or by omitting to define the conflict situation in which the violations are committed. In the case of Belgium, the decision to exclude situations covered solely by Article 3 common to the Geneva Conventions is somewhat surprising.

In addition, the four systems provide for punishment, to a greater or lesser degree, of breaches of other humanitarian treaties by which the States in question are bound.

2.2.2 Legislative approach: how are these violations incorporated into domestic law?

Description of the systems

■ Germany

Germany has not enacted any law or specific legal provision to incorporate violations of international humanitarian law into its national legislation. According to the German authorities, acts classified as offences under the ordinary Penal Code — and interpreted in the light of international law — sufficiently cover unlawful acts committed in a war situation, regardless of the way in which they are defined.

German military manuals and regulations clearly and thoroughly describe for the benefit of German troops which forms of conduct are authorized and which are unlawful in pursuing hostilities, and spell out commanders' responsibilities in that respect. Commanders are explicitly required to prevent their subordinates from committing violations of international humanitarian law and are held criminally responsible for any failure in that duty. The military regulations may provide a useful reference for the authorities responsible for prosecuting alleged perpetrators of such violations, particularly where German nationals are involved.

■ Belgium

Belgium has opted to incorporate the repression of violations of international humanitarian law into its national legislation by means of a special law that is quite distinct from the ordinary and Military Penal Codes. The Act of 16 June 1993 breaks new ground in that it constitutes a consistent and autonomous body of provisions relating to both substantive criminal law and criminal procedure. It introduces significant departures from ordinary criminal law and from usual procedure.

The Act contains a set of specifically classified offences defined as “crimes under international law”, which is independent of the ordinary offences set out in the Penal Code, even though some of them may coincide. The offences covered by the Act are an exact reproduction of the forms of

behaviour criminalized under international law (notably those qualified as grave breaches) and must be interpreted in the light of the instruments from which they are drawn.

■ Spain

Spain has chosen to incorporate the repression of violations of the law of armed conflict into its existing texts of criminal law, i.e., the 1985 Military Penal Code (which concerns perpetrators forming part of the military) and the 1995 ordinary Penal Code (“applicable to whomsoever shall commit ...”), by introducing a separate part or chapter for the purpose in each case. The method adopted may be described as a *mixed classification of offences*. A definition of the persons protected in the event of armed conflict, accompanied by a list of specifically defined offences and relating to the most serious and characteristic violations, classified according to the nature of the legally protected interests involved, is supplemented by a residual clause which closes each part or chapter with a generic criminalization. These specifically defined offences are drafted autonomously from the texts of treaty law, thus making it possible to determine all the constituent elements of an offence with all the accuracy required by the principle of legality. In the case of the ordinary Penal Code, common provisions covering the different acts classified as offences and departing slightly from general ordinary criminal law provide for punishment of incitement and conspiracy to the same degree as the main offence and for an aggravation of penalty in the event that an offence is committed by an authority or an official.

Since the adoption of the revised Penal Code, which came into force in 1996 and provides for punishment of types of conduct identical or similar to those covered by the Military Penal Code, both texts — which do not establish identical penalties — could apply for the same offence. This produces a dual system with regard to perpetrators having military status.

■ Switzerland

Violations of international humanitarian law are punishable under Swiss military law, the personal scope of which covers both Swiss and foreign military personnel and civilians in respect of such violations.

As to the method used for the classification of offences, the Swiss system for the repression of violations of the law of armed conflict may be

described as a *mixed system*. It combines a number of provisions containing specifically defined offences, drafted autonomously from the texts of treaty law, with a generic residual reference clause. The legislature has expressly determined that this clause sufficiently respects the principle of *nullum crimen nulla poena sine lege*. The clause must be interpreted and applied in the light of international law, which in Switzerland ranks equally with domestic law from the standpoint of the hierarchy of rules. The treaties by which Switzerland is bound are published in the Military Regulations, together with the international conventions relating to armed conflicts and neutrality. As for violations of international treaties whose constituent elements are similar to those of offences defined in Swiss law, they may be interpreted in the light of Switzerland's domestic legislation.

Swiss law makes no distinction between violations qualified as grave breaches and other violations, and covers all conflict situations irrespective of the type.

Assessment

The systems described above show that, from the *technical* standpoint, there are several ways of providing for the repression of violations of international humanitarian law in domestic legislation. For instance, it may be decided that violations will be covered under ordinary criminal law as in Germany, where the authorities have considered it unnecessary to enact specific provisions. Other methods range from establishing a complete set of specifically defined offences as in Belgium to drawing up a partial list of specifically defined offences as in Spain and Switzerland. A further option is to incorporate violations of international humanitarian law into national law by means of a simple reference clause.

All four countries have enacted specific legislation for the purpose and have opted for one or another combination of the aforementioned techniques. In Belgium, Spain and Switzerland any lacuna in the legislation may be remedied by the supplementary application of ordinary criminal law, a process which undoubtedly enables those countries fully to meet their obligations under international law.

For those subject to the authority of the law, the method of establishing specifically defined offences is certainly consistent with the principle of legality and meets the latter's requirements in terms of transparency and accuracy, whereas a simple reference clause may — depending on its

content — prove inadequate in that respect. The *dual criminal liability* technique, as chosen by Germany, raises some doubts as to whether the acts considered match the requirements and conditions laid down in international humanitarian law.

As for the provisions governing punishment of violations of international humanitarian law, they are to be found in different legal texts depending on the country, although all the systems examined cover both civilian and military perpetrators.

Only Belgium has opted for a specific law. Both Spain and Switzerland have incorporated punishment of crimes under international law into their existing bodies of legislation.

2.2.3 Jurisdiction

Description of the systems

■ Germany

The jurisdiction of Germany's prosecuting authorities is laid down in Articles 3 to 7 of the Penal Code. Article 6, paras 1 and 9, confers extraterritorial jurisdiction upon the German authorities (irrespective of the place where the offence was committed or the nationality of the perpetrator) for the crime of genocide and all other offences which Germany is required to prosecute under the terms of an international treaty by which it is bound.

The Federal Supreme Court has, however, limited the jurisdiction of the German courts for any serious offence committed abroad — at least in so far as the crime of genocide is concerned — by subjecting it to the existence of a *link* between the offence and Germany.⁷

■ Belgium

The jurisdiction of Belgium's judicial authorities is defined in the introductory section of the Code of Penal Procedure, which provides for different cases of extraterritorial jurisdiction based on the nationality or passive personality principle or on the nature of the offence. Those

⁷ See Federal Supreme Court, 14 *Neue Zeitschrift für Strafrecht* (1994), p. 232.

provisions subject jurisdiction to certain conditions and must be interpreted in a narrow sense.

As regards international humanitarian law, the legislature has departed from the above rules and established under Article 7 of the Act of 16 June 1993 that persons responsible for committing any of the serious offences covered by the Act shall fall within Belgian jurisdiction, irrespective of their nationality or that of the victims. The fact that the accused is a civilian or a member of foreign national or multinational armed forces does not affect the jurisdiction of Belgian courts. This extraterritorial jurisdiction departs in some respects from the usual terms of criminal law.⁸

■ Spain

Under the terms of Article 23, para. 4 (g), of Organic Law No. 6 of 1 July 1985 on the organization of justice, the Spanish courts have jurisdiction in respect of all offences perpetrated by Spanish nationals or aliens outside the national territory, where the offences may be qualified as any one of those which Spain is bound to prosecute under international treaties. The jurisdiction of the courts therefore extends to the acts defined in Articles 609 to 614 of the ordinary Penal Code and 69 to 78 of the Military Penal Code, the perpetrators of which must be tried by Spanish courts regardless of the places where the offences were committed or the nationality of the perpetrators.

■ Switzerland

Article 9, para. 1, of the Military Penal Code stipulates that the Code applies to offences committed in Switzerland or abroad and institutes extraterritorial jurisdiction for all violations of the law of war. The Code contains no precise indication concerning the nationality of perpetrators. An examination of the provisions of Switzerland's criminal law (Military Penal Code and, as a subsidiary source, the Penal Code) — and an interpretation consistent with the rules of international law by which the country is bound — do nevertheless suggest that in this respect the jurisdiction of the Swiss

⁸ – The requirement of dual criminal liability does not apply.
– In the case of serious offences committed abroad by a Belgian against a foreign national, the victim or his family are not required to lodge a complaint, nor does official notice have to be given by the authorities of the country where the offence was committed.
– Belgian courts have jurisdiction even if the accused is not on Belgian territory.

courts extends to all persons accused of offences against the law of war, whether civilians or members of the military, Swiss or foreign nationals.

Assessment

The systems described fulfil the obligation of *aut dedere aut judicare* in so far as they establish extensive extraterritorial jurisdiction in respect of breaches of international humanitarian law. In all four countries, such breaches can generally be prosecuted by the national authorities irrespective of the nationality of the perpetrators and the places where the breaches were committed. Extraterritorial jurisdiction is not, however, unlimited in the case of Germany, where the Federal Supreme Court subjects the jurisdiction of the national courts to the existence of a *link* between the breach and Germany in respect of certain acts perpetrated abroad, at least in the case of the crime of genocide. Spain requires the accused to be present for the actual sentencing. According to the Military Penal Code, universal jurisdiction is explicit and complete in Switzerland.

2.2.4 Legal procedure regarding investigation, prosecution and trial of violations of international humanitarian law

Description of the systems

■ Germany

Article 152, para. 1, of the Code of Criminal Procedure gives the State a monopoly over prosecution. The principle of legality requires the police or the Public Prosecutor's Office to institute criminal proceedings where there are sufficient grounds for suspecting that an offence has been committed; no other authority is able to influence the prosecuting authorities' decision to open an investigation. In exceptional circumstances, a public prosecutor may for reasons of political expediency refrain from bringing a prosecution in certain cases explicitly provided for in Article 153 of the Code of Criminal Procedure, in particular if the offence in question was committed abroad and instituting criminal proceedings might cause serious harm to Germany. The decision to abandon proceedings is subject to approval by the Chief Public Prosecutor of the Federal Supreme Court. Prosecution may also be abandoned if the accused is to be extradited or handed over for trial to an international tribunal (Article 154 (b), para. 1, of the Code of Criminal Procedure).

Under Article 395 of the same Code, victims are allowed to initiate supporting or private proceedings in respect of a number of acts defined as offences under German criminal law.

The German Constitution authorizes the creation of special military courts. Since the State has never made use of that option, however, the ordinary criminal courts are empowered to try violations of international humanitarian law. Jurisdiction in such matters lies with the regional courts of first instance and the higher regional courts. The latter have jurisdiction in respect of the crime of genocide (Article 120, para. 1 (8), of the Act on the constitution of the courts — GVG) and all other offences concomitant with or related to the crime. The prosecuting authority in such cases is the Federal Chief Public Prosecutor.

The ordinary rules of procedure generally apply without exception as there are no special courts.

No explicit provisions exist regarding the non-applicability of statutory limitation to violations of the law of armed conflict, although the ordinary rules providing for statutory limitation do not apply to murder or genocide (Article 78, para. 2, of the Penal Code).

International cooperation and mutual judicial assistance in criminal matters

Cooperation and mutual judicial assistance in criminal matters are governed both by bilateral treaties and by the Act on international assistance in criminal matters. Germany has also adopted a specific law on cooperation with the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, which amends certain provisions of the aforementioned act by broadening the potential for international cooperation in the prosecution of war crimes. Part V of the law on cooperation with the Tribunals, which deals with mutual assistance other than in connection with extradition or the enforcement of judgements, also applies to intergovernmental and supranational organizations.

■ Belgium

Responsibility for prosecution lies with the crown prosecutor's office, which has discretionary powers regarding the expediency of prosecution. In a case where it deems no judicial investigation necessary, it may conduct an inquiry of its own with a view to constituting a case-file. If it considers a

judicial investigation necessary, it may refer the case to an investigating judge (or the Judicial Committee if the matter falls within the jurisdiction of the military courts) and instruct him to conduct an inquiry. The Minister of Justice has a right of injunction regarding the institution of criminal proceedings.

An injured party can set a prosecution in motion by bringing a civil suit. The Act of 16 June 1993 grants injured parties that option also within the context of proceedings instituted before the military courts, in a departure from the usual rules of military criminal procedure. However, it makes participation by injured parties conditional upon the prior deposit with the registry of a sum deemed necessary to cover court fees, which may cause the party concerned to refrain from initiating civil proceedings.

The type of court competent to deal with violations of international humanitarian law is determined on the basis of a *ratione temporis* distinction as to whether or not Belgium is at war. In wartime, crimes under international law fall within the jurisdiction of the military courts. In peacetime, jurisdiction is determined on the basis of the general rules of *ratione personae* jurisdiction, members of the armed forces being answerable to the military courts and other persons accused (Belgian or foreign civilians and non-Belgian military personnel) to the ordinary courts. When proceedings are brought simultaneously against persons falling within the jurisdiction of both types of court, the ordinary courts will try all the offences. Internal jurisdiction is determined according to the rules governing territorial jurisdiction of the criminal courts; *ratione materiae* jurisdiction in respect of crimes under international law lies either with the assize court or with the regional criminal courts which try misdemeanours (*tribunaux correctionnels*), depending on the penalty applicable.

The rules of procedure of criminal law (military or ordinary courts) govern proceedings based on the application of the Act of 16 June 1993.

Article 8 of the Act provides for the *non-applicability of statutory limitation* to crimes under international law referred to in the Act. That rule applies to both prosecution and sentences.

International cooperation and mutual judicial assistance in criminal matters

International cooperation in criminal matters is governed by the relevant Belgian legislation.

There are no specific departures from the ordinary rules on extradition, so Belgium might have some difficulty in extraditing war criminals to countries with which it has not signed an extradition treaty. Similarly, doubts persist as to whether a political offence might be recognized as an exception for refusing the extradition of such criminals.

The Act of 22 March 1996 on recognition of the International Criminal Tribunals for the former Yugoslavia and Rwanda and to cooperation with those Tribunals governs relations between Belgium and the International Tribunals in respect of proceedings relating to crimes under international law and, to that end, removes certain obstacles contained in ordinary criminal law. Under the terms of Article 5 of the Act, the Minister of Justice is designated as the central contact for the International Tribunals. Requests for judicial cooperation must be addressed to him and he will ensure that they are followed up. The Court of Cassation is responsible for ordering the Belgian courts to relinquish jurisdiction to the International Tribunals.

■ Spain

The prosecution of violations of international humanitarian law is set in motion either automatically by the judicial police or by means of a denunciation or a complaint by an injured party. Investigating judges are the authorities competent to open criminal investigations and case-files. In the event of a denunciation or a complaint, the investigating judge is required to conduct an inquiry unless the facts reported do not constitute an offence or are manifestly unfounded.

The type of court competent to try such violations is determined according to whether the perpetrators fall within the personal scope of the ordinary Penal Code or that of the Military Penal Code; in the former case jurisdiction lies with the judicial authorities (investigating judge, provincial court) of the place where the offence in question was committed or, if it was perpetrated abroad, with the central judicial authorities in Madrid. In the latter case, the relevant military court depends on the rank of the accused. In the event of Spain's involvement in an armed conflict, the judicial bodies competent to deal with offences committed in that context would accompany the expeditionary forces.

Both the ordinary and the military courts are staffed by professional judges and magistrates.

The usual rules of procedure apply, without any derogation whatsoever, to the prosecution of crimes under international law. However, the law does provide for a special procedure which may be invoked in wartime for the prosecution of certain grave breaches identified by the government.

Article 117 of the Spanish Constitution establishes the principle of jurisdictional unity as the basis for the organization and operation of the courts; this also applies to the military courts. It further stipulates that military jurisdiction is exercised in the strictly military sphere and in the event of a state of siege. It explicitly bans the creation of special courts.

International cooperation and mutual judicial assistance in criminal matters

Mutual judicial assistance in criminal matters and extradition are regulated by Act No. 4 of 21 March 1985. Act No. 15 of 1 June 1994 authorizes and governs the cooperation of the Spanish authorities with the ad hoc International Criminal Tribunal for the former Yugoslavia. It departs from certain provisions of Act No. 4, thus broadening the potential for international cooperation in repressing grave breaches of international humanitarian law.

■ Switzerland

As a rule the investigation and prosecution of violations of international humanitarian law are the responsibility of the federal military judicial bodies. Acts punishable under Articles 108 to 114 of the Military Penal Code are automatically prosecuted, as are all other offences under the Code (with the exception of defamation). That does not, however, prevent anyone who has suffered injury as a result of an offence, or a third party, from bringing the facts to the attention of the competent authority in order to set a prosecution in motion.

Prosecution is triggered by the issue of an order to conduct an investigation to produce further evidence⁹ or an ordinary investigation, which places the matter in the hands of an investigating judge.

The order may be issued by the commander of the military unit involved (if the acts were committed while the suspected perpetrator was on duty) or,

⁹ If the facts available are incomplete, thus making it impossible to determine whether an offence has been committed.

particularly in the case of violations of international humanitarian law, by the Judge Advocate General. Where the latter refuses to issue such an order, an appeal may be lodged with the head of the Federal Military Department. If the Judge Advocate General knows that a serious offence has been committed or there are serious grounds for suspecting that such an offence may have been perpetrated, a judicial investigation is mandatory.

If the charges made come within the scope of Articles 108 to 114 of the Military Penal Code and the perpetrators fall within the personal scope of the law as defined in Articles 2 to 6 of the Code, jurisdiction lies with the military courts.

In the event that a crime under international law is accompanied by an ordinary offence, the ordinary courts competent to try the latter may be instructed to rule on all the facts. Persons who do not fall within the scope of the Military Penal Code remain subject to ordinary criminal law and therefore to the jurisdiction of the ordinary courts.

The rules of procedure applicable to the investigation and prosecution of crimes under international law are also military in nature and derive from military criminal procedure. They contain extensive procedural and defence safeguards.¹⁰ With the exception of the Judge Advocate General, who is a professional judge, the other persons who make up the military judiciary perform their duties (as presiding judges, judges advocate, investigating judges and clerks) within the context of their military service.

Under Swiss law, the victim of an offence (including a crime under international law) is granted extensive rights in the judicial process.

An injured party may bring a civil suit against the person accused of committing an offence and within those limits exercises the rights attributed to a party to the proceedings. The injured party may set out his civil claims once the investigation is opened, request the investigating judge to carry out the necessary inquiries for establishing his rights and consult the case-file. He may appeal against the judge advocate's (or the investigating judge's) decision to dismiss the case and, if the accused is found guilty, is entitled to have the sentencing authority rule on his civil

¹⁰ These stipulate *inter alia* that proceedings shall be oral, public and adversarial in nature. They also require the accused to be represented by a defence counsel. The evidence is assessed freely by the courts and hearings *in camera* may be ordered in the interests of national defence, State security, public policy, public morality or even a party or person. The judgement is always delivered in open court and there are broad avenues of appeal.

claims. He may appeal against or apply for a review of the judgement on merits if the decision is likely to affect the assessment of his civil claims.

The victim of an offence also enjoys the rights and safeguards afforded by the 1991 *Federal Law on Aid to Victims of Offences*.¹¹ Under the terms of that law, the victim of an offence may challenge a refusal on the part of the competent authority to open an inquiry at the end of an investigation to produce further evidence and may appeal against any subsequent order to discharge the accused issued by the judge advocate. He also enjoys certain procedural safeguards specifically linked to his status.

According to Articles 56a, para. 1, point 2, of the Military Penal Code and 75a, para. 1, point 2, of the Penal Code, which have exactly the same wording, the following offences are not time-barred: “*serious crimes covered by the Geneva Conventions of 12 August 1949 and other international treaties relative to the protection of war victims to which Switzerland is party, where the breach in question is particularly serious on account of the conditions under which it was committed*”. Since exemption from statutory limitation is an exception to the rule, it does not apply generally to crimes under international law but is confined to cases deemed particularly serious.

The Military Penal Code and the Code of Military Penal Procedure do not provide for the establishment of special courts or a special procedure but entrust specialized authorities with the task of ruling on offences which bear a specific relationship to military life; the rules followed differ little from those binding on ordinary courts, particularly with respect to judicial guarantees.

International cooperation and mutual judicial assistance in criminal matters

International cooperation in criminal matters is based on the international (multilateral or bilateral) treaties by which Switzerland is bound and on the *Federal Law on Mutual International Assistance in Criminal Matters*. The urgent Federal Order relating to cooperation with the International Criminal Tribunals responsible for prosecuting serious violations of international humanitarian law has institutionalized Switzerland’s cooperation with the international courts set up so far. It enables Switzerland to accede to requests by the United Nations tribunals to relinquish jurisdiction in cases where the Swiss authorities have already instituted judicial proceedings.

¹¹ Federal Law of 4 October 1991, *RS* (Systematic Compendium of Swiss laws) 312.5.

In the context of criminal proceedings against suspected perpetrators of serious violations of the law of war, the law in force enables the authorities to circumvent the usual obstacles to international cooperation and to extradition in particular.¹²

Assessment

In all the systems examined, responsibility for prosecuting serious violations of international humanitarian law lies in the last resort with the central or federal State authorities, which have certain discretionary powers in that respect. The authorities may decline to prosecute, particularly if in doing so they might jeopardize the interests of the nation. It will be noted, however, that the discretionary principle is generally limited by a fairly strict application of the principle of legality, especially if criminal proceedings have been instituted on the basis of a denunciation or a complaint by the victim.

As regards the courts competent to prosecute war crimes, each of the four States has opted for a different solution, ranging from exclusive primary jurisdiction of the military courts to a division of jurisdiction according to the status of the accused, the nature of the crime and whether the country was at war or at peace when the crime was committed. The solutions adopted depend on where the provisions governing punishment are incorporated into each country's legal texts and on the relationships between ordinary and military criminal law and authorities within the State. All the cases assessed reveal a general tendency to restrict the jurisdiction of the military courts to the advantage of the ordinary courts.¹³

None of the systems has established any specific or special procedure in respect of suspected perpetrators of war crimes or other violations of international humanitarian law. In all four countries, prosecution generally follows the usual procedure applicable by the competent courts — whether ordinary or military. Mention should be made of the major role generally

¹² Such as the condition of dual criminal liability, the fact that the offence is time-barred, and the military nature of the offence or its political character. In the latter connection it should be mentioned that Switzerland is bound by the Protocol additional to the 1975 European Convention on Extradition, which precludes the possibility of regarding grave breaches of the law of war as political offences for the purpose of impeding extradition.

¹³ In cases of concurrence between offences differing in nature or committed by perpetrators with differing status, the proceedings are moved to ordinary courts which are competent to deal with all the facts.

accorded by the various systems to the injured party who, in addition to the right to initiate criminal proceedings, often has extensive rights (particularly in the case of Switzerland) of participation in proceedings.

As to the obligation to cooperate in the prosecution of war crimes, the studies show that all four States have accepted and regulated cooperation with the ad hoc International Tribunals by taking legislative measures.

2.2.5 Operation of national systems for the repression of violations of international humanitarian law

■ Germany

The system for repressing violations of international humanitarian law has been implemented in Germany, on the one hand during the trials of suspected Second World War criminals (some of which are still in progress) and, on the other, in the context of the more recent prosecution of alleged perpetrators of violations committed during the conflicts in the former Yugoslavia.¹⁴

■ Belgium¹⁵

Because of its special links with the country,¹⁶ Belgium has had the opportunity to apply the Act of 16 June 1993 in respect of serious offences committed since April 1994 in Rwanda, i.e., within the context of an internal conflict. In February 1995 the Minister of Justice exercised his right to instruct the Public Prosecution Department to institute criminal proceedings against suspected perpetrators of crimes committed in Rwanda in 1994, living either in Belgium or abroad. Since then, a series of case-files implicating more than 20 individuals, some of whom were not in Belgium at the time, has been investigated pursuant to the Act of 16 June 1993. Following the Rwandan tragedy, the military judicial authorities brought a prosecution against a senior Belgian officer on the count of manslaughter

¹⁴ See, in particular, the *Djajic* case (Munich Supreme Court) and the *Jorgic* case (Dusseldorf Higher Regional Court).

¹⁵ For a more detailed assessment, see “Belgian legal system for the repression of crimes under international law”, p. 157.

¹⁶ Rwandan and Belgian citizens residing in Belgium have been affected by serious offences committed in Rwanda since April 1994; many Rwandans, including persons accused of taking part in the commission of such offences, have sought refuge in Belgium.

and failure to exercise due care in the matter concerning the death of 10 Belgian blue helmets. Moreover, complaints were lodged against the Belgian Minister of National Defence in office at the time of the events for failure to take action in accordance with the Act of 16 June 1993. With the exception of three case-files transferred to the International Criminal Tribunal for Rwanda, all other investigations are still under way.

In the context of those investigations, the criteria adopted for justifying prosecution were the presence of the alleged perpetrators on Belgian territory, the Belgian nationality of the perpetrators or the victims and the fact that the complainants were of Belgian nationality or present in Belgium.

Several characteristics of the Act of 16 June 1993 have proved particularly useful and appropriate in the investigations under way. These include the extension of the scope of the law to encompass internal armed conflicts; the ability of the courts to assess freely whether the acts of which a person is accused constitute offences in the eyes of the law; the fact that different modes of participation in offences and their classification are dealt with in the same way as the offences themselves; the provision for punishment of an order, instigation, incitement or an attempt to commit, or complicity in committing, an offence, irrespective of whether the act in question had a practical effect or not; and the exclusion of military necessity as grounds for justification. The investigations under way have also revealed the considerable practical difficulties facing the authorities in gathering and managing evidence in this type of prosecution.

The universal jurisdiction of the Belgian courts certainly facilitates prosecution at the domestic level, particularly since the accused is not required to be present in Belgium.

■ Spain

The national system for the repression of crimes under international law has not been put to use so far.

■ Switzerland

The system for the repression of violations of international law was applied for the first time in connection with the conflicts in the former Yugoslavia and in Rwanda, most notably in 1994.¹⁷

Practice has shown the advantages of being able to order an investigation to produce further evidence before opening an ordinary investigation into this type of offence. Such investigations are especially useful when there is a need to conduct delicate inquiries that can be carried out at leisure and if necessary without the person concerned being informed of them — this being justified in particular when the facts are hard to establish, suspicions are somewhat hazy or the safety of victims and possibly also of witnesses so requires. Experience has further revealed the difficulties facing the prosecuting authorities in gathering and managing evidence, most of which is made up of witnesses' accounts in such proceedings. For the military judiciary, made up as it is of militiamen who are less familiar with criminal procedure than their colleagues in the ordinary courts, applying legislation relative to crimes under international law is a genuine challenge.

¹⁷ See Federal Court Order 123-II, p. 175, concerning deferral to the International Criminal Tribunal for Rwanda.

Questionnaire

National repression of violations of international humanitarian law

1. National legislation for the repression of violations of international humanitarian law

1.1 Substantive criminal law

1.1.1 *What is the current state of criminal law relating to the repression of violations of international humanitarian law? Specifically:*

- (a) As regards grave breaches of the 1949 Geneva Conventions (Articles 49, 50, 129 and 146, respectively, of the four Conventions — *see table attached*).
- (b) As regards grave breaches of 1977 Protocol I additional to the Geneva Conventions (Articles 11, 85 and 86 — *see table attached*).
- (c) As regards other violations of these treaties which do not qualify as grave breaches.
- (d) As regards violations of international humanitarian law applicable in non-international armed conflicts (Article 3 common to the four Geneva Conventions and to Additional Protocol II).
- (e) As regards violations of the provisions of the other treaties governing the law of armed conflict: the Hague Conventions of 1899 and 1907, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the weapons conventions of 1972, 1980 and 1993.

1.2 Legislative approach

1.2.1 *How are the violations incorporated in national legislation?*

- (a) Are they part of the ordinary criminal code, the military criminal code, both, or of a law specifically designed for this purpose?
- (b) What wording is used in the relevant national law? (Has the wording been drawn from the Conventions or have the acts in question been reworded? Is there a general clause referring to international law?)

1.3 Jurisdiction

1.3.1 *Does national legislation recognize extraterritorial jurisdiction for some or all of the violations? Is this jurisdiction universal (and if so, is it conditional upon the presence of the accused on the national territory), or is it based on the nationality principle, the passive personality principle or the protective or security principle (which relates to matters affecting State security)?*

1.4 Legal procedure

1.4.1 *What is the procedure regarding investigation, prosecution and judgement of violations of international humanitarian law? Specifically:*

- (a) Which body is competent to initiate criminal proceedings? Is this body legally bound to prosecute, or does it have discretionary power to decide whether or not a case should be brought to court?
- (b) Can the victims of violations themselves initiate such proceedings (i.e., denunciation, lodging of complaint, summons before the competent court)?
- (c) Which courts have jurisdiction in such cases (ordinary, military, federal or regional, special courts)? Does this depend on whether the defendant is a civilian or a member of the military? What are the characteristics of these courts?

- (d) Are there any provisions for exceptional procedures in such cases, or is the regular criminal procedure applicable?
- (e) Does the procedure involve any special features, such as hearings *in camera*, appeals, etc.?
- (f) Is prosecution of violations in any way time-barred under national legislation (for example, by a statute of limitations)?

2. Assessment of national legislation

2.1 Legal precedents and case law

2.1.1 *Has the national system for the repression of violations ever been put to use (specific cases, case law)?*

2.2 Assessment

2.2.1 *How would you assess your country's legislation? What are its strong points and its weaknesses? What were the considerations underlying its adoption?*

Comparative table of national systems of repression Substantive criminal law				
<i>Abbreviations:</i> IHL: international humanitarian law MPC: Military Penal Code PC: Penal Code				
	Germany	Belgium	Spain	Switzerland
Grave breaches of the 1949 Geneva Conventions (Articles 49, 50, 129, 146)	<ul style="list-style-type: none"> • Covered by several provisions of the PC. Whether an act punishable under the PC can be considered as justified because it was committed during an armed conflict is decided in the light of international law, which takes precedence over national law. 	<ul style="list-style-type: none"> • Criminalized under the Act of 16 June 1993 on the repression of grave breaches of the 1949 Geneva Conventions and their Additional Protocols. 	<ul style="list-style-type: none"> • Punishable under the ordinary PC (Chapter III, Title XXIV, "Offences against persons and objects protected in the event of armed conflict", Articles 608-614). If the perpetrators are members of the military, the MPC applies (Part 2, Title III, "Violations of the laws and customs of war", Articles 69-78). 	<ul style="list-style-type: none"> • Punishable under the MPC (Chapter 6, "Offences against the law of nations" Articles 108-114).
Grave breaches of Protocol I (Articles 11, 85, 86)	<ul style="list-style-type: none"> • Covered by several provisions of the PC. 	<ul style="list-style-type: none"> • Punishable under the Act of 16 June 1993. 	<ul style="list-style-type: none"> • Specifically covered by and punishable under the ordinary PC. • The MPC takes into account the spirit and nature of the offences, it describes, without specifically criminalizing them. 	<ul style="list-style-type: none"> • Punishable under the MPC (Chapter 6, "Offences against the law of nations", Articles 108-114).

	Germany	Belgium	Spain	Switzerland
<p>Other violations not defined as grave breaches</p>	<ul style="list-style-type: none"> • Punishable in the same way as grave breaches, although the PC makes no mention of how offences are defined under IHL. • Misuse and unlawful use of the emblem are punishable under the Administrative Offences Act (Article 125). 	<ul style="list-style-type: none"> • Not specifically criminalized but punishable under ordinary criminal law. 	<ul style="list-style-type: none"> • Criminalized in the PC and covered by Article 78 of the MPC. 	<ul style="list-style-type: none"> • Covered by Articles 108-114 of the MPC, which punishes all violations of IHL irrespective of their gravity or how they are defined under IHL. • Minor violations are punishable through disciplinary sanctions.
<p>Violations of IHL committed in non-international armed conflicts (Article 3 common to the four Geneva Conventions, Protocol II)</p>	<ul style="list-style-type: none"> • Punishable in the same way as grave breaches, although the PC does not define “armed conflict” and applies to all the acts it covers, whether committed in wartime or in peacetime. 	<ul style="list-style-type: none"> • Violations of IHL committed in non-international armed conflicts as defined in Article 1 of Protocol II are punishable under the Act of 16 June 1993. • Violations committed in internal armed conflicts governed by Article 3 common to the Geneva Conventions are punishable under ordinary criminal law. 	<ul style="list-style-type: none"> • Covered by Title XXIV of the ordinary PC, which applies regardless of the nature of the armed conflict. • Punishable under the MPC (general residual clause in Article 78). 	<ul style="list-style-type: none"> • Punishable under the above-mentioned articles of the MPC. Their field of application extends to all conflicts, whatever the type.

	Germany	Belgium	Spain	Switzerland
<p>Violations of other treaties on the law of armed conflict</p> <ul style="list-style-type: none"> - The Hague Conventions of 1899 and 1907 - The 1954 Convention on Cultural Property - The 1980 Convention on Conventional Weapons 	<ul style="list-style-type: none"> • Since there are no specific provisions for punishing violations of these treaties, ordinary criminal law applies in the same way as it does for offences under the 1949 Geneva Conventions. 	<ul style="list-style-type: none"> • Not specifically criminalized by national law, therefore the provisions of the ordinary PC and/or the MPC apply. 	<ul style="list-style-type: none"> • The aforementioned provisions of the PC and the MPC cover violations of all the treaties on the law of armed conflict by which Switzerland was bound at the time the offence was committed. 	
<p>Legislative approach</p>	<ul style="list-style-type: none"> • Dual criminal liability, since no specific provision has been adopted. • Article 25 of the Constitution states that international law forms an integral part of national law and takes precedence over it. The provisions of criminal law must therefore be interpreted in accordance with international law. 	<ul style="list-style-type: none"> • Special law distinct from the PC and the MPC and containing provisions of both substantive and procedural law. • The acts criminalized in that law are described in the same terms as those used in the international treaties. The law also contains a general residual clause. 	<ul style="list-style-type: none"> • Incorporation of punishment for violations of the law of armed conflict in the existing military and ordinary criminal legislation. • Hybrid system of criminalization providing a definition of persons protected in the event of armed conflict; specific criminalization drafted differently from the text of the Conventions and supplemented by a general residual clause. 	<ul style="list-style-type: none"> • Incorporation of a specific chapter in military criminal legislation, which applies to both military and civilian perpetrators. • Hybrid system combining the criminalization of certain specific acts with an overall residual clause.

Comparative table of national systems of repression Procedural criminal law				
<i>Abbreviations:</i> IHL: international humanitarian law MPC: Military Penal Code PC: Penal Code				
Prosecuting bodies and the initiation of proceedings	Germany	Belgium	Spain	Switzerland
	<ul style="list-style-type: none"> • The State alone may prosecute. In accordance with the principle of legality, the prosecutor must open an inquiry if there is a founded suspicion that a crime has been committed. With the consent of the Ministry of Justice, a prosecutor may decide not to initiate proceedings, particularly if the act was committed abroad and if legal action might be prejudicial to Germany. Where the accused is not a German national, the decision rests with the chief public prosecutor of the higher regional court. Proceedings may be abandoned if the suspect is extradited. 	<ul style="list-style-type: none"> • Responsibility for initiating proceedings lies with the public prosecutor, who has discretionary powers as to the expediency of such action. If it considers a judicial inquiry necessary, it may refer matters to an investigating judge; otherwise it may conduct its own inquiry with a view to establishing a criminal case-file. • Anybody claiming injury may set a prosecution in motion by starting a civil action. As a departure from the rules usually applicable, that option is offered before the military courts. 	<ul style="list-style-type: none"> • Prosecution is set in motion either automatically by the judicial police or by a denunciation or complaint made by the injured party. • The investigating judge is competent to open a criminal inquiry and establish a case-file. Where there has been a denunciation or a complaint, the investigating judge must open an inquiry unless the facts do not constitute a crime or are manifestly false. 	<ul style="list-style-type: none"> • Offences under IHL, as other crimes mentioned in the MPC (with the exception of defamation), are automatically prosecuted. • Prosecution may also be initiated by a denunciation or complaint made by the injured party. • For violations of IHL, prosecution begins with an inquiry order issued by the Judge Advocate General. Depending on the case, that order may be followed by an inquiry for supplementary evidence or a judicial inquiry.

	Germany	Belgium	Spain	Switzerland
	<ul style="list-style-type: none"> • The victim may initiate accessory or private action but only in respect of certain crimes punishable under the PC. 			
Jurisdiction	<ul style="list-style-type: none"> • Determined by Articles 3-7 of the PC; Article 6, para. 9, provides for universal jurisdiction (irrespective of the place where the crime was committed and the nationality of the perpetrator) for offences which Germany must prosecute on the basis of an international treaty, including grave breaches of IHL. The Federal Supreme Court has, however, limited that jurisdiction in the case of genocide by requiring a link with Germany. 	<ul style="list-style-type: none"> • Article 7 of the Act of 16 June 1993 stipulates that the authors of any crimes referred to therein are subject to Belgian jurisdiction irrespective of their nationality, that of the victims or the place where the crime was committed. Such extraterritorial jurisdiction is a departure from the usual conditions set out in the PC. 	<ul style="list-style-type: none"> • Pursuant to Article 25, para. 4 (g) of Organic Law No. 6 of 1 July 1986 on the judiciary, the courts are competent to try all acts committed by Spanish nationals or aliens outside the national territory that qualify as offences which Spain is bound to prosecute under international treaties or conventions. 	<ul style="list-style-type: none"> • The MPC provides for extraterritorial jurisdiction concerning all violations of the law of war, whether committed in Switzerland or abroad and whoever the perpetrators are.

	Germany	Belgium	Spain	Switzerland
<p>Competent courts</p>	<ul style="list-style-type: none"> • Ordinary courts, except in the case of a court-martial (Constitution, Article 96, para. 2). • Both the regional courts and the higher regional courts are competent, the latter in particular to try genocide. 	<ul style="list-style-type: none"> • Determined on the basis of a <i>ratione temporis</i> distinction, depending on whether Belgium is at war or peace. In wartime, crimes against IHL are judged by the military courts. In peacetime, a <i>ratione personae</i> distinction is drawn between civilians and military personnel. If proceedings are instituted simultaneously against both categories of suspect, all the offences are tried by the ordinary courts. 	<ul style="list-style-type: none"> • Depends on whether the accused is a civilian or in the military. If a civilian, the judicial authorities of the place where the offence was committed try the case and if the offence was perpetrated abroad, the central judicial authorities in Madrid have competence. • Where military jurisdiction applies, the court will depend on the rank of the accused. All military courts are staffed by professional judges and magistrates. 	<ul style="list-style-type: none"> • The military courts are competent (Chapter 9, Article 2 of the MPC). In the event of concurrence between an offence under Articles 108-114 of the MPC and a criminal offence, the ordinary courts may be instructed to try all the charges. Except for the Judge Advocate General, all members of the military courts perform their duties as part of their military service (Switzerland has a militia army).

	Germany	Belgium	Spain	Switzerland
Applicable procedure	<ul style="list-style-type: none"> ♦ In principle, the rules of ordinary criminal procedure apply without exception. 	<ul style="list-style-type: none"> ♦ The rules of ordinary criminal procedure (relating to either ordinary or military jurisdiction) apply, in accordance with the Act of 16 June 1993. 	<ul style="list-style-type: none"> ♦ The usual rules of procedure (ordinary or military) apply without exception to the prosecution of crimes against international law or the laws and customs of war. These rules have the force of law. 	<ul style="list-style-type: none"> ♦ The rules of procedure applicable to the prosecution, investigation and judgement of offences under Articles 108-114 of the MPC are those laid down in military criminal procedure and the Federal Order on military criminal justice. The procedure differs little from that of ordinary criminal law. No special derogation exists with regard to crimes against international law.
Time-bar	<ul style="list-style-type: none"> ♦ The rules on time-barring do not apply to murder or genocide (Article 78, para. 2, of the PC). All other offences under the PC are time-barred. 	<ul style="list-style-type: none"> ♦ Article 8 of the Act of 16 June 1993 states that the violations of IHL referred to therein may not be time-barred. This rule applies to both prosecution and punishment. 	<ul style="list-style-type: none"> ♦ Only the crime of genocide is not time-barred under Spanish domestic law; the rules on time-barring are in no way limited in respect of other offences. 	<ul style="list-style-type: none"> ♦ Under Articles 56 bis of the MPC and 75 bis of the PC (which are identically worded), “the serious crimes contemplated in the Geneva Conventions of 1949 and in other international agreements concerning the protection of war victims to which Switzerland is party may not be time-barred if the offence in question is deemed particularly serious owing to the conditions under which it was perpetrated”.

	Germany	Belgium	Spain	Switzerland
<p>International cooperation and mutual judicial aid in criminal matters</p>	<ul style="list-style-type: none"> ♦ Mutual judicial aid is governed by the Act on international assistance in criminal matters and the 1995 Act on cooperation with the International Tribunal for the former Yugoslavia. 	<ul style="list-style-type: none"> ♦ Governed by specific legislation adopted to this end. ♦ The Act of 22 March 1995 on recognition of the International Criminal Tribunals for the former Yugoslavia and Rwanda and on cooperation with those Tribunals governs relations between them and Belgium in respect of proceedings against crimes under international law. 	<ul style="list-style-type: none"> ♦ Mutual judicial aid and extradition are governed by Act No. 4 of 21 March 1985. ♦ Act No. 15 of 1 June 1994 authorizes and regulates cooperation by the Spanish authorities with the International Tribunal for the former Yugoslavia and departs from certain provisions of Act No. 4 of 1985. 	<ul style="list-style-type: none"> ♦ Such cooperation is based on the international (bilateral or multilateral) agreements by which Switzerland is bound and by the Federal Act on mutual international aid in criminal matters. The urgent Federal Decree on cooperation with the International Tribunals responsible for prosecuting grave breaches of IHL governs Switzerland's cooperation with those courts.



ICRC