PREVENTING AND REPRESSING INTERNATIONAL CRIMES: TOWARDS AN "INTEGRATED" APPROACH BASED ON DOMESTIC PRACTICE

REPORT OF THE THIRD UNIVERSAL MEETING OF NATIONAL COMMITTEES FOR THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

Volume I

ICRC Advisory Service on International Humanitarian Law

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Volume I

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This report consists of two volumes containing the text of the report itself and the annexes to which it refers, respectively.

It comes with a DVD of other material useful for the national implementation of IHL.

All comments on the report and its annexes may be sent to the ICRC Advisory Service on International Humanitarian Law at: gva_advisoryservice@icrc.org.

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FOREWORD

Despite the spectacular progress made in the organization of international criminal justice in recent decades, penal repression of serious violations of international humanitarian law (IHL) and other international crimes remains primarily a State responsibility. The very principle of complementarity on which the Rome Statute of the International Criminal Court is based places national legal systems at the forefront. Under the Rome Statute, the Court acts only in cases in which the States cannot or do not wish to take the measures required to punish the crimes over which it has jurisdiction. That approach is in keeping with the obligation of the States party to the 1949 Geneva Conventions and Additional Protocol I to search for and bring to justice persons alleged to have committed, or to have ordered the commission of, a grave breach under those treaties.

It is for these reasons that the ICRC monitors and encourages implementation of the Rome Statute at national level. We have always wanted to contribute to the construction and consolidation of a system able to strengthen the prevention and repression of serious violations of IHL. Indeed, one of the first proposals for the establishment of a permanent criminal court was made nearly 140 years ago by Gustave Moynier, one of the ICRC's founders and long-time presidents. More recently, the ICRC invested heavily in the discussions leading to the adoption of the Rome Statute and has since then continued to follow the work of the Assembly of States Parties. It has always shown strong support for the work of international criminal tribunals, acting as an inspection authority for persons deprived of liberty under their jurisdiction.

The ICRC's specific mandate – to protect the life and dignity of the victims of armed conflicts – shapes the organization's relationship with international criminal justice and incites it to prefer confidentiality and persuasion in its operational dialogue with the authorities and weapon bearers. This is the mode of operation of a pragmatic organization working to enhance respect for the law while taking care to maintain access to the victims. As such, the ICRC works with the States to support their efforts to

bring their domestic legislation and practice in line with the requirements of IHL, in particular as regards the obligation to punish serious violations of the law and other international crimes. The ICRC is convinced that a clear legal framework can help ensure greater respect for IHL and prevent violations.

The national incorporation of serious violations of IHL and other international crimes is a complex exercise because of the large number of government players involved: ministries of defence, justice, finance, foreign affairs, education and health, and parliamentarians, to name but a few. In practice, the implementation of IHL depends on a series of competences spread among various State bodies and specialized institutions. Years of experience have shown that no body is better placed to coordinate such national efforts than a national IHL committee bringing together the main national players in charge of applying this branch of international law.

The challenges of implementation are such that the national IHL committees must make serious efforts to cooperate if they are to succeed. No matter how substantial they are, developments in international criminal justice must go hand in hand with State efforts to prevent and repress violations of IHL by State and non-State actors. Those efforts must be part of a prevention strategy in which the national IHL committees have a key role to play.

It was with this in mind that the ICRC Advisory Service on International Humanitarian Law decided, in 2010, that the time had come to take stock of the legal measures and national mechanisms able to support an integrated system for the prevention and repression of serious violations of IHL. I can but approve that decision, which combines a topic supposedly at the heart of the work of national IHL committees with discussions aimed at exchanging views on the processes that would enable them to maintain or even heighten their influence at national level.

In bringing together experts from countries that already have a national IHL committee or other similar body and representatives of other interested States, the ICRC Advisory Service intended to create the conditions conducive to a fruitful exchange of ideas on those challenges. The Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law met its objectives. It also helped strengthen ties

between national committees, enabling them to share practices that may help them function better and heighten their impact.

It is my sincere hope that the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law, this report and the ensuing exchanges will incite national authorities to pursue their efforts to bring their legislation and practice in line with the requirements of IHL. In that regard, I trust that the national committees will be given the means they need fully to play the role conferred on them. I pledge to promote contacts and the establishment of working relationships between such committees and the ICRC Advisory Service, whose terms of reference, which were clearly defined by the 26th International Conference of the Red Cross and Red Crescent in 1995, remain as topical as ever.

Peter Maurer
President of the International Committee of the Red Cross
September 2012

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1.
INTRODUCTION

Despite the valuable contribution of the *ad hoc* international tribunals, and most recently the establishment of the International Criminal Court, the criminal repression of serious violations of IHL remains primarily the responsibility of States. For reasons of efficiency (access to evidence, a judicial apparatus in place) and justice (proximity to the victims and increased dissuasive effect of holding a trial where the crime was committed), this responsibility derives most importantly from the States' obligation to "investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects"[1]. The effective application of the Court's principle of complementarity, which gives precedence to national courts in responding to crimes covered by the Rome Statute, also depends on States making sure that they have the necessary apparatus to prosecute and judge the crimes falling under its jurisdiction.

Such State actions are obviously not performed in a vacuum. They are but one stage in a cycle of constant interplay between the development and application of international and domestic law. In this cycle, the implementation of IHL – the incorporation of international obligations into the domestic legal system of States – fulfils an essential role. During this process, many challenges are likely to be encountered; the aim remains, however, to achieve a common set of rules regarding war crimes that can be enforced everywhere by domestic courts.

Few recent developments have provided greater momentum toward the criminal repression of IHL violations – and, in particular, of grave breaches of the 1949 Geneva Conventions – than the adoption of the Rome Statute. The result of truly multilateral negotiations, the Statute remains the first and most comprehensive multilateral attempt to establish a code of international crimes that could truly

1 J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules,* Rule 158, Cambridge University Press, Cambridge, 2005, pp. 607-611.

inspire domestic legislators when implementing punishment for IHL crimes at domestic level. The Rome Statute has now been widely ratified – there were 121 States Parties on 1 July 2012 – but much more needs to be done to make it truly universal. The first Review Conference, held in Kampala in 2010 (hereafter the Kampala Review Conference), which agreed *inter alia* to bring Article 8 of the Statute (war crimes) closer to compliance with IHL, made the Rome Statute an even better starting point than before.[2]

It is the questions relating to the implementation of mechanisms for the prevention and repression of serious violations of IHL and other international crimes that the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law deliberated and that are the object of this report. In view of the time that has elapsed since the Meeting, and in order for the report to be as useful and up-to-date as possible, care was taken to incorporate into the text the intervening developments in the prevention and repression of international crimes at national and international level.

2 Resolution RC/Res.5, in International Criminal Court, *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, Official Records*, document RC/11, pp. 13-16.

2.
MEETING OBJECTIVES AND PARTICIPANTS

The Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law (IHL), which was organized by the ICRC Advisory Service on International Humanitarian Law (hereafter ICRC Advisory Service), was held from 27 to 29 October 2010 at the Centre international de conférences de Genève, in Switzerland. It brought together 78 national IHL committees, representatives of governments of countries that had not yet established such a committee but had stated their intention to do so, representatives of international and regional organizations working in the field of IHL, members of National Red Cross and Red Crescent Societies and various experts and civil society members.[3] It was the third time the ICRC Advisory Service had brought together the national IHL committees from the world over. The first two meetings were held in 2002 and 2007.[4]

The objectives of the Third Meeting were twofold – practical and thematic. In practical terms, the aim was to organize a forum at which the national IHL committees could meet and discuss their respective terms of reference, operations and activities and debate their achievements and the challenges encountered in their efforts to implement IHL nationally or regionally. From the thematic point of view, the Meeting aimed to explore the important role played by domestic legislation when it comes to preventing and repressing serious violations of IHL. The deliberations focused in particular on the legal measures and mechanisms required to support an "integrated" approach to prevention and repression, emphasizing the role of the Rome Statute and its principle of complementarity.

3 Over 230 participants registered for the Third Universal Meeting (*see* Annex 1: List of participants).

4 The previous meetings gave rise to extensive and constructive discussion of the implementation of IHL (2002) and missing persons (2007). The reports presented at those meetings were subsequently published by the ICRC Advisory Service.

There was nothing haphazard about that choice: in 1997 and 2001, the ICRC had held a series of meetings with experts on the subject, and the time had come to review the situation and recognize that it had changed substantially since the publication of the results.[5] By examining the legal measures and national mechanisms able to support an "integrated" approach to the prevention and repression of grave breaches of IHL, the Meeting was part of the process of "stocktaking of international criminal justice" proposed at the Kampala Review Conference, which gave rise to wide-ranging discussion of international criminal justice.[6]

5 C. Pellandini (ed.), *National measures to repress violations of international humanitarian law (Civil law systems), Report of the Meeting of Experts*, ICRC Advisory Service, Geneva, 2000, 328 pp.; A. Segall, *Punishing Violations of International Humanitarian Law at National Level, A Guide for Common Law States*, ICRC Advisory Service, Geneva, 2001, 199 pp.

6 Above note 2, pp. 1–7 and 77–119. The discussion on the stocktaking of international criminal justice covered the following subjects: the impact of the Rome Statute system on victims and affected communities; peace and justice; taking stock of the principle of complementarity: bridging the impunity gap; and cooperation.

3.
METHODOLOGY, PROGRAMME OF WORK AND EXPECTED OUTCOMES

The Meeting was interactive and participative. This made it possible for the participants to speak on many occasions and gave rise to fruitful and constructive discussions. In order to explore the greatest possible number of subjects, the participants met in simultaneous working groups, their discussions led by a moderator[7] who guided the debates launched by the panelists on the basis of questions listed in the preparatory background document sent to all the participants before the Meeting.[8] The debate was then furthered by the panelists' questions and interaction between the participants in the various working groups. Each group designated a rapporteur to report back to the plenary. Simultaneous interpretation was provided in five languages (Arabic, English, French, Russian and Spanish) during both the working groups and the plenary sessions.[9]

More specifically, the working groups examined the following subjects: (a) methods of incorporating IHL (repressive aspects) into national legislation; (b) ways and means of addressing challenges to incorporation; (c) the challenges posed by the implementation of universal jurisdiction; and (d) the role of individual sanctions in the prevention of serious violations of IHL.

In addition, during two plenary sessions the participants exchanged views on the role of national committees in the establishment of an effective and integrated system for preventing and repressing serious violations of IHL, and on the tools available to strengthen and support their efforts to incorporate international crimes.

7 Annex 2: Detailed programme with list of moderators and panelists.
8 Annex 3: Background document.
9 The Chinese delegation proposed that interpretation into Chinese be provided at the next universal meeting of national committees, so as to further enrich the debates. The ICRC duly noted that proposal.

The ICRC Advisory Service had pledged to produce a report on the outcome of the Meeting that would comprise all the preparatory documents and those produced during the Meeting. The report also takes into account the replies provided by the delegations of 15 States[10] to the questionnaire sent out by the ICRC Advisory Service after the Meeting. As stated earlier, it also incorporates intervening national and international developments in this field. National and regional meetings are being or will be organized in order to pursue the discussions and deliberations on effective and long-term implementation of IHL and on the paramount role to be played in that respect by the national IHL committees and other similar bodies.

10 Belgium, the Comoros, Côte d'Ivoire, Germany, Guatemala, Honduras, Italy, Madagascar, Malaysia, Romania, the United Kingdom of Great Britain and Northern Ireland (hereafter United Kingdom), Slovenia, South Africa, Sweden and Togo. All the information collected by the ICRC Advisory Service is available from its secretariat in Geneva.

4.

WHAT DOES THIS REPORT MEAN BY “INTEGRATED APPROACH”?

The overwhelming majority of the Meeting participants said they were convinced that what was referred to as "the integrated approach" was most appropriate for preventing and repressing serious violations of IHL at national level. Although some of them had never before encountered the term, which refers to a practice dating back over one hundred years, all insisted that the contours of the "integrated" approach had to be clearly defined.

In the context of IHL implementation, "integrated approach" and "integrated system" are not accepted technical terms with a specific meaning.[11] They are mentioned in no IHL treaty, nor do they reflect an institutional position specific to the ICRC on the implementation of IHL. Rather, they constitute a multifaceted "concept". In the *Oxford English Dictionary,* the entries for "*integration*", "*integrated*" and "*integrate*" refer to notions such as "to combine one thing with another to form a whole".

For the purposes of the Meeting, it was decided to include in the concept of "integrated approach" all the *dynamic steps* that constitute so many ways of enhancing respect for and implementing IHL (repressive aspects), but which nevertheless form a whole and require *coordinated action* for maximum effectiveness. During the Meeting, some of those dynamic steps, and their impact on the prevention and repression of serious violations of IHL, were described.

Mutual and constant give-and-take between national legislation and international law. To start, the term "integrated approach" can be used with regard to the development of IHL as a body of law. In that case, it refers to the influence of the international legal order on national systems and vice versa, the national and international levels constantly contributing to and benefitting from this mutual give-and-take.

11 To avoid all confusion, it must be pointed out that the United Nations uses the term "integrated approach" in a specific way with regard to the activities of the international community, in particular concerning crisis management. That is not the approach considered by this report.

In other words, the States are obliged to incorporate their international obligations into their internal system. The more the provisions of a treaty reflect the current state of international law, the more domestic legislation and State practice arising from implementation of the treaty in question will be in line with international law. It is that law and that State practice that will in turn contribute to the development of international customary law or a new law of treaties. Hence the importance of working together at both levels – national and international – to ensure that they properly reflect the obligations undertaken with regard to international law, in this case IHL.

One example given of a dynamic step in the "integrated approach" to IHL implementation was the Kampala Review Conference, more specifically the States' decision by consensus to amend the Rome Statute by adding to the list of war crimes applicable in non-international armed conflicts the use of bullets that expand or flatten easily in the human body (dum-dum bullets), of asphyxiating or poisonous gases and of poisoned weapons. As it has said in the past, the ICRC hopes that the States will take account of this amendment when they incorporate the Rome Statute into their internal legal system, for it is a more accurate reflection of current customary IHL. For the ICRC, the amendment is in fact a means of guaranteeing better protection for the victims of all armed conflicts.

Integration of institutions. A second dimension of the "integrated approach" concerns the institutions working to ensure implementation of the law (repressive aspects). Whether with regard to serious violations of IHL specifically or international crimes in general, greater attention should be paid to the role of criminal tribunals and to the means and mechanisms enabling them to be more effective at national and international level. There is not a shadow of a doubt that, if it is to be successful, the struggle against such crimes requires repressive means and mechanisms (in particular courts) that work as one and that complement

each other, so that there are no loopholes for impunity. One court acting on its own cannot be expected to have the repressive and dissuasive effect inherent in its function with regard to crimes that, by their very nature, have an impact on the entire international community.

Adopting an "integrated approach" therefore also means, in that case, exploring all possible links between judicial procedure, cooperation, assistance and complementarity, within each State, between States and between States and the competent international organizations, and thereby making sure that all the loopholes that would allow certain perpetrators of international crimes to escape punishment are closed. In other words, sending a clear dissuasive message. In practice, the mechanisms of cooperation and complementarity established with international criminal tribunals or other States, the referral to national courts of cases brought before international criminal tribunals, and the use of forms of universal jurisdiction are all examples of this approach.

Incorporation at national level. A third facet of the "integrated approach" is national in nature; it corresponds to the work done at that level, i.e. the means by which IHL is correctly incorporated into the domestic legal system. The authorities are thus encouraged to fulfil the obligations conferred on them by international IHL treaties, always in the light of the broader framework of the branch of international law concerned.

The Rome Statute was cited as an example of this during the Meeting. An "integrated approach" presupposes that the Statute's implementation be considered from the more general point of view of the obligations binding on the States by virtue of IHL, in particular those relating to the repression of all war crimes and international crimes and to the effective protection of the victims of all armed conflicts. In fact, exploration of the most effective and comprehensive means of incorporating IHL (repressive aspects) into the domestic legal system was the dimension that was most intensely discussed during the Meeting and that is further developed in this report (see Section 11 below).[12]

12 Other than the repressive aspect, the Meeting did not have the opportunity to examine all the other measures and questions that, under IHL, States are obliged to take into account when they incorporate the law at national level, such as their obligations with regard to dissemination, training and identification, or those relating to protected persons and property, in particular the emblems. For more information on those questions, *see* ICRC Advisory Service, *The Domestic Implementation of International Humanitarian Law: A Manual*, ICRC, Geneva, 2011, 132 pp. plus annexes. The manual is also available online and on CD-ROM.

5.
INCORPORATION OF INTERNATIONAL HUMANITARIAN LAW (REPRESSIVE ASPECTS) INTO DOMESTIC LEGISLATION

International humanitarian law (IHL) contains detailed rules aimed at limiting the effects of armed conflicts. It protects in particular persons who are not or no longer participating in the hostilities, and limits the means and methods of warfare that can be used. Its provisions also set out the specific acts that constitute crimes for which the perpetrators incur criminal responsibility, independently of the way in which they took part in those acts. War crimes – and other international crimes – can be incorporated into domestic legislation in different ways, as State practice has shown; the aim is to make prohibited behaviour an offence under the domestic criminal system as well and thereby to make it indictable. The Meeting's participants engaged in lengthy discussion of the advantages and disadvantages of the five options for incorporation identified beforehand by the ICRC in the background document and summed up below.

Consideration of the advantages and disadvantages of the various options. A first method consists in applying existing domestic criminal law – regular or military – and using the offences under that law (such as murder, torture, grievous bodily harm and other crimes under ordinary law) that are closest to the behaviour being prosecuted. That approach, which was relatively commonplace in the trials carried out after the Second World War, has been adopted and continues to be used in more recent international criminal cases. One example is the court martial, under the United States Uniform Code of Military Justice, of First Lieutenant William L. Calley, who was charged with murder in the United States of America (hereafter United States) in the My Lai massacre (1970).[13] More recent examples are the cases of American soldiers tried by courts martial for crimes

13 *United States v. First Lieutenant William L. Calley, Jr. (1971),* 46 C.M.R. 1131 (1973), cited in W. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, T.M.C. Asser Press, The Hague, 2006, p. 19. For another example in which, even after the adoption of legislation on the ICC, it was deemed necessary to refer to ordinary law, *see* the trial of Donald Payne and other soldiers before the General Court Martial of the United Kingdom, Military Court Centre, Bulford (7 September 2006 to 30 April 2007). Of the seven British armed forces members charged in that case, only one (Donald Payne) was convicted.

committed in Iraq (presumption of widespread recourse to torture of Iraqi detainees in 2004). In both cases, the charges laid against the accused could have been assimilated to war crimes or crimes against humanity.[14]

The Meeting participants noted that this option had the advantage of requiring no major change in the law. In addition, the law was generally known both to the population concerned and to the judges called on to apply it, and was always a default solution: ordinary law is the only legal basis on which prosecution can proceed if there is nothing else. In fact, many States consider this an adequate "fall-back" method enabling them to adhere to and rapidly apply the Rome Statute during the long period of legislative reform leading up to its full implementation at national level.

However, the overwhelming majority of participants concurred that, if their country had recourse to this option, it should be for no more than a transitional period, as it also entailed numerous shortcomings, namely:

- the definitions of crimes set out in criminal codes never covered all the types of behaviour constituting war crimes; indeed, activities constituting violations of the rules governing the conduct of hostilities are obviously not included in codes covering offences committed by civilians in time of peace;
- the practice can lead to errors of substance and procedure, because the offence is very often not properly defined as a war crime, meaning that some of the objective elements needed will be absent (in particular the concept of armed conflict, or of protected persons or property), as will the subjective element of *mens rea*, another condition under IHL;
- indicting individuals suspected of having committed war crimes under ordinary law carries the risk of penalizing behaviour that is absolutely lawful under IHL and thus of

14 *See* W. Ferdinandusse, above note 13, pp. 18-19.

even further compromising respect for this body of law by non-State actors,[15] as it is they who are most likely to be prosecuted for crimes under ordinary law by national judicial systems;

- restrictions may apply to the punishment of perpetrators of ordinary law crimes, e.g. the offence may be time-barred, or the law may provide for amnesties, which are not allowed in the case of international crimes; in addition, the punishment set out by ordinary law may be incommensurate with serious violations of IHL and the context in which they were committed;
- the criminal code may not mention certain forms of responsibility, such as the responsibility of commanders, or allow defence arguments that are not admitted in international criminal law, such as following superior orders;
- the legal provisions applying to ordinary law crimes generally do not provide for a court with extraterritorial jurisdiction, an element that is inherent in the prosecution of certain war crimes under international law[16].

The second option considered by the Meeting participants consists in the State incorporating war crimes into its legislation by criminalizing serious violations of IHL by means of a general reference to the treaties to which it is party, to international law in general or, more usually, to the "laws and customs of war", and defining a series of corresponding penalties. This is the option usually encountered in national

15 While the States will always have the right to punish those who take up weapons against them, Article 6(5) of Additional Protocol II encourages the authorities to "(…) grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict …". There can be no such amnesty, however, in cases involving the commission of war crimes. *See* A.-M. La Rosa and C. Wuerzner, "Armed groups, sanctions and the implementation of international humanitarian law", *International Review of the Red Cross* (hereafter IRRC), Vol. 90, No. 870, June 2008, pp. 335-336, and *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, 2008, available from: http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf.

16 In particular, "grave breaches" as defined in the 1949 Geneva Conventions (Arts 50, 51, 130 and 147, respectively). *See below*, section 7 (problem of extraterritoriality of legal bases in the prosecution of violations of IHL and other international crimes).

constitutions and criminal codes.[17] Like the first option, it has the advantage of providing a legal basis if nothing else exists. It can therefore serve as a transitional solution before the legislative measures required for full implementation of the Rome Statute at national level have been enacted. It is relatively simple, and makes it fairly easy to cover all serious violations of IHL, including those established by customary law. In addition, no new legislation is needed if the treaties in question are modified, if new rules are added to customary law, or if the State concerned finds itself bound by other obligations when it becomes party to a treaty. The reference rule being identical, this option allows for an integrated approach between international and domestic law.

It was nevertheless clear to the participants that such a simple procedure might not be adapted to the system of certain States, depending on how they construed the principle of legality (in particular with regard to *nullum crimen sine lege scripta* and *nullum crimen sine lege certa*), whereby the penalty for any offence must be known and predictable. Some underscored that the degree of specificity required at national level in respect of criminal proscriptions would simply not be achieved with such an approach, which also obliged the domestic judge to determine the law applicable in the country in the light of the provisions figuring in certain treaties, in custom and in international case law, leaving the courts with great room for manoeuvre (and also confusion). The task could become even more complex given that the style and wording used in international instruments to define war crimes were not always the same as those used in domestic legislation, obliging the courts to use formulations or concepts that were not well known and with which they were unfamiliar.

The third approach considered by the Meeting consists in incorporating into domestic legislation a list of specific

17 For example, China, Criminal Law, Art. 9; Switzerland, Military Penal Code of 13 June 1927, Art. 109; Netherlands, War Crimes Act (abrogated), Art. 8(1); Bolivarian Republic of Venezuela, 1964 Penal Code, Art. 155.

crimes corresponding to those that figure in the relevant IHL treaties. The legislator can, to that end:

- refer directly to certain articles in a treaty;
- transpose the entire list of crimes to domestic legislation using exactly the same wording and adding only the penalties applicable to each crime or each category of offence; or
- incorporate each crime separately, rewording its definition in such a way as to align it more closely on the texts of domestic criminal law in force.

For the participants, the obvious advantage of this option was that, by integrating detailed provisions into criminal codes, the States would obtain clearer and more precise texts, affording the requisite degree of predictability in terms of the types of behaviour that were to be considered criminal and hence indictable. This option thus allows full compliance with the principles of lawfulness and specificity. In addition, the predictability achieved should help dissuade potential perpetrators while allowing judges to apply the law properly in specific cases. The participants were nevertheless aware that drafting such specific texts to criminalize all types of criminal behaviour was potentially a monumental task requiring considerable research and drafting work for which external expertise would probably be required, leading, inevitably, to further delays. Given sufficient political will – an element all the participants deemed essential – the exercise could nevertheless be an opportunity to review all criminal provisions and make them a coherent whole. Despite the clear advantages of this option, certain participants rightly noted that it required the adoption of specific provisions for each modification correlative to IHL and could lead the texts to be scattered throughout internal legislation.

This is the approach used in particular in common-law countries[18] to incorporate the provisions of the 1949 Geneva

18 See, for example, United Kingdom, Section 1 of the 1957 Geneva Conventions Act (amended), which was used as a model by many countries that have a common-law system.

Conventions on "grave breaches" into domestic legislation. It has also been used by certain States to incorporate into their legislation the material rules of the Rome Statute (crimes and general principles of international criminal law).

While some States have chosen to incorporate the entire Rome Statute into their criminal codes,[19] others have taken the opportunity to adapt the definitions of crimes under the Statute to prior practice, or to add crimes not set out in the Statute and to consolidate others that figured previously in separate acts of legislation[20]. Some States have thus chosen to take into consideration other provisions relating to IHL in general and to include other crimes relating to the protection of property and persons and to the conduct of hostilities. Others have referred to the elements of crimes drawn up by the Assembly of States Parties to the Rome Statute, or to international case law.[21] Some States that are not yet party to the Rome Statute followed suit.[22]

19 *See* Annex 4: Table on the integrated implementation of the provisions on criminal sanctions in IHL and other related provisions, in particular the legislation of the following countries: Burundi, Cyprus, Kenya, Luxembourg, Malta, New Zealand, Samoa, South Africa and Uganda. Nigeria's 2006 Rome Statute (Ratification and Jurisdiction) Bill, Mauritius's International Criminal Court Act and an amendment to the Penal Code of the Democratic Republic of the Congo (hereafter DRC) – all of which are still at the draft stage – are the outcome of the same approach.

20 *See* Annex 4: Table on the integrated implementation of the provisions on criminal sanctions in IHL and other related provisions, in particular the legislation of the following countries: Argentina, Australia, Belgium, Bosnia-Herzegovina, Burkina Faso, Colombia, Croatia, Czech Republic, France, Georgia, Germany, Greece, Lithuania, Netherlands, Nicaragua, Norway, Panama, Philippines, Poland, Portugal, Republic of Korea, Romania, Serbia, Slovakia, Slovenia, Spain, Switzerland, Tajikistan, Uruguay. On 7 May 2009, the lower house of the Chilean parliament approved draft legislation aimed at incorporating the crimes defined by the Rome Statute into the Chilean Penal Code, in order to bring domestic legislation in line with international norms. In Guatemala, the Comisión Guatemalteca para la Aplicación del Derecho Internacional Humanitario has drafted a section on war crimes that includes almost all the crimes listed in the 1949 Geneva Conventions, Additional Protocol I, arms treaties and the Rome Statute. The text has been submitted to the committee tasked with drafting a new penal code.

21 *See inter alia* the new Romanian Penal Code.

22 This is the case *inter alia* of the Armenian Criminal Code, adopted on 11 April 2003, and Rwanda's Law No. 33bis/2003 repressing the crime of genocide, crimes against humanity and war crimes, which entered into force on 1 November 2003 (replaced today by the Organic Law on the Criminal Code, No. 01/2012/OL of 2 May 2012). Draft legislation is being prepared in some Arab countries for the same purpose.

The fourth option considered was implementation based on a mixed approach to criminalization that combined a general reference to IHL with deliberate incorporation into the penal code of certain international crimes (often serious offences or the crime of genocide).[23] Some considered this the best option because it allowed them to uphold the principles of legality and specificity but did not oblige them to amend the provisions specific to each change or development in IHL. This method, which was common in national practice before the adoption of the Rome Statute, allows a State to meet its treaty obligations fully and, at the same time, to make a clear distinction between crimes. It nevertheless requires judges to be able to interpret both the provisions of domestic legislation and international law and the often disconcerting interplay between the two.

Lastly, IHL can also be implemented by direct application of the rules of international law by the country's courts, without inserting a deliberate reference to those rules into domestic legislation. Such a practice is usually authorized by a constitutional law or a provision of the Constitution that either recognizes international law (written and/or customary) as the legal basis for the criminalization of certain acts or gives it precedence over national law. While it offers a basis for prosecution in the absence of other provisions, this approach also carries with it a degree of uncertainty, as demonstrated by the contradictory case law of

23 Regarding practice **before** the adoption of the Rome Statute, *see*: Criminal Law of the People's Republic of China, 1997, Art. 9; Hungary, Act IV of 1978 on the Criminal Code, paras 155-164; Poland, Penal Code, Art. 121 ff, and Act No. 98 of 6 June 1997, Chap. XVI; Slovenia, 1994 Criminal Code, Arts 373 ff; Czech Republic, Penal Code, Act No. 140/1961 amended, Part II, special provisions, Chap. X. Guatemala punishes the crime of genocide on the basis of a standard definition, but also considers it a crime to infringe the obligations, law or treaties relating to prisoners or hostages of war wounded during the hostilities (1973 Penal Code, Art. 378).
For examples of combinations of generic references and specific provisions, after a process of revision following (or not) on the adoption of the Rome Statute, *see*, in Annex 4, the laws of the following countries: Azerbaijan, Bosnia-Herzegovina, Bulgaria, Canada, Costa Rica, El Salvador, Latvia, Mexico, Montenegro, Nigeria, Panama, Portugal, Senegal, Serbia, Ukraine and Uruguay.

various countries.[24] And it would not be admissible in countries of the common-law tradition, which usually require that the provisions of treaty-based international law be transcribed into domestic legislation.

Other important questions. The Meeting's participants raised a number of other important questions, either during the discussions or in their written contributions, which were subsequently made available. They all considered that serious violations of IHL and international crimes in general should apply in respect of everyone, soldiers and civilians.[25] Some of them added bodies corporate under private law.[26] This did not mean, however, that those crimes could or should be grouped in a single text of law. On this question, positions varied, although several participants recognized that certain measures could be taken to ensure greater visibility and better understanding of the relevant provisions. It was interesting to note that the incorporation of serious violations of IHL and international crimes within the meaning of the Rome Statute was sometimes achieved by means of a special law or amendments to the penal code, independently of the legal tradition of the participant concerned. Participants from dualist States in the common-law tradition, for example, explained that, while it was customary for each treaty to be the subject of an individual implementing statute incorporating it into domestic legislation, implementation of the Rome Statute had also given their States the opportunity to check which crimes already figured in their legislation – thus avoiding repetition – to consolidate the crimes in one place, or to add crimes that,

24 While in Hungary the Constitutional Court has allowed the country's criminal courts to apply the 1949 Geneva Conventions directly (*see* its decision No. 53/1993 (X.13) AB of 13 October 1993), direct application was rejected in France by the Court of Cassation (in *Javor*, 26 March 1996, *Bulletin des arrêts de la Cour de cassation*, Criminal Chamber, Decision No. 132).

25 Although some crimes (torture, or enforced disappearance within the meaning of the United Nations Convention) obviously require a pre-existing qualification, in particular as an agent of the State.

26 On this question, *see inter alia* Art. 102 of the Swiss Penal Code or Art. 5 of the Belgian Penal Code. In France, the criminal responsibility of bodies corporate was introduced by Art. 121(2) of the Criminal Code. The Council of Europe and the European Union have also made several references to this.

while not figuring in the Rome Statute, were undeniably part of their international obligations.[27] In so doing, those States manifestly adopted an "integrated approach" as defined in this report.

The participants also agreed that the national implementation of serious violations of IHL and international crimes often required adjustments to the general principles of law applicable, in particular with regard to the statute of limitations pertaining to such crimes or admissible defence arguments. Although the immunities attached to the quality or functions of the presumed culprit or the types of participation were potentially particularly sensitive issues at national level, several participants did not hesitate to stress the boldness demonstrated by their lawmakers in directly incorporating into domestic legislation the clear provisions of the Rome Statute on such matters.[28]

The establishment of penalties that were sufficiently dissuasive and clear was also discussed.[29] On this point, however, the approaches varied. Almost systematically, domestic legislation meted out the heaviest punishments for genocide and crimes against humanity. Capital punishment was in some cases the only penalty.[30] Some applied the severest penalties for cases of genocide or crimes against humanity resulting in death.[31] Very few systems had scales of punishment containing significant variations (Poland, for example, punished genocide with penalties ranging from five years to life imprisonment).

27 The United Kingdom explained in its report, for example (*see* note 10 above), that it had used the implementation of the Rome Statute to review the national implementation of IHL (repressive aspects). It had decided not to include weapons-related crimes, almost all of which were already covered by specific laws (the Biological Weapons Act 1974, the Chemical Weapons Act 1996, the Landmines Act 1998, the Cluster Munitions (Prohibitions) Act 2010).

28 On the exclusion of immunities, *see inter alia* South Africa, Implementation of the Rome Statute of the International Criminal Court Act, 2002, Art. 4(2).

29 For further information on this point, *see IRRC, V*ol. 90, No. 870, 2008, which deals specifically with the issue of sanctions for grave breaches of IHL.

30 Burundi, Congo, Côte d'Ivoire, DRC, Mali, Niger.

31 Argentina, Canada, India, Kenya, United Kingdom.

There were also manifold systems of sanctions for war crimes. Some made no distinction between crimes and imposed the severest penalty, be it the death sentence,[32] life imprisonment[33] or lifelong penal servitude[34]. Others distinguished between war crimes causing death and other war crimes. Capital punishment[35] or life imprisonment[36] were reserved for the former, a prison term or lifelong penal servitude[37] for the latter. In the same spirit, other systems differentiated between crimes depending on their target – civilian population or prisoners of war.[38] In addition, some had a detailed table of sanctions for each crime qualified as a war crime.[39]

Lastly, certain criminal statutes provided for optional additional sanctions, usually a fine[40] or the abrogation of certain rights[41]. Some military texts also included additional sanctions having to do with rank and military status[42]. Others added appeals by and compensation for the victims,[43] including the establishment of an aid fund for their benefit[44].

The participants also considered the question of which courts should have jurisdiction over such crimes, including on the basis of extraterritorial jurisdiction. Discussion of that question is summed up in section 7 of this report.

32 Burundi, Congo, Côte d'Ivoire, Mali.
33 Burkina Faso, Cambodia, Cyprus, Congo (alternative to capital punishment).
34 DRC.
35 DRC, Ghana, India, Nigeria, Papua New Guinea, United States.
36 Argentina, Cameroon, Canada, Germany, Greece, India, United Kingdom, United States, Uganda (in the United States and India, as an alternative to capital punishment).
37 DRC (lifelong penal servitude), Germany, Ghana, Papua New Guinea (term of imprisonment).
38 Côte d'Ivoire.
39 Very detailed: Australia, Belgium, Colombia, Germany, Niger, Rwanda, Switzerland; less detailed: Jordan, Poland, Russian Federation.
40 *Inter alia* Burkina Faso, Colombia, South Africa, Timor-Leste, United States.
41 United States, France, Congo.
42 Colombia, Rwanda.
43 Belgium, Burundi, Indonesia, United Kingdom, United States, Uruguay.
44 Canada and Timor-Leste.

6.
WAYS AND MEANS OF MEETING THE CHALLENGES OF INCORPORATION

The incorporation into domestic legislation of serious violations of international humanitarian law (IHL) and other international crimes poses a number of challenges. Those challenges were discussed during the Meeting by the working group on that topic. From the outset, the participants pointed to the difficulty the States could encounter in obtaining a clear idea of the scope of their obligations to incorporate serious violations of IHL and other international crimes into their legislation. Those violations are set out in a wide range of treaties or in some cases are part of customary law. In addition, the scope of prohibitions can vary, covering the protection of specific categories of protected persons or property in some cases, the means and methods of warfare in others. The participants therefore considered it essential to discuss the means and tools available to States to ascertain their obligations and determine the methods enabling them to give effect to those obligations at national level, taking account of the resources available.

Several participants underscored the paramount role played by the commissions and committees set up to consider the matter, which are made up of both specialists on the subject and representatives of the competent ministries and public bodies or civil society members. Such commissions and committees are very useful platforms for making progress and heightening awareness among all those concerned. Others emphasized that that role should be played as a priority by the national IHL committees. One delegation, for example, said that the national committee in its country had developed a tool (comprising 42 thematic working documents) giving the State an overview of its international obligations under IHL and their implementation at national level. Others pointed to the importance of taking international case law and the Rome Statute into account, as they codify custom from various points of view and hence facilitate its application nationally. Appreciation was also expressed for the tools developed by certain specialized organizations and their development encouraged.[45]

45 *See* section 10 below.

Next the participants considered the constitutional obstacles that could stand in the way of prosecution of the perpetrators of crimes under the Rome Statute at national level. In some cases, the Constitution required no modifications.[46] In others, the situation was more complex, and the Rome Statute could only be ratified if the Constitution was amended as indicated by the highest courts of the land.[47] Among the constitutional impediments mentioned, the question of the immunity of government members was discussed at length. For some participants, the Rome Statute took precedence over constitutional law or served to construe it, thus doing away with the apparent contradiction between the two legal texts.[48] Others said that the institution of proceedings against their monarch – who was the head of State but took no decisions on the use of the armed forces – was such an unlikely hypothesis that it did not prevent the State from becoming party to the Statute.[49]

The representative of South Africa specifically pointed out that the South African Constitution included, for historical reasons, clear provisions on the paramount place of international law at national level and on its implementation (*see notably* Arts 231-234 of the Constitution).

The question of the handover of nationals to the International Criminal Court (ICC) was also discussed. The

46 In their written reports, Honduras (*see* Supreme Court advisory opinion of 24 January 2002), Guatemala (*see* Constitutional Court advisory opinion of 25 March 2002) and Malaysia stated that they had encountered no particular constitutional difficulty. *See also* the decisions concerning Belgium (opinion of the Council of State of 21 April 1999), Spain (opinion of the Council of State of 22 August 1999), Costa Rica (Supreme Court opinion of 1 November 2000), Ecuador (Constitutional Court decision of 21 February 2001) and Albania (Constitutional Court decision of 23 September 2002).

47 *See notably* the decision of the Constitutional Court of Côte d'Ivoire, which concluded in 2003 that the Rome Statute raised major questions of constitutionality that had to be resolved before the State could become a party to it (decision CC No. 002/CC/SG of 17 December 2003). *See*, in the same spirit, the decisions relating to France (decision 98-408 DC of 22 January 1999), Luxembourg (Council of State opinion of 4 May 1999), Ukraine (Constitutional Court opinion of 11 July 2001), Chile (Constitutional Court decision of 7 April 2002), Colombia (Constitutional Court decision of 30 July 2002) and Armenia (Constitutional Court decision of 13 August 2004). *See also* the recent modifications to the Moroccan Constitution (Art. 23).

48 Costa Rica, Belgium, Spain, Honduras and Albania (above note 46), Ukraine (above note 47), and Republic of Moldova (Constitutional Court decision No. 22 of 2 October 2007). *A contrario*, France, Luxembourg, Chile and Côte d'Ivoire (above note 47), and Madagascar (High Constitutional Court decision No. 11-HCC/DI of 21 March2006).

49 *See notably* the report presented by the United Kingdom (*see above* note 10). In the same sense, *see* the opinion of the Spanish Council of State (above note 46).

participants agreed that there was a difference to be made between the extradition of nationals to the courts of a third country and their handover to the Court, as confirmed by all the courts called on to rule on the matter in their decisions.[50] On the question of the life sentences stipulated in the Rome Statute, most of the participants concluded that the Statute left the States sufficient leeway so as not to contravene the constitutional provisions that might prohibit such a sentence.[51] The discussion on the capacity of the ICC Prosecutor to conduct investigations on the territory of a State (Arts 54 and 99 of the Rome Statute) brought to light two relatively different positions: some participants believed that the Statute offered sufficient guarantees for the Prosecutor's action not to be considered undue interference in an area in which the States were sovereign, while others considered, on the contrary, that those functions could only be performed by the national prosecuting authorities at the risk of emptying national legislation of all useful effect.[52]

Lastly, among the other constitutional impediments examined, amnesties and respect for the *ne bis in idem* principle stand out. As concerns the former, certain participants said that ratification of the Rome Statute had required constitutional amendments because the text was incompatible with the powers that could be conferred on the executive or legislative branch when it came to pardons or amnesties.[53] As concerns the latter, most of the participants agreed that

50 *See notably* the decisions of the competent courts of Costa Rica, Ecuador, Honduras and Guatemala (above note 46), Ukraine (above note 47), and the Republic of Moldova (above note 48). *A contrario*, the Slovenian authorities had to modify the relevant provisions of their Constitution before Slovenia could become party to the Rome Statute.

51 In particular because the sentences are subject to national law, because the Rome Statute provides for an automatic mechanism for the reduction of sentences (Art. 110), or because convicts may not be transferred to a State without that State's consent.

52 On the compatibility of the Prosecutor's functions with domestic legislation, *see* the decisions handed down in Ecuador and Spain (above note 46), and in Luxembourg and Armenia (above note 47). *A contrario*, *see* the decisions of France, Chile and Côte d'Ivoire (above note 47).

53 That is the conclusion reached by the constitutional courts of Chile, Armenia and France (above note 47).

the limits imposed on respect for this fundamental principle were so tight and were intended for such exceptional situations that they in no way infringed it.[54]

In addition to the constitutional impediments, the participants all agreed that one of the biggest obstacles to the incorporation of serious violations of IHL and other international crimes at national level was maintaining the political momentum throughout the process. Full and complete incorporation of serious violations of IHL at national level is a process that usually runs to many years and requires action on the part of several State bodies and consultation of a large number of interest groups and experts. Parliaments also have to be convinced that the incorporation of such crimes into the domestic legislative framework should figure high on the legislative agenda. This implies long-term work and mobilization of not only the political world but also civil society, including NGOs working in the field of criminal justice and the National Red Cross and Red Crescent Societies. The participants also emphasized the key role of the national IHL committees, which is discussed at greater length in section 9 of this report. Suffice it to mention here that, for some delegations, the fact that the national IHL committee alone was entrusted with drawing up the draft legislation pertaining to IHL made it possible to create an environment that was conducive to proper follow-up of the texts until their enactment by the legislature, notably by ensuring sufficient time for debate in parliament. This approach also made it possible to obtain an overview and to ensure greater coherence between the measures taken, while guaranteeing that the level of protection required by IHL was systematically taken into account for the most vulnerable groups (children, women, the elderly, the missing and families, the wounded and sick, etc.)

54 That is also the conclusion reached by all the courts asked to rule on the question: *see notably* the decisions handed down in Ecuador, Spain, Honduras and Albania (above note 46).

Lastly, as stated in the previous section, the process of incorporating IHL (repressive aspects) at national level may require the adoption of specific laws and rules that have to be inserted into various legal texts (criminal code, code of criminal procedure or code of military justice); it will therefore involve various ministries, the legislature, the armed forces, technical agencies or bodies, the National Red Cross or Red Crescent Society and civil society. As in most such situations, the Meeting participants agreed that all action had to be coordinated and that differing objectives, levels of expertise and commitment towards the end goal had to be reconciled, as was the case in most such situations. In this regard as well, several participants underscored the paramount role of the national IHL committees, which could help to identify the impediments likely to hold up the process and the reasons they existed. Those questions, and the technical assistance that could be provided to the national authorities, are also discussed in greater detail in sections 9 and 10 of this report.

7.

REFLECTIONS ON THE ROLE OF UNIVERSAL JURISDICTION IN PREVENTING AND REPRESSING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND OTHER INTERNATIONAL CRIMES

It is hard to give a concise and precise description of universal jurisdiction. The African Union and European Union expert report on the principle of universal jurisdiction defines the concept as follows:

> Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exists at the time of the commission of the alleged offence.[55]

Although treaties do not contain all the provisions relating to State jurisdiction, and those which do generally provide for limited extraterritorial jurisdiction, it is now widely accepted that States have the right to vest any kind of jurisdiction, including universal jurisdiction, in their national courts, in particular in respect of war crimes, crimes against humanity, the crime of genocide and acts of torture.[56]

The past 60 years have seen major changes (several new international treaties, State practice and expert opinions), and the tendency is to believe that for certain international crimes, universal jurisdiction is not only authorized, it may be necessary or even mandatory. One of the most striking examples is no doubt the "grave breaches" regime set out in the 1949 Geneva Conventions and Additional Protocol I,[57] whereby the States have a legal obligation to search for persons suspected of having committed, or having ordered to be committed, such a crime, and referring them for trial to their own courts, no matter what their nationality or the

55 Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, document 8672/1/09 Rev. 1, 16 April 2009, p. 7 (hereafter "the AU-EU report").

56 As concerns war crimes, *see* Rule 157 of the ICRC Study on customary international humanitarian law, according to which "States have the right to vest universal jurisdiction in their national courts over war crimes". Available from: http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf.

57 The grave breaches are set out in the following provisions: GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; AP I, Arts 11 and 85.

place where the crime was committed.[58] The Commentary on the Fourth Geneva Convention states:

> The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.[59]

International humanitarian law (IHL) treaties contain different approaches to jurisdiction, the extraterritorial effects of which vary in importance.

1. The first approach consists in not saying anything and leaving the States free to choose measures to ensure respect for the treaty's provisions at national level and to establish the requisite legal bases. This approach is to be found in the 1972 Biological Weapons Convention and the 1925 Geneva Protocol prohibiting the use of toxic gases.
2. The second approach is slightly more specific and encompasses the obligation to adopt legal measures (including penal sanctions) to prevent and repress any prohibited activity carried out by persons, or on a territory, under the jurisdiction or control of the State concerned. This approach was adopted in instruments such as the 1997 Anti-personnel Mine Ban Convention[60] and Protocol II, as amended in 1996, to the Convention on Certain Conventional Weapons[61].
3. The third approach consists in referring to offences committed "in any place under [the State's] control", while obliging every State, by virtue of the active personality principle, to "extend its penal legislation […] to any activity prohibited […] under this Convention undertaken

58 GC I, Art. 49; GC II, Art. 50; GCIII, Art. 129; GC IV, Art. 146. These articles go on to say that the State may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another State concerned, provided such other State has made out a *prima facie* case.

59 J.S. Pictet (ed.), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Vol. IV of *The Geneva Conventions of 12 August 1949: Commentary*, ICRC, Geneva, 1958, p. 593.

60 Art. 9.

61 Art. 14(1).

anywhere by natural persons, possessing its nationality, in conformity with international law". That approach is to be found in treaties such as the 1993 Chemical Weapons Convention.[62]

4. Under the fourth approach, the State is obliged to institute proceedings when the offence is committed on its territory (thus acting by virtue of the principle of territoriality), when the alleged offender is a national (active personality principle) and, in the case of certain offences, when the alleged offender is on its territory (form of universal jurisdiction). In the latter case, the State concerned is also required, if it does not extradite the person, to "submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution". This approach is to be found in treaties such as the 1999 Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property.[63]

The fourth approach is also to be found in certain human rights treaties. Both the 1984 Convention against Torture[64] and the 2005 International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force in December 2010,[65] oblige States to take measures to assert jurisdiction when the offence was committed on any territory over which they have jurisdiction, when the alleged offender is a national, when the victim is a national, or when the alleged offender is on any territory under their jurisdiction and they do not extradite him or her.

When they adopt an "integrated approach" – as defined in section 4 above – to implementation of the Rome Statute, the States should analyse the nature and scope of the legal bases required (since none are stipulated in the Statute) to prosecute crimes covered by the International Criminal Court, in order to ensure full compliance with their obligations under IHL. The extraterritorial component should also

62 Art. VII(1).
63 Arts 16(1) and 17(1).
64 Art. 5.
65 Art. 9.

Universal jurisdiction for the most serious international crimes has long been incorporated into the domestic legislation of States. In the past several years, many States worldwide have asserted universal jurisdiction to repress serious violations of IHL (for example, Botswana and its 1970 Geneva Conventions Act). The ICRC has listed nearly 100 States that have asserted that their national courts have universal jurisdiction, to varying degrees, over serious violations of IHL. Their legislation provides for universal jurisdiction over all or a combination of the following offences: (a) grave breaches of the 1949 Geneva Conventions and Additional Protocol I (essentially members of the Commonwealth); (b) crimes under the 1999 Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property and the 2005 International Convention for the Protection of All Persons from Enforced Disappearance; (c) other violations of IHL for which no treaty requires universal jurisdiction, such as crimes of war committed in the context of a non-international armed conflict, and violations of treaties prohibiting the use of certain weapons; and (d) crimes of war under Article 8 of the Rome Statute.

be discussed and specified, including universal jurisdiction, which should be a feature of some of those legal bases. Indeed, the Meeting's discussions and deliberations concentrated on that angle. A clear tendency emerged with regard to the crimes targeted by the Rome Statute, with the States adopting a rational approach and usually making no distinction between the different legal bases that could apply, and indeed applying the same bases in all their implementing texts, including universal jurisdiction.[66]

With regard to the other crimes under IHL, the legal bases were generally those figuring in the treaties, as explained above. The experts nevertheless acknowledged that a fragmented approach of this kind could give rise to difficulties in terms of interpretation, application and predictability.[67] For example, the States that had specifically implemented the

66 For more information and examples on this point, *see* Annex 4: Table on the integrated implementation of the provisions on criminal sanctions in IHL and other related provisions.

67 Even though the British statute incorporating grave breaches under the 1949 Geneva Conventions and Additional Protocol I (Geneva Conventions Act, 1957 c. 52 5 and 6 Eliz 2, Section 2, stipulates that universal jurisdiction is mandatory for such crimes, the International Criminal Court Act 2001 gives jurisdiction to the British courts by virtue of the principle of territoriality and active personality (even though several war crimes covered by the 2001 Act are also grave breaches).

1949 Geneva Conventions and Additional Protocol I asserted universal jurisdiction over grave breaches in their domestic legal framework.[68] In other cases, even if the law contained no specific provisions on universal jurisdiction, some States claimed that they were not obliged to adopt a text to give effect to the treaties to which they had adhered. Others underscored that a court could in principle base its jurisdiction directly on international law and assert universal jurisdiction without making any reference at all to domestic legislation.

Several experts taking part in the Meeting stressed that universal jurisdiction tended to be gradually introduced over time and was contingent on true political will. One of the members of the German delegation summed up the changes in his country in five critical phases. The first, which he regretted, had followed on the First World War and had been characterized by a lack of political will and therefore by the absence of any real national or international prosecutions. The period after the Second World War, on the contrary, had been marked by influential political forces that had ensured, notably by the establishment of the allied tribunal, that crimes committed by the Nazi leadership in no specific geographical location were prosecuted and tried. The third phase corresponded to the first trial before the International Criminal Tribunal for the former Yugoslavia. At the time, Germany had amended its legislation to enable the first defendant to be transferred to the tribunal in The Hague. The fourth phase consisted of Germany's support for the international criminal justice system. The German Penal Code had been thoroughly amended in the years that followed. At that time – the start of the fifth phase – universal jurisdiction had been stipulated for genocide, crimes against humanity and war crimes, including when committed in non-international armed conflicts; there was nevertheless one major limitation, which was prosecutorial discretion to institute proceedings in certain cases.[69]

68 Chiefly the Commonwealth States.

69 *See* Arts 6 to 12 of the Code of Crimes against International Law and Art. 153(c) and (f) of the Code of Criminal Procedure (with regard to prosecutorial discretion).

Referring next to practice, a number of participants provided examples, both in their written contributions and in their oral statements, of national cases based on one form or another of universal jurisdiction.[70] Several insisted on the significance of those cases, which reflected the general opprobrium provoked by such crimes, which weighed on the conscience of all humanity. Even though the exercise of a form of universal jurisdiction could raise sensitive political and international relations issues, all the participants agreed that the decision to exercise such jurisdiction had to be taken by an independent judicial authority rather than the executive. They all acknowledged, however, that its full implementation faced daunting challenges and that it would be best, as a rule, to first define certain conditions or limits to make it more predictable and effective as a dissuasive measure.

For several years, those presumed to have perpetrated war crimes have increasingly been tried by national courts on the basis of the principle of universal jurisdiction. That trend gained considerable momentum in the mid-1990s, when the first international criminal tribunals were established.

The challenges are in fact technical, legal, practical, human and political in nature. The technical difficulties are, for example, essentially linked to the availability and safekeeping of evidence, witness protection, the phenomena of witness fatigue and "professionalization" that can emerge when witnesses repeat their stories to numerous bodies, or the distance between the place of the trial and the place where the offence was committed, which makes it harder for the victims to have access to justice. The question of the applicability of criminal law over time can also give rise to problems. Furthermore, the rules of international immunity can affect the way in which the proceedings are conducted. Although national judges have the possibility to visit the scene or to have recourse to rogatory commissions or similar procedures, such measures may prove impossible to take in certain situations because of problems

70 For further information on the cases heard before national courts under one form or another of universal jurisdiction, *see* Annex 5: Table of national case law on international crimes and universal jurisdiction. State practice in respect of universal jurisdiction is analysed in the following publications: Amnesty International, *Universal Jurisdiction – Strengthening this essential tool of international justice*, October 2012, and Amnesty International, *Universal Jurisdiction – A preliminary survey of legislation around the world – 2012 Update*, October 2012.

In addition to the well-known *Eichmann* case, heard in Israel in the 1960s, the ICRC has collected information on prosecutions in at least 16 countries, most of them in North America and Europe. Several suspects have also been tried by national courts, on the basis of universal jurisdiction, for war crimes committed in the context of non-international armed conflicts. It is important to note that the accused's State of nationality did not generally object to the exercise of universal jurisdiction in those cases. Recently, in 2012, the Swiss Federal Criminal Court ruled that a former Algerian defence minister could not claim immunity from prosecution by Switzerland for war crimes he was alleged to have committed while in office.

of access, language or incompatibility between legal systems and traditions. Several experts underscored the scarcity of human and material resources and the indifference or lack of interest shown by the societies concerned. One judge taking part in the Meeting, who had been called on to hear a case concerning the commission of acts of genocide tens of thousands of kilometres from his courtroom, underscored the psychological impact of such an undertaking and said that it had probably marked him for the rest of his life.

The participants also stressed that, while universal jurisdiction should only be exercised as a last resort, it was essential to consider the question of extradition, thanks to which the perpetrators of international crimes could be tried where they had committed their heinous deeds. Their discussions brought to light the close ties between two distinct rules of international law representing two equally distinct concepts: universal jurisdiction and the obligation to extradite in the absence of prosecution (*aut dedere aut judicare*).[71] They referred to the recent legislative practice applying that

71 The International Law Commission has been deliberating this point since 2005. Four reports have already been presented by the Special Rapporteur (documents A/CN.4/571, A/CN.4/585 and Corr.1, A/CN.4/603 and A/CN.4/648). In 2008, the Commission decided to set up an open-ended working group on the same subject. In 2010, the Secretariat examined the multilateral treaties that could be of interest to the Commission's work on the subject: document A/CN.4/630. *See also* the report published by Amnesty International in support of the Commission's work: *International Law Commission: The obligation to extradite or prosecute* (aut dedere aut judicare), London, February 2009.

obligation to crimes under the Rome Statute.[72] No matter which court was involved, all the experts agreed on the importance of making the requisite effort to ensure judicial cooperation and assistance when it came to prosecuting international crimes, including via strategic partnerships and capacity-building programmes.[73] Judicial cooperation and assistance could take various forms: execution of requests made by a foreign judge; notification of judicial proceedings; collection of evidence; searches and seizures; on-site examinations; recording of witness statements; provision of certified records and documents; tracing of witnesses; search for and confiscation of criminal proceeds; measures to ensure witnesses were heard, offenders extradited and sentences enforced; enforcement of foreign judgements; provision of judicial files. Certain experts nevertheless felt there was a legal vacuum that generated practical and legal impediments to effective judicial cooperation and assistance.[74] The wide range of practices described

72 *See in particular*: Argentina, Law No. 26.200 on the implementation of the Rome Statute of the International Criminal Court, Art. 4; Brazil's draft legislation on genocide, crimes against humanity, war crimes and other crimes against the administration of justice by the International Criminal Court (2008), Art. 128; Croatia, Law on the Implementation of the Rome Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law, 2003, No. 01-081-03-3537/2, Art. 10(2); Portugal, *Law* adapting Portuguese criminal legislation to the Statute of the International Criminal Court, No. 31/2004, Art. 5; the Swiss Penal Code, *Receuil systématique* 311.0, Art. 264 (m), as amended by the Federal Law of 18 June 2010 modifying federal legislation with a view to the Implementation of the Rome Statute of the International Criminal Court, *Receuil officiel* 2010 4963, FF 2008 3461, ch. 1; Uruguay, Act 18.026 on cooperation with the International Criminal Court in the fight against genocide, war crimes and crimes against humanity, *Diario oficial,* 4 October 2006, Art. 4(2).

73 *See inter alia* AP I, Arts 88(1) and 89, and Arts 18 and 19 of the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property. In 1983, interestingly, the Cambridge session of the Institute of International Law adopted Resolution III, entitled New Problems of Extradition, Article VI (1) of which reads: "The rule *aut judicare aut dedere* should be strengthened and amplified, and it should provide for detailed methods of legal assistance." Available from: http://www.idi-iil.org/idiE/resolutionsE/1983_camb_03_en.PDF

74 On this point, *see* the initiative launched by Belgium, the Netherlands and Slovenia, *A legal gap? Getting the evidence where it can be found: Investigating and prosecuting international crimes*, report of a meeting of experts, The Hague, 22 November 2011. On this question, the Special Rapporteur of the International Law Commission explains: "The serious weaknesses in the current system of extradition and mutual legal assistance derive, to a great extent, from the outdated bilateral extradition and mutual legal assistance treaties. There are numerous grounds of refusal which are not appropriate when crimes under international law are

during the Meeting attests to that. For some experts, for example, the obligation *aut dedere aut judicare* existed only insofar as it was set out in a treaty to which the State was party and, in any event, the basic provision authorizing extradition had to be incorporated into domestic legislation, the treaty being quite simply insufficient.[75] Others regretted that certain investigations and cases being conducted by national authorities had had to be stopped or had been considerably delayed in the absence – once again – of extradition treaties making it possible to bring the suspect before the applicant court, or because the courts had narrowly construed the obligation to extradite.[76] In most of the judicial cases in which a verdict was handed down, the defendant was already on the territory of the

concerned, but there are also important safeguards that often are missing regarding the extradition of persons to countries where they would face unfair trials, torture or the death penalty. On the other hand, there are also numerous obstacles to the effectiveness of prosecution systems that are not appropriate to such crimes, including statutes of limitation, immunities and prohibitions of retrospective criminal prosecution over conduct that was criminal under international law at the time it occurred." (Document A/CN.4/571, para. 14.)

75 *A contrario, see* the case law of the International Criminal Tribunal for the Former Yugoslavia, *Furundzija*, case No. IT-95-17, Judgement, 10 December 1998, para. 156 (on torture). Several States, in the course of the United Nations General Assembly Sixth Committee's systematic discussions of the question since 2006, have also expressed the opposite view; *see* the Special Rapporteur's fourth report, which sums up the issue (document A/CN.4/648). *See also* the address to the court by Professor E. David in the case of *Belgium* v. *Senegal* on questions relating to the obligation to prosecute or extradite, which provides an especially comprehensive description of the customary foundations of this obligation: Public sitting held on Monday 6 April 2009, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning Questions relating to the Obligation to Prosecute or Extradite (*Belgium* v. *Senegal*), International Court of Justice, CR.2009/8, 6 April 2009, pp. 23 to 25 (in French).

76 *See* for example, Guatemala, Constitutional Court, Judgement of 12 December 2007, File No. 3380-2007, in which the Court refused to extradite the three defendants to Spain on the grounds that Spain did not have jurisdiction to try offences committed in Guatemala. The case involving Senegal and Belgium, which at the time of writing was being heard by the International Court of Justice, eloquently highlights the tension that can exist between the obligation to extradite in the absence of prosecution and the scope of universal jurisdiction. In that case, Belgium demands that Senegal try Mr H. Habré, former president of Chad, for acts attributed to him and qualified as crimes against humanity and torture. Should Senegal fail to prosecute Mr Habré, Belgium demands that he be extradited so that it can prosecute him itself on the basis of universal jurisdiction: Questions relating to the obligation to prosecute or extradite *(Belgique v. Senegal)*, General List No. 144 [2009], International Court of Justice. Available from: http://www.icj-cij.org/docket/files/144/17064.pdf (last accessed on 13 August 2012).

forum State. Few cases had been heard because the accused was visiting the country or had been transferred to the forum State on the basis of an arrest warrant.

Turning next to the question of the tools and bodies that could serve to prosecute the crimes targeted by IHL or the Rome Statute efficiently, a number of experts advocated centralizing competences and specialization at all levels: prosecution, police, immigration, judicial assistance authorities and judges.[77] Several experts referred to the key role that could be played by specialized units, with sufficient resources and experience, in immigration, police and prosecution services. In a report on the matter, the International Federation for Human Rights (FIDH) underscores that "[t]he establishment of a specialized unit has the advantage of a consistent and coherent approach to accountability of serious international crimes, rendering investigations and prosecutions more effective and allowing for the accumulation of expertise and sharing of experiences".[78] Moreover, there should be regular, close ties between the investigating authorities and those in charge of immigration matters, so that they can exchange information. A national strategy aimed at effective investigation and prosecution of international crimes, including on the basis of universal jurisdiction, should also include a comprehensive component on witness and victim protection.[79] All the participants confirmed the position voiced by one delegation that it was crucially important to heighten the public's awareness and

77 On this point, *see* the interesting report published by the FIDH and REDRESS: *Strategies for the effective investigation and prosecution of serious international crimes: The Practice of Specialized War Crime Units*, December 2010. Available from: http://trial-ch.org/fileadmin/user_upload/documents/CSCPI/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf (last accessed on 27 January 2014).

78 *Ibid*., p. 21.

79 Measures of protection include the non-divulgation of witness identifying data, the possibility to testify by video link, the reading of written testimony, witness relocation and, in the most serious cases, new identity. In this respect, it is interesting to consult another report on a conference organized by the FIDH and REDRESS on the place of victims and witnesses in procedures based on universal jurisdiction: *Universal Jurisdiction Trial Strategies: Focus on victims and witnesses*. A report on the Conference held in Brussels, 9-11 November 2009, November 2010. Available from: http://fidh.org/IMG/pdf/Universal_Jurisdiction_Nov2010.pdf (last accessed on 27 January 2014).

The network of national contact points was set up by the European Union in application of decisions 2002/494/JAI of 13 June 2002 and 2003/335/JAI of 8 May 2003 of the Council of the European Union. The first decision concerns the designation, in each Member State, of a contact point for the exchange of information on investigations relating to acts of genocide, crimes against humanity and war crimes. The second decision is intended to strengthen cooperation between national units so as to improve, to the greatest extent possible, the ability of the authorities of the Member States to cooperate effectively on investigation and prosecution of those presumed to have committed such acts. The 2003 decision further provides that the designated contact points are to meet at regular intervals in order to exchange information on their experience, practices and methods, and that such meetings may take place in conjunction with meetings of the European Judicial Network. The network of contact points has a website: http://eurojust.europa.eu/Practitioners/networks-and-fora/Pages/genocide-network.aspx (last visited on 13 August 2012).

level of instruction in order to engage proceedings based on the exercise of a form of universal jurisdiction. They also emphasized the paramount role to be played by regional bodies aimed at promoting inter-State cooperation, mutual legal assistance and aid. They referred to the work carried out by the network of national contact points of European Union countries concerning persons responsible for genocide, crimes against humanity and war crimes.

The Meeting participants were particularly alert to the conditions that could be attached to the exercise by a State of a form of universal jurisdiction – conditions that could enable it to gain in predictability but that would not affect its extraterritorial and universal nature.[80] A number of elements were mentioned. It was generally agreed that universal jurisdiction should only be exercised subsidiarily, when the courts that could base their proceedings on the

80 Several academic associations have considered the matter. *See inter alia*: Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction*, Princeton, 2001; International Law Institute, "Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes", Seventeenth Commission, Krakow, resolution adopted on 26 August 2005, available from http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf (downloaded on 13 August 2012); International Association of Penal Law, "Universal Jurisdiction – General Report", prepared by I. Blanco and published in *Revue internationale de droit pénal*, Vol. 79, 2008.

principles of territoriality or of active or passive personality did not have the capacity or desire to do so. In this respect, some of the participants stressed the importance of investing in national capacity building, in keeping with the principle of the complementarity of the International Criminal Court. All the participants said they were convinced that the involvement of the courts closest to the scene of the crime would heighten the dissuasive effect of the punishment, as explained in the next section of this report.

In addition, the experts appeared to prefer a pragmatic to a dogmatic approach in this regard: "the legitimacy and credibility of the use of universal jurisdiction are best ensured by its responsible and judicious application".[81] Some experts questioned whether a case could be brought before a court if it was doomed to fail because of the unavailability of the elements of proof, even if the court in question had jurisdiction. Most of the experts agreed that efforts must be invested in cases in which there was some form or other of link.[82] On this question, besides the investigative acts and extradition requests, the presence of the accused – even for a short period – on the territory of the State wishing to prosecute – or, at the very least, the existence of means of ensuring that presence at the trial – was preferred.[83] In addition, for some experts, universal jurisdiction was only conceivable if the principle of discretionary prosecution – which obviously did not mean arbitrary

81 *See* United Nations General Assembly resolution 65/33, preambular paragraph 4 (repeated in resolution 66/103).

82 That is the approach promoted in the Princeton Principles (*see above*, note 80) and in the International Law Institute resolution (*see above*, note 80). Compare Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1998*, 16 April 1999, document OEA/Ser.L/V/II.102, Chapter VII, Recommendation 21, commemorating the fiftieth anniversary of the American Declaration of the Rights and Duties of Man. and the Universal Declaration of Human Rights, in which the experts consider that the States must provide for universal jurisdiction in the broad sense, and without any limit such as the stipulation that the accused must be present on the territory for the tribunal to have jurisdiction. Available from: http://www.cidh.org/annualrep/98eng/Chapter%20VII.htm (visited on 14 August 2012).

83 In the same sense, *see* the resolution of the International Law Institute (above note 80), para. 3(b).

According to the information collected by the ICRC, presence on the territory of the prosecuting State is required in the national legislation and case law of over 40 States, including Argentina, Bosnia-Herzegovina, Colombia, France, India, the Netherlands, the Philippines, Spain, Switzerland and the United States. In other States, domestic legislation and case law do not require the existence of such a link and allow prosecution of a presumed war criminal who is not present on the territory of the prosecuting State (Austria, Canada, Germany, Italy, Luxembourg, New Zealand and the United Kingdom).

prosecution – was recognized. As was stated in the report on the meeting of experts organized by the ICRC in 1997:

> [t]here 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. […] The ability to put together a case and marshal the available evidence would naturally limit the implementation of universal jurisdiction.[84]

In short, and within the meaning of the current fight against impunity, the Meeting tended to recognize that the States had a clear obligation to exercise universal jurisdiction over international crimes and thus to help combat impunity not only at home but also as members of the international community, in the framework of each country's cooperation on the universal objective of fighting impunity and, in any case for those that were party to the Rome Statute, as a harmonious complement to the relationship to be established with the International Criminal Court. Indeed, universal jurisdiction must be exercised in a clearly defined framework and predictably, to avoid the debate it had sparked in several instances. Discussions of the scope and application of universal jurisdiction at the United Nations and regional organizations must, in this sense, be encouraged, especially if they were aimed at generating universal support for the principle and lead to the conclusion of agreements promoting local capacity building.[85]

84 C. Pellandini (ed.), above note 5, p. 131.

85 In this respect, *see inter alia*: Scope and application of the principle of universal jurisdiction, reports drawn up by the Secretary-General on the basis of government observations, documents A/65/181 (29 July 2010), A/66/93 (20 June 2011) and A/67/117 (28 June 2012). *See also*: the AU-EU report, above note 55; the 2008 Report of the African Commission on the Use of the Principle of Universal Jurisdiction by some non-African States, EX.CL/411 (XIII); or the decision of the Assembly of the African Union, dated December 2008, on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/dec.199 (XI). Lastly, a meeting of government experts and justice ministers held under African Union auspices proposed, in May 2012, a draft African Union Model Law on Universal Jurisdiction over International Crimes.

8.

THE ROLE OF INDIVIDUAL SANCTIONS IN PREVENTING SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Having recourse to repression and punishment is an admission of failure: the failure to comply with a rule of international humanitarian law (IHL) which must be respected on pain of prosecution. There may nevertheless be various reasons for that failure. For individuals to uphold a rule of IHL, they must first know that it exists, hence the importance of criminalizing, in domestic legislation, conduct prohibited under IHL and constituting international crimes. However, if repression and punishment are to play their preventive role effectively, more is needed. Indeed, any talk of repression and punishment of serious violations of IHL must be accompanied from the outset by measures aimed at improving adherence to and respect for the rules. The parties concerned must take all necessary measures to ensure that the applicable rules and penalties are incorporated into the reference system, are known and are properly applied. They must educate people and inculcate what is authorized and what is not: the effectiveness of the penalty's message depends on the degree to which the relevant norm has been internalized by the persons likely to violate it, in particular weapon bearers. IHL must become second nature, to the point that compliance with its rules becomes an automatic reflex.[86] In this spirit, the Registrar of the International Criminal Tribunal for Rwanda told the Meeting that the Tribunal had used basically two levers to maximize its preventive function, namely its outreach activities and its programme to reinforce the capacity of the Rwandan judicial system.

The Meeting's discussions and deliberations on punishment considered in depth two major issues relating to the means of maximizing the dissuasive effect of sanctions, on the one hand, and of ensuring that the target groups concerned received proper instruction and dissemination, on the other.

86 The ICRC, with the help of a team of experts, has done an enormous amount of work on sanctions since 2005, some of which was summed up in a special issue of the *IRRC* in 2008 (Vol. 90, No. 870, *see above* note 15). To learn about the 14 elements on which the effectiveness of sanctions hinges (identified in the course of the ICRC's work over several years), *see* "Annex 6: Elements which determine the effectiveness of sanctions and comments".

The overwhelming majority of the participants agreed that it was important to know that a specific act was a crime and what were the consequences from the point of view of criminal law of a specific type of conduct. The incorporation of serious violations of IHL into the relevant criminal law texts facilitated knowledge among both those likely to commit a crime and those who had to apply the sanction. The experts also recognized that sanctions had a number of invariable characteristics, no matter what the circumstances, the individuals targeted or the jurisdiction applying them. First, there must be no difference in the sanction based on the nature of the armed conflict. Second, the sanction must apply to all, without distinction. Third – and this was an important point raised both orally and in the experts' written contributions – sanctions could only fully play their role if they served to mark the reprehensible nature of the offence in every case, i.e. during or just after it had been committed. There must therefore be certainty that the sanction would be applied and that it would be immediate, i.e. that there would be a reaction without delay. Lastly, the notion that punishment of corporate bodies – which was provided for in many domestic laws – can apply in the case of war crimes had definitely gained credence.

Seen from this angle, sanctions can take a variety of forms: they can be criminal or disciplinary, judicial or not, handed down by a criminal court under ordinary or military law, or by an international or national tribunal. While it remains mandatory to maintain criminal sanctions for serious violations of IHL and while imprisonment is indispensable in such cases, it would appear that IHL should not automatically exclude recourse to other possibilities. The experts specified that such complementary possibilities might be better able to take into consideration the contextual specificities and the mass or systematic nature of the violations. In a written report, one delegation said that the dissuasive impact of a sanction could be heightened using

To place the sanctions provided for with regard to humanitarian law back in the context of a review of transitional justice is to acknowledge that, taken in isolation, they are frequently insufficient and even ineffective. It is also to accept simultaneously that humanitarian law does not rule out having recourse to complementary solutions which are better able to take account of the mass or systematic nature of the violations that have been committed in the context of armed conflicts or of special contextual aspects and the expectations of the population or individuals concerned. To position humanitarian law in that manner stimulates respect for it and its implementation by placing those issues back in the flow of justice which, when mass violations have been committed, covers several decades, takes varying forms ranging from the quest for truth via memory to reparations and requires mechanisms which are suited to those purposes.

Excerpted from A.-M. La Rosa, "Sanctions as a means of obtaining greater respect for humanitarian law: a review of their effectiveness", *IRRC,* Vol. 90, No. 870, June 2008, pp. 221-247.

a holistic approach.[87] It did not suffice to prosecute only senior leaders. The holistic approach presupposed the use of a broad range of sanctions – be they criminal, disciplinary or administrative – to reach all those who had taken part, in one way or another, in the crimes. Whether or not to prosecute had to be decided in the light of each context, i.e. depending on the seriousness of the crime and the position of the accused. The non-judicial measures adopted as part of the transitional justice process, such as truth and reconciliation commissions, should also be considered in order to promote reconciliation in general and to enable the victims and all those affected by the crime to tell their stories and obtain fair reparation. They also give those who helped commit the crime an opportunity to express regret.

Another subject discussed during the Meeting was the advantages and disadvantages of having recourse to international criminal justice. The experts appeared to acknowledge that national and mixed courts were to be preferred whenever possible over exclusively international criminal tribunals located far from the scene of the crime

87 The holistic approach was proposed by the United Kingdom in its written report (*see above* note 10). The preliminary conclusions of the ICRC's work on sanctions tend to agree.

An integrated approach based on pragmatism serves to seize every window of opportunity in the hope of launching a kind of healthy momentum in society and among the individuals concerned: there is nothing worse, when the fabric of society has been shredded beyond repair, than a void. It is therefore accepted that transitional justice is complementary to criminal justice and that it can help reconstruct a society and the individuals it comprises and write a coherent, authentic and honest history.

and the victims. Within each State, the choice between a military or a civilian structure depended entirely on the country's organization. In some cases, it could be claimed that military tribunals were best placed to try military personnel, leaving the civilian courts to prosecute other suspects. According to some participants, prosecuting a soldier in a civilian court risked feeding an artificial feeling of "us versus them" and would therefore not have a dissuasive effect. On the contrary, the worst thing that could happen to a professional soldier was to be convicted by his or her peers. In all cases, as the experts stated, it was important for the courts to be independent, competent, efficient and fair. A degree of specialization, as stated in the previous section of this report, could also be considered an important asset.

Everyone agreed that the obligation to disseminate knowledge of the law was fundamental, because it was thanks to dissemination that people were informed and educated about the types of conduct prohibited by IHL and learned about the consequences of serious violations of IHL.

For the Meeting participants, it was also clear that training judges and prosecutors played a crucial role, in that it gave the national authorities the feeling that they were indeed capable of applying sanctions. Recent developments in IHL and international criminal law – new treaties or the revision of existing treaties, changes in customary rules, clarification provided by the case law of international tribunals or by the work of experts – had to be assimilated by judges through

proper training tools. Furthermore, training in judicial circles should not be limited to points of law but also cover military aspects. In practice, training could be provided in various ways depending on the context, including by seconding judicial personnel for brief periods to military units. International criminal law should not be perceived as being further and further removed from operational and combat reality. As the United Kingdom stated in its written report, "IHL was born on the battlefield and cannot be so divorced".[88] For example, a judge or prosecutor with no experience of military affairs might find it difficult to grasp the scope and meaning of specific IHL concepts and notions (such as military advantage or necessity) when hearing a case concerning a presumed war criminal. For others, the troops' respect for the trial and interpretive authority was an important factor of dissuasion and effectively enhanced the preventive impact of the sanctions that authority could apply.

The Meeting participants also agreed that heightening the awareness of other major players, such as the members of national parliaments, could help strengthen the effectiveness of sanctions and their dissuasive impact.

No one contested the paramount role of national IHL committees or similar structures when it came to spreading knowledge of IHL among all those concerned at national level. The committees could notably recommend the inclusion of references to the repression of serious violations of IHL in the courses and publications produced for various target groups. They could also provide support with a view to ensuring that such references were included in military handbooks and, if necessary, echoed in the media. The role of national IHL committees and other similar bodies is examined in the next section of this report.

88 *See above* note 10.

9.

ROLE AND IMPACT OF NATIONAL COMMITTEES FOR THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

There are at present over 100 national bodies for the implementation of international humanitarian law (IHL) on all five continents, covering more than half the world's countries.[89] These figures confirm the relevance of the initiative launched by the 26th International Conference of the Red Cross and Red Crescent in 1995 to encourage the establishment of national IHL committees. At the time, the Conference echoed the recommendations of the Intergovernmental Group of Experts for the Protection of War Victims on the usefulness of such mechanisms.[90] It has since become clear that national IHL committees, if they function efficiently, can considerably facilitate the States' task when it comes to ensuring appropriate application of IHL and related rules.

Generally speaking, national IHL committees and other similar bodies act as an *advisory body* to governments on matters pertaining to IHL, *promote* the implementation of IHL at national level, take part in efforts and strategies to *spread knowledge* of IHL (or design them), *provide advice* on the subject, *ensure coordination* of related questions, *promote respect for the law* and *lobby for the necessary legislation*. Because they know the ratification and implementation status of IHL treaties in their respective countries, the national committees are well placed to encourage ratification of or adherence to those instruments and to advance their enactment in domestic legislation. They can also help bring national and other laws and regulations in line with the IHL instruments by which the State is, or wishes to be, bound. They must therefore be able to assess domestic legislation, case law and administrative provisions in the light of the obligations arising from the various instruments concerned, formulate advisory opinions for the national authorities on questions relating to the implementation of IHL, and make

89 For a complete list of national IHL committees, *see* Annex 7: List of national IHL committees and other national bodies.

90 "Recommendations of the Intergovernmental Group of Experts for the Protection of War Victims", *IRRC*, No. 304, January-February 1995, pp. 33-38.

Heightened participation by national committees and International Conference of the Red Cross and Red Crescent

After the Meeting, the ICRC observed that a greater number of national IHL committees contributed to their State's preparations for the 31st International Conference of the Red Cross and Red Crescent (November 2011), and that some of them were even part of their country's delegation to the Conference in Geneva.

recommendations and proposals in that regard. Because of their cross-cutting nature (they bring together the main State bodies dealing with IHL), the national committees should be able to ensure that the authorities take IHL into consideration in timely fashion. In addition, their expertise may be called on when it comes to injecting relevant elements of IHL into discussions and decisions on related branches of the law, such as human rights or international criminal law.

The Meeting's participants confirmed the usefulness of the national committees, while acknowledging that their composition, functions, terms of reference and activities may vary. The many statements made by the members of such bodies on their experiences and best practices, and on the obstacles encountered in their work, were appreciated and a source of much valuable information. For example, the discussions revealed that several national committees had developed structures which, over the years, had become a solid part of their country's governmental architecture; they had therefore acquired an uncontested advisory function that went beyond pure and simple matters of IHL to cover all the norms that are today an integral part of the law. Other participants stressed the tangible benefits of their national committee as a platform for interinstitutional exchange on and coordination of the various strategies and initiatives adopted by the main government bodies in the field of IHL and related norms.

The participants also underscored the complexity of their efforts to enact the international obligations arising from

IHL and international criminal law in the domestic legal order, in particular given the growing number of areas on which the two branches of international law touch, such as defence, justice, finance, foreign affairs, education, health, culture and even child protection. In practice, those areas were shared between various State bodies and specialized institutions. The Meeting revealed, however, that the national committees could play a role coordinating, supporting and training all those involved so that the best possible use was made of often limited resources, the authorities' knowledge of IHL reinforced and the law promoted among the general public. Such coordination should extend to national implementation of the Rome Statute or any other treaty covering issues that went beyond the basic frame of IHL but were directly related to it, such as the International Convention for the Protection of All Persons from Enforced Disappearance, or the Convention against Torture. It was best to avoid, to the extent possible, duplicate bodies performing similar tasks; at a minimum, measures should be taken to ensure that they were complementary and coordinated.

The national committees could only do their work effectively, however, if they had the requisite capacities. Several stressed that, to perform their duties as summed up above, they needed additional human and material resources. The participants also emphasized the importance of conferring formal status on the national committee, of giving it a permanent secretariat and of ensuring that its members were able to devote the necessary time to its work. They also referred to the importance of drawing up a detailed action plan that clearly defined who was responsible for what and of scheduling regular meetings.

The participants agreed that, for the system to function, there had to be a genuine political will to make those means available. It was thus up to the national committees, not only to identify the means they needed to function properly, but also to convince the political authorities

Establishment of sub-committees: the national committees' quest for effectiveness

In support of their work, some national committees also establish "sub-committees" or technical groups that specialize on IHL matters. Such is the case, for example, of Nicaragua's Comisión Nacional para la Aplicación del Derecho Internacional Humanitario, which works with three sub-committees: one on the protection of cultural property, one on legislation and one on IHL training and dissemination. Morocco's Commission nationale de droit international humanitaire has also established two sub-committees with specific terms of reference: the first is in charge of research and legislation, the second of dissemination and training.

to make them available. In its written report, for example, Malaysia stated that the fact that the Minister of Foreign Affairs was also the President of the Malaysian National International Humanitarian Law Committee was an advantage, because it was therefore able to maintain the political momentum, notably through the establishment (at the minister's behest) of a governmental and parliamentary space in which to heighten awareness of IHL, and to take promotional measures.[91] The message to be sent to political circles would be ineffective, however, if the population was not aware of the importance of the committee's work and did not share its objectives. It was therefore essential to explain and spread knowledge in order to garner support for the national committees, but also and above all to ensure that the effort to prevent and repress violations of IHL and other international crimes was properly understood and accepted. For the national committees, this implied a true communication strategy, including on social networks and websites in general, and alerting the State to the importance of it having a similar strategy as part of its general obligation to spread knowledge of and disseminate IHL to the population. The national committees could thus enhance the visibility of IHL and promote broader exchanges with civil society.

The participants also exchanged views on the implementation as such of IHL and other related norms. They stressed

91 *See* above note 10.

National IHL committees increasingly interested in social media

In order to make their work more visible and share it with a broader group of interested people, several national committees have turned to the Internet and set up public websites. Examples are the National Commission for International Humanitarian Law of the United Arab Emirates and the Belgian, Peruvian and Swiss national IHL committees.

that, while this was an area in which few principles applied, a balanced approach was difficult to determine and hard to define as an abstract concept: it had to be found in each situation, depending on the specific context. There were principles, avenues, models, model laws, effective systems and best practices, but no dogma that could be adapted to each context. Here, too, the national committees had a fundamental role to play: they had to speak about their specific situation and its peculiarities, with a view to finding, initially through internal dialogue but also through exchanges with other countries facing similar problems, the most appropriate solutions for a given situation.

Besides the specificities of each situation and their specific function in terms of IHL, the participants recognized that the challenge was above all to ensure that the national committees were active and dynamic, bristling with energy and ideas. Several participants emphasized that, to that end, it was important to establish cooperation between committees, starting, of course, within regions, which usually shared a greater number of problems and often also had a common language and similar systems. With the encouragement and support of the ICRC, many meetings had been held in Africa, Latin America, Asia (Indian subcontinent), Europe and among national committees from the Arab countries. In 2009, for example, the sub-regional meeting of countries in the Southern Cone enabled Argentina, Brazil, Chile, Paraguay and Uruguay to meet and adopt recommendations allowing their respective national committees to stay in touch and share best practices and other useful information. The national committees of the

The national committees promote peer exchanges

The national committees engage in frequent contacts with each other on a host of subjects. For example, the El Salvador Intersectorial National Committee on International Humanitarian Law was able to help its Guatemalan counterpart draw up a national list of cultural sites and property and ensure they were marked for the purpose of protection. The Moroccan National Commission for International Humanitarian Law was in touch with its Peruvian counterpart, as was the national committee of Belarus with the recently established Kyrgyz committee. The Serbian International Humanitarian Law Committee was invited to attend a meeting in Switzerland by the Swiss Interdepartmental Committee on International Humanitarian Law (both had been recently established), and the Ecuador National Commission on International Humanitarian Law Application took part in the *VII Miguel Grau Course on IHL* organized in April 2012 in Lima by the Peruvian National Commission of Study and Application of International Humanitarian Law; on that occasion, the two committees exchanged views on their respective practices. Lastly, a cooperation project was being discussed by the United Kingdom's Interdepartmental Committee on International Humanitarian Law and Georgia's National Inter-Agency Commission on the Implementation of International Humanitarian Law.

Commonwealth countries also meet on a regular basis, the last time in June 2011. The aim of the meeting was *inter alia* to prepare, jointly with the National Red Cross and Red Crescent Societies, the participation of their respective States in the 31st International Conference of the Red Cross and Red Crescent. In June 2012, the Serbian International Humanitarian Law Committee, in partnership with the ICRC, organized a meeting of the national committees and similar bodies of the Balkan countries and others from the rest of Europe, providing a favourable environment and mutually stimulating conditions in which to discuss contemporary challenges to the implementation of IHL. Countries that do not have a national committee can also participate in these meetings, in order to enhance their understanding of the crucial role played by such bodies in the implementation of IHL. Suriname, for example, took part in the International Conference of National IHL Committees of Latin America and the Caribbean in Mexico in June 2010, and the Caribbean Community (CARICOM) participated in the

universal meeting of national IHL committees covered by this report.[92]

The members of the national committees also told the Meeting that they were in touch regularly with their counterparts and had cooperated on numerous issues. Innovative and promising agreements had been reached between sometimes distant committees, for example between those of Germany and Peru. In other cases, the contacts established between a national committee and the authorities of another State had helped prompt the establishment of a national committee in that country. Such had been the case of the Interagency Commission on Securing the Implementation of International Obligations of Turkmenistan in the Sphere of Human Rights and International Humanitarian Law Commitments, which was officially established in August 2011 in the wake of contacts *inter alia* with the Belarus committee. Switzerland had also expanded its exchanges beyond Europe, concluding a co-operation agreement with the Jordanian National Committee. All the participants wished to consolidate the conditions that would allow them to multiply and maximize the impact of such cooperation agreements, in the knowledge that they afforded invaluable opportunities for the exchange of experience and knowledge.

92 The list of regional meetings organized by the ICRC Advisory Service in 2010, 2011 and 2012 and dealing with the question of the national implementation of the Rome Statute is to be found in Annexe 8: List of regional meetings of national IHL committees (covering the Rome Statute).

10.

TOOLS FOR THE INCORPORATION OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND OTHER INTERNATIONAL CRIMES

Many tools exist to help and support the efforts of the national authorities, in particular the national international humanitarian law (IHL) committees, to establish an effective system for the repression of serious violations of IHL and other international crimes, including those covered by the Rome Statute. During the Meeting, the participants agreed that each situation was different and that the measures to be taken and mechanisms to introduce had to be decided in the light of those specificities. They recognized that, in this respect, the national committees had an important role to play in evaluating the situation with a view to finding the most appropriate solutions for their respective State. The statements made by the panelists and the participants served to identify tools for the incorporation of crimes under IHL and the Rome Statute. They covered a wide range of aids and means of assistance, some of which are described below.

Introductory tools. The technical fact sheets, ratification files and lists of relevant publications made available by the ICRC Advisory Service on specific topics are often an excellent starting point when a State, through its national committee, for example, wants to start the process of ratifying a treaty or implementing IHL. These documents are intended to enhance understanding of the rules of IHL requiring the adoption of national implementing measures.

Introductory tools	
ICRC Advisory Service	Technical fact sheets

Specialized documents. The scope of the States' obligation to enact violations of IHL and other international crimes in domestic legislation is raising increasingly complex questions, as these obligations are set out in various treaties and are also governed by customary law. Practical implementation of State obligations pertaining, for example, to the institution of investigations, judicial proceedings and sentence enforcement also requires consideration of many

questions relating to the legal traditions of each national system. The introductory tools are therefore supplemented with specialized documents: reports of meetings of experts, model laws, check lists and specialized handbooks allowed for more in-depth consideration of the thorniest issues and were, in the view of all the participants, indispensable.

Meetings of experts	
Asian-African Legal Consultative Organization (AALCO)	*Summary Report of the Meeting of Legal Experts on the Rome Statute of the International Criminal Court: Issues and Challenges*, 19–20 July 2011, Putrajaya, Malaysia
ICRC	Advisory Service on International Humanitarian Law, *Répression nationale des violations du droit international humanitaire (systèmes romano-germaniques): rapport de la réunion d'experts*, Geneva, 23-25 September 1997 Advisory Service on International Humanitarian Law, *Punishing Violations of International Humanitarian Law at the National Level : A Guide for Common Law States*, meeting of experts, Geneva, 11–13 November 1998 (includes a model Geneva Conventions act)
International Criminal Law Network & Regional Human Security Centre at the Jordan Institute of Diplomacy	*The International Criminal Court and the Arab World*, final report of the regional workshop, 14-15 February 2005, Amman, Jordan
Arab League (in partnership with the ICRC)	Arab Government Experts Meeting on the Harmonization of Domestic Legislation with International Humanitarian Law, 12–14 January 2011, Rabat, Morocco
Commonwealth Secretariat	*Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court*, Marlborough House, London, 7–9 July 2004
Centre for Human Rights, University of Pretoria (CHR), International Criminal Law Services (ICLS) and the Konrad Adenauer Foundation	Expert Workshop: Giving effect to the law on war crimes, crimes against humanity and genocide in Southern Africa, University of Pretoria, 13–14 June 2011
Organization of American States	*Seventh Working Session on the International Criminal Court*, report of the meeting organized jointly with the ICRC (much of which covered the International Criminal Court), 10 March 2011

Model laws	
Commonwealth Secretariat	*Revised Model Law to Implement the Rome Statute of the International Criminal Court and related commentary*[93]
Arab League	*Arab League Model Law Project on Crimes under the Jurisdiction of the ICC*[94]

Checklists and specialized handbooks	
Amnesty International	Updated checklist of the principles to uphold for effective implementation of the International Criminal Court[95]
International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR)	*International Criminal Court – Manual for the Ratification and Implementation of the Rome Statute*, 3rd edition[96]
Rights and Democracy and the ICCLR	*International Criminal Court – Manual for the Ratification and Implementation of the Rome Statute*, 2nd edition *International Criminal Court – Rules of Procedure and Evidence. Implementation Considerations*[97] *Checklist of Implementation Considerations and Examples Relating to the Rome Statute and the Rules of Procedure and Evidence*[98]
Folke Bernadotte Academy	*A Handbook on Assisting International Criminal Investigations*[99]

93 The revised model law is appended to Annex B of the report of the Meeting of Commonwealth Law Ministers and Senior Officials, Sydney, Australia, 11-14 July 2011, document SOLM(11)10. In 2011, a Commonwealth group of experts was convened to review the model law to implement the Rome Statute in the light of developments following the Kampala Review Conference. The ICRC took part in the group's deliberations. The initial version of the model law had been drawn up in 2004 by a group of experts in order to support the efforts of Commonwealth member countries to implement the Rome Statute.

94 Decree No. 598-21d-29/11/2005. The original is available from: http://www.coalitionfortheicc.org/?mod=leagueofarabstates (last accessed on 27 January 2014). An unofficial translation is available from the Coalition for the ICC.

95 IOR 53/009/2010, London, 6 May 2010. This is the updated version of International Criminal Court: Checklist for Effective Implementation, IOR 40/011/00, London, 2000.

96 The third edition of this manual is available in English only. The previous editions, produced jointly with the Canadian International Centre for Human Rights and Democratic Development (Rights and Democracy), are available in Arabic, English, French, Portuguese, Russian and Spanish. The second edition is available from the website of Foreign Affairs, Trade and Development Canada (http://www.international.gc.ca/court-cour/index.aspx, last accessed on 27 January 2014).

97 Supplement to the *Manual for the Ratification and Implementation of the Rome Statute*, 2nd edition, produced by the ICCLR, March 2003.

98 Supplement to the *Manual for the Ratification and Implementation of the Rome Statute*, produced by the ICCLR, April 2002.

99 Published in 2011. Available from: http://folkebernadotteacademy.se/Global/Verksamhet/Reportage/RuleOfLaw_Handbook.pdf (last accessed on 27 January 2014).

Checklists and specialized handbooks	
Human Rights Watch	*Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute*[100]
International Bar Association	*International Criminal Law Manual*[101]
International Criminal Law Services	Domestic Application of International Law, *Module 5: Domestic Application of International Criminal Law*, part of the OSCE-ODIHR/ICTY/UNICRI project entitled Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions
ICTY-United Nations Interregional Crime and Justice Research Institute (UNICRI)	*ICTY Manual on Developed Practices*, prepared in conjunction with UNICRI as part of a project to preserve the legacy of the ICTY
No Peace Without Justice	*International "Ratification Now!" Campaign for the Establishment of the International Criminal Court by Year 2000. A Manual for Legislators*
Open Society Justice Initiative	*International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*[102] For the Democratic Republic of the Congo, Uganda and Kenya, see: *Putting Complementarity into Practice*[103]
United States Institute for Peace	*Model Codes for Post-Conflict Criminal Justice*, Vols 1 and 2 (criminal law and criminal procedure law)[104]

Like the ICRC, other organizations made available to States databases containing information on national legislation and practice and serving to foster exchanges on the subject between all interested parties. Three databases may be particularly useful when it comes to incorporating violations of IHL and other international crimes, including those covered by the Rome Statute.

100 Vol. 13, No. 4 (G), New York, September 2001.
101 June 2010. Available from: http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/HRI_Training_Manuals_.aspx (last accessed on 27 January 2014).
102 New York, 2011.
103 New York, 2011.
104 2007 and 2008.

Databases	
ICRC	National implementation of international humanitarian law. Visit: http://www.icrc.org/ihl-nat Customary law. Visit: http://www.icrc.org/customary-ihl/eng/docs/home
Coalition for the ICC	A series of documents. Visit: http://www.iccnow.org/?mod=documents
ICC	Legal tools (includes a separate database on implementing legislation, with input provided by the University of Nottingham). Visit: http://www.legal-tools.org/fr/acces-aux-outils/

Documents and tools developed by the Assembly of States Parties. The ICC and the Assembly of States Parties have themselves developed tools aimed at implementing the principle of complementarity and at strengthening cooperation between the States and international organizations, on the one hand, and the ICC's bodies, on the other. The Assembly adopts resolutions on these topics every year.[105] The Kampala Review Conference provided an opportunity to review and identify, in extensive discussions, the questions on which the States had to redouble their efforts to make the principle of complementarity an undisputed reality. The "positive" principle of complementarity that emerged from the Conference encourages activities to strengthen national courts from the legislative and technical points of view. The Conference participants nevertheless also recognized that the ICC could provide only very limited support to national courts; the aid therefore had to be provided via cooperation between States, and between States, international organizations and civil society.[106]

105 Assembly of States Parties (ASP), resolutions on *cooperation*: documents ICC-ASP/11/Res.5 (21 November 2012), ICC-ASP/10/Res.2 (20 December 2011) and ICC-ASP/8/Res.2 (26 November 2009); ASP, resolutions on *complementarity*: documents ICC-ASP/11/Res.6 (21 November 2012) and RC/Res.1 (8 June 2010); ASP, resolutions on *strengthening the ICC and the ASP* (which include, up to 2010, cooperation and complementarity): documents ICC-ASP/11/Res.8 (21 November 2012), ICC-ASP/9/Res.3 (10 December 2010), ICC-ASP/8/Res.3 (26 November 2009), ICC-ASP/7/Res.3 (21 November 2008), ICC-ASP/6/Res.2 (14 December 2007), ICC-ASP/5/Res.3 (1 December 2006), ICC-ASP/4/Res.4 (3 December 2005), ICC-ASP/3/Res.3 (10 September 2004) and ICC-ASP/2/Res.7 (12 September 2003).

106 ASP, Kampala Review Conference, Resolution on cooperation, RC/Res.1 (8 June 2010); ICC, ASP Secretariat, Review Conference on the Rome Statute of the International Criminal Court, Kampala, 31 May to 11 June 2010, RC/9/11. *See also* ASP, *Report of the Bureau on stocktaking: Complementarity. Taking stock of the principle of complementarity: bridging the impunity gap*, document ICC-ASP/8/51 (18 March 2010).

In addition, a mechanism has been established within the Assembly Secretariat to facilitate the exchange of information between the ICC, the States, civil society and the other stakeholders, so as to reinforce the national courts, including via an electronic forum (extranet on complementarity).[107]

The Assembly of States Parties has also adopted a plan of action for achieving universality and full implementation of the Rome Statute.[108] The plan of action calls on the States Parties actively to promote those goals at bilateral and regional level and to provide the Assembly Secretariat with information on the obstacles they encounter and the strategies they adopt in respect of the ratification and implementation of the Rome Statute.[109] In 2012, according to information provided by the Assembly Secretariat, 20 States Parties submitted reports, and since 2007, 139 States Parties in all have forwarded their observations.[110] In view of those figures, it might be interesting to see how best to incorporate the plan of action into a process aimed at obtaining accurate and immediate information on practices and at generating more exchanges between the players concerned.

Linking the plan of action to a schedule could help catalyse action. Concretely, the plan of action could be used to consolidate the pledges made by the States at the Kampala Review Conference and to ensure follow-up. In this regard, it should be noted that the International Conference of the

107 ASP, *Report of the Secretariat on complementarity*, document ICC-ASP/11/25 (16 October 2012); ASP, *Report of the Bureau on complementarity*, document ICC-ASP/11/24 (16 November 2012); ASP, *Report of the Secretariat on complementarity*, document ICC-ASP/10/2 (11 November 2011); ASP, *Report of the Court on complementarity*, document ICC-ASP/11/39 (16 October 2012); ASP, *Report of the Bureau on complementarity*, document ICC-ASP/10/24 (22 November 2011); ASP, *Report of the Secretariat on complementarity*, document ICC-ASP/10/24 (22 November 2011); ASP, *Report of the Court on complementarity*, document ICC-ASP/10/23 (11 November 2011); ASP, Kampala Review Conference, Resolution on cooperation, RC/Res.1 (8 June 2010), para. 9.

108 Plan of action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court, document ICC-ASP/5/Res.3, Annex I (1 December 2006).

109 *Ibid*., para. 6 (h).

110 Since 2007, the Arab League (2007), the European Union (2007, 2009 and 2011) and the Commonwealth Secretariat (2009 and 2011) have also submitted reports.

Red Cross and Red Crescent,[111] which brings together all the world's States, recently adopted a four-year plan of action for the implementation of IHL.[112]

A key part of this plan of action (Objective 4) focuses on efforts aimed at improving the incorporation and repression of serious violations of IHL – including crimes covered by the Rome Statute – into domestic legislation. At the 30th and 31st International Conferences of the Red Cross and Red Crescent, several States and international organizations therefore made pledges relating to implementation of the Rome Statute that dovetailed with those they had made at the Kampala Review Conference. Those pledges, it must be underscored, were based on the principle of self-regulation. The fact that this approach is voluntary in nature in fact constitutes a strength rather than a weakness, for it allows for greater flexibility.

Obvious possibilities for synergy could be explored between the respective plans of action of the International Conference of the Red Cross and Red Crescent and the Assembly of States Parties. It goes without saying that both processes – International Conferences and Assemblies – can lead to positive developments, as demonstrated by the table in Annex 9 of all the pledges relating to the repression of international crimes under the Rome Statute and IHL made at the Kampala Review Conference and at the two most recent International Conferences of the Red Cross and Red Crescent, in 2007 and 2011.

In the context of the Assembly of States Parties, it might be interesting to supplement the plan of action with three measures of reinforcement, based on what the International Red Cross and Red Crescent Movement does. First, it might be useful to provide for systematic discussion of the plan of action every time the Assembly convenes, including with

111 For more information on International Conferences of the Red Cross and Red Crescent, visit http://www.rcrcconference.org/en.

112 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November to 1 December 2011, *4-Year Action Plan for the Implementation of international humanitarian law*, Resolution 2, document 31IC/11/R2, prepared by the ICRC. Available from: http://rcrcconference.org/docs_upl/en/R2_4-Year_Action_Plan_EN.pdf (last accessed on 27 January 2014).

regard to implementation of the pledges made. This might foster both debate at national level and exchanges between States on the questions raised by the pledges, thus generating a form of "positive peer pressure" for fulfilment of the pledges. Secondly, it might be a good idea to consider establishing a database providing an overview of the pledges made and their degree of fulfillment. Information technology is very useful for comparing positions and exchanging information on achievements. Lastly, the potential benefit of writing a report containing all the information from all relevant sources on the progress made towards achieving universality of the Rome Statute and its full implementation should not be underestimated.[113]

Process of emulation and networking. All the participants stressed the importance of establishing processes and mechanisms of emulation, especially at regional level between States with shared languages and systems. They pointed out in this respect that the universal meetings of national IHL committees organized in 2002 and 2007 had been supplemented with regional meetings that were held on a more regular basis and which served to exchange information on ongoing activities and past experiences.[114] The approach used by two regional organizations was presented and applauded. First, in 2011 the Council of the European Union had reviewed its Common Position on the ICC, which expresses support for the preparation of a plan of action aimed at ensuring the universality and integrity of the Rome Statute.[115] Focal points were appointed both at European level and in the Member States; they coordinate with each other on the Council of the European Union through the COJUR ICC Working Party. The network of contact points between European Union countries was also

113 Such a report would be similar to the one drawn up under United Nations General Assembly resolution 65/29 of 10 January 2011 every two years on the status of the 1977 Additional Protocols.

114 The list of regional meetings organized by the ICRC Advisory Service in 2010, 2011 and 2012 and dealing with national implementation of the Rome Statute is contained in Annex 8.

115 Council of the European Union, Common Position 2011/168/CFSP, *Official Journal of the European Union*, L 76/56. This decision repeals the one taken in 2003.

mentioned. Secondly, the Organization of American States (OAS) had promoted and encouraged the establishment of an OAS network of States in favour of the ICC. It had also collected an enormous amount of information on related experiences and practices which was used to prepare recommendations for the Member States on the strengthening of cooperation with the ICC and a model law on national implementation of the Rome Statute.[116] Resolutions on the ICC and IHL had been systematically adopted every year by the OAS plenary body.[117]

116 Reports on working meetings on the International Criminal Court: OAS, Permanent Council, Committee on Juridical and Political Affairs, *Report: Working meeting on the International Criminal Court*, documents CP/CAJP-2978/11 (25 April 2011), CP/CAJP-2811/10 rev. 1 (30 March2010), CP/CAJP-2700/09 (17 March2009), CP/CAJP-2569/08 (12 February 2008), CP/CAJP 2457/07 rev. 1 (5 March 2007) and CP/CAJP-2327/06 corr. 1 (24 February 2006); OAS, Permanent Council, Committee on Juridical and Political Affairs, *Report: Working Meeting on Appropriate Measures That States Should Take to Cooperate with the International Criminal Court in the Investigation, Prosecution, and Punishment of the Perpetrators of War Crimes, Crimes against Humanity, Genocide, and Crimes against the Administration of Justice of the International Criminal Court*, document CP/CAJP-2262/05 add. 3 (12 April 2005); OAS, *Guide to the General Principles and Agendas for the Cooperation of States with the International Criminal Court*, presented by Dr Mauricio Herdocia Sacasa, document CJI/doc.293/08 rev. 1 (6 March 2008); OAS, *Report on Perspectives for a Model Law on State Cooperation with the International Criminal Court*, presented by Dr Mauricio Herdocia Sacasa, document CJI/doc.290/08 rev. 1 (7 March 2008); OAS, General Assembly, *Framework for OAS Action on the International Criminal Court*, document submitted by the delegation of Canada, document AG/INF.248/00 (5 June 2000). For further information, visit: oas.org/dil.

117 Resolutions on the promotion of the International Criminal Court: AG/RES. 2659 (XLI-O/11) (7 June 2011); AG/RES. 2577 (XL-O/10) (8 June 2010); AG/RES. 2505 (XXXIX-O/09) (4 June 2009); AG/RES. 2364 (XXXVIII-O/08) (3 June 2008); AG/RES. 2279 (XXXVII-O/07) (5 June 2007); AG/RES. 2176 (XXXVI-O/06) (6 June 2006); AG/RES. 2072 (XXXV-O/05) (7 June 2005); AG/RES. 2039 (XXXIV-O/04) (8 June 2004); AG/RES. 1929 (XXXIII-O/03) (10 June 2003); AG/RES. 1900 (XXXII-O/02) (4 June 2002); AG/RES. 1770 (XXXI-O/01) (5 June 2001); OAS, Inter-American Juridical Committee, resolutions on the promotion of the International Criminal Court, CJI/RES. 140 (LXXII-O/08) (7 March 2008); CJI/RES.125 (LXX-O/07) (7 March 2007); CJI/doc.256/07 rev. 1 (7 March 2007); OAS, Permanent Council, Note from the Inter-American Juridical Committee enclosing resolution CJI/RES. 105 (LXVIII-O/06) "Promotion of the International Criminal Court", document CP/doc.4111/06 (2 May 2006).
Resolutions on the promotion of and respect for IHL: AG/RES. 2575 (XL-O/10) (8 June 2010); AG/RES. 2507 (XXXIX-O/09) (4 June 2009); AG/RES. 2433 (XXXVIII-O/08) (3 June 2008); AG/RES. 2293 (XXXVII O/07) (5 June 2007); AG/RES. 2226 (XXXVI-O/06) (6 June 2006); AG/RES. 2127 (XXXV-O/05) (7 June 2005); AG/RES. 2052 (XXXIV-O/04) (8 June 2004); AG/RES. 1944 (XXXIII-O/03) (10 June 2003); AG/RES. 1904 (XXXII-O/02) (4 June 2002); AG/RES. 1771 (XXXI-O/01) (5 June 2001); AG/RES. 1706 (XXX-O/00) (5 June 2000); AG/RES. 1619 (XXIX-O/99) (7 June 1999); AG/RES. 1565 (XXVIII-O/98) (2 June 1998); AG/RES. 1503 (XXVII-O/97) (5 June 1997); AG/RES. 1408 (XXVI-O/96) (7 June 1996); AG/RES. 1335 (XXV-O/95) (9 June 1995).

European Common Position on the ICC

The European Union and its Member States provide support for the ICC in a variety of ways: policy dialogue, representations, clauses expressing diplomatic support for the ICC, mainstreaming of the ICC when internal and external policies are drawn up and implemented. For further information, see: http://consilium.europa.eu/icc and http://ec.europa.eu/external_relations/human_rights/icc/index.htm.

The participants also recognized how important it was to encourage civil society organizations working in this field to get in touch and network with each other. It was equally important to promote recourse to networks such as the Coalition for the ICC, the European Legal Support Group, or, more broadly, the network of National Societies making up the International Red Cross and Red Crescent Movement.

Technical assistance. Another tool is assistance from various entities such as States, international or regional organizations and the ICRC. Such assistance may be technical in nature and take the form of the preparation of relevant national texts. It can also aim to strengthen national capacities so that not only the legislation but also practice is in conformity with the requirements of international law and so that there exist institutions able and willing to apply the law.[118] In the pledges they made at the 31st International Conference of the Red Cross and Red Crescent, several States referred to the assistance provided by other States for the implementation of IHL. Some of them offered to help the national IHL committees in other countries, in particular in terms of capacity building and the exchange of information. During the Kampala Review Conference, some States also pledged to support the efforts of other governments to promulgate domestic legislation implementing the Statute.

118 *See inter alia* the capacity-building toolkit put together by the Open Society Foundation together with the Council of Europe: *Toolkit I – Capacity-Building for Local Government*, prepared by the Centre of Expertise for Local Government Reform, Council of Europe, Strasbourg, September 2008. Available from: http://www.coe.int/t/dgap/localdemocracy/centre_expertise/tools/ToolkitI_fr.pdf (last visited on 17 August 2012).

11.

ARTICLE 8 OF THE ROME STATUTE: INTEGRATED APPROACH AND COMPLEMENTARITY

The preparation and adoption of the Rome Statute, Article 8 in particular, marks a major step towards the implementation of an effective system for preventing and repressing serious violations of IHL and other related norms.

To start, Article 8 of the Rome Statute, which repeats most of the provisions of the 1949 Geneva Conventions and Additional Protocol I on "grave breaches", contains the most exhaustive list of war crimes ever. In addition, the definitions of the crimes are clear and detailed enough to be used as such by a national or international court of law, without any major changes or amendments. As indicated above, this makes it relatively easy to "incorporate" the crimes listed in the Statute into domestic legislation.

In this respect, the provisions relating to non-international armed conflicts are particularly welcome. Until relatively recently, international law did not stipulate individual criminal liability for serious violations of IHL committed during non-international armed conflicts. Such breaches were sometimes penalized in application of the provisions of national criminal codes repressing crimes under ordinary law (notably murder, rape, torture) – with the disadvantages mentioned earlier – or on the basis of *ad hoc* definitions of war crimes adopted by the State concerned, or simply went unpunished. While Article 8 of the Rome Statute is not the first provision of international law to apply to non-international armed conflicts as well, it is no doubt the first to apply in such detail.[119] And it should not be forgotten that, at the Rome Conference, Article 8 was the subject of intense negotiation between

119 The other IHL instruments expressly covering internal conflicts include the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the 1980 Convention on Certain Conventional Weapons as amended on 3 May 1996), the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999), and Article 1 of the 1980 Convention on Certain Conventional Weapons, as amended on 21 December 2001. Other instruments, such as the Anti-Personnel Mine Ban Convention (18 September 1997), the Chemical Weapons Convention (13 January 1993), the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (25 May 2000) and the Convention on Cluster Munitions (adopted on 4 December 2008), are construed as applying to all armed conflicts.

over 120 States, which agreed to include in the list of crimes only acts likely to be considered as unlawful under customary law and the commission of which already incurred the criminal liability of the perpetrators.

Article 8 nevertheless presents a number of limits. Although it has positive aspects, it does not contain an exhaustive list of the IHL provisions applicable to serious violations. There are major loopholes; some are the inevitable outcome of the Rome Conference's protracted negotiations and political compromises; others are omissions resulting from the object of the treaty, which is intended for application by an international criminal court.

Omissions in the provisions governing international armed conflicts. The first major omission in the provisions governing international armed conflicts relates to certain grave breaches that were not incorporated into the Rome Statute, even though they figure in Additional Protocol I and can be said to be part of customary law,[120] notably deliberate attacks against works or installations containing dangerous forces,[121] deliberate and unjustified delays in the repatriation of prisoners of war or civilians,[122] and the practice of apartheid and other inhuman and degrading practices based on racial discrimination.[123]

The second major omission concerns the methods and means of warfare, in particular the annex referred to in Article 8(2)(b)(xx), which was supposed to contain a list of prohibited weapons but ultimately never saw the light of day, neither during nor after the Conference. It had been agreed that two conditions had to be met for a weapon to figure in the annex, as stated in the relevant sub-paragraph: first, the weapons, projectiles and material and methods of warfare had to be of a nature to cause superfluous injury or

120 Their customary nature has been recognized by the ICRC: *see* ICRC Study on customary international humanitarian law, above note 56, Rule 156.
121 AP I, Art. 85(3)(c).
122 AP I, Art. 85(4)(b).
123 AP I, Art. 85(4)(c). This violation is listed in the Rome Statute as a crime against humanity (*see* Rome Statute, Art. 7(1)(j)).

unnecessary suffering or be inherently indiscriminate, and second, they had to be the subject of a "comprehensive prohibition"[124]. Today, only the use of poison, poisoned weapons, toxic gases and dum-dum bullets are prohibited under the Statute.[125] No account at all has been taken of other weapons recognized as being absolutely prohibited by customary law, such as explosive bullets[126], non-detectable fragments[127] and blinding laser weapons[128], or of weapons the use of which is prohibited in certain circumstances, such as booby-traps[129], anti-personnel landmines[130] and cluster munitions[131].

Omissions in the provisions governing non-international armed conflicts. When it comes to non-international armed conflicts, Article 8 lists a considerable number of crimes acknowledged to be reprehensible, a development to be welcomed in an instrument as important as the Rome Statute; however, it also contains some glaring omissions. The list of war crimes in this category of armed conflict is set out in two paragraphs: the first refers to grave breaches of Article 3 common to the 1949 Geneva Conventions[132], while the second contains a list of "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law"[133]. The sub-paragraphs that come

124 The preparatory documents say very little about the meaning of the term "comprehensive prohibition". Some scholars interpret it as a quantitative reference, i.e. a comprehensive prohibition presupposes that a treaty prohibiting the use of certain weapons has been broadly ratified, whereas for others it refers to an absolute as opposed to a conditional prohibition. *See* the commentary by M. Cottier on Art. 8(2)(b)(xx) of the Rome Statute, in O. Triffterer (dir.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 1st ed., Nomos Verlagsgesellschaft, Baden-Baden, 1999.

125 Art. 8(2)(b)(xvii), (xviii) and (xix), respectively.

126 Explosive bullets are prohibited under customary law (*see* ICRC Study on customary international humanitarian law, above note 56, Rule 78).

127 *Ibid*., Rule 79.

128 *Ibid*., Rule 86.

129 *Ibid*., Rule 80.

130 *Ibid*., Rule 81.

131 Although it is premature to assimilate it to customary law, the Convention on Cluster Munitions, which was adopted on 30 May 2008 can be considered as a step in that direction. It entered into force on 1 August 2010 and by 1 December 2012 had 77 States Parties.

132 Rome Statute, Art. 8(2)(c).

133 Rome Statute, Art. 8(2)(e).

next however only partially cover, if not totally overlook, crimes that already figure in several IHL treaties applicable in non-international armed conflicts and are considered as being part of international customary law. The fact that certain war crimes are set out in Article 8(2)(b) with respect to international armed conflicts but not mentioned at all in the sub-paragraphs on non-international armed conflicts raises the question whether the States should respect those prohibitions when fighting foreign troops, but not when they were at war with their own citizens. As the International Criminal Tribunal for the former Yugoslavia pointed out in the *Tadić* case, the victims should benefit from the same level of protection and assistance in all conflicts, because what "is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife"[134].

In addition, the provisions on the conduct of hostilities were kept to a minimum. Many means and methods of warfare already considered as prohibited in non-international armed conflicts – such as indiscriminate attacks, famine as a method of warfare against civilians and attacks on civilian objects – were also omitted. Lastly, until the Kampala Review Conference, the Statute contained no provisions on weapons the prohibition of which had been accepted as applying in all conflicts. It is a source of satisfaction that, in Kampala, the States opted to amend the Statute and add to the provisions relating to internal armed conflicts the prohibition of the use of bullets which expand or flatten

134 *Prosecutor v. Tadić*, case No. IT-95-1. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 119. The ICRC has also systematically deplored the fact that a number of crimes were not included in the Rome Statute in respect of non-international armed conflicts. *See*, for example, the following excerpt from the statement by Mr. Yves Sandoz, head of the ICRC delegation to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, final plenary meeting, Rome, 18 July 1998: "[…] the lack of specific provisions mentioning the use of famine, indiscriminate attacks and prohibited weapons is to be regretted. Is it not true that today we recognize that it is unacceptable to use against one's own people weapons which are banned from use against an external enemy?" *See also* the ICRC's statement to the Sixty-fifth Session of the United Nations General Assembly, Sixth Committee, item 85 on the Agenda, New York, 14 October 2010.

easily in the human body (dum-dum bullets), asphyxiating gases and poisons and poisoned weapons.[135]

Other limitations. The Rome Statute presents a number of other limitations with regard to an effective system for preventing and repressing serious violations of IHL. The first is that it does not expressly oblige the States Parties to include in their domestic legal system the crimes listed in its provisions. Some States have, it is true, adopted legislation on war crimes or modified their criminal code since the Statute's adoption, but they have done so above all because of the principle of complementarity, in order to ensure that the ICC does not assert jurisdiction over cases falling within their national jurisdiction.[136]

A second limitation to Article 8's role as a basis for the implementation of IHL (repressive aspects) lies in the fact that it does not contain a specific reference to the principles of jurisdiction relating to the repression of war crimes established in international law.[137] While those principles do not concern the functioning of the Court (which has its own system), their omission carries considerable weight when the States decide to implement IHL by importing into their domestic legal system only the Statute's provisions, without connecting them to their other obligations under treaty-based and customary IHL.

Article 8 and the integrated approach to the implementation of IHL. The Meeting participants acknowledged that Article 8 played an important role in the implementation of IHL

135 ICC, RC/Res.5, *Amendments to article 8 of the Rome Statute*, Adopted at the 12th plenary meeting, on 10 June 2010, Annex I: "*Add to article 8, paragraph 2 (e), the following:* '(xiii) Employing poison or poisoned weapons; (xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions'."

136 Rome Statute, Arts 17 and 19.

137 While the sixth and tenth preambular paragraphs of the Rome Statute refer simply to the criminal jurisdiction of States, Articles 17 and 19, which deal with questions of admissibility, provide that the Court's jurisdiction may be challenged if the State "which has jurisdiction over a case" is conducting a genuine investigation or prosecuting the case. The Statute does not define the term "jurisdiction".

(repressive aspects) and constituted an excellent launchpad for any related process. It afforded and would continue to afford States with specific provisions enabling them to punish prohibited behaviour, no doubt facilitating implementation of IHL at national level. In fact, the adoption of legislation on implementation of the provisions of the Rome Statute – or other similar legal rules – should be the minimum required of States, if only to equip them with the means of repressing violations already included and defined in the Statute.

The Meeting participants also considered the options for remedying the limitations to Article 8, in particular in terms of its national impact. Their discussions led them to agree that a State should not examine the application of the principle of ICC complementarity in isolation. On the contrary, national implementation of IHL should be considered from the broader perspective of the obligations incumbent on the States by virtue of this branch of international law and other related provisions. More specifically, the States should initially ensure that all the *figurae criminis* arising from their international obligations (treaty-based or customary) to prosecute and repress violations of IHL were covered by their domestic legislation. Depending on the level of implementation attained, this might concern international crimes that did not figure in the Rome Statute, such as the grave breaches under Additional Protocol I, as mentioned earlier.

Furthermore, the States should take the opportunity provided by the process of implementing the Rome Statute to determine to what extent the protection granted to victims of international armed conflicts could be extended to those of non-international armed conflicts, and to eliminate any obstacles to such extension.

Thirdly, the States would be wise to ensure that the general principles of criminal law set out in their legislation were adapted to the requirements of international criminal law and IHL, at least for the purposes of prosecuting

international crimes. In this regard, they should adopt measures guaranteeing the non-applicability of statutes of limitations (when domestic legislation contained time bars), recognition of certain forms of responsibility, including that of military leaders, the inadmissibility of a defence based on following superior orders that were manifestly unlawful, and non-recognition of amnesties for war criminals.

Lastly, and most importantly, this process should also comprise the adoption of appropriate principles of jurisdiction, including extraterritorial jurisdiction. As stated earlier,[138] the past sixty years have seen a clear shift – with the adoption of several international treaties and a number of major advances in State practice and in doctrine – towards a unanimously held view: the idea that, for specific international crimes, certain forms of extraterritorial jurisdiction, notably universal jurisdiction, are not only permitted but are sometimes even necessary.

Why should the national authorities prefer an "integrated" approach to the implementation of IHL (repressive aspects)? The Meeting gave a number of reasons.

First, an integrated approach took account of the authorities' constant struggle to obtain economic and human resources. It also respected the increasingly strict political agendas of governments and parliaments. It allowed them to take advantage of discussions and activities in areas that were the focus of more intense political attention to broach others that were less frequently discussed but no less important for achieving full and complete implementation of their obligations under IHL and promoting respect for it.

Secondly, an integrated approach could help save time by ensuring the same work was not done several times over. Indeed, it had often been observed that several international instruments gave rise to similar or related international obligations. For example, the obligation to punish

138 Section 7 above.

certain acts in several domains, such as the protection of children, protection of cultural property and weapons control, was set out in several IHL treaties besides the 1949 Geneva Conventions and Additional Protocol I.

Thirdly, an integrated approach applied at national level could also serve as a means of promoting, encouraging and facilitating broader exchanges between the authorities and all those responsible for and interested in the implementation of IHL and related provisions.

The Meeting participants acknowledged that following an "integrated" approach to the incorporation of IHL (repressive aspects) into domestic legislation implied painstaking preparatory work. First, the governments concerned had to identify the international obligations their State was bound to respect with regard to both treaty-based and customary IHL. On this point, the participants raised the fundamental question of serious violations of IHL committed in non-international armed conflicts, which were not considered as war crimes under the 1949 Geneva Conventions or the 1977 Additional Protocols, but which had come to be so considered as the case law had evolved and had subsequently been confirmed as such by the Rome Statute. Next, the authorities had to examine and identify the obligations already implemented in their legislation and case law. Only then would the States be able to determine exactly what they still had to do and make sure they were not giving effect to an obligation that had already been implemented.

In short, coherence, simplification and clarity are the key words justifying an "integrated" approach as defined during the Meeting and on which a genuine consensus emerged, even though slight differences may persist on how to accomplish it. It was in that context, moreover, that the Meeting participants acknowledged the paramount role to be played by the national IHL committees and other similar bodies and discussed it at length.

12.
THE INTEGRATED APPROACH, COMPLEMENTARITY AND THE RULE OF LAW

It emerged from the Meeting that the debate must be broadened even further. Indeed, to be properly understood, the struggle against impunity had to be waged within the broader context of the protection of populations against violations of international humanitarian law (IHL) and aid for the victims of armed conflicts and other situations of violence. A clear national normative framework, including the protections set out in IHL and international human rights law, helped – if correctly applied – to prevent violations and thus served to save lives, avoid suffering and alleviate the victims' plight.[139] The importance of incorporating into domestic legislation the provisions needed to prevent and repress serious violations of IHL and other international crimes was therefore not to be underestimated. It was in this spirit that the European Union, speaking at the Sixty-fifth Session of the United Nations General Assembly on the 1977 Additional Protocols in October 2010, stressed that IHL was one of the strongest instruments available to the international community to ensure the protection and dignity of people affected by armed conflicts. It added that "it would continue to promote an international order based on the rule of law where no State or individual was above the law and no person was denied protection under the law, especially in situations of armed conflict".[140]

The provisions incorporated into domestic legislation must serve to prosecute and try all those who took part in the commission of crimes and must stipulate dissuasive penalties. At the same time, institutions had to be established

139 In a 2004 report, the United Nations Secretary-General stated: "In matters of justice and the rule of law, an ounce of prevention is worth significantly more than a pound of cure" (United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General* (document S/2004/616), para. 4, 23 August 2004).

140 United Nations General Assembly, Fifty-sixth Session, Sixth Committee, *Official Records* (document A/C.6/65/SR.12), paras 44-48 (15 December 2010). In the same vein, *see* the statement made by the President of the Security Council on 29 June 2010: "The Security Council recognizes that respect for international humanitarian law is an essential component of the rule of law in conflict situations and reaffirms its conviction that the protection of the civilian population in armed conflict should be an important aspect of any comprehensive strategy to resolve conflict (…)" (United Nations Security Council, *Statement by the President of the Security Council* (document S/PRST/2010/11), 29 June 2010, para. 5).

that were able to apply those provisions and measures of reparation had to be introduced for the victims of violations and international crimes. Of course, the conviction of criminals was a form of reparation, but it was insufficient if the victims were otherwise left to fend for themselves, without support, and had the feeling that the criminal was better treated than they were. If the struggle against impunity was to be properly understood, it could not be disassociated from the work being done on the subject of reparation. The Meeting participants reached the collective conclusion that the problem of individual reparation in contexts in which the victims numbered in the hundreds of thousands could not be broached without positioning it in the broader framework of reconstruction, development aid, social justice and, ultimately, the rule of law. This, moreover, was the approach advocated by the United Nations in the deliberations it had conducted for over ten years on the restoration of the rule of law and the administration of justice during the transition period in conflict-prone or post-conflict societies.[141]

141 This approach has been mainstreamed at all levels of the United Nations. *See notably* the statements by the President of the United Nations Security Council (documents S/PRST/2012/1, 19 January 2012; S/PRST/2010/11, 29 June 2010; S/PRST/2006/28, 22 June 2006; S/PRST/2004/34, 6 October 2004). *See also* the guidance notes issued by United Nations Secretary-General: United Nations, *Guidance Note of the Secretary General: UN Approach to Assistance for Strengthening the Rule of Law at the International Level*, May 2011; United Nations, *Guidance Note of the Secretary-General: UN Approach to Transitional Justice*, March 2010; United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Rule of Law Assistance*, April 2008. These documents are available on the United Nations website on the rule of law: http://www.unrol.org. *See also* the United Nations Secretary-General's reports on the subject, the latest of which was issued in August 2012 (documents A/67/290, 10 August 2012; A/66/749, 16 March 2012; S/2011/634, 12 October 2011; A/66/133, 8 August 2011; A/65/318, 20 August 2010; A/63/226, 6 August 2008; A/63/64, 12 March 2008; A/62/261, 15 August 2007; A/62/121, 11 July 2007; S/2004/616, 23 August 2004). Lastly, *see* the resolutions on the subject adopted by the United Nations General Assembly: resolution 66/102, 13 January 2012; resolution 65/32, 10 January 2011; resolution 64/116, 15 January 2010; resolution 63/128, 15 January 2009; resolution 62/70, 8 July 2008; resolution 61/39, 18 December 2006. The Office of the High Commissioner for Human Rights has also considered the matter. Since 2006, it has, for example, published a series of documents on rule-of-law instruments in post-conflict societies. A large section of the Office's 2011 annual report discusses impunity and the rule of law (available from: www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011).

This was a real challenge. Several participants spoke of their countries' efforts to strengthen their capacities to promote the rule of law.[142] Indeed, as concerns the Rome Statute, the States Parties recognized that it would be best for them to help each other strengthen their capacities and that they needed the support of international organizations in that undertaking.[143] Such cooperation could cover fields as varied as prison reform, reinforcing the judicial apparatus, criminal law reform, university syllabuses and teaching, the training of civil servants and instruction for the forces of law and order. Some States stressed the importance of ensuring that local experts participated fully so that they felt they had a stake in the outcome and promoted the process. Local expertise also served to ensure that capacity-building efforts were furnished from the national perspective and responded as closely as possible to the needs of the persons and victims concerned. In other words, the means had to be made available to take full account of existing legal and institutional traditions.[144] This could help

142 Several examples of assistance in relevant domains are given in the annexes to the United Nations Secretary-General's reports of August 2010 and 2011 on strengthening and coordinating United Nations rule-of-law activities (documents A/65/318 of 20 August 2010 and A/66/133 of 8 August 2011). More generally, the Secretary-General's report of 16 March 2012 (document A/66/749) identifies the main commitments that the States and the United Nations must make in order to strengthen the rule of law at national and international level.

143 *See notably* document RC/Res.1, adopted by the Kampala Review Conference on 8 June 2010. At present, moreover, there is no systematic means of bringing those requesting assistance together with international players willing to provide funds or aid. Thanks to an initiative launched by the International Centre for Transitional Justice, a discussion has now been engaged between stakeholders from the international criminal justice, development and law sectors. In the same spirit, *see* the 2011 World Bank report on global development, which underscores the need to guarantee justice, security and jobs in order to stop the cycles of recurrent violence hamstringing development (World Bank, *World Development Report 2011: Conflict, Security and Development*, Washington, 2011, 384 pp. Available from: http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf.)

144 In the same vein, *see* the statement by the President of the Security Council of 19 January 2012, in which the Council "recognizes the importance of national ownership in rule of law assistance activities, strengthening justice and security institutions that are accessible and responsive to citizens' needs and which promote social cohesion and economic prosperity" (United Nations Security Council, *Statement by the President of the Security Council*, document S/PRST/2012/1, para. 7). *See also* the resolutions adopted by the United Nations General Assembly in 2011 and 2012 on the rule of law at national and international level (resolutions 65/32 (10 January 2011), paras 3 and 4 to the same effect, and resolution 66/102 (13 January 2012), paras 5 and 6).

tighten the ties between formal and informal justice systems and help the States maintain law and order with due regard for the main international norms. It is from this angle that the networks by which contact was maintained with national bodies, such as the Coalition for the ICC or, more broadly, the National Red Cross and Red Crescent Societies, were truly important.

13.
LOOKING AHEAD

The Meeting's concluding remarks were made by an active member of the ICRC, Mr Yves Sandoz, who occupied the post of Director of International Law and Principles for 18 years.[145] He started by pointing out that the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law (IHL) had been held on the same premises as the thorny negotiations on the 1977 Additional Protocols. He himself could testify that, at the time, no one could have imagined that international justice would make such great strides or that half the countries in the world would establish national IHL committees or similar bodies. There was a new impetus for better enforcement of humanitarian law, reflecting a new determination to counter impunity. But there were also still enormous needs, and it remained an obligation to work unstintingly to improve the plight of war victims.

Mr Sandoz then referred to the Meeting's educational objective, which was especially relevant since the Rome Statute had just been reviewed and it was important to consider the consequences of this for implementation. The in-depth discussions and exchanges at the Meeting had convinced almost everyone of the advisability of what was referred to as the "integrated approach", i.e. the inclusion of mechanisms to prevent and repress serious violations of IHL at national level. If the aim was really to strengthen the application of humanitarian law, there must be clear rules at national level and those rules must, above all, be consistent with the constitution, even if this meant adapting the constitution accordingly. The first thing to be done was to make a list of all the obligations deriving from humanitarian law, then harmonize them with those deriving from national law, in order to spare judges from having to search through a vast number of instruments for instructions that might be difficult to understand and that sometimes had to be reconciled with one another. This implied adding the breaches of IHL that were not covered by national law and

145 Mr Sandoz's conclusions are reproduced in full in Annex 10 to this report (Volume II).

clarifying those which were covered, but in a different manner. Breaches derived not from treaty obligations but from customary international law also had to be included. In that respect, consideration had to be given to the fundamental question of serious violations of IHL committed during non-international armed conflicts, which were not considered as war crimes under the 1949 Geneva Conventions or the 1977 Additional Protocols, but which became war crimes through the development of case law that was later confirmed by the Rome Statute and widespread State practice.

Mr Sandoz also noted that the Meeting's deliberations had clearly brought to light the need for States to exercise their power of universal jurisdiction and thus help fight impunity not only in their own countries, but as members of the international community, as part of the contribution that each country made towards the universal objective of countering impunity and, for those countries that were party to the Rome Statute, as a fitting complement to the relationship to be established with the ICC. The power of universal jurisdiction had to be exercised within a well-defined framework and in a predictable manner, and he welcomed all future work and deliberation on the matter.

The Meeting had also confirmed that there was more than one way of incorporating IHL into national law. Several parallel courts, or courts at different levels, could have jurisdiction. In this regard, the question of the respective merits of civilian and military courts could, of course, be reconsidered; it had been broached without having been settled. What everyone agreed on was that such courts must be independent, competent, effective and fair.

In a nutshell, the objective of coherence, clarity and simplicity remained valid no matter what the system. Mr Sandoz noted that the national IHL committees clearly had an essential role to play in avoiding any waste of energy and maximizing the efficiency of available resources, especially

since those resources were often insufficient. Efficiency also implied good training for those who had to apply the law, starting with judges. Yet it was clear that judges had to absorb and "master" both the recent changes in the rules of IHL and international criminal law resulting from new conventions or the revision of existing ones, and developments in customary law and the clarifications provided by the case law of international tribunals and expert studies. The national committees should not just remind the authorities of this; they should also contribute to that effort, either directly or by encouraging the establishment of training tools and coordinated use of those that existed.

Mr Sandoz stressed that the committees could do this only if they themselves had all the requisite skills, and this was obviously one of their concerns. Another concern was ensuring that their membership comprised representatives of all the ministries involved in the effort and that each ministry had staff who were truly competent in the matter. For the system to work, adequate resources were needed, and therefore a real political will to make those resources available. In that sense, the national committees had to not only identify the resources they needed to function properly, but also persuade politicians to make them available.

What also emerged from the Meeting, according to Mr Sandoz, was that the debate had to be opened further, for in order to be properly understood, the struggle against impunity had to be placed in the broader context of protecting people against violations of IHL and aiding war victims.

That was a real challenge. Of course, as the participants had emphasized, the conviction of criminals was a form of reparation, but it was not sufficient if the victim was in other respects left alone without any support. If the aim was for the anti-impunity campaign to be properly understood, it could not be considered separately from the effort to be made in the area of reparation. What is more, in contexts

Excerpt from the conclusions of Mr Yves Sandoz, member of the ICRC

"International criminal justice, which symbolizes this new energy for countering impunity that we see emerging, has become a locomotive, but it has to pull behind it the 'wagons' of compensation, development and solidarity among peoples. This is why it is important to support it. But in order for international criminal justice to be understood and accepted, the other wagons must remain connected to the train – and we have not even talked about the need to find a balance between pacification, reconciliation and punishment. As has been emphasized, no genuine reconciliation is possible if major criminals, war criminals, go unpunished in a so-called spirit of conciliation."

like Rwanda or in other situations in which the victims numbered in the hundreds of thousands, the issue of individual reparation could not be approached without placing it in the broader context of reconstruction, development assistance and social justice. The international criminal tribunals had clearly understood how important it was to explain their legal work and to support and reinforce national courts, as in Rwanda and the former Yugoslavia, in order to maintain and enhance understanding of their essential complementarity. The very phrase "international courts", their location and their composition had been and continued to be subject to examination. The importance of proximity and of involving the people concerned, the different systems in which local judges rubbed shoulders with international judges – all of this fuelled the debate, which of course focused mainly on concern with the proper rendering of justice, but also on the reception, understanding and ownership of such justice by the population.

In that respect, Mr Sandoz added that, in recent years, the debate had also focused on sanctions, for if punishment was an important signal, so were the type and severity of the penalty. The choice and severity of the penalty, the possibility of preventive financial penalties, the relationship between disciplinary penalties and criminal penalties, the immediacy of the penalty, the establishment of the facts and, to that end, the protection of victims and other witnesses – all of those factors were now better understood

and taken into account, but remained huge issues and, therefore, major challenges.

Lastly, Mr Sandoz hoped that the participants would leave the Meeting strengthened in their conviction that their work was useful and important. It was true that, when people were confronted with atrocities committed during conflicts, they could become discouraged and question whether the effort to counter impunity really had a preventive effect, whether humanitarian law served any purpose. Those doubts had existed since the inception of IHL. After the war of 1870–71, the failure to respect IHL during that conflict had led some to conclude that the law was useless and to advocate abandoning it. Others, including Gustave Moynier, whose work was recently commemorated on the one hundredth anniversary of his death, had drawn the opposite conclusion: they asked how the law could be strengthened, already putting forward, more than 100 years before its time, the idea of an international criminal court.

Mr Sandoz concluded the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law by exhorting the participants to continue acting for greater compliance with the law: "We do not have a choice, and we do not have the right to give way to discouragement. As long as there are wars, we must do all we can to better safeguard populations and to better protect and aid war victims. Do not forget that this beautiful and ambitious task lies behind all of your work."

MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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