

NABBING THE DEVIL

Practical Considerations in the
Use of Armed Force
in the Apprehension and Arrest of
Persons Indicted for War Crimes

by

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Abstract

This thesis considers the challenges faced by international criminal tribunals in gaining physical jurisdiction over those persons indicted for the commission of war crimes, crimes against humanity and genocide. The thesis covers the need for justice for victims of such crimes, the history of the laws of war, war crimes and their prosecution, the need for an interdiction instrument, the legal basis for acting with force to arrest indictees, the use of military force to effect such arrests, and some of the various political and practical issues that arise in such use of force.

I sought out first hand quotes and stories contained in various media sources, books and court transcripts to lend a voice to the victims. Substantiating the requirement for justice, I researched the written works and oral texts of academics, politicians, jurists, and senior military commanders, who have experienced firsthand the difficulties in preventing atrocities and prosecuting accused.

To concisely discuss the history of the laws of war, I studied various academic works on the conduct of war including the writings of various history, religious and legal academics, as well as several primary source documents, including religious texts. In considering current international tribunals, I relied on treaty and customary international law documents, United Nations' documentation, and the current tribunals' statutes. The case law on

extraterritorial detention of accused was found in trial and appellate court decisions from the United States, United Kingdom, South Africa, Israel and the ICTY.

The thesis concludes that current international tribunals lack necessary mechanisms for enforcing indictments and thus ensuring that accused are brought before the courts' jurisdiction. In light of this inadequacy, a practical mechanism is needed to effect the interdiction and arrest of indictees for current and future international criminal tribunals. In conclusion, the use of military force to secure the detention and delivery of accused before the jurisdiction of issuing courts can be justified and should be utilized when other options have failed to effect with celerity, the accused's arrest.

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Lastly, I wish to dedicate this work to the victims of all too many conflicts that have occurred in our lifetime.

CHAPTER 1

Of War, Crime and Prosecution

A. Crimes Beyond Imagining

Despite advances over many centuries in the development of civilization, the depths of man's inhumanity to man seem only to have deepened with time. It is the last decade of the twentieth century, and the following examples are a very few among the very many during two egregious conflicts in the past fourteen years.

To prepare to appreciate what is represented by these examples, a brief exercise in perspective on the part of the reader may prove useful. Imagine living through your worst nightmare, waking only to discover that the horror surrounding you is not a dream but one of war's stark realities. The deep anguish you have awoken from does not disappear when you blink your eyes but becomes worse, then worse again. You are, for now, alive and awake in a world where people are tortured, raped and murdered in ways along the continuum of depravity that are unthinkableably malign.

This is not just an external perspective; this is the reality of war and war crimes. These are acts of war criminals. A description of some of the specific acts of war criminals, in synopsis, may include accounts such as the following.

The year is 1999, and it is Saturday 12 June. The Bala family have lived in Pec for years. The paramilitary have decided to kill all the remaining Albanians living in Pec and have methodically set about doing it.

Five of the seven children remain on the couch, their bodies punctured by bullets. Four of them are dead. Nita is unconscious and bleeding but still alive. Her mother Vjollca is also dead. Her aunt Halise has been shot eight times. Through both her arms, her torso, her breasts. The men think she is dead. Halise thinks she will be soon. Halise pulls herself up and stares at the dead children on the sofa and at Vjollca. They are slumped over each other, bleeding through their clothes. She drags herself through the house, looking for survivors, and she finds none.... Back in the living room, she sees that Nita is still alive but terribly wounded. ... "I'm not leaving my mummy," Nita says. "I'm not. She's going to wake up soon."¹

Selman Morina of Golubovac, Albania, was a victim of what is known as the "forest massacre" on Saturday 26 September 1998 and was interviewed by Human Rights Watch on 1 October 1998. Mr. Morina recounted this experience:

The last time I saw the women and children was in the field, so I do not know where they were taken. We were made to kneel with our hands behind our heads and faces touching the ground. ... I believe one policeman executed all of us. We were executed one by one. Each person was fired on twice with a burst from a machine gun. ... I heard the police say, "One is still alive," and they kicked him once and shot him again. They kicked me, too, but I didn't move and then they didn't touch me again. I survived because I remained totally dead.²

Criminals like Stanilav Galic, who commanded the Sarajevo Romanija Corps from September 1992 to August 1994, inflicted their depravity on ordinary people going about ordinary daily lives.

¹ Mathew McAllester, "The Killing," *Beyond the Mountains of the Damned: The War Inside Kosovo* (New York: New York University Press, 2002), p. 172.

² Peter Boukaert and Fr d Abrahams, *A Week of Terror in Drenica: Humanitarian Law Violations in Kosovo* (New York: Human Rights Watch, 1999), pp. 51-53.

During that time, the Sarajevo Romanija Corps ... used shelling and sniping to kill, maim, wound and terrorize Sarajevo civilians. ... [and] wounded thousands of civilians of both sexes and all ages, including the elderly, ... who were tending vegetable plots, queuing for bread, collecting water, attending funerals, shopping in markets, riding on trams, gathering wood or simply walking with their children or friends.³

Similarly, ordinary lives were cut and burned out of existence by criminal minds such as that of Major General Rahim Ademi, who, while Acting Commander of the Gospic Military District Operational Zone within the self-proclaimed Republika Srpska Krajina in September 1993, allegedly ordered a meticulously vicious handling of a certain rural area.

[In] the Croatian military operation in the Medak Pocket, at least 38 local Serb civilians were unlawfully killed, and others sustained serious injury. Many of the killed and wounded civilians were women and elderly people. ... In addition, approximately 164 homes and 148 barns and outbuildings, being a majority of the buildings in the villages within the Medak Pocket, were destroyed, mostly by fire and explosives.

During the above period, it is further alleged that property belonging to Serb civilians was plundered by Croatian forces or by persons in civilian clothes under the supervision of the Croatian forces. The property that was not plundered was burned or otherwise destroyed, farm machinery was riddled with bullets, farm animals were killed and wells were polluted.⁴

Authorities in the former Yugoslavia such as those of the Prijedor municipality, adopting an organizational method that had produced the worst horrors of the Second World War, gathered citizens into camps.

[They] unlawfully segregated, detained and confined more than 7,000 Bosnian Muslims, Bosnian Croats and other non-Serbs from the Prijedor area in the Omarska, Trnopolje and Keraterm camps.... Severe

³ ICTY, Galic case (IT-98-29).

⁴ ICTY Ademi case (IT-01-46).

beatings, killings as well as other forms of physical and psychological abuse, including sexual assault, are alleged to have been commonplace at the Omarska and Keraterm camps.⁵

The Chief of Security of the Main Staff of the Bosnian Serb Army, Colonel Ljubisa Beara, was responsible for dealing with Bosnian Muslim prisoners. He, too, appears to have drawn on prior example and on the depths of human behaviour in himself and in those under his command, when:

...in the several days following the attack on Srebrenica, the VRS forces captured, detained, summarily executed and buried over 7,000 Bosnian Muslim men and boys from the Srebrenica enclave and forcibly transferred the Bosnian Muslim women and children of Srebrenica out of the enclave. According to the Indictment, [he] committed, planned, instigated, ordered and otherwise aided and abetted in the planning, preparation and execution of the charged crimes.⁶

Brutality and inhumane campaigns were not limited to the conflict in the former Yugoslavia. Concurrent with that event was the civil war that erupted in Rwanda, a war that also released profoundly base values that appear ever-present in the human psyche. Hamis Kamuhanda was eleven years old when his family in Rwanda heard about the downing of the Falcon 50 aircraft carrying the Rwandan president Juvenal Habyarimana on 6 April 1994. The assassination of the president, for such it was, would trigger one hundred days of unrelenting terror and bloodshed, culminating in the deaths of eight hundred thousand Rwandan citizens.

⁵ ICTY, Banovic (IT-02-65/1).

⁶ ICTY, Beara case (IC-02-58).

The young Kamuhanda's story, horrific in itself, is one of hundreds of thousands of stories of anguish.

The following day we had rumours that Hutus were out to kill every Tutsi in the country, claiming that we, the Tutsis, had killed the Hutu president. We were advised to stay indoors. ... Then there was a knock at the door and before we could even respond, the door fell in and about four or so people came in and dragged my father out by his legs. That was the last we saw of him.

We were hiding under the bed, but we could see everything. Mother told us to keep quiet. Then the shooting began. ... One of them said: "Let's make sure he is dead — with this." I didn't move an inch, nor did I make any noise. They must have thought I was dead. I just felt a very sharp pain on my leg, and I must have passed out.

They had cut off half his right leg.

The armed Hutu men, the Interahamwe, were scattered and patrolling every corner. The situation was tense for a very long time, and we could smell the stench of the dead even inside our fenced house.⁷

Valentina Iribagiza, speaking through an interpreter, reported the experience of her own hell, where it was only by seeming dead that she lived through a bloody frenzy of killings:

We were pretending to be dead. They took stones and smashed the heads of the bodies. They took little children and smashed their heads together. When they found someone breathing, they pulled them out and finished them off. They killed my family. I saw them kill my papa and my brother, but I didn't see what happened to my mother.⁸

The cycle of this slaughter appears never to reach an end, for the pain lives on not only in the victims but in their unborn offspring. Ms. Severa

⁷ "Eyewitness: A Survivor's Story," BBC News, Africa, Monday, 2 April 2001, 12:15 GMT 13:15 UK.

⁸ Frontline #1710, "The Triumph of Evil," air date January 16, 1999; Mike Robinson, Ben Loeterman, producers; Steve Bradshaw, Ben Loeterman, writers; Steve Bradshaw, reporter.

Mukakinani was forced to watch as her seven children were butchered. She was then repeatedly gang-raped by their murderers.

"The raping went on for a long time — I don't know how long. When they tired of me, they cut and beat me and threw me in the river." She was left for dead but survived to find she was pregnant from the rapes. "I wanted to remove the baby. I decided to keep it, because I believe the child is innocent." She named her daughter Akimana, which means child of God.⁹

The nightmare of Rwanda affected not only the intended victims of the crimes but those who risked their lives to save the undefended. Dr. Zachariah, Chief Medical and Field Coordinator for Medecins sans frontières based in the Butare region of Rwanda, reported on his experiences in the region at length. One observation he put on record provides an example of the situations that were occurring around him:

On the road from Butare to Burundi on 19 April 1994, Dr. Zachariah stated that he saw civilians being massacred in villages throughout the countryside and at roadblocks. In his words: "All the way through we could see on the ... hillside, where there were communities, people ... being pulled out by people with machetes, and we could see piles of bodies. In fact, the entire landscape was becoming spotted with corpses...." [H]e arrived at the Burundian border on 24 April 1994. On the way to the border and at the border, he stated that he had crossed streams and rivers in which the mutilated corpses of men, women and children floated by at an estimated rate of five bodies every minute.¹⁰

⁹ "Out of Madness, A Matriarchy," Kimberlee Acquaro, Peter Landesman, *Motherjones.com*/January-February 2003 Issue.

¹⁰ ICTR, Hearing of 16 January 1997, pp. 98-99.

Brigadier General Henry Anyidoho, Deputy Commander, United Nations Assistance Mission in Rwanda (UNAMIR), observed other instances of blind blood-fever during the same civil war and commented:

I couldn't believe it. You met men and women together at the roadblocks holding the cutlasses, or machetes, as they call them, and all of them sort of, like, they were singing war songs. And what were they looking for? Human beings to hack to death.¹¹

Lieutenant General Romeo Dallaire, the thirty-five-year veteran Canadian soldier and Commander of the United Nations Observer Mission — Uganda and Rwanda, recalled that during the genocide:

My force was standing knee-deep in mutilated bodies, surrounded by the guttural moans of dying people, looking into the eyes of children bleeding to death with their wounds burning in the sun and being invaded by maggots and flies. I found myself walking through villages where the only sign of life was a goat, or a chicken, or a songbird, as all the people were dead. Their bodies being eaten by voracious packs of wild dogs. During those seven to eight weeks of the war, with little mandate, no reinforcements in sight, and only one phone line to the outside world (which a mortar round knocked out for nineteen hours), I felt like the ghost of Gordon of Khartoum was watching over me. Dying in Rwanda without a sight or a sight of relief was a reality we faced on a daily basis.¹²

Those who have come through such circumstances, even when they reach a point when they can function without repeatedly breaking, are increasing in numbers. Some will not be heard because they cannot articulate in a public forum what it is they experienced. Some will tell what they can, where they are able, and will not be content with keeping silent. As those people emerge out of

¹¹ Frontline #1710, "The Triumph of Evil."

¹² Romeo. A. Dallaire, "Hard Choices: Moral Dilemmas in Humanitarian Intervention," *The End Of Innocence*, Jonathan Moore, ed. (Boulder: Rowman and Littlefield, 1998).

their initial shock with anger and fear deeply intact, their cries for revenge and pleadings for safety are proliferating. They will never heal from what they have been through, for their emotional wounds will stay raw, and their demands for justice, whether raucous or refined, are filling the ears of the international community. The international community is not ready with a response.

B. Justice Required

To force the still-living victims to watch war criminals remain comfortably at large in the world is to deny the moral, ethical, political and legal responsibilities all nations share within the greater community.¹³ Hans Corell, the United Nations Under-Secretary-General for Legal Affairs,¹⁴ described the situation:

The very reason that certain armed conflicts occur, entailing crimes against international humanitarian law, is, in my view, that the international community has so far been unable to demonstrate that those responsible would be brought to justice — sooner or later. Until the day when the international community can demonstrate that those who

¹³ For example, the ICC, at UN web site <http://www.un.org/icc/index.htm>, quotes Olara Otunnu, Special Representative of the United Nations Secretary-General on the Impact of Armed Conflict on Children, as saying:

"In the course of the last decade, two million children have been killed in conflict; more than 4.5 million have been disabled or permanently injured; more than 30 million uprooted from their homes; more than ten million have been gravely traumatized at the psychological level; more than one million have been made orphans or lost all contact with their parents; not to speak of the young women who are being subjected to sexual abuse." Carol Bellamy, Executive Director, UNICEF, in the same background brief, reflects on the impact that the ICC will have on the victimization of children during conflict, in that: "The establishment of the International Criminal Court will in fact ensure that a clear signal is given that atrocities committed against children will not go unpunished and that those responsible for acts of torture, rape, murder and the disappearance of children will be brought to justice."

¹⁴ From his biography as listed by the UN (http://www.un.org/News/ossg/sg/stories/corell_bio.html): "Hans Corell has been Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations since March 1994. In this capacity, Mr. Corell is head of the Office of Legal Affairs in the UN Secretariat."

ultimately bear the responsibility for violations of the most fundamental rules for the protection of the human being are brought to justice, history will repeat itself.¹⁵

In a similar vein, U.S. Secretary of State Madeline Albright reaffirmed her belief in the need for vigorous prosecution of such people and proffered a parallel warning when she said: "We can only presume to forget what only God and the victims have standing to forgive, or we can heed the most searing lesson of this century, which is that evil — when unopposed — will spawn more evil."¹⁶

When grave breaches of humanitarian law have been committed, circumstances make it necessary to affirm justice as the underlying authority for the international community's efforts to re-establish security and peace. "There must be peace for justice to prevail," said Albright's countryman, former U.S. President William Jefferson Clinton, "but there must be justice when peace prevails."¹⁷ The justice sought in the circumstances of the former Yugoslavia and of Rwanda includes a diversity of issues.¹⁸

First, victims of inhumane aggression need an opportunity to state their injuries publicly to provide them the cathartic process that begins to release the poisons and to validate their original and their continuing suffering.¹⁹ Mary

¹⁵ Hans Corell, United Nations Under-Secretary-General for Legal Affairs, from a UN website <http://www.un.org/icc/index.htm>.

¹⁶ *New York Times*, 6 June 1997.

¹⁷ White House press release, remarks by President Clinton at the University of Connecticut, Storrs, 15 October 1995.

¹⁸ See also the statement of Corell, *supra*, note 15.

¹⁹ Brigadier General Telford Taylor, chief counsel for the prosecution Nuremberg, said on 9 December 1946:

Robinson, former United Nations High Commissioner for Human Rights,²⁰ explains the value of the International Criminal Court (ICC) to the quest for justice:

This Court is about providing justice for the victims of crimes against humanity and war crimes. There are times when victims' search for justice is frustrated by the inability or unwillingness of a national justice system to take up their case, [and] an International Criminal Court must be a safe and effective recourse for the victims of the most serious violations. Of course, it must also be fair and impartial — the court will fail if it does not ensure due process for the accused.²¹

The court process allows the victims of atrocities to address their feelings and grievances through a structured process rather than have emotions fester, which re-victimizes the injured with unhealed psychological scars. The empowerment and dignity that can be restored due to the opportunities afforded by a trial contribute to the rehabilitation process and the overcoming of their grief and pain.

“It is owed, not only to the victims and to the parents and children of the victims, that just punishment be imposed on the guilty, but also to the defendants that they be accorded a fair hearing and decision. Such responsibilities are the ordinary burden of any tribunal.... It is our deep obligation to all peoples of the world to show why and how these things happened. It is incumbent upon us to set forth with conspicuous clarity the ideas and motives which moved these defendants to treat their fellow men as less than beasts. The perverse thoughts and distorted concepts which brought about these savageries are not dead. They cannot be killed by force of arms. They must not become a spreading cancer in the breast of humanity.” Quoted from G.J. Annas and M. A. Grodin, *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation* (Oxford: Oxford University Press, 1992), pp. 67-68.

²⁰ The former Madam Justice Louise Arbour took up her duties as United Nations High Commissioner for Human Rights on 1 July 2004. Ms. Arbour was, until June 2004, a member of the Supreme Court of Canada and before that, the chief prosecutor for the International Criminal Tribunal for the former Yugoslavia and Rwanda. Quoted from press release, 1 July 2004, website of the Office of the United Nations High Commissioner for Human Rights (OHCHR), at <http://www.ohchr.org>.

²¹ Mary Robinson, former United Nations High Commissioner for Human Rights, quoted from International Criminal Court (ICC) background brief at UN website <http://www.un.org/icc/index.htm>. The nature and scale of the crimes that can be considered by the ICC are delineated in the Rome Statute. See Appendix 5.

Second, persons accountable for atrocities must be tried for individual responsibility and personal guilt. By exposing in a public forum the actions and crimes of the individual perpetrators, the possibility of an assignation of collective guilt can be avoided. The emphasis on individual accountability and responsibility was central to the Nuremberg and Tokyo war crimes tribunals, as the Allied powers did not wish the burden of collective guilt to be placed against entire nations.²²

The former Madam Justice Louise Arbour did consider the matter of imposing a criminal responsibility on leaders as a means to remove the issue of collective guilt or responsibility by a community or country. In *War Crimes and the Culture of Peace*, she states in part:²³

It is argued that the imposition of personal criminal responsibility on leaders will serve to remove the legacy of collective guilt and responsibility. That argument, in my view, is only partly persuasive. First, it is not all that convincing when the persons targeted for prosecution were elected leaders who enjoyed sustained support from the population while their widespread and systematic crimes were unfolding in a blatant and widely reported manner. Of course there are circumstances where repressed or manipulated populations become simply unwilling, and therefore unable, to see even the most obvious of truths. Second, this rationale becomes even more problematic when the criminal activities engineered or tolerated by the leaders required the massive participation of the population – for example, during the genocide in Rwanda. Finally, it is unconvincing when the leaders' crimes advanced group claims of entitlement, based, for instance, on alleged unsettled historical grievances or, worse, on assertions of racial, ethnic, or religious superiority.

I would suggest that, in addition to this rationale for leaders' personal criminal responsibility, the holding of an international trial is in itself a major positive step towards peace and reconciliation. Not that the

²² Ms. Arbour, in her 2002 speech, the annual Keith Davey Lecture at the University of Victoria, Victoria, B.C.

²³ Louise Arbour, *War Crimes and the Culture of Peace* (Toronto: University of Toronto Press, 2003), pp. 31-32.

trial process itself has an immediate calming effect – quite the opposite. The issuance of indictments, the arrest of indictees and the unfolding of the story in the dramatic stage of an international courtroom disturb the semblance of peace that comes sometimes from ignorance, often from silence. But more even than the punishment of the perpetrator, it is the process itself, from beginning to end, that speaks the language of peace. The integrity of the criminal justice system in Canada, and in many other countries, is so well entrenched that we easily forget what it tells us about who we are and how we live.

Our willingness to submit our disputes to legal process and, more important, to forgo all responses to injury except those sanctioned by law, is the hallmark of our choice to live in peace with each other. It is exceedingly rare in domestic criminal law that, regardless of its outcome, a criminal trial does not suffice to “stay the hand of vengeance.” Gary Bass chose that expression as his title, referring to the way U.S. Justice Robert Jackson so powerfully expressed this idea in his opening statement at Nuremberg: “That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason.”

I agree with Ms. Arbour’s comments that imposing a criminal responsibility on leaders as a means to remove the issue of collective guilt or responsibility is not in itself a complete answer. Her observation that committing such matters to an international criminal justice mechanism will “stay the hand of vengeance” and thus contribute to the goal of living in peace, is a higher objective.

Nevertheless, holding leaders personally accountable for their roles in war crimes and atrocities will avoid the tendency to hold at blame all members of societies in which crimes have been committed. Many Germans were complicit in the Nazi atrocities through their acquiescence or silence. Despite their possible moral complicity, it would be wrong and counterproductive to view all Germans

as bearing collective guilt, thereby creating an inescapable stigma of responsibility for atrocities as a people or society.

In recent examples of war crimes that occurred in Yugoslavia²⁴ and Rwanda,²⁵ future peace will depend on such understandings. Yugoslavia offers an excellent example of the destructive nationalist forces unleashed when whole peoples are tarred with the broad brushstrokes of ethnic prejudice.²⁶ The "historical wrongs" of more than five hundred years are ascribed to entire nations and not to the individuals or groups within those societies who are in fact blameworthy. "When we neither punish nor reproach evildoers, we are not simply protecting their trivial old age," Alexander Solzhenitsyn wrote. "We are thereby ripping the foundations of justice from beneath new generations."²⁷ This application of collective national guilt for past wrongs, compounded by current atrocities, continues to fuel nationalist fires.

²⁴ See Appendix 1.

²⁵ See Appendix 2.

²⁶ The International Criminal Tribunal Rwanda (see Appendix 4) states its view on the value of the work done to date. At its website (<http://www.icttr.org/default.htm>), the ICTR states:

"Above all, the Rwanda Tribunal, through its work, has made and continues to make a substantial contribution to the replacement of a culture of impunity by a culture of accountability. As noted above, a new climate of opinion regarding the effectiveness of international humanitarian law has emerged as a result of the visible, practical success of the two ad hoc Tribunals. Further evidence of this is the fact that the creation of such Tribunals is now automatically called for in conflict situations as far apart as Sierra Leone, Cambodia and East Timor. Indeed, it has been mooted that those responsible for other conflicts in Africa should be prosecuted before the Arusha Tribunal. A provision to that effect was included in the Lusaka agreement intended to bring an end to the conflict in Democratic Republic of Congo."

²⁷ Alexander Solzhenitsyn, *The Gulag Archipelago*, Thomas Whitney, trans., (New York: HarperCollins, 1974), p. 178.

Sadako Ogata, former United Nations High Commissioner for Refugees, put the situation thus:

The potential Pol Pots of this world — yes, the planners and not just the perpetrators — must be deterred by the prospect of criminal justice. And is it fair and realistic to expect the survivors to forgive and to cooperate if there is no justice? In the absence of justice, private revenge may prevail, which will spread fear and undermine the possibility of reconciliation.²⁸

Lastly, the necessity of gathering, organizing and preserving the records required for successful prosecutions assists in creating an immutable historic record that cannot be altered through time and fable. The factual evidence will always stand to maintain the authenticity and accuracy of the conflict.²⁹ Politically, ethnically or religiously motivated historical revisionists should be afforded no opportunity to pervert or destroy the truth of the crimes' existence. The records of history must stand as a warning and a reminder to future generations of the consequences of man's inhumanity to man.³⁰ "Those who cannot remember the past," said George Santayana, "are condemned to repeat it."³¹

²⁸ Sadako Ogata, former United Nations High Commissioner for Refugees, ICC Background Brief prepared May 1998, UN website <http://www.un.org/icc/index.htm>. Mrs. Ogata's comment is from her lecture 30 April 1997, United States Holocaust Memorial Museum, Washington, D.C., "Preventing Future Genocide and Protecting Refugees," <http://www.ushmm.org/conscience/events/ogata/ogata.php>.

²⁹ While it could be said that this is analogous to the victors writing the history, I would argue that the transcript of a trial stands as an immutable record of fact, the veracity of which is reliable as a social record.

³⁰ Robert Burns, 1784, from *Man was Made to Mourn: A Dirge*, <http://www.robertburns.org/works/55.shtml>: *I've seen yon weary winter-sun/ Twice forty times return;/ And ev'ry time has added proofs,/ That man was made to mourn.*

³¹ George Santayana, *Life of Reason*; also see comment by Corell, *supra*, note 15.

C. Justice Enacted

Thousands of pages have been written³² on issues surrounding the prosecution of those charged with the most grievous of crimes: genocide, war crimes, crimes against humanity. It could be argued that the effective prosecution of indicted suspects is a clear issue of collective global responsibility, yet there are those who would question the effort required or the duty to ensure that justice is accomplished. Others would claim that the financial, political or military costs of ensuring that the criminal is brought to trial are simply too high for the consequential benefits achieved.³³

Richard Goldstone, former prosecutor for the International Criminal Tribunal Yugoslavia (ICTY) blamed NATO for holding this reluctant position: "There is no moral, legal or political justification for a military authority to grant effective immunity to persons whom the prosecutor, on behalf of the Security Council, has determined should be brought to trial."³⁴ As he argued in another article:

[That] IFOR, with its force of 60,000 troops, its sophisticated weaponry and intelligence capacity, is able to effect such arrests must be beyond question. From a political point of view, can IFOR's men in

³² See Chapter 3; see also available documentation on Nuremberg trials, Tokyo War Crimes Tribunal, the Khmer Rouge in Vietnam, Iraqi acts against the Kurds, Indonesian army activities in East Timor, to name but a few; see also a reference list on war crimes writings, Appendix 7, for some of the many writers who have addressed this subject, including Robert H. Jackson, Leslie C. Green and M. Cherif Bassiouni.

³³ See "An Interview with Defense Department General Counsel Judith A. Miller," 18:5 (1996), National Security Law Report of the American Bar Association, pp. 1-8.

³⁴ Goldstone quoted in Jon Swain, "Serb War Criminals Flaunt Their Freedom," *Sunday Times* (London), 23 June 1996.

uniform legitimately argue that they can avoid certain duties because they are potentially dangerous? On a national level, policemen are not infrequently obliged to arrest people who are armed and dangerous. Yet, it is inconceivable that an attorney general would call off the arrests because of the risks to the lives of the arresting officers.³⁵

Others worry that the indicted felon may become a martyr to his own cause and that after all the effort expended, the potential for a stable peace will be no closer than before. Klaus Naumann, past chair of NATO's military command, stated: "We do not know what the aftermath would be, because many people regard these criminals as heroes worth defending."³⁶ The use of the possibility of hero status as an excuse for inaction is simply not acceptable. It is precisely because of the stature of the criminal that the international community must demonstrate its condemnation of the crimes by the exertion of every effort to effect the perpetrator's arrest and trial.

The international community has shown its desire to act with the creation of the ICTY, again with the creation of the International Criminal Tribunal Rwanda (ICTR) and, later, the International Criminal Court (ICC).³⁷ Antonio

³⁵ Commentary by Richard Goldstone, "Bosnia-Herzegovina: The Responsibility to Act," *Inter Press Service*, 27 June 1996.

³⁶ As quoted by William Droszdiak, "NATO Rejects Hunting Bosnia Crimes Suspects," *International Herald Tribune*, 14 June 1997.

³⁷ In his 15 June 1998 address to the inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (<http://www.un.org/icc/index.htm>), United Nations Secretary-General Kofi Annan stated with respect to the need to prosecute war crimes: "It is said that all roads lead to Rome. But not all lead there directly. The road that has led us to this Conference in the Eternal City has been a long one. It has led through some of the darkest moments in human history. But it has also been marked by the determined belief of human beings that their true nature is to be noble and generous. When human beings maltreat each other, they call it 'inhuman.' Most human societies, alas, have practised warfare. But most have also had some kind of warrior code of honour. They have proclaimed, at least in principle, the need to protect the innocent and defenceless, and to punish those who carry violence to excess. Unhappily, that did not prevent acts of genocide in previous

centuries, such as the extermination of indigenous peoples, nor did it prevent the barbaric trade in African slaves.

Our own century has seen the invention and use of weapons of mass destruction and the use of industrial technology to dispose of million upon million of human lives. Gradually, the world has come to realize that relying on each State or army to punish its own transgressors is not enough. When crimes are committed on such a scale, we know that the State lacks either the power or the will to stop them. Too often, indeed, they are part of a systematic State policy, and the worst criminals may be found at the pinnacle of State power.

After the defeat of Nazism and fascism in 1945, the United Nations was set up in an effort to ensure that world war could never happen again. The victorious Powers also set up international tribunals, at Nuremberg and Tokyo, to judge the leaders who had ordered and carried out the worst atrocities. And they decided to prosecute Nazi leaders not only for "war crimes" — waging aggressive war and massacring people in occupied territories — but also for "crimes against humanity," which included the slaughter of their own fellow citizens and others in the tragedy we now know as the Holocaust.

Was it enough to make an example of a few arch-criminals in two States that had waged aggressive war, and leave it at that? The General Assembly of the United Nations did not think so. In 1948, it adopted the Convention on the Prevention and Punishment of the Crime of Genocide. And it requested the International Law Commission to study the possibility of establishing a permanent international criminal court. In this area, as in so many, the cold war prevented further progress at that time. If only it had prevented further crimes against humanity as well!

Alas, this was far from the case. I need only mention, as the most notorious single example in that period, the killing of more than two million people in Cambodia between 1975 and 1978. As you know, the man who organized that horror died just two months ago, without ever being brought to answer for his crimes before a court.

Humanity had to wait until the 1990s for a political climate in which the United Nations could once again consider establishing an international criminal court. And, unhappily, this decade has also brought new crimes to force the issue on the world's attention. Events in the former Yugoslavia have added the dreadful euphemism of "ethnic cleansing" to our vocabulary. Perhaps a quarter of a million people died there between 1991 and 1995 — the great majority of them civilians, guilty only of living on the "wrong" side of a line someone had drawn on a map.

And then, in 1994, came the genocide in Rwanda. On my visit there last month, I was able to register at first hand the terrible, irreparable damage that event has done, not only to one small country but to the very idea of an international community. In future, the United Nations and its Member States must summon the will to prevent such a catastrophe from being repeated anywhere in the world. And as part of that effort, we must show clearly that such crimes will not be left unpunished.

Events in the former Yugoslavia and in Rwanda overtook the slow processes by which the world was considering the creation of a permanent criminal court. Ad hoc tribunals had to be set up for those two countries, and they are now at work. They have issued indictments and international arrest warrants. Even those indicted but who have not yet been arrested have been turned into international pariahs; though of course they enjoy the presumption of innocence, they are unable to travel freely or to hold political office. A historic milestone was passed six weeks ago when a former prime minister of Rwanda actually pleaded guilty to the charge of genocide.

These tribunals are showing, however imperfectly, that there is such a thing as international criminal justice, and that it can have teeth. But ad hoc tribunals are not enough. People all over the world want to know that humanity can strike back — that wherever and whenever genocide, war crimes or other such violations are committed, there is a court before which the criminal can be held to account; a court that puts an end to a global culture of impunity; a court where "acting under orders" is no defence; a court where all individuals in a government hierarchy or military chain of command, without exception, from rulers to private soldiers, must answer for their actions....

But the overriding interest must be that of the victims, and of the international community as a whole. I trust you will not flinch from creating a court strong and independent enough to carry out its task. It must be an instrument of justice, not expediency. It must be able to protect the weak against the strong....

I hope you will feel, at every moment, that the eyes of the victims of past crimes, and of the potential victims of future ones, are fixed firmly upon us. We have before us an opportunity to take a monumental step in the name of human rights and the rule of law. We have an opportunity to create an institution that can save lives and serve as a bulwark against evil. We who have witnessed, time and again in this century,

Cassese, at one time the president of the International Criminal Tribunal for the former Yugoslavia, described the responsibilities of the tribunal as being "...to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace."³⁸ Tribunals such as the ICTY can, if fully supported and implemented, play an essential role in maintaining world peace and security through the pursuit of justice.

D. Justice Achieved?

Impunitas semper ad deteriora invitat.

Impunity always invites to greater crimes. That dark invitation is perhaps the single greatest reason for the international community to ensure the prosecution of war criminals. Without national and international exertion to apprehend and try those who commit the gravest of atrocities against the innocent and helpless, belief in international justice will suffer a fatal blow, for if criminals believe they can commit such barbarism with impunity, the scope and horror of future actions will only increase. Even for such reprehensible characters, another maxim still holds true: "Though few are punished, the fear of

the worst crimes against humanity, have an opportunity to bequeath to the next century a powerful instrument of justice. So let us rise to this challenge. Let us give succeeding generations this gift of hope. They will not forgive us if we fail."

³⁸ Report to the United Nations Security Council, UN Doc. A/49/342,S/1994/1007(1994).

punishment affects all."³⁹ The international community and all states individually must ensure the end of the illegitimate freedom of thugs who have committed, condoned and encouraged heinous crimes against humanity. Although their numbers are not great, they must all be sought and apprehended to influence by way of deterrence any others who may consider the breaching of laws of moral order to further their political or personal ambitions.

Lloyd Axworthy, the then Canadian Minister of Foreign Affairs, stated the Canadian position on the founding of the ICC and on the prosecution of war criminals in a June 1998 address to the inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court:⁴⁰

In an era where the nature of conflict has changed so profoundly — as evidenced by the tragic events of recent years in Central Africa and in the former Yugoslavia — the need for an International Criminal Court is clear and acute. We live in a world where most of the conflict is civil and most of the victims are civilian. The acts of war have become even more senseless, and too often these acts of atrocity go unpunished. Thus, the most pressing priority of international relations today is no longer the security of states, but of individual citizens. Yet international institutions, practices and codes of humanitarian law were designed in an earlier era, when this was not the case. The time has come for us to build new institutions that respond to new needs.

An independent and effective International Criminal Court will help to deter some of the most serious violations of international humanitarian law. It will help give new meaning and global reach to protecting the vulnerable and innocent. By isolating and stigmatizing those who commit war crimes or genocide and removing them from the

³⁹ Translation of the Latin: *Ut poena ad paucos, metus ad omnes perveniat.*

⁴⁰ From Lloyd Axworthy address, 15 June 1998, to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, <http://www.un.org/icc/index.htm>.

community, it will help to end cycles of impunity and retribution. Without justice, there is no reconciliation, and without reconciliation, no peace.

To achieve this end, we must work together, not simply to establish a Court, but to ensure that it is one worth having. A Court worth having is one with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes. We must not create a regime that would allow states to gain the prestige of ratifying the ICC Statute without ever accepting the Court's jurisdiction over a particular crime.

A Court worth having is one with a constructive relationship with the United Nations, in which the independence and impartiality of the Court are preserved. The Security Council has a useful role to play in referring matters to the ICC, as this will increase the effectiveness of the Court. We must not, however, allow the Court to be paralyzed simply because a matter is on the Security Council agenda....

Even one instance of failing to bring offenders to the bar of justice can have devastating results. The failure of the international community in 1918 to ensure prosecution of the Turkish officers for the Armenian massacre, for example, encouraged Adolf Hitler to adopt his "final solution." Bassiouni notes Hitler's dismissal of any potential consequences for aggression or genocide. "Who, after all," Hitler said in a 1939 speech, "is today speaking about the destruction of the Armenians?"⁴¹ While vigorous prosecution of criminals may not deter future Hitlers, if it can prevent the death of one person, it will have achieved great success.⁴²

⁴¹ Adolf Hitler, 22 August 1939, in his Obersalzberg speech concerning his planned invasion of Poland, from *Documents on British Foreign Policy 1919-1939*, E. L. Woodward and Rohan Riffle, eds.; 3rd series (London: HMSO, 1954), 7:258-60; in *Internet Modern History Sourcebook*, <http://www.fordham.edu/halsall/mod/hitler-obersalzberg.html>. A translated excerpt at <http://www.atour.com/~aahgn/news/20040107c.html> uses slightly different terminology. There, following the reaffirmation that "the goal to be obtained in the war is not that of reaching certain lines but of physically demolishing the opponent," Hitler outlined for his staff the following rationale for the invasion: "to send to death mercilessly and without compassion, men, women and children of Polish derivation and language. Only thus shall we gain the living space [*lebensraum*] which we need. Who, after all, speaks today of the annihilation of the Armenians?"

⁴² The Jewish legal tractate, Talmud Bavli, Echad Dinei Mamonos, on Sanhedrin 37a, in discussing the testimony of witnesses at a capital trial and thus the need for truthfulness, teaches the value of life to the Jewish

For the brutish element of society that will not heed the lessons from a prosecution, we must stand ready to bring the full weight of the international legal, political and military might to bear on them in order to denounce and punish their actions. There is a moral imperative on the international community to punish severely those who choose to act outside the norms of human decency.

Punishment and retribution, recognized values within sentencing regimes, play an important role in establishing and maintaining the international community's intolerance of such criminal actions. Even if the prosecution and incarceration of a particular suspect will have no influence on others, it will have removed a locus of evil from society's midst and will have prevented them from continuing their actions or from enjoying the fruits of their crimes.

The world community must be seen to condemn all acts that threaten international security and world peace. Without a doubt, mass torture, rapes, murders and forced deportations are central issues in the fight to preserve global order and peace.⁴³ The very barbarity and moral abasement of the acts committed by their perpetrators in and of itself demands that the international community reaffirm its revulsion for the crimes and its determination to prevent

nation, states: "...whoever destroys a single life from Israel is considered by scripture as if he had destroyed an entire world and whoever preserves a life is considered by scripture to have preserved an entire world." *Talmud Bavli, Tractate Sanhedrin*, vol. 1, Chapter 4: 37a (New York: Mesorah Publishing, 1993).

⁴³ The legal responsibility for the prosecution of such criminals will, as reflected in the Rome Statute (see Appendix 5), fall to the national government within whose jurisdiction the perpetrator is found. The international community has recognized through the creation of special tribunals such as ICTR and ICTY that in special cases, the international community must assume the responsibility. With the inception of the ICC, the international community is able to act where a domestic court is unable or unwilling to bring forth a prosecution.

such conduct in future.⁴⁴ While the international community's record of preventing the tragic situations giving rise to these crimes is poor, the successful

⁴⁴ Ms. Arbour discussed the realities of the expectations for the ICC in her 27 June 2002 speech at Madrid, Spain, to the Prix de la Fondation Justice dans le Monde de L'Union Internationale des Magistrats, http://www.justiceintheworld.org/n11/ip_pfm_la_e.htm. She said, in part:

"The ICC does not promise to end all wars, to diffuse all conflicts, to deter all atrocities, any more than domestic criminal law promises to eradicate all crimes. In fact, the need to activate the reach of the criminal sanction is a manifestation of the failure, if not in some cases the bankruptcy, of other social and political institutions in education, wealth distribution, family support or the mental health system for example. But when criminal law is invoked, after the fact, it ensures that the harm is acknowledged, and redressed, through a process that itself repudiates violence and self-vindication. That over 60 States have embraced recourse to the personal criminal accountability of those who control the means of destruction is thus a repudiation of violence and self-vindication, and a major advance for the rule of law. Pacifists, and in particular young people, are often skeptical towards the so-called Laws of War, which they perceive as an absurdity, a surreal if not a cynical attempt to introduce a civilized element in an enterprise which speaks of the ultimate failure of all forms of civilization. Yet the regulation of the use of force, including the use of physical, often lethal, force, is very much part of the regulation of human interaction. Hence, for instance, the law of self-defence. In that spirit, the introduction of personal criminal responsibility of commanders, both civil and military, for orchestrating or tolerating the Commission of Crimes against Humanity is possibly the most imaginative and the most promising novel response if not to war itself, at least to its controllable excesses.

Indeed, it will seem, in retrospect, incomprehensible that international law has been so slow to enhance human security and to utilize the tools for controlling social order provided by a criminal justice system. The fact that it has now been launched, successfully in my view, and that it is irreversible, confirms my belief that justice is slowly moving towards its true calling of universality of access.

In that spirit, we should not underestimate the contribution that justice makes to safety. And most importantly, we should never lose sight of what Herbert Packer identified as the central purpose of criminal law. As he so well put it in his most influential 1968 book, *The Limits of the Criminal Sanction*, law, including the criminal law, must in a free society be judged ultimately on the basis of its success in promoting human autonomy and the capacity for individual human growth and development. The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free.

We live in an era plagued by its own peculiar pathologies. The recent wave of terrorism reflects profound pathologies of the need and of the desire to belong, and yet the basic human need to nurture identity through affiliation is fully compatible with the ideals of equality and liberty that are more than ever accessible to us. The forces of religious, ethnic and national affiliation, which at other times in history have been channelled positively to promote inclusion, cohesion and progress, are often today the expression of isolation, exclusion and destruction.

This presents for the Rule of Law a double challenge. On the one hand, it is critical that all the legitimate grievances of all human rights holders be heard and addressed in a global project of social justice. Equally important, all power must be exercised under legal constraints and all abuses of power must be exposed, denounced and punished. The creation of the International Criminal Court as well as the expansion of the concept of universal jurisdiction in many national courts reflect a growing commitment to end a culture of impunity. It is the prevalence of that culture that has given rise to the feelings of victimisation, injustice and neglect on the part of those who have then claimed an entitlement to settle their grievances outside the law.

Never has so much been expected of the legal profession, particularly in the classical role of the lawyer as standing between the State, or other manifestations of power, and the individual accused or victim. It is the law that calls for the articulation of the difficult balance between rights and responsibility, between the legitimate aspirations of victims, and of society at large, and the necessary protections for offenders, alleged and found, in the broad context of criminal justice.

That balance does not rest on a scientific formula, and equilibrium is not a matter of scientific discovery

establishment of the ICTY, the ICTR and the ICC speaks well of that community's intent to prosecute the guilty to the fullest extent possible.⁴⁵ Yet, for all that, the ultimate measure of success will depend on the effective prosecution and punishment of all guilty parties.

but one of political choice. Part of that political choice is informed by evolving social science research, interest group advocacy, legal developments and the general mood of the times. It undergoes periods of daring progress and periods of inexplicable regression. And while these political mood-swings occur, it is often the most vulnerable groups of victims and offenders alike that are put at risk.

Yet today more than ever we can affirm with confidence that the law can deliver on its promise of a more just and therefore a safer world. It would be a sad indictment of our professional choices if we were to concede the impotence of the legal process to meet the expectations of justice. In fact, I believe that our concern should be just the opposite.

The relevance and indeed the potency of the law has been so enhanced in the last decade, particularly on the international scene, that the legal system may now be rightly concerned with its own ability to meet the many expectations it has raised. This is particularly true in the fields of Human Rights and International Humanitarian Law.

This brings me to conclude that we live in an era that may one day be described as the golden age of legalism and that we are called to become, collectively, magistrates and jurists from all over the world, the architects of a more just society for all human rights holders."

⁴⁵ On the issue of the international communities will to prosecute war crimes in the future, Baltasar Garzón Real, Spanish Magistrate, Audiencia Nacional de España, delivered a message on the first anniversary of the International Criminal Court, 1 July 2003. The following excerpts are from his speech, translated from Spanish, at http://www.icc-cpi.int/library/newspoint/mediaalert/baltazar_garzon_en.pdf:

"The ICC represents the first peacetime attempt to provide a permanent response to the most degenerative phenomena in times of war or peace, embodied in the most heinous criminal figures inflicted upon the international community.... However, the ICC will be unable to stop the mass violations of human rights, its investigations will not end the excesses committed by States at the hands of their leaders, and not all cases will be subjected to its jurisdiction....

The Preamble to this Statute reads: "...Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, ... determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, ... [and] Emphasizing that the International Criminal Court... shall be complementary to national criminal jurisdictions," this International Criminal Court is established to prosecute the crimes of genocide, crimes against humanity and war crimes or those described as crimes of aggression.

At the Opening Session of the Nuremberg Trial on [20 November 1945], Robert Jackson, the U.S. Chief Prosecutor to the International Military Tribunal, on reading out the arrest warrant on behalf of the team of prosecutors appointed by the four victorious powers, uttered these memorable words: "Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."

The lesson from this declaration is that an International Criminal Justice, in order to be just that, must be a justice for all and equal for all.... For those of us who believe in International Criminal Justice, the creation and operation of the ICC is a triumph of Justice and of Peace. It is up to us to demand that this great initiative by humanity does not become a failed reality. It is a time of hope, and as the Spanish poet Antonio Machado said: "Today is always still."

CHAPTER 2

Of Blood, Toil, Tears and Sweat

Methodology

This thesis grew out of the horrific war crimes, crimes against humanity, and genocide committed in Rwanda and the former Yugoslavia. In particular, this work considers the challenges faced by international tribunals in gaining physical jurisdiction over those persons indicted for allegedly committing such merciless violence.

During the last decade of the Twentieth Century, the world watched as hundreds of thousands of innocent men, women, and children died at the hands of their neighbours and countrymen. Not since the times of the Jewish Holocaust had inhumanity of this magnitude been thrust to the forefront of the world attention. As the international community struggled to come to grips with its own failings - or at least its shortcomings - in preventing the tragedies, steps were being taken at the United Nations to bring to justice the principle actors in these atrocities. To that end, the United Nations established two international criminal tribunals, one for each of the aforementioned conflicts. Additionally, in part as a result of the situation in Rwanda and the former Yugoslavia, the international community was moved to bring into being the ICC for the prosecution of those accused of acts of similar violence in future conflicts.

As the ICTR and ICTY began to issue international indictments for the arrest of accused persons, an impediment in the prosecution process became apparent: the tribunals' lacked a mechanism for ensuring that the indictments were enforced and that the accused would be brought before the jurisdiction of the courts. This inadequacy led to the flagrant disregard of issued indictments by some of the accused, their supporters and sheltering political entities. Similarly, as the governing statute for the ICC was developed and brought into place, the lack of an "enforcement arm" for that Court raised the prospect for similar problems in the future.

In light of the noted inadequacy of the tribunals' jurisdiction or power, this thesis considers the need for some mechanism to be available to effect the interdiction and arrest of those persons indicted by the ICTY, ICTR and ICC or any future ad hoc criminal tribunal. To that end, I propose in this thesis, that the use of military force to secure the detention and delivery of an accused before the jurisdiction of the issuing court can be justified and should be utilized when other options have failed to effect with celerity the accused's arrest.

This thesis, in 7 chapters, addresses the need for justice, the history of the laws of war, war crimes and their prosecution, the need for an interdiction instrument, the legal basis for acting with force to arrest indictees, the use of military force to effect such arrests, and some of the various political and practical issues that arise in such use of force. For simplicity's sake, I will, throughout the remainder of this chapter, use the term war crimes to include

crimes against humanity and genocide. This thesis does crossover many disciplinary areas from political science, to history, to military science and of course, law. I can offer no apology for having so included these various subject areas, for, I suggest, any attempt to consider the problem presented and the solutions proffered must, by the very nature of the subject, include aspects of the above noted disciplines.

The thesis begins with the voices of the victims themselves, for it is their poignant words and moving stories that must compel the world to ensure the expeditious arrest and effective prosecution of the perpetrators. The challenge in giving a living voice to the victims in this chapter was not, sadly, in searching for the appropriate material, rather, it was limiting the tragic and seemingly inexhaustible number of equally compelling and heartbreaking narratives that could physically and emotionally overwhelm any researcher. I have culled the quotes and stories used in Chapter one from various media sources, books and court transcripts. To this end I read all journal materials available on and by the victims. I researched and reviewed newspaper articles dating from the beginning of the Yugoslavian and Rwandan crises though to 2004 in which the words, thoughts and accounts of the victims were given voice. Moreover I read all available indictments, transcripts and decisions released by the ICTY and ICTR through to August 2004.

In the later three sections of the chapter I substantiate the requirement for justice, the enactment of such justice, and the efficacy of the measures taken to

ensure that justice is achieved for the myriads of victims and their families. To establish these lines of reasoning, I looked to the written and spoken reflections of those academics, politicians, jurists, judges and senior commanders, who have experienced firsthand the challenges and frustrations of attempting to prevent atrocities, successfully prosecuting indictees or developing jurisprudence for future tribunals. The views provided, I suggest, offer compelling confirmation that expedient, effective and fair legal processes are required for all indicted war criminals. It only stands to reason that the legal process can only be effective and justice can only be achieved if the accused can be brought before the tribunal with alacrity. I have also included as appendixes to this chapter, the brief histories of the former Yugoslavia and Rwanda as found in decisions rendered by the respective tribunals.

The third chapter of this thesis examines the history of the laws of war and war crimes. The chapter begins with a review of the codification or regulation by early ethno-cultural entities of the practices of, and limitations on, the prosecution of war and the subsequent treatment of soldiers, civilians and property. It continues with the examination of the laws of war and war crimes under Christian rule and includes a brief description of the proscriptions imposed on the conduct of battle, the conduct of soldiers and the earliest trials of those founding violating accepted standards of the day.

The third chapter then reviews the early development of "modern" international standards for the waging of conflict and the treatment of prisoners

and non-combatants. This section carries on with a concise assessment of the criminal actions that took place during the First and Second World Wars, including the subsequent trials of accused war criminals.

In researching these portions of the third chapter, I developed a framework for the time lines and landmark events I wished to cover - with admittedly arbitrary groupings of early cultures - from various academic works on the conduct of war. This was also true of my research on the development of treaty and customary international law on the conduct of war and hostilities, and the prosecution of those accused of having violated such law from the end of the Nineteenth Century through to the close of the Twentieth Century. While relying on "secondary" and in some cases "tertiary" research material to map-out my study, where possible, I turned to the original source documents - including the original "codes" and primary religious texts - that constitute the foundation for the various cultural and religious perspectives discussed in the chapter.

In almost all cases - except for some German, Hebrew, French and limited Latin source materials - where the original works were in a language other than English, I was compelled to rely on translations. In all such cases I attempted to use the most accurate translation available within the market place today, confirming with Islamic, Talmudic and academic scholars when necessary, to obtain a translation that best reflects the original essence, meaning and nuance of the language and faith in question.

Chapter three closes with the development of the ICTY, ICTR and ICC. The United Nations resolutions concerning the ICTY and ICTR served, in addition to the founding statutes of the three tribunals, as the main sources of information used in this section. I elected to include a brief overview of the ICTY's and ICTR's statutes in the appendixes to this thesis as well as a review of the status of the various cases before the tribunals. Further, I included as an appendix, the Rome Statute of the ICC and a list of signatory countries including the dates of their ratification of or accession to the Rome Statute.

Chapter four opens with a continued analysis of the ICTY, ICTR and ICC however, giving particular consideration to the ability or inability of these tribunals to gain jurisdiction over indictees. To this end, I have again relied on documentation from the United Nations as well as the statutes for the ICTY, ICTR and ICC. Additionally, I have interviewed several individuals who have dealt firsthand with the issues of war crimes and the military justice system. Further, I reviewed several major newspapers for reports or articles that detailed the difficulties encountered by the tribunals in gaining jurisdiction over some of the most wanted indictees. To assist in understanding how some indictees have been brought into the jurisdiction of the tribunals, I included as an appendix a list of indictees and the manner in which they were brought before the ICTY.

The subsequent portion of Chapter four examines the need for interdiction by force when the voluntary surrender of an accused cannot be achieved in a timely manner. Highlighting the issue, this section discusses three of the most

notorious of ICTY indictees, Slobodan Milosevic, Radovan Karadzic, and Radko Mladic. Again, I have relied on the interviews I conducted with various jurists and legal officers as well as the tribunal indictments and court documents. I have also drawn on a number of books covering the NATO's involvement in Kosovo and the surrender of Slobodan Milosevic to the ICTY by Serbia.

The third section of the fourth chapter addresses the legal justifications for the use of force to arrest indicted persons. First and foremost I considered the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention Relative to the Treatment of Prisoners of War, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War as well as related commentaries by various authors. I took the relevant portions of the Conventions into consideration and analysed them in light of the ICTY and ICTR statutes and the Dayton Peace accord in order to identify national responsibilities for the surrender and capture of persons wanted for war crimes.

Further in chapter four, although there is not an expansive number of cases dealing with extraterritorial detention of indictees, the available case law from the United States, United Kingdom, South Africa, Israel and the ICTY is reviewed and limited conclusions are offered. In doing so, I also sought the written views of various international jurists and policy specialists on the issue of international law and the use of military force in manner I advocate.

Chapter four ends with a subdivided section on the political considerations and responses to the use of force for the capture of wanted indictees. Newspaper and journal reports reflecting various political positions, particularly with respect to the use of NATO military forces to arrest indictees wanted by the ICTY, were culled for insights into the political mindset. Additionally, I relied on various works, academic and non-academic, to look at the political responses and military consequences of the few publicly known attempts at forcible interdiction. This final portion of the chapter also describes and considers the nature of the military units that are capable of performing such missions.

It must be pointed out here that the very nature of national military capabilities is a close guarded secret beyond, for the most part, the most generic of information. As a result, there is a great deal of "pop-culture" material on special force units. I have not drawn on any information that was outside of the public realm nor have I sought to obtain information beyond that found through university libraries. I attempted to avoid that material that is sensationalised or of questionable veracity, however, some of the sources I have drawn on do come out of the non-academic world. In each case, I have attempted to first cross-reference the essential information on the units discussed in the more "popular" material before relying on it and I have also sought to independently verify that information that was essential to the thesis.

Chapter five involves a review of various options open in the employment of military or paramilitary force for effecting detentions. I have relied on the published works of historians, academics, my interviews with military persons, as well as the works of some mainstream writers to discuss the pros and cons of employing various mission capable forces in interdiction operations. I have also sought through the works and words of these individuals to detail the range of issues that must be considered from a military perspective in planning any operations including, and perhaps especially, the need for and advisability of using multi-national forces.

Chapter six briefly addresses just some of the problems that can arise in military operations in general, but interdiction operations in particular. My previous observation on the limited availability of non-classified information applies on these issues as well. I have utilised the same types of sources as noted for chapter 5 and I elected to limit this chapter to a simple explanation of the difficulties and dangers faced when using military forces in the interdiction role.

CHAPTER 3

The Bloody Trail: A Short History of Conduct in War and Social Responses

A. War Crimes: Historical Antecedents

Since the beginning of civilized society, conflict and war have been an inseparable part of the development and progress of virtually every society.

Along with war, however, have come brutality, cruelty and suffering. Therefore, almost from the time of the first examples of organized warfare, it has been recognized that some degree of constraint should be observed in the manner of conducting armed conflict.⁴⁶

The ancient Sumerians, Babylonians, Persians and Hittites all had codes that imposed constraints on the practice of war.⁴⁷ It should be remembered that, while many ancient civilizations had certain forms of laws that constituted codes of conduct for the practice of warfare, they were generally founded on a religious morality and do not bear great similarity to the modern laws of war.⁴⁸

⁴⁶ Leslie C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 2000).

⁴⁷ Christopher Greenwood, "Historical Development and Legal Basis," in *The Handbook of Humanitarian Law in Armed Conflict*, ed. Dieter Fleck (Oxford: Oxford University Press, 1995), p. 12. Greenwood notes that some ancient cultures imposed controls, albeit limited in scope, over the conduct of war at a time when conflict was often without any delimitation. As examples, he notes that the Sumerians afforded immunity to enemy negotiators, that the Hittites required respect for inhabitants of captured cities and that the Babylonians' Code of Hammurabi required protection be afforded to the weak and for prisoners to be ransomed and released.

⁴⁸ Ibid., p. 12-13; also see Gerald I. A. Draper, *The Implementation of the Modern Law of Armed Conflict* (Jerusalem: Magnes Press/Hebrew University, 1973); Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), chapt. 1; and Quincy Wright, *A Study of War*, 2nd ed. (Chicago: University of Chicago Press, 1965), pp. 158-73.

Hugo Grotius,⁴⁹ at the beginning of his 1625 seminal work, *De Jure Belli ac Pacis*,⁵⁰ suggests that a “law of war” can not truly exist absent an international law regulating the values of individual states.⁵¹ If this is indeed true, historic civilizations⁵² can therefore never be said to have possessed a law of war in the sense stated by Grotius. Nevertheless, these societies did create bodies of religiously or philosophically based laws that governed their respective practice of war.⁵³ Drawn from religion, philosophy and cultural ethics, these civilizations

⁴⁹ *On the Law of War and Peace*, 1625, one of the first great contributions to modern international law and perhaps the first definitive text on international law, has become the basis of the enduring fame of Hugo Grotius, the Latin rendition of his Dutch name, Huigh de Groot. The child prodigy born 10 April 1583 became a prolific poet, playwright, translator and legal scholar, well-grounded as humanist philosopher, who was able to synthesize and fluently present an exceptional range of writers’ ideas from earlier centuries, notably, in the field of international law, scholars such as Gentili. Entry “Hugo Grotius,” *Encyclopaedia Britannica*, 15th ed., Vol. 5, p. 514; entry “Hugo Grotius,” *Columbia Encyclopedia*, 6th ed., <http://www.bartleby.com/65/gr/Grotius.html>; see also H. Vreeland, *Hugo Grotius, the Father of the Modern Science of International Law* (New York: Oxford University Press, 1917); E. Dumbauld, *The Life and Legal Writings of Hugo Grotius* (Norman: University of Oklahoma Press, 1969).

⁵⁰ Hugonis Grotii, *De jure belli ac pacis libri tres, in quibus jus naturae & gentium, item juris publici praecipua explicantur*, trans., I. I. Carnegie Institution (Washington, D.C.: [n.p.], 1933), p. 11.

⁵¹ *Ibid.*, with the comment:

“This work arose as a result of the excesses of the Thirty Years’ War and Grotius’ opposition to tyranny. In his *magnum opus*, he did not condemn war as an instrument of national policy, however. He maintained that it was criminal for countries and leaders to pursue war except in specific circumstances. For the greater extent of *De jure belli ac pacis*, Grotius argues means by which the conditions of warfare can be made more humane through the combatants affording respect for private persons and their property.”

The entry “Grotius on the Law of War and Peace,” *International Law Pioneers* (online at <http://www.san.beck.org/GPJ13-InternationalLaw.html>), includes this comment on the book’s context and content:

“Although he believed that there could be a ‘just war’ (unlike Erasmus and other pacifists), Grotius made a tremendous contribution toward international law and to more just and moral conduct during wars. Living during an age of cruel and lawless religious and national warfare, *The Law of War and Peace* delineated codes of justice for protecting innocent non-combatants, discerning rights of persons and property and arranging methods for truces, treaties and humane treatment of hostages and prisoners. In the *Prolegomena*, Grotius suggested that there is a common law among nations that is valid for war. Then he asserted the need for these principles.”

⁵² Within this “historic civilizations,” I am including Islam and Judaism, two current and vibrant faiths that maintain today and continue to develop religiously based laws on the conduct in war. Even though the contemporary concept of the “law of war” would fit Grotius’ description above, many in these two major faiths presently found their moral conduct on their respective religious teachings.

⁵³ For some societies and faiths, as noted above, the laws of these historic civilizations continue to govern their

defined the circumstances under which war could be engaged and delimited the acceptable conduct to be practiced in the event of conflict. I will review below the laws and social attitudes to the conduct of hostilities by several historic civilizations.⁵⁴

(i) China

In China, Sun Tzu, the fourth century BCE⁵⁵ military commentator, teacher and warrior, maintained that, in war, one should attack the enemy armies and that "...the lowest [realization of warfare] is to attack their fortified cities. This tactic of attacking fortified cities is adopted only when unavoidable."⁵⁶

conduct through to the present day.

⁵⁴ I have grouped the non-Judeo-based faiths and cultures first: China, India (Hinduism), Greece and Rome. This is followed by the three founding faiths of western society: Judaism, Islam and Christianity. The division is, I admit, arbitrary, and there can be no denying the influence that Greek and Roman philosophy and culture had on Judaism and Christianity. There is, however, a logical progression from the writings of the Hebrew canon to the development of Christian theology and, ultimately, to the modern setting we face today. Also see, D. Brownstone and Irene Franck. *Timelines of War: A Chronology of Warfare from 100,000 B.C. to the Present*. (Boston: Little, Brown, 1994).

⁵⁵ Rather than using Christian-based nominations here, I am using the culturally neutral notions of BCE, before the common era, and CE, common era.

⁵⁶ Sun Tzu, "Planning Offensives," in *The Art of War*, trans. by Ralph D. Sawyer (Oxford: Westview Press, 1994), p. 177; for an overview of the Chinese cultural position on the conduct of war, also see Frederick Tse-Shyang Chen, "The Confucian View of World Order," in *The Influence of Religion on the Development of International Law*, ed. Mark W. Janis, (Dordrecht: Nijhoff, 1991); also see Green, *The Contemporary Law of Armed Conflict*, pp. 15 and 21. Sun Tzu's statement is similar to the current teaching of the International Red Cross and to the approach now adopted by most countries that warriors make war on warriors, not civilians.

(ii) India

The early Hindu culture, noted as being among the most peaceful of early civilizations, had within its ancient sacred writings introduced a measure of humanitarianism into armed conflict.⁵⁷ The *Mahabharata*,⁵⁸ one of the earliest Hindu sacred texts, and the Code of Manu,⁵⁹ written around the same time as the *Mahabharata*, demanded of the Hindu military leader to avoid superfluous injury to a foe, perfidy in attack and desecration of the enemy dead.⁶⁰ Further, the *Mahabharata* bars all Hindu soldiers from killing woman, children, the elderly and anyone suffering from physical or mental incapacity.⁶¹ It also prohibited the killing of those enemies who were attempting to surrender or were *hors de combat* and the destruction of enemy property or the execution of prisoners of war.⁶² The Code of Manu prohibited as "wicked" the use of concealed weapons or of

⁵⁷ Quincy Wright, *A Study of War*, pp. 158-59.

⁵⁸ The exact dating of the Hindu epic, the Sanskrit poem the *Mahabharata*, is difficult in that different authors suggest dates ranging from as early as 400 BCE to as late as CE 200.

⁵⁹ Text, second century BCE; see George Buhler, *The Laws of Manu*, (Sacred Books of the East, Volume 25), 230, Tit. VII, 90 re-print of 1886 edition (Delhi: Motilal Banarsidass, 1964); according to Greenwood, this text was written, "...after the turn to a new era," approximately 100 BCE, Greenwood, "Historical Development and Legal Basis," p. 13; also see Green, *The Contemporary Law of Armed Conflict*, pp. 21, 286, 287.

⁶⁰ W.S. Armour, "Customs and Warfare in Ancient India," in *Transactions of the Grotius Society vol 8: Problems of Peace and War: papers read before the society in the year 1922*, (Oxford: Oxford University Press, 1922), pp. 71-88 71, 74, 77 and 81, in: <http://www.jstor.org/journals/14791234.html>; also see Green, *The Contemporary Law of Armed Conflict*, pp. 21, 286, 287; S.V. Viswanatha, *International Law in Ancient India* (Bombay: Longmans Green, 1925); H. Chatterjee, *International Law and Inter-State Relations in Ancient India* (Calcutta, K.L. Mukhopadhyay, 1958); Ved P. Nanda, "International Law in Ancient Hindu India," in "The Influence of Religion on the Development of International Law" ed. Mark W. Janis, (Dordrecht: Nijhoff, 1991); and Nawaz, *The Law of Nations in Ancient India*, 6 Indian BIA 172 (1957).

⁶¹ Armour, "Customs and Warfare in Ancient India," p. 76; also see Green, *The Contemporary Law of Armed Conflict*, pp. 21, 286, 287.

⁶² Greenwood, "Historical Development and Legal Basis," p. 13.

weapons that were intended to cause superfluous injury by their design.⁶³

Similar to the concept articulated by the Chinese warrior Sun Tzu, ancient Indian law also held that soldiers should fight only soldiers. Hindu law extended this concept to the point of conducting war on a basis of equality and proportionality between the contestants: "a car-warrior should fight a car-warrior. One on horse should fight one on horse. Elephant riders must fight with elephant riders, as one on foot fights a foot soldier." ⁶⁴

(iii) Classical Civilization

The position of Classical civilization on the conduct of war was articulated by the great writers Plato, Aristotle and Cicero, all of whom shaped Western views on warfare.⁶⁵ The Greeks and Romans adhered to the observance of humanitarian principles, and these principles, however limited, have greatly contributed to the development of fundamental rules in contemporary laws of armed conflict.⁶⁶

⁶³ George Buhler, *The Laws of Manu*; also see George Buhler, *The Laws of Manu, with extracts of seven commentaries by G. Buhler* (Oxford: Clarendon Press, 1886). The weapons in question are described as barbed, poisoned or as having had their points blazed with fire.

⁶⁴ Armour, "Customs and Warfare in Ancient India," pp. 7, 74; Green, *The Contemporary Law of Armed Conflict*, in which Green notes at p. 21 that "...in more recent times, it has been suggested that if a sophisticated force is engaged with one not so advanced, the former should only use weapons available to the latter."

⁶⁵ W. B. Ballis, *The Legal Position of War: Changes in its Practice and Theory from Plato to Vattel* (New York, Garland Publishing, 1973[©1937]).

⁶⁶ See Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London: Macmillan, 1911), reprinted 1979 (New York: Arno Press, 1979), vol. 2, pp. 166-384; also see Green, *The Contemporary Law of Armed Conflict*, pp. 21, 22, 286.

The ancient Greeks addressed many of the issues that confront modern warfare, including prohibiting the use of poisoned weapons and holding that compassion was to be shown to captives with prisoners being ransomed or exchanged.⁶⁷ As with the Hindu teachings, respect for the bodies of the enemy and burial of dead were observed.⁶⁸ During the war with the Persian Empire, Alexander the Great made the regard for the life and dignity of victims in that war a central tenet of the conflict.⁶⁹ In the conduct of attacking a city, it was forbidden to interrupt an enemy's water supply or poison it.⁷⁰ The Greeks condemned those who committed breaches of the code of conduct of war, believing that such acts betrayed the values of civilized culture and the will of the gods.⁷¹ Polybius, a chronicler of many Greek campaigns, was greatly concerned with the responsibility borne by those conducting the hostilities, and he notes that Greek society was not above putting on trial those believed responsible for crimes.⁷²

⁶⁷ Y. Garlan, *Ancient Culture and Society: War in the Ancient World: A Social History* (London: Chatto and Windus, 1975), pp. 54-56, 60-64, 68-77.

⁶⁸ Ibid., pp. 60-64.

⁶⁹ Greenwood, "Historical Development and Legal Basis," p. 13.

⁷⁰ Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vol. 2, pp. 21-23; Greenwood, "Historical Development and Legal Basis," p. 13; Green, *The Contemporary Law of Armed Conflict*, pp. 21, 22, 286; and Ballis, *The Legal Position of War*.

⁷¹ Phillipson, *International Law and Custom of Ancient Greece and Rome*, vol. 2, pp. 21-23; Green, *The Contemporary Law of Armed Conflict*, pp. 21, 22, 286.

⁷² Brownlie, *International Law and the Use of Force by States*, p. 4; also see T.A. Walker, *History of the Law of Nations* (Cambridge: University Press, 1899), p. 41, for a discussion of Greek practices during siege warfare.

The Romans were among the first civilizations to consider outside the religious context the idea of a just war, an issue that would become central to the development of modern laws of armed conflict.⁷³ Adopting many of the Greek concepts and philosophies, the Romans' practices of war "...varied according as their wars were commenced to exact vengeance for gross violations of international law or for deliberate acts of treachery."⁷⁴ Further, Phillipson notes that the Romans governed the manner in which they conducted war according to the nature of their enemy – whether civilized foe or uncivilized barbarians marauders.⁷⁵

In fact, both the Greeks and Romans, in the manner of waging war, made a clear distinction between those enemies they considered their cultural equals and those considered barbarians,⁷⁶ though the moral understanding of the

⁷³ Brownlie, *International Law and the Use of Force by States*, p. 4; also see Phillipson, *International Law and Custom of Ancient Greece and Rome*, p. 180; also see Garlan, *Ancient Culture and Society*, pp. 27-41; Green, *The Contemporary Law of Armed Conflict*, pp. 21, 22, 286.

⁷⁴ Phillipson, *International Law and Custom of Ancient Greece and Rome*, pp. 110-11; Green, *The Contemporary Law of Armed Conflict* in which Green states at p. 22:

"During the United States operations against Panama – Operation 'Just Cause' - 1989, the U.S. put a price on the head of Noriega, then head of the Panamanian government and forces. Similarly, in Somalia in 1993 the UN put a price on the head of General Aidid, one of the faction leaders. It was disclosed in 1998 that during WW II Churchill had instructed plans to be prepared for the assassination of Hitler, but these were never put into operation. However, it should be noted that during the third Gulf War – the 2003 conflict conducted by the United States and its coalition against Iraq – that the United States Government made it clear that one of its stated intents was the capture or death of Saddam Hussein and may have, covertly, put a price on Hussein and senior Iraqi leaders' heads."

⁷⁵ Phillipson, *The International Law and Custom of Ancient Greece and Rome*, pp. 110-11; Green, *The Contemporary Law of Armed Conflict*, pp. 21, 22.

⁷⁶ Greenwood, "Historical Development and Legal Basis," p. 13; Phillipson, *International Law and Custom of Ancient Greece and Rome*, pp. 110-11. It is dangerous to compare the standards of conduct and laws of today to civilizations from former millenniums. Nevertheless, it is worth noting that the Roman practice of applying different standards to the practice of war according to the nature or classification of the enemy, while perhaps appealing in this post-11 September 2001 world, would be condemned today as a violation of the concept of "non-discrimination" found in the modern Laws of Armed Conflict. The concept of "non-discrimination"

Greeks did not prevent the sacking, pillaging and destruction of enemy cities.⁷⁷

The Roman view, however, was clear on violations of acceptable behaviour in war, with restrictions against barbarism, acts of treachery or criminal behaviour toward the enemy.⁷⁸

(iv) Judaism

Some of the earliest recorded and structured rules on the conduct of war are found in the many precepts and restrictions of the Torah⁷⁹ that impose limitations upon what may or may not be done during war.⁸⁰ God, in telling the Jewish nation He will help them overcome their enemies, set forth the basis of treatment and care for conquered land when He said, "I will not drive them out from before thee in one year, lest the land become desolate."⁸¹ The Israelites were

binds both sides of a conflict to apply the laws of war regardless of which party is branded the aggressor, additionally; it also requires the laws be applied without distinction to race, colour and religion.

⁷⁷ Xenophon, "A Plundering Expedition," from John Keegan, ed., *The Book of War: 25 Centuries of Great War Writing* (New York: Viking Books, 1999), pp. 20-25; also see Walker, *History of the Law of Nations*, pp. 48, 60, for a description of Roman practices in siege warfare.

⁷⁸ Phillipson, *The International Law and Custom of Ancient Greece and Rome*, pp. 221, 231-32; also see Keegan, *The Book of War*, pp. x-xi. The Roman attitude to stubborn and resistant uprisings to their control is well documented by Josephus, particularly in his recalling of the siege of Jerusalem, Keegan, *The Book of War*, pp. 30-41; also see Walker, *History of the Law of Nations*, p. 56; Green, *The Contemporary Law of Armed Conflict*, pp. 21, 22 and 286.

⁷⁹ The Hebrew Bible comprising the Five Books of Moses, also referred to as the Pentateuch, is held by observant Jews to have been written by Moses, at the direction and inspiration of the Almighty, in the thirteenth century BCE.

⁸⁰ Green, *The Contemporary Law of Armed Conflict*, pp. 20, 22, 287; see commentary of Rashi, 7 C.E. Jewish Scholar on Deuteronomy 20:19-20; also see Roberts, "Judaic sources and views on the laws of war" (1988) 37 *Naval Law Rev.* 221.

⁸¹ Shemos (Exodus), 23:29, quoted from *Tora*, trans. and ed. Harold Fisch (Jerusalem: Koren Publishers, 1982).

further commanded in Devorim that, with respect to attacking the pagan tribes of Canaan:

When thou shalt besiege a city a long time, in making war against it to take it, thou shalt not destroy its trees by forcing an axe against them; for thou mayst eat of them, and thou shalt not cut them down; for is the tree of the field a man, that it should be besieged by thee? Only the trees which thou knowst that they be not trees for food, thou shalt destroy and cut them down; and thou shalt build bulwarks against the city that makes war with thee, until it be subdued.⁸²

Maimonides,⁸³ commenting upon this law, clearly concluded that the law regarding the destruction of fruit trees for the mere purpose of afflicting the civilian population forbade the practice.⁸⁴ Moreover, the Jews were further commanded in Devorim:

When thou comest near to a city to fight against it, then proclaim peace to it. And it shall be, if it make thee answer of peace, and open to thee, then it shall be, that all the people to be found in it shall be tributaries to thee, and they shall serve thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it; and when the Lord thy God has delivered it into thy hands, thou shalt smite every male of it with the edge of the sword; but the women, and the little ones, and the cattle, and all that is in the city, all the spoil of it, shalt thou take to thyself; and thou shalt eat the spoil of thy enemies, which the Lord thy God has given thee.⁸⁵

⁸² Devorim (Deuteronomy), 20:19-20, quoted from Fisch, *Tora*; also see Talmud Bavali, tractate Sanhedrin, 8:2a. It is interesting to note that not only may the fruit tree not be destroyed but that even those trees that can be cut down must only be destroyed for a matter of great importance.

⁸³ Maimonides (Rabbi Moses ben Maimon) was born in Cordova, Spain, in 1135 CE, died in Fostat, Egypt, in 1204 CE and was buried in Tiberias. The two outstanding works of this physician and great Jewish scholar, philosopher and codifier of the Middle Ages are *Mishne Torah*, a Hebrew compendium of the entire Halakha, which he completed in 1180, and *More Nevukhim* (*Guide for the Perplexed*), an exposition of the Jewish faith (completed 1190).

⁸⁴ Roberts, "Judaic sources of and views on the laws of war," 37 *Naval Law Rev* (1988), 231.

⁸⁵ Devorim, 20:10-14, quoted from Fisch, *Tora*. It should also be noted that within Jewish law, a positive obligation rests on the Jewish nation to seek peace and the surrender of an enemy city prior to commencing military operations involving attacks against cities populated by civilians. Maimonides, commenting on Halachos Melochim (Law of Kings) 6:5, supported by Aruch Ha Schulchan 75:6-7 on Halachos Melochim,

The words of the prophet Elisha illustrate the Judaic approach to the treatment of an enemy, when as the King of Israel approached him regarding the treatment to be afforded the prisoners of Aram, he stated:

And the King of Yisra'el said to Elisha, when he saw them, My father, shall I smite them? shall I smite them? And he answered, Thou shalt not smite them: wouldst thou smite those whom thou hast taken captive with thy sword and with thy bow? Set bread and water before them, that they may eat and drink and go to their master. And he prepared great feast for them: and when they had eaten and drunk, he sent them away, and they went to their master.⁸⁶

Further, and in keeping with the words of Elisha above, it is taught in Mishle that, "If thy enemy be hungry, give him bread to eat; and if he be thirsty, give him water to drink; for thou shalt heap coals of fire upon his head, and the Lord shall reward thee."⁸⁷

states that Joshua, before he entered the land of Israel, sent three letters to its inhabitants — the first offering those that wished to flee should flee, the second offering those that wished to make peace should do so and the third warning that those who wanted war should prepare to fight. Further, Maimonides, in commandments 187 and 190, also codifies a number of specific rules of military ethics that relate to the laying of siege to a city. Nachmonides, the foremost critic of Maimonides, citing Bemidbar XXXI, 7, includes the prohibition against surrounding the city on all sides: one side must be left open to allow the inhabitants to flee the combat. Jewish tradition accepts that civilians and soldiers who are *hors de combat* are always permitted to flee from the scene of the battle. Particularly in combination with Joshua's practice of sending letters of warning in advance of combat, this legal approach limits greatly the role of the doctrine of "innocent civilian" in the Jewish tradition. Furthermore, Jewish tradition mandated many other rules that prescribe certain tactics that violated ethical and behavior norms, even in war. Nachmonides, again, in his criticism of Maimonides Safer Ha-Mitzvos, citing Bemidbar 31:7, holds one as requiring one to have mercy on one's enemy as one would have mercy on one's own. Undue cruel activity, even rape of the female civilian population of the enemy, was regulated under Kidushin 21b.

⁸⁶ 2 Melakhim (2 Kings), 6:22-3, quoted from *Tora*, Fisch, trans. The events chronicled in 2 Kings transpired in approximately 790 BCE. It is important to note that although the texts cited may vary from 200 BCE to 1200 CE, the foundation and textual basis for these writings are found in the Torah. Also see Green, *The Contemporary Law of Armed Conflict*, pp. 20, 22, 287

⁸⁷ Mishle (Proverbs) 25:21-22, quoted from *Tora*, Fisch, trans. This passage raises a seeming dichotomy, in that the reader is instructed to fulfil the Godly attributes of compassion and mercy to an enemy, yet the closing section speaks of the destruction of the very same foe. I suggest that this passage, while allowing for the attack and destruction of an enemy force in battle, requires compassion for one's enemy who is *hors de combat*.

(v) Islam

The Islamic approach to war in general can be found words of the Prophet Muhammed⁸⁸ when he writes of the manner in which Islamic soldiers are to approach combat. At Surah IV, 71-76, they are enjoined to prepare themselves, to fight in the manner allowed, not to fear the consequences of victory or defeat but to be sure they fight in the name and will of Allah.⁸⁹ The Surah states:

71. O you who believe! Take precaution, then go forth in detachments or go forth in a body.

72. And surely among you is he who would certainly hang back! If then a misfortune befalls you he says: Surely Allah conferred a benefit on me that I was not present with them.

73. And if grace from Allah come to you, he would certainly cry out, as if there had not been any friendship between you and him: Would that I had been with them, then I should have attained a mighty good fortune.

74. Therefore let those fight in the way of Allah, who sell this world's life for the hereafter; and whoever fights in the way of Allah, then be he slain or be he victorious, We shall grant him a mighty reward.

75. And what reason have you that you should not fight in the way of Allah and of the weak among the men and women and the children, (of) those who say: Our Lord! Cause us to go forth from this town, whose people are oppressors, and give us from Thee a guardian and give us from Thee a helper.

76. Those who believe fight in the way of Allah, and those who disbelieve fight in the way the Shaitan. Fight therefore against the friends of the Shaitan; surely the strategy of the Shaitan is weak.

⁸⁸ The Prophet Muhammed, born 570 CE, died 632 CE.

⁸⁹ R. Firestone, *Jihad: The Origin of Holy War* (Oxford: Oxford University Press, 1999), pp. 84-91; also see Green, *The Contemporary Law of Armed Conflict*, pp. 22, 23; Paul Fregosi, *Jihad in the West: Muslim Conquests from the 7th to the 21st Centuries* (Amherst: Prometheus Books, 1998). For an interesting, if not academic work, on Islamic/Christian conflicts, see M. J. Akabar, *The Shade of Swords: Jihad and the Conflict Between Islam and Christianity* (London: Routledge, 2002).

Recognition of the essential requirement for humanity in war necessitating limitations on armed conflict⁹⁰ appeared in Islamic thought by the early part of the seventh century CE, a result of the writings of Muhammed, the influence of Jewish and Christian principles on the conduct of war as well as incorporation of some Greek and Roman concepts on war.⁹¹ The leading Islamic statement on the law of nations, written in the ninth century, reflects in general terms the same principles as were laid down in the Torah, including a ban on the killing of women, children, the elderly, the blind, the crippled and the mentally infirm.⁹² The first caliph, Abu Bakr,⁹³ stated the Islamic view on the moral conduct of war as: "The blood of women, children and old people shall not stain your victory. Do not destroy a palm tree, not burn houses and cornfields with fire, and do not cut any fruit tree. You must not slay any flock or herds, save for your subsistence."⁹⁴ Of particular note in the Islamic view on the waging of war is the Judaic and Islamic parallel that can be seen in the rules pertaining to cities under

⁹⁰ Firestone, *Jihad*, pp. 50-51, 73-77; also see Green, *The Contemporary Law of Armed Conflict*, pp. 22, 23; also see Ati ibn Abi Bakr, *Hidāyah, The Hedaya, or Guide: a Commentary on the Mussulman Laws*, Charles Hamilton, trans., (Delhi, India: Islamic Book Trust, 1982).

⁹¹ For a general description of early Islam and the conduct of war by Muhammad and his followers, see Edward Gibbon, *The Decline and Fall of the Roman Empire* (London: J.M. Dent, 1954), chapt. 50, pp. 257-69, 274, 282-84, 287-88; also see Green, *The Contemporary Law of Armed Conflict*, pp. 22, 23.

⁹² *Islamic Law of Nations* (Shaybani's *Siyar*, c. early ninth century), tr. Khadduri (Baltimore: Johns Hopkins Press, 1966), pp. 29-31, 47, 81, 110-11; for a further discussion of the parallels between Islamic and Judaic law see Jacob Neusner, *Comparing Religions through Law: Judaism and Islam* (London; New York: Routledge, 1999).

⁹³ Abu Bakr was the Prophet's closest friend and eventually his father-in-law. On the death of the Prophet, Abu Bakr was chosen by consensus to become the first Caliph and carried out these duties from 632 CE until his death in 634 CE.

⁹⁴ Greenwood, "Historical Development and Legal Basis," p. 14. Abu Bakr's expression of the Islamic concept of moral conduct in war bears great similarity to the Jewish position expressed above.

siege, which were to be treated by Islamic forces in a fashion similar to that laid down for the Jewish nation in Devorim.⁹⁵

Islam teaches those involved in combat to be honest with their enemies, enjoining them to practice the divine concepts of mercy, moderation and compassion, forbidding them from acting beyond the constraints of justice.⁹⁶ Yet the Qur'an at Surah XLVIII, 22 states: "And if those who disbelieve fight with you, they would certainly turn [their] backs, then they would not find any protector or helper."⁹⁷ Further, the Qur'an states at Surah VIII:

15. O you who believe! when you meet those who disbelieve marching for war, then turn not your backs to them.⁹⁸

Later, in the same Surah, the Islamic view of the infidel enemy is made clear when it is written:

65. O Prophet! urge the believers to war; if there are twenty patient ones of you they shall overcome two hundred, and if there are a hundred

⁹⁵ Ibid., pp. 1, 55; see note 46 above; also see Walker, *History of the Law of Nations*, for his views on the Muslim conduct during siege warfare.

⁹⁶ Alib Hasan Al Muttaqui, *Book of Kanwi'umman*, vol. 4 (1979), p. 472; H. Sultan, "The Islamic Concept," in *International Dimensions of Humanitarian Law*/UNESCO (Dordrecht: Martinus Nijhoff, 1988), pp. 29, 32; see also, *The Islamic Law of Nations* (Shaybani's *Siyar*), p. 1711; Majid Khadduri, *The Law of War and Peace in Islam: a Study in Muslim International Law* (London: Luzac & Co., 1940), reprinted as *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins Press, 1955); *Islamic Law: Theory and Practice*, edited by Robert Gleave and Eugenia Kermeli (London: I.B. Tauris, 2001); C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (New York: St. Martin's Press, 1988); Green, *The Contemporary Law of Armed Conflict*, pp. 22, 23, 287; and J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967).

⁹⁷ Quoted from *The Qur'an*, trans. M.H. Shakir (Elmhurst: Tahrike Tarsile Qur'an, 1999).

⁹⁸ Quoted from *The Qur'an*, trans. M.H. Shakir.

of you they shall overcome a thousand of those who disbelieve, because they are a people who do not understand.⁹⁹

The Qur'an goes on to comment, however, on the Islamic treatment and attitude of monotheistic non-Muslims, where at Surah XLVIII, 29, it states:

Muhammad is the Apostle of Allah, and those with him are firm of heart against the unbelievers, compassionate among themselves; you will see bowing down, prostrating themselves, seeking grace from Allah and pleasure; their marks¹⁰⁰ are in their faces because of the effects of their prostration; that is their description in the Taurat¹⁰¹ and their description in the Injeel;¹⁰² like as seed-produce that puts forth its sprout, then strengthens it, so it becomes stout and stands firm on its stem, delighting the sowers that He enrage the unbelievers on account of them; Allah has promised those among them who believe and do good, forgiveness and great reward.¹⁰³

When the armed combat involved the followers of Islam and non-Muslims, the "Muslims were under legal obligations to respect the rights of non-Muslims, both combatants and civilians."¹⁰⁴ Moreover, while Islam teaches that prisoners of war should not be killed but instead ransomed or set free without

⁹⁹ Ibid.

¹⁰⁰ A mark of bruising and dust seen on the forehead of some devout Muslims incurred from prostrating before God and seen as a mark of devotion.

¹⁰¹ Arabic word for Torah, the five books of the Hebrew Bible, as noted above.

¹⁰² Arabic word for Gospels or Christian Bible.

¹⁰³ Quoted from *The Qur'an*, trans. M.H. Shakir.

¹⁰⁴ Khadduri, Intro., p. 13; the general attitude of Islam toward Christians and Jews is found in the Qur'an, Surahs IV, 71-76 and XLVIII, 29, noted above. However, this did not preclude Muslims from going to war against those termed non-believers. For more on the Islamic concept of war on non-believers, also see Green, *The Contemporary Law of Armed Conflict*, p. 22; Alexandrowicz, 100 Hague *Recueil* (1960, II), pp. 235-238. For a review of the Islamic perspective on Muslim/non-Muslim conflicts, see Fregosi, *Jihad in the West*, pp. 71-100; M. J. Akbar, *The Shade of Swords: Jihad and the Conflict between Islam and Christianity*; Rudolph Peters, *Jihad in Mediaeval and Modern Islam*, in the chapter on Jihad from Averroes' legal handbook *Bidayat al-mudjtahid* and the treatise "Koran and fighting" by the late Shaykh-al-Azhar, Mahmud Shaltut, trans. and annotated by Rudolph Peters (Leyden: Brill, 1977).

ransom.¹⁰⁵ Prisoners and captives could be executed under certain compelling circumstances, but this would not be carried out if the prospective victims chose to convert to Islam.¹⁰⁶ In such cases, these forced converts were to be regarded as war prizes and were divided among their captors.¹⁰⁷ Despite the philosophical and religious injunctions to act morality, the actual record of war between Islam and Christianity does not reflect well on the adherence to the moral positions.¹⁰⁸

¹⁰⁵ This precept is based on *Qur'an* XLVII, 4, which states:

"So when you meet in battle those who disbelieve, then smite the necks until when you have overcome them, then make (them) prisoners, and afterwards either set them free as a favour or let them ransom (themselves) until the war terminates. That (shall be so); and if Allah had pleased He would certainly have exacted what is due from them, but he may try some of you by means of others; and (as for) those who are slain in the way of Allah, He will by no means allow their deeds to perish."

Also see Usamah ibn-Munqidh, "An Arab-Syrian Gentleman," in Keegan, ed., *The Book of War*, for an interesting description of a 509 CE battle between Islamic and Christian forces.

¹⁰⁶ The *Qur'an*, *Surah* IV, 94 offers one view on how Islam views dealing with non-believers in war where it states:

"O you who believe! when you go to war in Allah's way, make investigation, and do not say to any one who offers you peace: You are not a believer. Do you seek goods of this world's life! But with Allah there are abundant gains; you too were such before, then Allah conferred a benefit on you; therefore make investigation; surely Allah is aware of what you do."

¹⁰⁷ Ibid.

¹⁰⁸ Greenwood, "Historical Development and Legal Basis," p. 14. Greenwood comments on the exception to the normally brutish warfare practiced during the Islamic/Christian conflicts of the eleventh, twelfth and thirteenth centuries. During the twelfth century battle for Jerusalem between the Sultan Saladin and the Crusaders, the laws of war were, according to Greenwood, observed in "...an exemplary manner." Of particular note was the actions of Saladin in ordering the treatment of the wounded on both sides of the conflict outside of Jerusalem, and in his allowing the members of the Order of St. John to attend to their ministrations for the injured and dying. Some three centuries after Saladin, the Turkish Sultan Mehmet demonstrated great mercy to the citizens of Constantinople during the great siege. See Greenwood, "Historical Development and Legal Basis," p. 14; Andrew Wheatcroft, "The Fall of Constantinople," in Keegan, *The Book of War*, pp. 60-69; Fregosi, *Jihad in the West*, pp. 248-264; for a full description of the epic siege, see Sir Edwin Pears, *The Fall of Constantinople, Being the Story of the Fourth Crusade*, Sir Stephen Runciman, *The Fall of Constantinople, 1453* (Cambridge: Cambridge University Press, 1965); and Sir Stephen Runciman, *The Great Church in Captivity: A Study of the Patriarchate of Constantinople from the Eve of the Turkish Conquest to the Greek War of Independence* (London: Cambridge University Press, 1968).

(vi) Christianity

Early Christianity, unlike other major faiths and cultures of the time, refused to accept the morality of armed conflict.¹⁰⁹ Yoram Dinstein notes that, “as long as the Roman Emperors were pagans, the Church upheld a pacifist posture...”¹¹⁰ The earliest Christian fathers of the faith, such as Origen (185-254 CE), Lactantius (died c. 330 CE) and Justinus (c. 100-165 CE), adopted a position of extreme pacifism that forbade a Christian from taking part in war.¹¹¹ It was only after Christianity became the official religion of the Roman Empire during the reign of Constantine that the Church moved its position.¹¹² With the work of St. Augustine (354-430 CE), the concept of “just war” and therefore, the duty to participate in war, was given authority in the church.¹¹³

Once the concept of “just war” was accepted, the church began to address the manner in which a Christian soldier and commander could practice the art of war and establish the standard of moral conduct expected on the battlefield.

¹⁰⁹ For an interesting discussion of the earliest Christian perspective on war, see C.J. Cadoux, *The Early Christian Attitude to War: A Contribution to the History of Christian Ethics* (London: Headley Bros., 1919); and Gibbon, *The Rise and Fall of the Roman Empire*, chapt. 15; Green, *The Contemporary Law of Armed Conflict*, pp. 23-25, 287, 288. For a more modern view of the Christian perspective on all aspects of war, particularly post-Victorian conflicts, see P. Ramsey, *War and the Christian Conscience* (Durham, N.C.: Duke University Press, 1961).

¹¹⁰ Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Grotius, 1988), p. 62; Y. Le Bohec, *The Imperial Roman Army* (London: Batsford, 1994), pp. 251-52, 256-58.

¹¹¹ Brownlie, *International Law and the Use of Force by States*, p. 4.

¹¹² Dinstein, *War, Aggression and Self-Defence*, p. 62.

¹¹³ Brownlie, *International Law and the Use of Force by States*, p. 4; Dinstein, *War, Aggression and Self-Defence*, p. 62. It is interesting to note that the Church's shift in position on war was significant and extreme — moving from absolute pacifism where martyrdom was preferable to combat — to an position of expectation for Christians to fight and shed their blood as well as the blood of enemies for the Empire and the Church.

Drawing on Jewish law in combination with various works of Greek philosophy, codes of conduct for the use of arms in war were developed and taught in Europe during the Middle Ages.¹¹⁴ These codes constituted the pragmatic framework for imposing legal and morally defensible methods of the use of arms in war.¹¹⁵

By the early twelfth century, the Roman Catholic Church had begun to establish specific codes of conduct for Christian knights, particularly addressing those acts that would be viewed as hateful in the eyes of God, Church and civilized men.¹¹⁶ Not only was the Church concerned with the manner in which Christian nobles approached the conduct of a campaign, but the Church also dictated, and would continue to do so for the next several centuries, the weapons that could be used to wage war.¹¹⁷ Of particular distress to the Church were those weapons that, by their nature and by the manner of injury inflicted, were

¹¹⁴ Green, *The Contemporary Law of Armed Conflict* citing Gardot, *Le Droit de la Guerre dans l'Oeuvre des Capitaines Français du XVIe Siecle*, 72 *Hague Recueil* (1948), pp. 297, 452-53, 467-73.

¹¹⁵ Green, *The Contemporary Law of Armed Conflict*, pp. 23-25, 288; Greenwood, "Historical Development and Legal Basis," pp. 15-16; also see C. W. C. Oman, *The Art of War in the Middle Ages: A.D. 378-1515* (Ithaca: Cornell University Press, 1968); and Cadoux, *The Early Christian Attitude to War*.

¹¹⁶ The matters of conduct in war and the use of specific weapons were addressed at the Second Lateran Council. Convoled by Pope Innocent II in April 1139, the Council was an attempt to smooth away the lingering friction following the schism of 1130-1138 and to correct and condemn various errors and abuses that were occurring within the clergy and the community. The almost one thousand princes of the Church representing most Christian nations were present. Beyond the matter of banning certain acts and weapons of war, the assembly witnessed Innocent II depose from holy office all who had been ordained by the antipope. The council, in twenty-eight canons, also condemn the errors of heretics, and drafted amendments of ecclesiastical morals and discipline.

¹¹⁷ Green, *The Contemporary Law of Armed Conflict*, pp. 23-24; Pierino Belli, *De Re Militari et Bello Tractatus*, Pars VII, cap. 29 and Pars. III, Cap. III, 29, Venice, 1563, reprinted with translation H.C. Nutting, (Oxford: The Clarendon Press; London, H. Milford, 1936; reprinted Buffalo, N.Y.: W.S. Hein, 1995).

considered to be anathema to Christian doctrine, including the crossbow, arc,¹¹⁸ “darts” and catapults.¹¹⁹

The Middle Ages also saw the enactment of laws that made certain “acts of war” — for example, directing violence against non-combatants — capital crimes.¹²⁰ These “laws of chivalry” eventually became a codified body of accepted customary chivalrous conduct and were enforced and judged by special tribunals and courts.¹²¹ The power of these courts included the right to sit in judgement of accused knights who were alleged to have committed deliberate or wilful violations of the law of arms.¹²² Such charges carried sentences ranging from dishonour to death.¹²³ These chivalric codes and courts were not without

¹¹⁸ Middle English *ark*, through Old French *arc*, from Latin *arcus*, bow or curve. Canadian Oxford Dictionary, 2001, *s.v.* arc; Webster's Third New International Dictionary, unabridged, *s.v.* arc.

¹¹⁹ Greenwood, “Historical Development and Legal Basis,” p. 14; Green, *The Contemporary Law of Armed Conflict*, pp. 23-24; Belli, *De Re Militari et Bello Tractatus*, pp. 186 – 187 in translation; Gerald I. A. Draper, “The Interaction of Christianity and Chivalry in the Historical Development of the Law of War,” 5 Int'l Rev. Red X (1965), pp. 3, 19. While both the Second Lateran Council and the *Corpus Juris Canonici* forbade the use of certain weapons that afforded the users the ability to injure or kill an opponent with little direct risk to themselves, given the prevalence of the cross-bow and the use of catapults, one can only assume that the proscription on these weapons was practised more in the exception than the rule. The term *corpus juris*, although never having received legal sanction in canon law, is used in the sense of the official and complete collection of legislation made by a legislative body, comprising all of the laws in force within the legislative jurisdiction. The laws of the Catholic Church themselves have been known by many names throughout the centuries, but by the later half of the thirteenth century, the *Corpus Juris Canonici* was generally considered to be constituted of the Decretals of Gregory IX, Boniface VIII and Clement V. The ban on the weapons was added to the collection of Decretals in 1500 as part of Decretal V.

¹²⁰ Green, *The Contemporary Law of Armed Conflict*, pp. 23-25, 288; Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge and Keegan Paul, 1965), chapt. 2 and 3; and G. D. Squibb, *The High Court of Chivalry: A Study of the Civil Law in England* (Oxford: Clarendon Press, 1959), chapt. 23.

¹²¹ In England and France, these tribunals were known as Courts of Chivalry.

¹²² Keen, *The Laws of War in the Late Middle Ages* p. 27; see also Green, *The Contemporary Law of Armed Conflict*, p. 288; Maurice H. Keen, *Chivalry*, (New Haven: Yale University Press, 1984); see also Squibb, *The High Court of Chivalry*, chapt. 23.

¹²³ Ibid. chapt. 2 and 3; see also Contamine, *War in the Middle Ages* (Eng. tr., 1984), pp. 289-92; see also Squibb, *The High Court of Chivalry*. 1997, ch. XII, “The law of arms”; G. Draper, *The Interaction of Christianity and Chivalry*

their limitations, however: such judicial mechanisms could regulate the behaviour only of the knights, not of the foot soldiers.¹²⁴ The duty of discipline over the ordinary soldier, embodied in the concept of the "right of justice," was left to the commanding officer or knight of the individual troops.¹²⁵

Green notes that as early as 1385, the English Crown had issued clear orders that set the limits and scope of a military commander's powers. These common-man soldiers or men-at-arms became subject to a disciplinary code that included rules with respect to the taking and distribution of booty, prohibitions on pillage and the destruction of private property as well as respect for priests, women, children, the infirm and others.¹²⁶ While individual courts did try those accused of violating the codes of chivalry, the trials were usually carried out by the accused's own nation or by the victors in a conflict, should the accused be so unfortunate as to be captured.

in the Historical Development of the Law of War, IRRC 7 (1965), 3 and Fredrick .H. Russell, *The Just War In the Middle Ages*, (Cambridge: Cambridge University Press, 1975).

¹²⁴ Greenwood, "Historical Development and Legal Basis", p. 14; Green, "The Contemporary Law of Armed Conflict", pp. 24-25, 288.

¹²⁵ Green, *The Contemporary Law of Armed Conflict*, p. 25. It should be noted that, with the decline of chivalric orders and the European descent into the inhumane horrors experienced during the Thirty Years War, Japanese warriors and leaders were developing rules on the conduct in war, reflective of many of the old codes, particularly the *Mahabharata* and the laws of Manu, yet in a manner similar to the advanced levels of humanity, only considered in Europe in the nineteenth century. The Code of Bushido in sixteenth-century CE Japanese military code, that, according to Samio Adachi, in *The Asian concept*, UNESCO, *International Dimensions of Humanitarian Law*, (Nijhoff, Dordrecht, 1988), at pp. 13, 17, prescribed that "...every soldier must report to the commander about prisoners of war.... He shall be guilty of manslaughter if he kills them with his own hands. Prisoners of war shall not be executed wantonly regardless of whether they laid down their arms or fought to the last arrow." Greenwood, quoting the Japanese tactician Sorai, states that, "...whoever kills a prisoner of war shall be guilty of manslaughter, whether that prisoner had surrendered or fought 'to the last arrow.'"

¹²⁶ Green, *The Contemporary Law of Armed Conflict*, p. 25.

The first recorded “international” war crime tribunal occurred in 1474 in the Upper Rhine.¹²⁷ Vogt Peter Von Hagenbach, sent by the Duke of Burgundy to be governor of the occupied town of Breisach on the Upper Rhine, was given the responsibility to maintain order in the town and surrounding area.¹²⁸ It was alleged that he ordered the non-German mercenary forces under his command to enforce obedience and order on the hapless inhabitants through a campaign of terror that included such savage extravagances as murder, rape, unlawful taxation and the shameless expropriation of private property.¹²⁹ In one example, four citizens who could not pay the taxes that were demanded of them were hung in prominent places around the city as a deterrent to others.¹³⁰

As a result of the actions of Von Hagenbach and his troops, the coalition of forces from Austria, France, Bern and the free-towns of the Upper Rhine, a coalition formed to resist the Duke of Burgundy, began its campaign by laying siege to Breisach. The citizens of the city and Von Hagenbach’s own mercenaries

¹²⁷ G. Schwarzenberger, International Law, vol. 2, *The Law of Armed Conflict*, ch. 39, (London, Stevens & sons, 1945); Historische Personen, Vogt Peter von Hagenbach, in German, at web site; <http://www.mediatime.ch/museum/personen/index.htm>; Don Murray, *Judge and Master*, CBC News Viewpoint | July 18, 2002, http://www.cbc.ca/news/viewpoint/vp_murray/20020718.html; Historischen Lexikon der Schweiz; Burgunderkriege, in German, <http://www.lexhist.ch/externe/protect/textes/d/D8881-1-464.html>.

¹²⁸ Schwarzenberger, International Law; Don Murray, *Judge and Master*; Historische Personen, Vogt Peter von Hagenbach.

¹²⁹ Ibid.

¹³⁰ Historische Personen, Vogt Peter von Hagenbach.

betrayed the governor, deserting from his service and allowing the coalition army to take the city and capture the Landvogt.¹³¹

Rather than summarily execute Von Hagenbach or turn him over to the local inhabitants for an execution preceded by local trial, the Archduke of Austria, at that point responsible for governance of the area surrounding Breisach, decided to hold what is now considered the first recorded trial of a war criminal by an international tribunal.¹³² The Court, presided over by the Archduke of Austria himself as chief judge and prosecutor, was constituted of twenty-eight judges from the Hanseatic League, including representatives from Alsace, Switzerland and states of the Holy Roman Empire, thus making the court tantamount to an international tribunal.¹³³

Von Hagenbach was charged with "crimes against the law of God and humanity," specifically with ordering the murders, rapes and other atrocities carried out by his troops on the citizens of Breisach.¹³⁴ He was also accused of ordering his foreign mercenaries to kill the men in the houses where they were quartered so that the women and children would be without protection and at

¹³¹ Schwarzenberger, International Law; Don Murray, *Judge and Master*, Historische Personen, Vogt Peter von Hagenbach.

¹³² Schwarzenberger, International Law; Don Murray, *Judge and Master*

¹³³ Schwarzenberger, International Law; Don Murray, *Judge and Master*, Historische Personen, Vogt Peter von Hagenbach.

¹³⁴ Ibid.

the mercy and whim of Von Hagenbach's men.¹³⁵ The Vogt began the proceedings by arguing that he could not be judged by the court, for he recognized no other judge but his lord and master, the Duke of Burgundy. Not surprisingly, this line of defence did not impress the assembled judges, and the trial continued.¹³⁶

Von Hagenbach and his counsel then led the defence of "superior orders," a defence that was to be raised innumerable times through the centuries until the Nuremberg and Tokyo Tribunals after World War II. Von Hagenbach attempted to argue that, as a soldier, he owed absolute obedience to his superior, the Duke of Burgundy, who he suggested was ultimately responsible for the actions of the Vogt and his troops.¹³⁷ Ultimately, the court rejected his arguments, found him guilty of the charges, stripped him of his knighthood and ordered him beheaded¹³⁸ for "having trampled under foot the laws of God and of man."¹³⁹ On 9 May 1474 at four o'clock in the morning, he was executed.¹⁴⁰ Almost 450 years

¹³⁵ Don Murray, *Judge and Master*

¹³⁶ Schwarzenberger, *International Law*; Don Murray, *Judge and Master*; Historische Personen, Vogt Peter von Hagenbach.

¹³⁷ Schwarzenberger, *International Law*; Don Murray, *Judge and Master*.

¹³⁸ Ibid.

¹³⁹ G. Schwartzberger, *The Law of Armed Conflict, International Law as Applied by International Courts and Tribunals* (London: Stevens 1968) at 462-466 and also see William Fenwick, "The prosecution of War Criminals in Canada," (1989) 12 Dalhousie L.J., p. 275.

¹⁴⁰ Historische Personen, Vogt Peter von Hagenbach.

elapsed after that trial before another attempt was made at organizing such prosecutions.

By the beginning of the sixteenth century, the combination of the decline of chivalric orders, the development and utilization of firearms and the growing reliance on mercenary armies had begun the steady descent into a moral abyss that was most readily apparent in the inhumane conduct of conflict during the Thirty Years War.¹⁴¹ In spite of, or perhaps because of, the regression of "war morality" in the post-Middle Ages period, development of a new body of literature on the conduct of war began to emerge from the writings of the "classical fathers" such as Vittoria, Belli, Gentili and Grotius.¹⁴² Gentili, in his great work, *De Jure Belli, libri tres*, so clearly wrote on the issue of maintaining morality in the conduct of arms and the consequences when that morality is found wanting:

In war ... victory is sought in no prescribed fashion ... but an enemy should be dealt with according to law.... In dealing with a just and lawful enemy we have the whole fetial law and many other laws in common.... It is the manner of the killing which is forbidden. Necessity does not oblige us to violate the rights of our adversaries [but] the laws of war are not observed towards one who does not himself observe them.... He is foolish

¹⁴¹ Green, *The Contemporary Law of Armed Conflict*, pp. 26-29; Greenwood, "Historical Development and Legal Basis", pp. 15-16; also see Keen, *The Laws of War in the Late Middle Ages*.

¹⁴² The works of these classical fathers, listed below, continue through to today to influence modern thought on the laws of war. Franciscus de Vittoria, *Relectiones Theologicae*, Lyon, 1557, reprinted and translated, (Washington : The Carnegie Institution of Washington, 1917); Belli, *De Re Militarai et Bello Tractatus*, Alberico Gentili, *De Jure Belli, libri tres*, Hanau, 1598, reprinted with translation J.C. Rolfe, (Oxford : The Clarendon press; London, H. Milford, 1933), also available from (New York: Oceana Publications, 1964); and Hugo Grotius, *Hugonis Grottii De jure belli ac pacis libri tres, in quibus jus naturae [et] gentium, itme juris publici praceipua explicantur*, Paris, 1625, reprinted and translated, (London: Clarendon press, 1925).

who connects with the laws of war the unlawful acts committed in time of war. In this connection I make no allowance for retaliation.... At some time the enemy will have to render account to God, and he will render it to the rest of the world, if there is no magistrate here to check and punish the injustice of the victor. He will render an account to those sovereigns who wish to observe honourable causes for war and to maintain the common law of nations and of nature.¹⁴³

Grotius, sharing concerns similar to those of Gentili and explaining why he felt compelled to write on the conduct of war and its abuses, said:

I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations should be ashamed; men resorting to arms for trivial or for no reason at all, and when arms were once taken up, no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.¹⁴⁴

In the seventeenth century, England, in seeking to regulate the behavioural excesses of the armed forces, had developed a series of laws that

¹⁴³ Green, *The Contemporary Law of Armed Conflict*, p. 288 quoting from the Carnegie translation of Gentili at Lib. II. Cap. III, VI, XXIII. XXI, found at pp. 142, 143, 146 159, 272, 257 of the American printing.

¹⁴⁴ Grotius, *Prolegomena to the Law of war and peace*, Translated by Francis W. Kelsey, (New York, Liberal Arts Press, 1957), p. 28. It is interesting to note that while Grotius had great empathy with suffering, he was not adverse to seeing those guilty of serious crimes in conflict punished most severely. In the A. C. Campbell translation of *The Rights of War and Peace*, (London, M. Walter Dunne, 1901), Grotius, in Chapter XX, "On Punishments", at p. 226 notes the difference between Aristotle and Plutarch on the objective of punishment. Grotius states:

"Aristotle passing over example as a motive, confines the object of punishment to the amendment or correction of the offender. But Plutarch has not made the same omission: for he has said, that "where immediate punishment follows the execution of a heinous crime, it both operates to deter others from committing the same crime, and administers some degree of consolation to the injured and suffering person."

Further, at page 227, in commenting on the use of capital punishment, he states:

"But this kind of corrective punishment does not extend to death, which can not be considered, as a benefit in itself, except INDIRECTLY and BY WAY OF REDUCTION, as it is called by Logicians, who, in order to confirm negatives, reduce them to things of an opposite kind. Thus, in Mark xiv. 21, when our Saviour says, that it were better for some, they had never been born, so, for incurable dispositions, it is better, that it would be a less evil, to die than to live; since it is certain that by living they will grow worse. Plutarch calls such men a pest to others, but the greatest pest to themselves. Galen says that capital punishments are inflicted to prevent men from doing harm by a longer course of iniquity, and to deter others by the fear of punishment, adding that it is better men should die, when they have souls so infected with evil, as to be incurable."

stood as Articles of War similar in content to other existing codes developed in France, Switzerland and Germany.¹⁴⁵ The English Act, similar to the Articles of War proclaimed by Gustavus Adolphus of Sweden, sought to restrain, if not forbid, acts such as unauthorized attacks against towns and villages, individual acts of violence against the enemy without authorization from a superior officer, plus pillage, theft for private gain or detention of an enemy prisoner for personal financial gain.¹⁴⁶

B. War Crimes: Nineteenth and Twentieth Centuries

From the time of Gentili in the early 1600s until the end of the nineteenth century, there was little progress in the area of international law concerning war crimes until the dissemination of the Lieber Code by U.S. President Abraham Lincoln in 1863.¹⁴⁷ This Code particularized a number of acts that, if committed by United States military personnel during armed conflict, would be considered

¹⁴⁵ Green, *The Contemporary Law of Armed Conflict*, p. 25.

¹⁴⁶ *Documents on the Law of War*, 3rd ed., Adam Roberts and Richard Guelff, eds., (Oxford University Press, Oxford, 2001), p. 3.

¹⁴⁷ "Instructions for the Government of Armies of the United States in the Field, General Orders," No. 100, 24 April 1863 in D. Schindler and J. Toman, *The Laws of Armed Conflict*, (Dordrecht: Martinus Nijhoff, 1988), p. 3; Green, *The Contemporary Law of Armed Conflict*, p. 29; also see G. R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 *Military Law Review* 1998, 224. The Lieber code, a manual on conduct in war and based on international jurisprudence, was developed by Dr. Francis Lieber (1800-1872), a professor of political science and law at Columbia University for President Abraham Lincoln. This manual of law was first used in 1863 and was the guiding document for the Union Army in the latter half of the American Civil War (1861-1865). The Code addressed such issues as respect for civilians and civilian property (Arts. 22-23 and 34-38), armed forces only attack enemy combatants (Art. 15) and humane treatment of prisoners of war (Art. 49).

criminal, with some acts being regarded as so grave as to warrant immediate imposition of capital punishment without benefit of due trial process.¹⁴⁸

The Lieber Code went so far as to assert the right of an American tribunal, civilian or military, to try each and every person who "...intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed."¹⁴⁹ The Lieber Code was put the test soon after its proclamation when Col. Wirz, the commandant of the Andersonville Confederate prisoner-of-war camp, was tried and condemned for the several atrocities that today would be classified as war crimes as well as crimes against humanity committed by the Confederate camp staff against Unionist prisoners.¹⁵⁰

Within decades following its introduction, the Lieber Code became the prototype for a series of similar codes that emerged in Europe.¹⁵¹ In fact, the Lieber Code, specifically, served as the example for the Institute of International

¹⁴⁸ Art. 44 of the Code, which condemns "wanton violence" against persons and property in invaded territory.

¹⁴⁹ Ibid, Art. 71.

¹⁵⁰ (1865) H.R. Exec. Doc. no. 23, 40th Cong., 2d Sess., 1867-8, Vol. 8; Green, *The Contemporary Law of Armed Conflict*, p. 289; for more on the acts of Col Wirz, see A. Spencer, *A narrative of Andersonville: drawn from the evidence elicited on the trial of Henry Wirz, the jailer, with the argument of Col. N.P. Chipman*, (New York : Harper, 1866) and A. E. Stearns, *The Civil War diary of Amos E. Stearns, a prisoner at Andersonville*, (London: Associated University Presses, 1981).

¹⁵¹ Holland, *The Laws of War on Land*, 72-73 and Green, *The Contemporary Law of Armed Conflict*, p. 289.

Law's *Oxford Manual of the Laws of War on Land*¹⁵² and the Brussels Project of an International Declaration concerning the Laws and Customs of War.¹⁵³ Both works support the concept that belligerents do not have an unrestricted right as to the means of warfare, a concept later expanded upon in the Martens Clause adopted by the delegates at the 1899 Hague Conference.¹⁵⁴ The *Oxford Manual* further advances the early development of the law concerning war crimes wherein it advocated, under the section entitled "Penal Sanction," that those who violate the rules should be tried and punished before a formal judicial process.¹⁵⁵

The European states met in 1899 and 1907 for The Hague conferences and adopted the Convention with Respect to the Laws and Customs of War on Land.¹⁵⁶ The High Contracting Parties, however, unwilling to adopt the position

¹⁵² 1874. See D. Schindler and J. Toman, *The Laws of Armed Conflict*, p. 27.

¹⁵³ 1880. See Schindler and Toman, *The Laws of Armed Conflict*, p. 35; Green, *The Contemporary Law of Armed Conflict*, p. 32.

¹⁵⁴ For a description of the Hague Conventions, see note 104 below. The Martens clause, the preamble to the Convention (II) Respecting the Laws and Customs of War on Land, is not only of significant historical significance, but holds equal import today where in it states:

"The High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgement of military commanders. Until a more complete code of the laws of war is issued, the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usage established between civilized nations, from the laws of humanity, and dictates of the public conscience."

In other words, the Martens clause brings into the discussion of the laws of war the concept that, insofar as the laws of armed conflict are silent on a specific issue or action, customary international will govern. Thus the clause established the fundamental concept that, whatever is not expressly forbidden by the laws of armed conflict, is not necessarily permitted.

¹⁵⁵ Three notable international agreements on the conduct of war were developed in the years around the authoring of the Lieber Code and before the development of The Hague Conventions. They are, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, the 1856 Paris Declaration Respecting Maritime Law, and the 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.

¹⁵⁶ Hague Convention 1899 and 1907. See, Roberts and Guelff, *Documents on the Law of War*, pp. 9-10, 58-137; Schindler and Toman, *The Laws of Armed Conflict*, p. 65; Green, *The Contemporary Law of Armed Conflict*, pp. 31-34;

advocated in the *Oxford Manual* for the prosecution of “war criminals,” were prepared only to concede that a “...belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”¹⁵⁷

The only reference The Hague Convention makes to individual liability relates to the responsibility of an individual for an intentional breach of the terms of an armistice.¹⁵⁸ The failure of The Hague Convention to address individual liability for violations of the Convention should not, however, be interpreted as meaning a belligerent could not proceed against an individual, civilian or military, whether or not their own national, who is alleged to have committed a breach of the customary law of war.

At the end of the First World War, the Allied powers established a commission to investigate the conduct of the Central Powers and recommend

Brownlie, *International Law and the Use of Force by States*, pp. 24-25.

In 1899, at the invitation of the Russian Czar, twenty-six countries met at the Hague to consider a series of initiatives that would become the Hague Conventions. The countries adopted Conventions and Declarations that are today a part of the laws of armed conflict still known as the Laws of The Hague. The Declarations covered a number of agree to proscribed activities in conflict, yet it was the Convention (II) Respecting the Laws and Customs of War on Land that had the greatest impact in 1899. In that convention's annexed regulations, the Parties agreed to rules for the conduct of land warfare that eventually have become a part of Customary International Law.

In 1907 the Parties again met in the Hague and proceeded to consider several other aspects of the conduct of war on land and at sea. The fourth Convention, passed in 1907 reiterated much of what had appeared in the second Convention 1899, however the ideals of the *Oxford Manual* and the Brussels Project now received support in the introduction of enforcement principles.

¹⁵⁷ Conv. 1907 IV, Art 3, Conv. IV Regs, Art 41, Roberts and Guelff, *Documents on the Law of War*, pp. 70 and 80.

¹⁵⁸ Conv. IV Regs, Art 41, Roberts and Guelff, *Documents on the Law of War*, p. 80.

actions on prosecution.¹⁵⁹ Brownlie notes that the commission attempted the imposition through its work "...of criminal responsibility on those persons who were the 'authors of war.'"¹⁶⁰ The commission documented thirty categories of offences and recommended prosecution of those responsible for the atrocities.¹⁶¹

One of the more egregious acts that occurred during the First World War involved the 1915 massacre of hundreds of thousands of Armenians.¹⁶² In what was the first organized genocide of the twentieth century, the infamous action was carried out by a group of Turkish military officers known as the "Young Turks."¹⁶³ From the moment the information came out about the situation, the British and Allied governments repeatedly declared their intention to prosecute those responsible. By the end of the war, Sultan Mehemet VI had pledged to bring the perpetrators to justice in Turkey, thus avoiding the surrender of Turkish nationals to a foreign jurisdiction. After some initial convictions in the

¹⁵⁹ *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties for Violations of the Laws and Customs of War, Conference of Paris 1919*, (1919) Pamphlet 32, Carnegie Endowment for International Peace, Division of International Law, reprinted (1920) in 1920 supplement, 14 *American Journal of International Law*, p. 95; Brownlie, *International Law and the Use of Force by States*, p. 52; Green, *The Contemporary Law of Armed Conflict*, pp. 289, 290.

¹⁶⁰ Brownlie, *International Law and the Use of Force by States*, p. 52.

¹⁶¹ *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties for Violations of the Laws and Customs of War*, p. 95.

¹⁶² D. Lang, *The Armenians: A people in Exile*, (London: George Allen and Unwin, 1981), p. 37. The author estimates that by 1922, over 500,000 Armenians had perished directly or indirectly from the Turkish actions; also see United States Official Documents on the Armenian genocide - compiled and introduced by Ara Sarafian, Watertown: Armenian Review, 1993.

¹⁶³ On the issue of the tragedy that befell the Armenian nation and people, see, United States Official Documents on the Armenian genocide; *Remembrance and Denial: the Case of the Armenian Genocide*, R. G. Hovannisian ed., (Detroit : Wayne State University Press, c1998); and *The Armenian Genocide: A Comprehensive Bibliography and Library Resource Guide*, H. B. Vassilian ed., (Glendale, CA : Armenian Reference Books Co., 1992).

Turkish domestic courts, consequential social unrest in Turkey led to virtual abandonment of internal prosecutions. In 1921, Britain, too, dropped much of its policy on war crimes, believing reconciliation with the Turkish nationalists to be of greater importance.¹⁶⁴ In 1923, through the signing of the Treaty of Lausanne, all those implicated in the Armenian genocide were granted amnesty.¹⁶⁵

Despite the attempt to address "the Turkish issue," the matter of individual liability was considered and attempted at the end of World War I with war crimes prosecutions arising from the actions of Germany and her forces. Combatants on both sides of the conflict in World War I committed atrocities, but it was the victorious Allied powers that sought to try German soldiers, officers and even Kaiser Wilhelm II as war criminals.¹⁶⁶ The Commission of Fifteen established to investigate the persons and causes of the outbreak of the war brought forth its recommendation that:

...on the whole case, both the acts which brought about the war and those which accompanied its inception, particularly the violations of the neutrality of Belgium and Luxembourg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts. It is desirable that for the future, penal sanctions should be provided for such grave outrages against the elementary principles of international law.¹⁶⁷

¹⁶⁴ J. F. Willis, *Prologue to Nuremberg: the politics and diplomacy of punishing war criminals of the First World War* (Westport: Greenwood Press, 1982).

¹⁶⁵ *Treaty of Peace Between the Allied and Associated Powers and Turkey (Treaty of Lausanne)*, 24 July 1923, 28 L.N.T.S. 11.

¹⁶⁶ Y. Dinstein, *War, Aggression and Self-Defence*, p112; Green, *The Contemporary Law of Armed Conflict*, pp. 289, 290.

¹⁶⁷ Green, *The Contemporary Law of Armed Conflict*, p. 290.

On the basis of the work of the Commission of Fifteen, the Treaty of Versailles "indicted" the former Emperor of Germany to stand trial before a special tribunal,¹⁶⁸ as Article 227 of the peace treaty expressed:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused....

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality....

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.¹⁶⁹

Despite the commission's work and the declaration of the Treaty of Versailles, there was a marked lack of consensus by the international community on the issue of holding the Kaiser responsible in his individual capacity for his actions in bringing the world to a bloody and so costly a global conflict. The United States, despite its better-late-than-never participation in the war, opposed trying a head of state. On the other hand, Holland, where the Kaiser had taken refuge and sanctuary, refused to extradite him to the Allied powers. As a consequence of the international split on a war crimes trial and after many political machinations, the Kaiser was not brought to trial but rather was allowed to remain in exile in the Netherlands.¹⁷⁰

¹⁶⁸ Dinstein, *War, Aggression and Self-Defence*, p. 112; Green, *The Contemporary Law of Armed Conflict*, pp. 35, 290, 291.

¹⁶⁹ Brownlie, *International Law and the Use of Force by States*, p. 53.

¹⁷⁰ Dinstein, *War, Aggression and Self-Defence*, p. 112; Green, *The Contemporary Law of Armed Conflict*, pp. 35, 290, 291; also see Brownlie, in, *International Law and the Use of Force by States*, at p. 54, where he states the problem as:

Although prosecution against the Kaiser failed, the principal Allied and associated powers also sought trial "...before military tribunals [of] persons accused of having committed acts in violation of the laws and customs of war,"¹⁷¹ and required Germany to hand over any persons so accused. While Germany refused, it tried the other named accused before the Supreme Court of Germany.¹⁷² As Turkey had done, Germany managed to avoid having her nationals surrender themselves to the jurisdiction of a foreign or international tribunal.

The trials, held in Leipzig, were generally considered unsatisfactory due to the limited number of convictions and the light punishments imposed on those found guilty.¹⁷³ Of the 896 Germans accused of war crimes, six were convicted, and those six received what could be described as token sentences.¹⁷⁴ While few trials were held and only relatively mild sentences were delivered, the

"Difficulty was experienced by the Allied governments in finding the legal formula for the request to the Dutch government for extradition. The Dutch government refused to extradite the Kaiser and exchanges on the subject of his extradition and concerning a safe place of residence and internment continued for many months."

Despite the frustrations and disappointment, Brownlie concluded, "thus the Kaiser was not brought to trial but in the legal developments of the years 1943 to 1946 Article 227 was to have some value as a precedent."

¹⁷¹ Treaty of Versailles Art. 228.

¹⁷² Green, *The Contemporary Law of Armed Conflict*, p. 290; see also C. Mullins, *The Leipzig Trials* (London: Witherby, 1921); Willis, *Prologue to Nuremberg*.

¹⁷³ The Leipzig trials have been soundly criticized as seriously flawed, focusing on specific events and failing to consider the greater issues on the conduct of hostilities. Green, *The Contemporary Law of Armed Conflict*, pp. 290, 291; see also Mullins, *The Leipzig Trials*; Willis, *Prologue to Nuremberg*.

¹⁷⁴ Mullins, *The Leipzig Trials*; R. Bierzanek, "War Crimes: History and Definition," from M. Cherif Bassiouni and V. Nanda, eds., *A Treatise on International Criminal Law* (Springfield, Ill.: Thomas, 1973), pp. 566-567; Green, *The Contemporary Law of Armed Conflict*, pp. 290, 291; also see Willis, *Prologue to Nuremberg*, and M. C. Bassiouni, "Historical Survey: 1919-1998", in *The Statute of the International Court: A Documentary History*, (New York: Transnational Publishers, 1998).

Reichsgericht did lay down principles regarding the defence of superior orders that have formed the basis for the law as it stands today.¹⁷⁵

During the years between the First and Second World Wars, several commissions were formed to study, draft and propose a permanent international criminal court that would be capable of adjudicating issues involving war crimes. In 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties recommended that an international tribunal be established to try those accused of violating the laws of civilized nations, humanity and moral conscience.¹⁷⁶ A year later, however, the Legal Committee of the League of Nations, commenting on the creation of a permanent international tribunal, found there was insufficient agreement on an international criminal law foundation for the creation of a tribunal statute, and the attempt was abandoned by the League.¹⁷⁷ It would take the atrocities of the Second World War before the concept of an international criminal tribunal would be raised again.

With the world again at war in 1939, the matter of war crimes became a significant issue. During that war, it became known to the Allies that the

¹⁷⁵ Green, *The Contemporary Law of Armed Conflict*, Ch. 18, *Developments since 1977*; J.W. Garner, *International Law and the World War*, (London: Longmans Greens, 1920), 477, n. 3; Dinstein, *War, Aggression and Self-Defence*, p. 112.

¹⁷⁶ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 29 March 1919, reprinted in Benjamin Ferencz, *An International Criminal Court: A Step Toward World Peace*, Vol. 1, *Half a Century of Hope* (London: Oceana, 1980).

¹⁷⁷ Ferencz, *An International Criminal Court*, p. 38.

Germans had been and were still continuing to ill-treat, torture and, in many cases, execute captured Allied personnel. Similar acts of cruelty were perpetrated against resistance forces and civilian populations in the occupied countries. The actions taken by Germany and her allies in prosecuting the "Final Solution," the extermination of all Jews in Axis-controlled lands, presented particularly horrific examples of cruelty. Additionally, the Axis powers committed persecutions similar to those directed at the Jews against political opponents, Jehovah's Witnesses, gypsies, homosexuals and many of the medically and mentally unfit among the German population. Similar concerns were also being expressed with respect to the Japanese treatment of Allied prisoners and the civilian populations under their control.

Representatives of the Allied powers met on the matter of prosecuting those responsible for committing or ordering such crimes. In 1942, the Allies established the Commission for the Investigation of War Crimes, which, in 1943, became the United Nations Commission for the Investigation of War Crimes.¹⁷⁸ In the Moscow Declaration, the Allied leaders stated that their governments intended at the conclusion of the war to prosecute German and Japanese civilian and military leaders, regardless of positions or status, for their actions in instigating the hostilities and for their conduct during the armed conflict.¹⁷⁹

¹⁷⁸ *History of the United Nations War Crimes Commission and the Development of the Laws of War*, (London: Published on behalf of the United Nations War Crimes Commission by Her Majesty's Stationery Office, 1948).

¹⁷⁹ Churchill, Roosevelt and Stalin joint declaration of Nov. 1, 1942 (1943) 9 Department of State Bulletin (November 6, 1943) at 310; Moscow Declaration 1943, UNWCC, *History of the United Nations War Crimes Commission*, 107.

In order to proceed with the prosecutions, an agreement was drafted in 1945 establishing an International Military Tribunal to try the “major” war criminals — those criminals whose offences were not geographically limited to a single location — for crimes against peace, for war crimes¹⁸⁰ and for crimes against humanity.¹⁸¹ The legal principles established by establishment of and judgements arising from the Nuremberg Tribunal¹⁸² are now accepted as declaratory of the law on the subject.¹⁸³

The Nuremberg War Crimes Tribunal and Tokyo War Crimes Tribunal, while having strong mandates, still required that the accused be brought into their jurisdictions. With Allied forces in control of Axis countries, the military was able to move to apprehend the accused criminals, and the first prosecutions commenced in 1945 at both the Nuremberg and Tokyo tribunals. It must be remembered that both were established by the “international community,” insofar as that international community was represented by the victorious Allied forces, with the express purpose of prosecuting crimes committed within a specific geographic area and within a specific time frame.

¹⁸⁰ Y. Dinstein, *The Distinction Between War Crimes and Crimes Against Peace*, taken from Yoram Dinstein and Mala Tabory, *War Crimes in International Law*, (The Hague: Martinus Nijhoff, 1996), p. 1.

¹⁸¹ Schindler and Toman, *The Laws of Armed Conflict*, on The London Charter, p. 911; Green, *The Contemporary Law of Armed Conflict*, p. 291.

¹⁸² HMSO, Cmd 6964 (1946); 41 Am. J. Int'l Law (1947), 172.

¹⁸³ Schindler and Toman, *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, 923; this principle was also affirmed by United Nations General Assembly Resolution 177(11) (1950); also see Green, *The Contemporary Law of Armed Conflict*, p. 291.

The process was limited to prosecution of the major actors from Germany and Japan whom the Allied forces held responsible for the outbreak of the Second World War and for the commission of the resultant atrocities. Military commissions administered by the Allied powers were used from 1945 through 1951 to prosecute several thousand other lesser Japanese and German war criminals. At Nuremberg, twenty-two German accused were tried and nineteen convicted, with twelve being sentenced to death. The Tokyo Tribunal prosecuted twenty-five Japanese suspects, all of whom were found guilty. Seven were given capital sentences. At both tribunals, those not sentenced to death received sentences of varying prison terms.¹⁸⁴

While the Allies were determined not to allow these criminals to escape prosecution, as had happened in 1918, there was no suggestion that these tribunals should be of a permanent nature or that they should they address crimes committed outside the actual period of global conflict. However, unlike the prosecutions attempted in 1918, these accused were charged with crimes against international humanitarian law, specifically:

- Crimes against peace
- War crimes
- Crimes against humanity¹⁸⁵

¹⁸⁴ L. Friedman, ed., *The Laws of War: A Documentary History* (1972) p. 779; Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (Austin: University of Texas Press, 1979) p. 23; also see L. Richard, *The Yamashita precedent: war crimes and command responsibility*, (Wilmington: Scholarly Resources, 1982).

¹⁸⁵ Allen Lane, *Nuremberg: A Nation on Trial* (London: Penguin Books, 1979) and Ferencz, *An International Criminal Court*.

This departure from the earlier prosecutions, which had been conducted solely on the basis of "war crimes," was an indication of the direction of things to come.

C. War Crimes: Contemporary Developments and Responses

Despite the end of the Cold War and the lessons of the first half of the twentieth century, the decade of the 1990s saw the rise of ethnic, political and religious tensions throughout the world. Several of these situations, particularly the ethnic conflicts in the former Yugoslavia¹⁸⁶ and in Rwanda,¹⁸⁷ have resulted in shocking atrocities that exemplify the bloodiest of human behaviours.

Members of the public, reacting in revulsion to scenes of horror broadcast daily into their homes, formed a growing movement for establishment of a process for prosecution of those implicated in the breaching of the most basic human rights. The public wanted to see the perpetrators tried by the international community, before all the world and according to international law.

In 1991, the United Nations began the process of investigating alleged offences in Yugoslavia for possible prosecution of the offenders under the charges of war crimes, crimes against humanity and genocide. As a result of the investigations conducted, the Security Council of the UN in resolution 808 (1993) of February 1993 decided that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international

¹⁸⁶ See Appendix 1.

¹⁸⁷ See Appendix 2.

humanitarian law committed in the territory of the former Yugoslavia since 1991.”¹⁸⁸ Humanitarian law in this context was defined as the “principles and rules which limit recourse to violence during a period of armed conflict,” directed toward “protecting those persons which are not or are no longer directly engaged in hostilities — the wounded, shipwrecked, prisoners of war and civilians” to “limit the effects of violence in combat to attain the objectives of the conflict.”¹⁸⁹

On the passing of this historic document, the Secretary-General of the United Nations, Boutros Boutros-Ghali, wrote in the 18 November 1993 issue of *Point of View* that “the Security Council wanted to show as clearly as possible that henceforth, war crimes and the systematic breach of human rights constitute genuine threats to peace and must be treated as such.”¹⁹⁰ On 25 May 1993, resolution 827 (1993) of the Security Council, acting under Chapter VII of the UN Charter and in its role as the main restraining body of the UN, which in turn represents the international community, instituted the International Criminal Tribunal Yugoslavia (ICTY), to be situated in The Hague.¹⁹¹

¹⁸⁸ Virginia Morris and Michael P. Scharf, *An Insider's Guide to the Criminal Tribunal for the Former Yugoslavia*, Vol. 2, p. 4 (New York: Transnational, 1995).

¹⁸⁹ Taken from the Information Sheet No. 13, *International Humanitarian Law and Rights of Man*, Geneva, United Nations, May 1992.

¹⁹⁰ Karine Lescure and Florence Trintignac, *International Justice for Former Yugoslavia: The Working of the International Criminal Tribunal of the Hague* (The Hague: Kluwer Law International, 1996), p. 35.

¹⁹¹ Morris and Scharf, *An Insider's Guide to the Criminal Tribunal for the Former Yugoslavia*, p. 177; see Appendix 3, Statutes of the ICTY.

Pierre Truche, chief prosecutor of the Court of Appeal and chairman of the committee established to create the international tribunal, said in an interview:

Even if this tribunal only tries cases involving the former Yugoslavia, it indubitably represents a major advance in international law. This discussion has preoccupied jurists throughout the twentieth century. After the 1914-1918 War, several attempts were made to create an international tribunal. Then there was the Nuremberg Tribunal and the Tokyo Tribunal. Today, we have reached a new stage.¹⁹²

In the spring of 1994, the Hutus of Rwanda massacred more than half a million Tutsis within one hundred days. When this crisis emerged, despite noble sentiments expressed beforehand, there was little initial support for the creation of another tribunal. The Rwandan Prime Minister-Designate challenged the United Nations Security Council's integrity when he asked: "Is it because we're Africans that a [similar] court has not been set up?"¹⁹³ It is a sad commentary on international political realities that the systematic and brutal annihilation of hundreds of thousands of African men, women and children failed to generate sufficient impetus, in and of itself, for the immediate creation of an international criminal court for Rwanda.

The appalling failure of the international community — in particular, the UN's peacekeeping operations — to respond at the outset of the unrest should have sensitised the world to the needs of this devastated country. It was only

¹⁹² From an interview with *Le Point* 27, February 1993, Number 1067.

¹⁹³ Nelson Graves, "Premier-Designate Compares Rwanda to Nazi Genocide," *Reuters World Service* (May 26, 1994).

after considerable international pressure and with accusations of Euro-centricity echoing through the chamber that the Security Council felt compelled to establish the Rwandan Court. On 8 November 1994, the Security Council, again acting under Chapter VII of the UN Charter through resolution 955 (1994), established the International Criminal Tribunal Rwanda (ICTR), based in Arusha, Tanzania.¹⁹⁴

Both courts have independent Trial Chambers but share the use of a joint Appeal Chamber. The Security Council also arrogated primacy of the tribunals over national courts, as the tribunals can request that a national judicial body

¹⁹⁴ See Appendix 4. The ICTR expresses its views on the value of war crimes prosecutions in its statement entitled *Relevance for Peace and Justice* (<http://www.ictor.org/default.htm>), wherein the Tribunal states:

NEVER AGAIN. African countries must absorb the lessons of the Rwanda genocide in order to avoid a repetition of the ultimate crime" on the continent. Weak institutions in many African countries have given rise to a culture of impunity, especially under dictatorships that will do anything to cling to power.

EVOLUTION OF POLITICAL AND LEGAL ACCOUNTABILITY. It is usually individuals in power or authority that can in practice commit genocide and crimes against humanity. This is the first time high-ranking individuals have been called to account before an international court of law for massive violations of human rights in Africa. The Tribunal's work sends a strong message to Africa's leaders and warlords. By delivering the first-ever verdicts in relation to genocide by an international court, the ICTR is providing an example to be followed in other parts of the world where these kinds of crimes have also been committed. COOPERATION OF AFRICAN COUNTRIES. The accused persons in the custody of the Tribunal in Arusha have been arrested and transferred from more than 15 countries. Several countries in Africa have increasingly cooperated with the Tribunal in the discharge of its mandate. There appears to have been a progressive realization in these countries that they cannot allow fugitives from international justice in their domain.

ENFORCEMENT OF PRISON SENTENCES. The Tribunal prefers, to the extent possible, enforcement of its sentences in Africa, for socio-cultural reasons. This will also have greater deterrent effect in the continent. By providing jails for the Tribunal's genocide convicts, African countries would be demonstrating a serious commitment to the rule of law. On 12 February 1999, the Republic of Mali became the first country to sign an agreement with the ICTR to provide prison facilities for the enforcement of the Tribunal's sentences. A similar agreement was signed with Benin on 26 August 1999. Negotiations with other African countries are nearing conclusion.

POLITICAL, MORAL AND MATERIAL SUPPORT by African countries for the court is essential. Much depends upon the ultimate success or failure of the ICTR because it is dealing with crimes committed in Africa, with more than 500,000 victims. African countries and Governments should make the point that the lives of these victims are as important as those of victims of mass atrocities everywhere by giving a higher profile to the work of the International Tribunal for Rwanda. The Tribunal's work is providing important precedents for the future International Criminal Court and various national jurisdictions. It is making a fundamental contribution to international peace and justice in the twenty-first century.

defer to its own competence. Additionally, the tribunals each have their own critically important Office of the Prosecutor, an office divided into four central areas: prosecution section; investigation section; special advisory section; and information and records. Additionally, the ICTY and ICTR were structured to prevent trials *in absentia*. Both courts require the presence of the accused before the court in order to commence a prosecution.

While the two tribunals share almost identical and interrelated structural frameworks, they were instituted under very different circumstances. In the case of Yugoslavia, combat was still underway when the tribunal was established. In fact, given the ongoing crises in many parts of the former Yugoslavia, the ICTY may be responsible for prosecutions arising from conflicts there for some time to come. The ICTR, however, was begun after conflict had terminated, when some sense of order was being restored in the country.

Despite the circumstantial differences in their founding, the instituting of these tribunals by the UN has changed the nature of war crimes prosecutions. In the World War I situation, the victors forced¹⁹⁵ the vanquished to try their own nationals, while after World War II, the Allied governments themselves tried the defeated Axis leaders. The ICTY and ICTR, however, have been established not by a victorious force but by the international community on behalf of the

¹⁹⁵ Although I must concede that it could be stated as coerced the defeated forces into a generally unsatisfactory compromise that neither saw the guilty punished nor the matters resolved.

international community.¹⁹⁶ Further, the founding of the ICTY and the ICTR provided sufficient impetus to advance the long-striven-for efforts to establish a permanent International Criminal Court (ICC).

The idea of a permanent international criminal tribunal had first been raised in the early part of the twentieth century and had garnered considerable interest after the success of the Nuremberg and Tokyo prosecutions, yet it was not until the international community found itself in the position of needing to establish the ICTY and the ICTR that the proposal for the International Criminal Court achieved the necessary support to bring it into being. The new permanent tribunal has jurisdiction over a broader range of offences than the two temporary tribunals. The offences covered are:

- The crime of genocide
- Crimes against humanity
- War crimes
- The crime of aggression

While this list developed and modified the previous categories of crimes found at the Nuremberg Tribunal, the definition of many of the crimes has expanded the types of offences that will be brought under the aforementioned headings.

On 17 July 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court created

¹⁹⁶ See Appendices 3 and 4 for the charter for both the ICTY and ICTR as well as the countries which have supported these tribunals. It can be argued that many countries have failed to adequately support the ICTY and ICTR through a lack of national will to expel those indicted by international warrants and the various NATO and UN countries with troops in place and capable of ensure the apprehension of these wanted suspects. Nevertheless, the ICTY and ICTR are both the creation of the international will as embodied in the United Nations and therefore, for better or worse, the courts exist from the international will and serve, within their capacity, the interests and needs of the international community.

the 1998 Rome Statute of the International Criminal Court, which resulted in the establishment of the judicial body.¹⁹⁷ In this court, which is a related but non-UN body based in The Hague, participation by states is on a voluntary basis upon their ratification of the final convention. The fact that this court has been established through international convention¹⁹⁸ and not through the mandate or authority of a UN body has several ramifications, and one of the most difficult lies in the area of gaining custody over or compelling the attendance of the accused at trial.

Like the ICTY and ICTR, the ICC has Trial and Appeal Chambers as well as an Office of the Prosecutor. Also, in keeping with the rules established at the two temporary tribunals, no accused will be tried *in absentia*, so the court must have the indicted suspect in custody prior to the commencement of proceedings. The Prosecutor for the ICC is charged with the same basic responsibilities as the prosecutors in the temporary tribunals, but that court's authority to compel cooperation in arresting the accused is very different than that of either the ICTY or ICTR.¹⁹⁹ The prosecutors for the ICTY and ICTR, as a result of the tribunals' Security Council parentage, have the authority to forcibly compel the arrest of an

¹⁹⁷ 1998 Rome Statute of the International Criminal Court, A/CONF.183/9 July 17 1998. See Appendix 5.

¹⁹⁸ The court has been established by convention however, art 12 of the Rome Statute allows for declaration on a case by case basis. See Appendix 5.

¹⁹⁹ The Rome Statute does mandate in arts 59 and 89 that a person in the custody of a State, must be turned over by that State authority to the ICC for trial. However, this falls short of a mechanism that will compel States to act and can not address non-State actors from meeting any enforcement obligations.

accused up to and including the application of military force,²⁰⁰ authority that can be given under the direction and authority of the Security Council acting under Chapter VII. As a cooperative body founded by international convention, however, the ICC has none of the inherent power found in the other two courts.²⁰¹ Additionally and in contrast to any domestic criminal courts, none of the tribunals has an enforcement arm to search for, detain and arrest an accused, and the lack of such a mechanism to effect an arrest has been a major problem for both the ICTY and ICTR. Even with the "large stick" of the Security Council, both tribunals have had little success in getting the accused into their jurisdiction and control.

Any commitment to justice that does not include such instruments of compulsion is a hollow commitment. There can be no justice without effective and consistent enforcement mechanisms for compelling the attendance of a reluctant or fugitive accused before the court.²⁰² It is the issue of interdicting and

²⁰⁰ The statutory authority and legal justifications for the arrest and detention of indicted suspects is discussed below.

²⁰¹ The possibility does exist that the United Nations Security Council may refer a matter to the ICC, but the reality of such an event happening and the efficacy of the system are yet to be seen.

²⁰² It is interesting to note the views of John Keegan OBE, said to be Britain's foremost military historian today, on a separate but parallel issue. For many years, Keegan was the Senior Lecturer in Military History at the Royal Military Academy, Sandhurst, and has been a Fellow at Princeton University and Delmas Professor of History at Vassar. A Fellow of the Royal Society of Literature, he is the author of many best-selling academic historical books, including *The First World War*, *The Battle for History*, *Warpaths*, *A History of Warfare* (awarded the Duff Cooper Prize), *The Second World War*, *The Mask of Command*, *Six Armies in Normandy* and *The Face of Battle*. In his new work *The Iraq War*, (Toronto: Key Porter Books, 2004), Keegan reviews the efficacy of the European Union, an "Olympian body," enforcing laws and treaties with respect to various nations without the governance mechanisms to back-up or enforce the decisions of this supranational entity. He states at p. 109:

"The workings of the Union do seem to lend credence to the idea in which Olympians most want to trust: that laws will be obeyed by their mere promulgation and that treaties can be self-enforcing. The idea is, of course illusory. 'Covenants without swords are but words' judged the supreme realist Thomas Hobbes and nothing that has happened since the seventeenth century gives reason to expect

arresting the non-voluntary accused that will be the focus of the discussions below.

otherwise.

Obedience to law by the mere promulgation of the law, the very argument that Keegan dismisses above, is at the heart of the problem with the enforceability of any International Tribunal's arrest warrant. The mere fact that a warrant or indictment has been issued by a judicial body is not, I suggest, sufficient to ensure that the indictee is brought before the jurisdiction of the issuing Tribunal. Indictments and warrants 'without swords' are also nothing but words and good intentions, paving a tortured path to an enforcement hell."

CHAPTER 4

Nabbing the Devil

A. The Game Is Afoot: Gaining Jurisdiction

No amount of law, however well written, is likely to alter the behavior of a malefactor where the deterrent effect of certain prosecution is lacking.

Lt. Col. Hayes Parks
"The Protection of Civilians"
Israeli Yearbook on Human Rights, 1997

Moral imperatives and historical precedents may support the prosecution of indicted suspects, but due to the structure of the three international tribunals, no prosecution can take place without the apprehension of the accused. One of the most important practical issues raised when questioning the ability of the courts to fulfil their mandates, therefore, is their responsibility and capacity for apprehension of indicted suspects.

(i) ICTY and ICTR

The Security Council, when establishing the ICTY and the ICTR, placed responsibility for such arrests on individual states. Article 29 of the Statute of the ICTY and Article 28 of the Statute of the ICTR both charge "States" to "comply without undue delay with any request for assistance or an order issued by the Trial Chamber." This is to include requests or orders for the "arrest or detention

of persons" and for the "surrender or the transfer of the accused" to the jurisdiction and control of the tribunals.²⁰³ Additionally, in the founding document of the ICTY, resolution 827 (1993), the Security Council ordered all states to co-operate fully with the Tribunal. Section 4 of the document declares that the Security Council:

Decides that all States shall co-operate fully with the International Tribunal and its organs in accordance with the present resolution and the Statutes of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.

Rule 40 in both the ICTY and ICTR statutes gives the prosecutor the power to request the provisional arrest of a suspect before a formal indictment has been prepared by the tribunals. In addition, prosecutors can request that states take "all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness or the destruction of evidence."²⁰⁴

If a state fails to execute an arrest warrant, the tribunals are authorized to inform the Security Council of the breach, and the Council can take further action.²⁰⁵ When a warrant has not been executed as requested, a judge of the

²⁰³ Article 29, Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 28, Statute of the International Criminal Tribunal for Rwanda. See appendices 3 and 4 respectively.

²⁰⁴ Statute of the International Criminal Tribunal for the Former Yugoslavia, Rule 40(i) and Rule 40 (iii); Statute of the International Criminal Tribunal for Rwanda, Rule 40(i) and Rule 40(iii). See appendices 3 and 4 respectively.

²⁰⁵ Rule 59 of the statutes for the ICTY and ICTR. See appendices 3 and 4 respectively.

Trial Chamber of the tribunal is able to issue an international arrest warrant for the suspect, thus effectively making the accused an enemy of mankind and an international pariah.²⁰⁶ In 1971, the International Court of Justice (ICJ)²⁰⁷ held that all states are under an *erga omnes* obligation to follow the authority and direction of the Security Council as "all states can be held to have a legal interest" in the detention and surrender of such individuals.²⁰⁸

(ii) ICC

The authority for the International Criminal Court is found in the Rome Statute.²⁰⁹ The ICC, unlike the other tribunals, is able to exercise its jurisdiction

²⁰⁶Rule 61 of the statutes for the ICTY and ICTR. See appendices 3 and 4 respectively.

²⁰⁷ The International Court of Justice (ICJ), seated at the Palais de la Paix, in The Hague, Netherlands, is the principal judicial organ of the United Nations. The ICJ began sitting in 1946, replacing the Permanent Court of International Justice that had functioned in the Palais de la Paix since 1922. Constituted under a statute similar in nature to that of its predecessor, the ICJ is an integral element of the Charter of the United Nations. The ICJ bench is composed of fifteen independent magistrates, not to include more than one judge of any nationality, each elected to nine-year terms by the United Nations General Assembly and Security Council. The judges, reflecting the principal legal systems of the world, either hold high judicial offices in their own countries or are recognized jurists in international law. The Court renders its decisions in accordance with international treaties and conventions, international custom and the general principles of law. The Court has twin responsibilities: (1) to resolve legal disputes in accordance with international law, as they are submitted to it by States, and only the Member States of the United Nations may apply to and appear before the Court; and (2) to provide advisory opinions on legal questions referred to it by authorized international organs and agencies, and the only bodies currently authorized to request advisory opinions are the five organs and sixteen specialized agencies of the United Nations. In matters of legal disputes, the Court may only act if the States concerned have accepted the ICJ's jurisdiction by: special agreement between the subject States to submit the dispute to the Court; and / or virtue of a jurisdictional clause, usually contained in treaty provisions for the resolution of disagreements over the interpretation or application of the treaty; and / or through reciprocal declarations made by the subject States, accepting the jurisdiction of the Court as compulsory in cases of disputes with other States having made a comparable declarations. In matters of advisory opinions, the Court's procedure is structured in a similar manner as in contentious proceedings, with the same sources of applicable law. The Court's advisory opinions are generally only consultative in nature and are therefore not binding at law on the requesting bodies. [http://www.lawschool.cornell.edu/library/International_Resources/icj.htm and <http://www.icj-cij.org>]

²⁰⁸ *Case Concerning Barcelona Tradition (Belgium v. Spain)*, (1970) I.C.J. Rep. 3, at paras. 33-34.

²⁰⁹ See Appendix 5.

under one of three options described in Article 13 of the statute.²¹⁰ This article confirms that the court may act, in accordance with Article 5, if:

- A situation of apparent criminal commission has been referred by a State Party
- A situation of apparent criminal commission has been referred by the Security Council acting under Chapter 7 of the UN Charter
- The Prosecutor initiated the investigation on his own motion in accordance with Article 15²¹¹

The authority for the court to issue a warrant for an ICC prosecution is found under Article 58 (1-7).²¹² It allows that, where a Pre-Trial Chamber is satisfied with the application and evidence presented by the Prosecutor for the purpose of obtaining a warrant, the court may issue the indictment. The drafters of the statute expect that a State Party that receives the warrant “shall immediately take steps to arrest the person in question in accordance with the laws and provisions of Part 9.”²¹³ Under Part 9, Article 86, all States Parties bind themselves to “co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”²¹⁴

Where a State Party or an *ad hoc* State Party fails to comply with a request to co-operate with the court, the court can refer the matter to the Assembly of States Parties if the case arose as a result of a state referral or prosecutorial

²¹⁰ See Appendix 5, Part 2, Article 13.

²¹¹ Ibid

²¹² See Appendix 5, Part 5, Article 58.

²¹³ See Appendix 5, Part 5, Article 59.

²¹⁴ See Appendix 5, Part 9, Article 86.

discretion under Article 13(c). The court may refer the issue to the Security Council if the initial referral came to the court from the council under Article 13(b). While there does not appear to be a mechanism for a referral by the court directly to the Security Council on a non-cooperation issue arising from a matter not initiated by the Council, such a referral may not be precluded.

Certainly, the Assembly of States Parties does not appear to be precluded from approaching the Security Council for its possible enforcement powers, but given the political nature of the Assembly, one must wonder about the potential for achieving sufficient support for such a reference. If the need for the use of military force to effect the detention of wanted suspects is to be considered, the ICC may be presented with an insurmountable problem in even approaching the Security Council to obtain its support.

It is important to note, however, that the establishment of the ICC does not preclude the Security Council from establishing other *ad hoc* tribunals. In fact, it has been suggested that the Security Council could establish such tribunals and second the ICC to fulfil the role, thus giving the ICC the potential *de facto* support of Chapter 7 powers to assist in enforcing cooperation. A parallel can be drawn between the use of the ICC as a special tribunal by the Security Council and the structure of courts within the domestic law. In Britain, the Court of Appeal, Criminal Division, can also sit as the Courts Marshals Appeal Court. Thus the same bench can function within the same chambers under two distinct and separate mandates and authorities.

The use of the ICC as an *ad hoc* tribunal for the Security Council could allow the Council to use the ICC in a retrospective capacity, something precluded in the court's Statutes. The Security Council could, for example, establish an International Criminal Tribunal Iraq to prosecute crimes arising from the Iran-Iraq war, the 1990 Gulf War, and then use the ICC as the *ad hoc* prosecutorial and judicial body.²¹⁵

(iii) Difficulties in Warrant Enforcement

While both tribunals have had only limited success in gaining custody of indicted suspects, the reasons behind the difficulties vary. In the case of Rwanda, four problems appear to have resulted in few of the accused being arrested.

First, the Rwandan government decided to establish an internal prosecution protocol separate from the ICTR. This may have resulted from initial delays in establishing an international tribunal and subsequent distrust of the effectiveness of the system. There may also have been some concern over the penalty structure of the ICTR, which precludes the death penalty. The current domestic trials in Rwanda, which allow capital sentences, have been criticized for their lack of adequate judicial safeguards, dearth of trained judiciary or counsel and appalling detention facilities, where disease and illness can claim many of the accused before they ever reach a hearing. Many of the suspects the ICTR has

²¹⁵ From a telephone interview in 1999 with Col. C. H. B. Garraway, Directorate of Army Legal Services (ALS2), MoD, London. This view was generally supported by the members of various JAG offices with whom I spoke.

an interest in may well be languishing in Rwandan jails awaiting domestic adjudication without the ICTR being aware of their true identity or presence.

The second and third causes of difficulty in apprehending accused have resulted from the few indictments issued by the prosecutor and the reaction of states to these indictments. In many cases, states did not have domestic legislation that allowed for the arrest, detention and transfer of a suspect to an international body. Compounding this problem, proper identification of a number of the Rwandan "refugees" admitted to other states after the genocide has been difficult to confirm or deny.

This latter issue is also closely related to the question of national will on the part of harbouring states. It is believed that many of the wanted suspects fled to French-speaking countries, including those in North Africa and other former French colonies. The cost and difficulty involved in pursuing possible suspects is not a national priority for many of these states, and the international community, including the Security Council, has not adopted sufficiently stringent measures to coerce them to act.

Lastly, many persons that are of interest to the ICTR are still involved with the Hutu rebel movement that has fled into neighbouring countries to wage a campaign of guerrilla attacks and terrorist actions. Until sufficient local military

attention is turned on these forces, with or without the help of the international community, it is unlikely these suspects will face trial anytime soon.²¹⁶

Yugoslavia has faced a different series of problems, including the geopolitical fracturing of the former state into a number of different states and territories. Each of these governments, ethnically separated from its neighbours and each with its own ethnic minority enclaves, varies in its administrative capacities. Many of the suspects here are believed to reside in a state or ethnic division within a state that is determined to protect them from any possible prosecutions.

Serbia and Montenegro have completely failed to surrender to the ICTY any of the indicted suspects known to be within their territories, repeatedly claiming they lack the required domestic legislation required to extradite the accused to an international body. As has been indicated above, such excuses, as a result of the Security Council's resolution, are invalid and unacceptable.

Croatia has done little better than Serbia. With the exception of General Tihomir Blaskic's voluntary surrender,²¹⁷ only one extradition — that of Saso Aleksouski — has been undertaken. In fact, many of the indicted in Croatia, as in

²¹⁶ Interview by the author with a CSIS analyst, Vancouver, 1999.

²¹⁷ Tihomir Blaskic surrendered voluntarily 1 April 1998. ICTY press information, 27 February 2004, lists the names of the accused, date of the arrest, whether the surrender was voluntary and when transferred. See Appendix 8.

Serbia, continue to hold government posts and receive national support for their actions.²¹⁸

Bosnia, due to its political situation of ethnic Serbian and Croatian autonomous enclaves, has been limited in its ability to co-operate with the ICTY. The government of the Federation of Bosnia and Herzegovina has generally complied with the requests made by the tribunal, but the autonomous zones have behaved in a fashion similar to that of their related state governments. There are currently more than forty-five indicted suspects in the Bosnian-Serb entity of "Srbska." The government of this region has declared its intention of non-cooperation with the ICTY, to the point of declaring the indictments invalid.²¹⁹ Here, as in the previously mentioned areas, many of the indicted continue to hold responsible civic positions, including positions in the police or paramilitary forces.²²⁰ The situation in the Croat territory of Bosnia is a direct reflection of the attitudes and actions of the government of Croatia.

All of the above problems exist despite the authority of the tribunals and of the Security Council. Because of the blatant contempt shown by some states and the inaction or lethargy demonstrated by others, grave concern must be shown for the ability of the tribunals to accomplish their tasks. If the international community does not act to bring the reluctant or recalcitrant states

²¹⁸ "Medal for Indicted Croat," *New York Times* (December 10, 1996); see also "Bosnian Serb Leader Urges Democracy," *International Herald Tribune*, 22 July 1997.

²¹⁹ "Bosnia Serbs Resist UN Order," *Washington Post*, 11 January 1997.

²²⁰ Chris Hedges, "Indicted Serb Town Official 'Not Uncatchable'," *Boston Globe*, 1 November 1996.

into line, the moral authority and credibility of the Security Council, the UN and any international tribunals or courts will suffer serious damage and the promises to victims of horrific crimes become something akin to puffery and political window-dressing.

The international community, through the UN and the Security Council, can take several actions to enforce the orders of the tribunals and thereby compel cooperation. The Security Council must denounce the actions or lack of actions of non-cooperative parties. If this were to fail, the Council could then impose measures such as to:

- Enact UN sanctions against offending states, including suspension of international transportation links; suspension of diplomatic contact; banning of exports; embargoing of imports; freezing all foreign-placed assets; impounding all state vessels; banning cultural, educational and sporting exchanges or participation
- Enact UN sanctions against individuals, including freezing of all assets and a prohibition on recognition or contact with an indicted suspect who holds an official position
- Impose state political and diplomatic sanctions against offending states
- Enhance assistance and increase pressure for effective and fair domestic prosecutions, including the required changes to state laws

If those steps failed to accomplish an expedient and successful resolution, then the Security Council should order the employment of adequate and suitable force to arrest suspects in appropriate circumstances.

B. Unleashing the Hounds: The Need for Forcible Interdictions

There are a number of situations in which the arrest of the accused will not occur without the use of some form of force. As was mentioned above, sanctions and punitive international actions can be effective in the pursuit of indicted suspects. This has recently been evidenced in the Libyan surrender of the bombing suspects in the Lockerbie case. Additionally, there are many who feel that even such notorious characters as Radovan Karadic and Radko Maladic will be turned over to the international community by their own people.²²¹

The difficulty the international community faces is the length of time required for this to occur. In the example of the Libyan suspects, almost fourteen years passed since the tragedy occurred before the suspects were surrendered to court of competent jurisdiction. Throughout this period of time, national and international law enforcement agencies and their governments kept working on having the suspects surrendered for trial. International sanctions imposed against Libya had a telling effect on the country and assisted in its decision to belatedly co-operate with the international community.

Sanctions, however, do not always have the desired effect. In some cases, they merely entrench the nationalist positions of the state and produce a martyr

²²¹ From an interview by phone, 1999, with Col Garraway, *supra* note 214: 1999 interview with L Col W. Hayes Parks, Special Assistant to The Judge Advocate General Of The Army, HQDA (DAJA-IO), the Pentagon; and then Lt. Col. D. McAlea, Director of Law\International, Office of the Judge Advocate General, National Defence Headquarters, Ottawa. The matter of the arrest of Slobodan Milosevic presents an interesting situation that will be discussed below.

complex within its population. In the case of the former Yugoslavia, sanctions have been having little effect on the State Parties, since they have appeared able to sustain a reasonable level of social structure despite international actions. This situation did not continue for Serbia, however, given the tremendous damage its infrastructure, military and industrial complexes suffered as a result of the NATO air attacks. Without international assistance for a long period of time after the cessation of the hostilities, Serbia's ability to rebuild its economy and social foundations appears unlikely.

The matter of the surrender of Slobodan Milosevic to the ICTY jurisdiction is best discussed at this point. Milosevic was transferred from the jurisdiction of the Federal Republic of Yugoslavia (Serbia and Montenegro) into the custody and jurisdiction of the ICTY on 29 June 2001 to face judicial proceedings in relation with offences alleged to have occurred in connection with Serbian activities in Kosovo during the first half of 1999.²²² Milosevic's initial appearance at the ICTY transpired on 3 July 2001 before Trial Chamber III, composed of Judges Patrick Lipton Robinson (Jamaica), Richard George May (U.K.), O-gon Kwon (South Korea).²²³ The former Yugoslav and Serbian leader was additionally indicted for a variety of crimes allegedly committed in Croatia and Bosnia and Herzegovina during the earlier phases of the Yugoslavian Federation's implosion. Milosevic's initial appearance on those indictments was held on 29 October and 11 December 2001.²²⁴

²²² ICTY Case Information Sheet, 22 August 2004, "MILOSEVIC Case (IT-02-54) "Kosovo, Croatia, Bosnia and Herzegovina"", ICTY web site: <http://www.un.org/icty/glance/index.htm>.

²²³ *Ibid.*

²²⁴ *Ibid.*

Milosevic is charged in the alternative as a commander and as a direct participant in the joint criminal enterprise for the commission of offences including crimes against humanity, violations of the laws or customs of war, and genocide.²²⁵ The Prosecutor for the ICTY laid the first indictment against Milosevic on 24 May 1999²²⁶ for Crimes Against Humanity and Violations of the Laws or Customs of War with respect to activities in Kosovo. Further indictments were laid:

8 October 2001 for Crimes Against Humanity, Grave Breaches of the Geneva Conventions and Violations of the Laws or Customs of War, with respect to activities in Croatia;²²⁷

22 November 2001 for Crimes Against Humanity, Grave Breaches of the Geneva Conventions and Violations of the Laws or Customs of War, with respect to activities in Bosnia;²²⁸

In December 2001, the Trial Chamber denied a prosecution application to join the three indictments however on 1 February 2002, the Appeals Chamber overturned the decision of the December 2001 Trial Chamber decision, ruling that the three cases against

²²⁵ *Ibid.* also see *infra* note 226.

²²⁶ The International Criminal Tribunal for the Former Yugoslavia, case No. IT-99-37: The Prosecutor of the Tribunal Against Slobodan Milosevic. This indictment was first amended 29 June 2001 - case No. IT-99-37-I - and then further amended 29 October 2001 - case No. IT-99-37-PT - it now appears under the case No. IT-02-54-T.

²²⁷ The International Criminal Tribunal for the Former Yugoslavia, case No. IT-01-50-I The Prosecutor of the Tribunal Against Slobodan Milosevic. This further amended on 23 October 2002 - case No. IT-02-54-T - the case number now used by the ICTY for the various indictments against Milosevic.

²²⁸ The International Criminal Tribunal for the Former Yugoslavia, case No. IT-01-51-I The Prosecutor of the Tribunal Against Slobodan Milosevic. This indictment was amended on 21 April 2004 - case No. IT-02-54-T - the case number now used by the ICTY for the various indictments against Milosevic.

the accused would be joined and that the crimes alleged to have been committed in all three indictments would be heard in one trial.²²⁹

The 2001 surrender of the former President of Yugoslavia, Slobodan Milosevic,²³⁰ to the ICTY by the government of Serbia²³¹ - achieved without the need for foreign or international military interdiction - could be viewed as a notable exception to the need for forcible interdiction of indicted persons well imbedded within a country or ethnic region. Since the ICTY was stood-up by the United Nations, one could speculate that, given the roles Milosevic played in the former Yugoslavia in the 1990s, he would be a justifiably important subject for indictment by the Tribunal Prosecutor. Until the former President was handed over to the authorities of the ICTY, one could be forgiven for believing that

²²⁹ *Supra* notes 222, 226 and 228.

²³⁰ Perhaps the best short biography of Milosevic is that given by the Prosecutor for the ICTY in the various indictments laid against the former leader. In *The International Criminal Tribunal for the Former Yugoslavia*, case No. IT-01-51-I, The Prosecutor of the Tribunal Against Slobodan Milosevic the indictment reads:

1. Slobodan MILOSEVIC, son of Svetozar Milosevic, was born on 20 August 1941 in Pozarevac, in present-day Serbia. In 1964, he graduated from the Law Faculty of the University of Belgrade and began a career in management and banking. Until 1978, he held the posts of deputy director and later general director at *Tehnogas*, a major oil company in the Socialist Federal Republic of Yugoslavia ("SFRY"). Thereafter, he became president of *Beogradska banka* (*Beobanka*), one of the largest banks in the SFRY, a post he held until 1983.
2. Slobodan MILOSEVIC joined the League of Communists of Yugoslavia in 1959. In 1984, he became Chairman of the City Committee of the League of Communists of Belgrade. In 1986, he was elected Chairman of the Presidium of the Central Committee of the League of Communists of Serbia and was re-elected in 1988. On 16 July 1990, the League of Communists of Serbia and the Socialist Alliance of Working People of Serbia united, forming a new party named the Socialist Party of Serbia ("SPS"). On 17 July 1990, Slobodan MILOSEVIC was elected President of the SPS and has remained in that post until the present date, except during the period 24 May 1991 to 24 October 1992.
3. Slobodan MILOSEVIC was elected President of the Presidency of the then Socialist Republic of Serbia on 8 May 1989 and re-elected on 5 December 1989. After the adoption of a new Constitution, on 28 September 1990, the Socialist Republic of Serbia became the Republic of Serbia, and Slobodan MILOSEVIC was elected to the newly established office of President of the Republic of Serbia in multi-party elections, held in December 1990. He was re-elected to this office in elections held on 20 December 1992.
4. After serving two terms as President of the Republic of Serbia, Slobodan MILOSEVIC was elected President of the Federal Republic of Yugoslavia ("FRY") on 15 July 1997, beginning his official duties on 23 July 1997. Following his defeat in the Federal Republic of Yugoslavia's presidential election of September 2000, Slobodan MILOSEVIC relinquished his position on 6 October 2000.

For more in depth discussions of the rise and fall of Milosevic, see: R. Thomas, *Serbia under Milosevic: politics in the 1990s* (London: Hurst & Company, 1999).

²³¹ 1 April 2001, an ironic, unintended, but perhaps not inappropriate date for the former dictator's arrest.

Milosevic, like the two other most notable indictees, Radovan Karadzic²³² and Ratko Mladic,²³³ would need to be forcibly arrested before they would ever face trial. The

²³² Again, as with Milosevic above, the Prosecutor for the ICTY provides a telling short biography of the accused in, the original indictment and the amended indictment (IT-95-5/18 "Bosnia and Herzegovina" and "Srebrenica") where in they state:

1. Radovan KARADZIC was born on 19 June 1945 in the municipality of Savnik, presently Republic of Montenegro, Federal Republic of Yugoslavia.
2. Radovan KARADZIC was a founding member of the Serbian Democratic Party (hereafter SDS) which was established within the Socialist Republic of Bosnia and Herzegovina (hereafter Bosnia and Herzegovina) on 12 July 1990. From 12 July 1990 until his resignation on 19 July 1996, Radovan KARADZIC was President of the SDS. In that capacity he also, *inter alia*, presided over meetings of the SDS Main Board.
3. Radovan KARADZIC is a long-standing associate of Momcilo KRAJISNIK, former President of the Assembly of Serbian People in Bosnia and Herzegovina (hereafter Bosnian Serb Assembly) and member of the National Security Council and expanded Presidency of the so-called Serbian Republic of Bosnia and Herzegovina (hereafter Serbian republic) and Biljana PLAVSIC, former member of the collective Presidency of Bosnia and Herzegovina, acting President of the Serbian republic, member of the Presidency of the Serbian republic and Vice- President of Republika Srpska.
4. Radovan KARADZIC became President of the National Security Council of the Serbian republic on 27 March 1992.
5. Radovan KARADZIC, became a member of the three-member Presidency of the Serbian republic on 12 May 1992. On the same day Radovan KARADZIC was elected President of the Presidency.
6. Radovan KARADZIC, together with Momcilo KRAJISNIK, Biljana PLAVSIC and other members of the SDS; served on the expanded Presidency of the Serbian republic from the beginning of June 1992 until 17 December 1992.
7. Radovan KARADZIC, along with Momcilo KRAJISNIK, Biljana PLAVSIC and others, was a member of the Supreme Command of the armed forces of the Serbian republic from on or about the 30 November 1992.
8. Radovan KARADZIC was sole President of Republika Srpska from 17 December 1992 until his resignation on 19 July 1996. From 20 December 1992, Radovan KARADZIC in his capacity as Supreme Commander of the armed forces presided over sessions of the Supreme Command.

And further, from the first indictment against Karadzic:

34. RADOVAN KARADZIC was a founding member and president of the Serbian Democratic Party (SDS) of what was then the Socialist Republic of Bosnia and Herzegovina. The SDS was the main political party among the Serbs in Bosnia and Herzegovina. As president of the SDS, he was and is the most powerful official in the party. His duties as president include representing the party, co-ordinating the work of party organs and ensuring the realisation of the programmatic tasks and goals of the party. He continues to hold this post.
35. RADOVAN KARADZIC became the first president of the Bosnian Serb administration in Pale on or about 13 May 1992. At the time he assumed this position, his *de jure* powers, as described in the constitution of the Bosnian Serb administration, included, but were not limited to, commanding the army of the Bosnian Serb administration in times of war and peace and having the authority to appoint, promote and discharge officers of the army. As president, he was and is a position of superior authority to RATKO MLADIC and every member of the Bosnian Serb army and all units and personnel assigned or attached to the Bosnian Serb army.
36. In addition to his powers described in the constitution, RADOVAN KARADZIC's powers as president of the Bosnian Serb administration are augmented by Article 6 of the Bosnian Serb Act on People's Defence. This Act vested in him, among other powers, the authority to supervise the Territorial Defence both in peace and war and the authority to issue orders for the utilisation of the police in case of war, immediate threat and other emergencies. Article 39 of the same Act empowered him, in cases of imminent threat of war and other emergencies, to deploy Territorial Defence units for the maintenance of law and order.

²³³ As above the accused pertinent information is found in, The International Criminal Tribunal for the Former

surrender of Milosevic however, should not in my opinion, be seen as the success of non-military options to compel the surrender of wanted indictees. I suggest that the case of Milosevic is deceptive and that such a view would be in error.

In my opinion, the arrest and surrender of Milosevic - while not requiring military interdiction - came about as the direct result of the consequences of extensive North Atlantic Treaty Organization (NATO) military action directed against Serbia and the Serbian leadership.²³⁴ The NATO air campaign against Serbia, intended to halt the actions of the Serbian Government's criminal aggression in Kosovo, resulted in the almost complete destruction of Serbia's infrastructure.²³⁵ While this military action was

Yugoslavia, case No. IT-95-5/18-I, The Prosecutor of the Tribunal Against Ratko Mladic, Amended Indictment, 11 October 2002, where in it states:

1. Ratko MLADIC was born on 12 March 1942 in the municipality of Kalinovik in the Republic of Bosnia and Herzegovina ("BiH"). He was trained at the military academy of the Yugoslav People's Army ("JNA") in Belgrade, and was then a regular officer in the JNA and subsequently in the army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska ("VRS").
2. In June of 1991, Ratko MLADIC was posted to Knin as Commander of the 9th Corps of the JNA, during fighting between the JNA and Croatian forces. On 4 October 1991, he was promoted to General Major by the President of the Socialist Federal Republic of Yugoslavia ("SFRY"). On 24 April 1992, Ratko MLADIC was promoted to the rank of General Lieutenant, and on 25 April 1992 he was assigned to the post of Chief of Staff/Deputy Commander of the Second Military District Headquarters of the JNA in Sarajevo. He assumed that post on 9 May 1992. On 10 May 1992, Ratko MLADIC assumed the command of the Second Military District Headquarters of the JNA.
3. On 12 May 1992, Ratko MLADIC was appointed Commander of the Main Staff of the VRS, a position he held until at least 22 December 1996. On 24 June 1994, Ratko MLADIC was promoted to the rank of General Colonel.

²³⁴ For a perspective of the NATO campaign by its leadership see: W. K. Clark, *Waging Modern War, Bosnia, Kosovo, and the Future of Combat* (New York : Public Affairs Press, 2001).

²³⁵ The actual figures of surrounding the NATO bombing campaign are very difficult to state with certainty. There are various and often conflicting statistics with respect to the number of missions flown, targets hit, repetitive attacks on the same target, the weight and type of ordinance dropped, the economic impact on Serbia and the percentage of infrastructure damage inflicted by NATO forces, depending on the source reporting the figures. Beyond these statistics, information on the types of targets damaged or destroyed and the individual and cumulative impact of the damage and destruction of national infrastructure on the Yugoslav economy is also very difficult to ascertain. It is beyond the scope of this thesis to analyse the many sources of often conflicting statistics arising from the NATO Kosovo campaign, however, detailed information can be found in: "The Kosovo Report: conflict, international response, lessons learned" / *The Independent International Commission on Kosovo*, (Oxford [Oxfordshire]; New York: Oxford University Press, 2000); A. Schnabel and R Thakur eds., *Kosovo and the challenge of humanitarian intervention: selective indignation, collective intervention, and international citizenship*, (Tokyo: United Nations University Press, 2000); S. Kosiak, *The Cost of Allied Force Air Campaign: A Preliminary Estimate*, (Washington D.C.: Centre for Strategic and Budgetary Assessments, June 10, 1999); P.C. Latowski and M.A. Smith, *The Kosovo crisis and the evolution of post-Cold War European security*, (Manchester: Manchester

not designed to affect the arrest or surrender of Milosevic, his surrender by the new Serbian leadership was, I suggest, a consequential result. The manner through which Milosevic came into the jurisdiction of the ICTY, therefore, was a result of foreign military intervention, albeit not in the form or manner suggested in this thesis. It can hardly be argued that such force be used in the future to secure the arrest of indicted persons, but the use of an appropriate, controlled and disciplined interdiction team may be the only way that some indictees are brought to justice.

If the sanctions are ineffective, how long can the international community wait for a voluntary surrender? There are examples of what happens when justice is long delayed. The contemporary prosecution of war criminals from World War II and the surrounding public controversy of the morality of trying septuagenarians and octogenarians for crimes committed more than fifty years before illustrates the problem. The attempted extradition of Gen. Pinochet has also raised concerns. Many feel that by prosecuting the accused for crimes that happened so long in the past, the courts are stirring up problems and memories that would be better left alone.²³⁶

University Press, 2003); J. T. Correll, "Lessons Drawn and Quartered," *Air Force Magazine* (December 1999); M. Buckley and S.N. Cummings eds, *Kosovo: perceptions of war and its aftermath*, London (New York: Continuum, 2001); *Report to Congress: Kosovo/Operation Allied Force After-Action Report*, (U.S. Department of Defence, January 2000); I.H. Daalder and M. E. O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo*, (Washington D.C., Brookings Institution Press 2000); W.K. Clark, "The United States and NATO: The Way Ahead," *Parameters*, vol.29 (Winter 1999-2000); D. Priest, "The Commander's War: Bombing by Committee: France Balked at NATO Target Series," *Washington Post*, June 20, 1999, p. A1. 70; M.E. O'Hanlon, *Military Dimensions of a Ground War in Kosovo*, (Unpublished Paper, April 26, 1999), (<http://www.brook.edu/dybdocroot/views/articles/ohanlon/1999unp.htm> [accessed May 2004]).

²³⁶ Although it should be noted that the ICTR Trial Chamber decision in KAMBANDA, Jean (ICTR-97-23), upheld at appeal, found Jean Kambanda, the Prime Minister of the Rwandan Government during the genocide, guilty of Genocide, Conspiracy to Commit Genocide, Direct and Public Incitement to Commit Genocide, Complicity in Genocide, and two counts of Crimes Against Humanity, imposing a sentence of life imprisonment. The Court in making this finding contributed to that body of international criminal law applied

Compounding the issue of public and government apathy about or distaste for such prosecutions, there is a concern that the quality of evidence available to the court decades after the crimes may not be satisfactory and that what is available may no longer be as easily applied to a prosecution years after the fact. The ability to locate willing witnesses, the reliability of their memories and their capacity to identify the accused all add to a steady decline of probable convictions commensurate with the time required to arrest and detain the accused. As well, time and circumstance can create new political realities that prevent or dissuade the international community from proceeding with a latent prosecution.

"Justice delayed is justice denied" could never be more true than in those cases where indicted criminals continue to enjoy their lives in freedom and comfort while their victims, living broken and displaced existences, wait for the international community to act. They gradually lose hope, growing so bitter that the seeds of future conflicts are sown on the fallow ground of new generations fed by stories of atrocities and world indifference. Such situations cannot be allowed to continue. There are times when the international community can and must employ force to ensure the arrest and detention of suspects and thus preserve international peace and security.

to the highest State authorities and assisted in creating the conditions which should allow prosecutions to be undertaken against former Heads of State General Augusto Pinochet of Chile, President Hissein Habre of Chad and Slobodan Milosevic of Serbia.

Reasonable parallels can be drawn between domestic and international needs for the use of armed force. In both applications, a sliding scale of escalating force depends upon the threat and difficulty faced by the enforcement agency. In domestic criminal enforcement, there are many examples of, as Col. Garraway put it: "Knock, knock — you're nabbed."²³⁷ When law enforcement agencies are dealing with armed fugitives, however, the level of armed preparedness on the part of the police increases, preparedness that involves the use of special reaction or SWAT teams operating alongside the regular police units. In other more serious cases such as hostage-taking, hijacking or armed insurrection as have been seen in states such as Northern Ireland and Israel, military or paramilitary forces play a central role in resolving the situation.

The use of military forces in the arrest and detention of indicted persons will, of course, be dependent on legal, political, tactical and strategic considerations. There will be examples of arrests in countries that are willing participants in the requests of the tribunal but are unable to accomplish the task with domestic military assets. In such cases, the use of international troops or foreign national troops under an international mandate to assist the state forces could be envisioned.

Alternatively, there will be situations where, for domestic political reasons, a state government may not be able to be seen arresting the suspect. In

²³⁷ From a telephone interview in 1999 with Col. C. H. B. Garraway, see note 215 *supra*.

this situation, the closed-eyes, back-door-open scenario may be offered to the international community for the use of international military assets.

Lastly, there will be the resistant states that steadfastly refuse to support the international court. The ability of an international force to accomplish a detention in these circumstances will depend greatly on the political situation within the uncooperative state. If there are international troops in the country fulfilling a peace-making or peacekeeping role, the ability to effect an arrest will be greatly enhanced and the political repercussions lessened. While the political will required to undertake such missions may be hard to achieve, as can be seen in the former Yugoslavia, the commitment to entering a sovereign nation with no international forces pre-positioned inside the state would almost be beyond imagining.

C. Legal Justifications for the Use of Force

The earliest source for a general duty to search for and arrest indicted persons are the Geneva Conventions of 1949.²³⁸ Each of the Conventions identifies a series of acts occurring during actions of armed conflict that are

²³⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. no. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. no. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. no. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Hereinafter these conventions will be referred to as Geneva Conventions of 1949.

deemed to be “grave breaches” of the agreements when committed against “protected” persons. The fourth of the Conventions at Article 147 states:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.²³⁹

All the Conventions create a positive obligation, in unambiguous terms, to:

...search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party...²⁴⁰

While these articles help us establish an obligation on all High Contracting Parties, the issue of their obligation in an extraterritorial application needs to be resolved. The ICTY and ICTR in their establishing statutes set out the matters over which the courts have jurisdiction. The statutes granted the following:

The International Tribunal shall have the power to prosecute persons

²³⁹*Ibid.* the fourth Convention at Article 147.

²⁴⁰*Ibid.* Geneva Conventions of 1949, Convention 1, Article 49; Convention 2, Article 50; Convention 3, Article 129; Convention 4, Article 146.

committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhumane treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.²⁴¹

While the ICC does not have the Chapter VII genesis of the other tribunals, the Rome Statute under Article 8 gives the court jurisdiction over "War Crimes," described in the same manner as the ICTY/ICTR statute quoted above and well as those matters defined by "grave breaches" in the Geneva Conventions of 1949.²⁴² If the ICC is to be given any additional powers by the Security Council either by way of returned reference, discussed above, or through the use of the ICC as an *ad hoc* tribunal, the same fundamental grounds of jurisdiction apply to at least some of the possible charges within the court's jurisdiction.

²⁴¹ ICTY and ICTR Statutes, Article 2. See appendices 3 and 4 respectively.

²⁴² Appendix 5, Part 2, Article 8.

With the establishing of the obligations under the Geneva Conventions of 1949 and the confirmation that the crimes referred to in those Conventions are, at least in part, the subject of the jurisdiction of the International Tribunals, more specific grounds are needed to justify the extraterritorial obligations to search for, arrest and detain indicted suspects. The first argument is founded in the very concepts of the Geneva Conventions of 1949. While the plain wording of the Conventions mentions only trial before domestic courts, it must be remembered that those were the only judicial mechanisms available in 1949 with which to try such cases. To suggest a limitation on this basis would be to restrict unduly the interpretation of the documents. In fact, the International Red Cross Commentary on the Geneva Conventions of 1949 felt that nothing in the wording compelling the prosecution of grave breaches precluded the transfer of an accused to an International Tribunal, providing that it was recognized by the High Contracting Parties.²⁴³

However, the Vienna Convention on the Law of Treaties states that: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its territory."²⁴⁴ The very essence of the Geneva Conventions of 1949 deals with both intranational and international armed conflict. The common Article 2 of the four Conventions

²⁴³ Jean S. Pictet, gen. ed., International Committee of the Red Cross, 4, Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (1958), p. 593.

²⁴⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, UN Doc. A/CONF.39/27 at Article 29.

affirms that they apply to "...all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" as well as to "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."²⁴⁵

Clearly, the Geneva Conventions of 1949 were envisioned to apply to circumstances outside the territorial confines of each specific High Contracting Party. If the Conventions are to have any meaningful application, they must apply where the conflict takes place and to the Contracting Parties involved in the action, whether they are inside their territory or not. Therefore, the Vienna Convention restriction should not be interpreted as limiting the Geneva Conventions of 1949 to issues and actions only within the High Contracting Parties' territories.

In an armed conflict in which troops of Contracting Parties to the Geneva Conventions of 1949 are involved either as principal participants or as interveners in the aggression, as noted above, the aforementioned responsibilities to search for and arrest wanted criminals should apply. This position finds additional support from the International Red Cross Commentary where, in discussing the responsibilities to search for, to arrest and to prosecute those suspected of grave breaches, it states: "The possibility of handing over the accused to be tried by another Contracting Party willing to prosecute him is an

²⁴⁵ Geneva Conventions of 1949, common article 2.

option open to the Contracting Party in whose territory the accused is or in whose hands he has fallen.”²⁴⁶ It would appear that the ICRC, the International Committee of the Red Cross, felt an implicit duty rested on Contracting Parties to arrest the accused even in extraterritorial circumstances whenever possible or appropriate.

Lastly, the Geneva Conventions of 1949 also provide for the enforcement of penal law by an occupying power and its forces. The exercise of judicial authority and, in particular, of policing duties is an essential part of effective administration of an area by occupying forces.²⁴⁷

The above arguments appear to support the right of states who are Contracting Parties to the Geneva Conventions of 1949 to exercise their authority, based on their contracting obligation, to detain and arrest on an extraterritorial basis those persons indicted for grave breaches of the Conventions. Given the circumstances that would lead to such a situation, the Contracting Parties might well need to use some form of military force to compel the suspects to surrender to their authority. It is within this context that one can look at the specific issues that face the multinational forces in the former Yugoslavia.

On 14 December 1995, the Bosnian Peace Agreement was signed in Paris. With the conclusion of this document, the North Atlantic Council (NAC), acting

²⁴⁶ Yves Sandoz *et al*, eds., International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (1987), p 1026.

²⁴⁷ Geneva Conventions of 1949, fourth Convention, Articles 64-77.

under Security Council Resolution 1031, began an intensive peacekeeping role in the former Yugoslavia. The troops were responsible for implementing the military aspects of the peace agreement as contained in Annex 1A of the accord.

The immediate difficulty faced in using the NATO-led Implementation Force (IFOR) to arrest indicted suspects came from within NATO itself. NAC made it very clear from the outset that while they might possess the authority to arrest persons wanted by the ICTY, they believed they were under no requirement to take action on the matter. While NAC had the authority under Article VI of Annex 1A²⁴⁸ to add to the duties of IFOR in implementing the agreement, they indicated that troops would be used only to arrest suspects they came in contact with in the course of regular duties. A great deal of the NAC reluctance to engage in an active manhunt for the indicted can be ascribed to policy issues, especially those that may have affected IFOR's ability to complete its mission taskings.

Compounding the apparent reluctance of NAC to take a more assertive leadership role, several critics have voiced their opinions on the legitimacy, legality or advisability of tasking IFOR with an active detention and arrest mission. Judith Miller²⁴⁹ laid out three central arguments against IFOR action:²⁵⁰

²⁴⁸Annex 1-A of the Dayton Peace Accord allows in Article VI: "4. The Parties understand and agree that further directives from the [North Atlantic Council] may establish additional duties and responsibilities for the IFOR in implementing this Annex."

²⁴⁹ Judith A. Miller, as of 2004 a partner at Williams & Connolly LLP, Washington, D.C., advises on a wide range of business and government issues. She returned to the firm in January 2000, after serving as the General Counsel for the U.S. Department of Defense for more than five years. Ms. Miller graduated summa cum laude from Beloit College in 1972 and from Yale Law School in 1975.

- The lack of “universal obligation” as opposed to domestic territorial obligations to search for, arrest and detain suspects in keeping with the provisions of the Geneva Conventions 1949
- The arrest warrants issued by ICTY not specifically stating that U.S. forces are to seek out indicted persons²⁵¹
- NAC has determined that the mission for SFOR²⁵² “does not include seeking out or searching for accused war criminals”²⁵³

To begin, the Security Council Resolution 827 established that the ICTY requires all states to “co-operate fully with the International Tribunal,” including taking “all measures necessary” to implement the resolution. More specifically, Article 29(2) of the Statute provides that all “States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, included but not limited to ... the arrest and detention of persons....” The resolutions of the Security Council are binding on all member states and therefore on the conduct of forces or assets under their control. The Tribunal has generally directed arrest warrants to the governments or authorities for the areas the suspects are believed to be living in. However, it has issued a number of international arrest warrants and has included with some the exhortation to “the authorities and officers and agents of all States to act promptly with all due

²⁵⁰ Interview by Paul Schott Stevens, “An Interview with Defense Department General Counsel Judith A. Miller,” *American Bar Association National Security Law Report* (Summer 1996).

²⁵¹ While she refers to U.S. forces in particular, the argument extends to any one national force.

²⁵² IFOR finished its responsibilities to the UN mandate on 20 December 1996, and on the same day, the stabilization force (SFOR) created by UN Security Council Resolution 1088 of 12 December 1996 continued to ensure peace and stability within the areas formally patrolled by IFOR.

²⁵³ Stevens, “An Interview with Defense Department General Counsel Judith A. Miller”.

diligence to secure the arrest, detention and transfer to the Tribunal"²⁵⁴ of the accused. There would appear to be no ambiguity in this request, and as it is supported by Security Council Resolution 827, it should create a binding obligation on all member states and their military forces.

It has been argued, though, that all of the Geneva Conventions of 1949 obligations and the various complementary Security Council resolutions are binding only on *states* and do not apply to their armed forces when they are part of a multinational force that is not a member organization. Such an argument would appear to be wrong in law as well as morally questionable.

While NATO and SFOR are not parties to the Geneva Conventions of 1949, it has been generally accepted that these Conventions are now accepted as customary international law and are therefore binding on all governments *and* intergovernmental organizations established by and representing the states.²⁵⁵ Additionally, to suggest that nations could escape their international obligations by virtue of having their military as part of a multinational force would be to suggest that any state could vitiate its moral and legal responsibilities under the Geneva Conventions of 1949 by banding together with other corrupt states.

Lastly, the mandate of the Security Council is to enforce world peace and security. Under the Dayton Accord, annex 1-A, IFOR and its progeny SFOR have

²⁵⁴ From the International Arrest Warrants issued by the ICTY for the apprehension of Radovan Karadzic and Ratko Mladic. See notes 232 and 233 *supra*.

²⁵⁵ See John F. Hector, "Why U.S. Troops Must Arrest War Criminals" (1997) Summer, American Bar Association National Security Law Report 7, p. 8.

been given the task of ensuring the secure environment necessary for the consolidation of peace. It can be argued that the continued presence of indicted war criminals moving freely in the former Yugoslavia are an endangerment to the peace and security of the region and that therefore SFOR, as an enforcement arm of the Security Council, is under a positive obligation to act to remove the threat.

As the Security Council has established the ICTY as the judicial structure for trying the accused and has required all states to co-operate with the Court, the appropriate action for the removal of the threat is the transfer of the suspects to the Tribunal. SFOR has, therefore, not only the authority to search out, arrest and detain the accused but a clear and direct obligation to do so.

D. Authority to Operate in Non-War Situations

The previous discussions apply to situations where the suspects are in an area of active or recent conflict. The international forces tasked with arresting alleged criminals would be active in a peacemaking, peacekeeping or peace-enforcing role in the territory in question. However, there have been and will continue to be scenarios where the indicted suspect is in a third-party state that is not part of a conflict, a state that will not act to arrest the accused and, in fact, may actively resist any attempts to do so. While a number of non-military options exist for the international community, as has been mentioned above,

there may be situations where a forcible capture on sovereign territory is contemplated. Regardless of any apparent moral justifications, can a "snatch and grab" operation ever be legally sanctioned or accepted?

A long-honoured but somewhat worn maxim of international law has been *male captus, bene detentus*, the concept being that no matter how the accused comes into the jurisdiction of the court, the right to detain and try the individual is acceptable at law. Over the past several decades, this concept has been challenged, and while the results have been mixed, a new thread of law is emerging. Domestic and international courts have begun to adopt the position that a capture that violates the rights of the individual or is in conflict with the law will not be allowed to proceed to trial.

The most prominent abduction case in this century is that of Adolf Eichmann.²⁵⁶ In 1960, Israeli agents abducted Eichmann in Argentina and relayed him to Israel to stand trial for his World War II actions, where he was eventually convicted and executed.²⁵⁷ The kidnapping of the accused was a clear violation of Argentinean sovereignty. While Argentina could have protested and demanded the return of Eichmann, it did not. The matter of the violation of its sovereignty by state agents (or, as Israel claimed, private individuals) was eventually resolved,²⁵⁸ but it was done without a request for the return of the victim. At

²⁵⁶ See D. Lasok, "The Eichmann Case" (1960) 23 Modern Law Review, 507 and D. Lasok, "The Eichmann Trial" 11 Int'l Comp. L.Q. 355-374 (1962).

²⁵⁷ *Attorney General of the Government of Israel v. Adolf Eichmann* (1961) 36 INT'L L REP. 5 (Dist. Ct. Jerusalem).

²⁵⁸ See M. J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Mecain*, American Journal

trial, Eichmann attempted to argue that, by Israel's actions in abducting him, the court had lost jurisdiction due to the violation of the fundamental international rights of Argentina. The court rejected this argument on the basis that the accused had no *locus standi* to raise the issue and that how an accused comes before the court is irrelevant and does not invalidate the trial.²⁵⁹

British courts had traditionally held that the method of arrest and detention was not of relevance for the courts and that any subsequent trials would be lawful. The cases of *Ex. p. Susannah Scott* 109 E.R. 166 (1829) and *Ex. p. Elliot* 1 All E.R. 373 both involved the arrest, detention and return of British subjects by British police operating in foreign territory. In both cases, despite the violations of foreign sovereignty or extradition processes, the courts were unwilling to enquire into the method of capture.²⁶⁰ The first change in British law

of International Law 86, no. 4 (October 1992), 746-756, at 747. Glennon notes that, "[F]ollowing Israel's 1960 abduction of the Nazi war criminal Adolf Eichmann, the UN Security Council constructed Article 2, paragraph 4, of the Charter as proscribing abduction without the consent of the state in which the abduction occurred." He goes on to cite the Security Council's resolution, which read in part, "[T]he violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations.... [N]oting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creates an atmosphere of insecurity and distrust incompatible with the preservation of peace...." Glennon then notes: "Commentators have construed this action as being a definitive construction of the United Nations Charter as proscribing forcible abductions in the absence of acquiescence by the asylum state."

²⁵⁹ The District Court of Jerusalem, relying on numerous decisions of British, American and Israeli courts, stated on the issue:

"[I]t was an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State, whether the illegality was under municipal or international law. A violation of sovereignty constituted an international tort, giving rise to a duty to make reparation which might be waived by the State injured, and the accused could not claim rights which the State has waived – as Argentina has done. There is no immunity derived from asylum given by a sovereign State, except in the case where a person has been extradited for a specific offence not the one for which he is being tried; and in any event the accused could not compel a State to give him protection against its will by concealing his identity."

International Law Reports 36 (1968), pp. 12-13.

²⁶⁰ Supporting these cases are also the matters of *R. v. Lopez & Sattler*, 1 Dearsley & Bell's Crown Cases 525,

appeared in the case of *R. v. Bow Street Magistrates ex p. Mackeson* (1981), 75 Cr. App. R 24. In this case, a British subject was deported from Zimbabwe at the instigation of and with the assistance of British police authorities rather than having been the subject of an extradition request. The court considered Australian and New Zealand cases and decided that it had discretion to decline the jurisdiction of the matter.

Shortly after this decision, however, in the case of *R. v. Plymouth Magistrates Court et al., ex p. Driver* [1985] 2 All ER 681, the court found that no discretion to deny jurisdiction is given to the courts in Anglo-American jurisprudence on the basis of how the accused was brought to court. The most recent, and perhaps definitive, case came in the form of *Bennett v. Horseferry Road Magistrates' Court and another* [1993] 3 All ER. Here, a British subject was removed from South Africa at a time when no extradition treaty existed between the states. At the urging of and with the assistance of British police authorities, the accused was put on a flight to Britain by South African authorities without any due process.

The court, on reviewing the issue, determined that it was an abuse of process for a person to be forcibly brought within the jurisdiction in disregard of

546-47 (1858) wherein the court upheld the prosecution of the accused arrested abroad and found that the Court's jurisdiction over the accused was not impacted by the issue of "...whether the capture ... [and] ... subsequent detention were lawful or unlawful..."; *Afouneh v. Attorney General*, 4 Ann. Dig. 327, 327-328 (Palestine Sup. Ct. 1942) wherein the Court refused the accused's claim that, as a result of the kidnapping that occurred in order to bring him before the court, the court lacked the jurisdiction to hear the matter due to the unlawful manner in which he was brought within the jurisdiction of the court; and, in *re Karoly R.*, 4 Ann. Dig. 345, 345-46 (Hungarian Minister of Justice 1928), the court stated: "There is no rule of public international law according to which courts of a State have no right to conduct criminal proceedings against an accused who returned from abroad by any means other than Extradition."

extradition procedures available for the return of an accused person to the United Kingdom. Additionally, the majority found the High Court has the power, in the exercise of its supervisory jurisdiction, to enquire into the circumstances by which a person is brought into the jurisdiction and, if having found a disregard for extradition procedures, can stay the prosecution.²⁶¹

In a similar finding to that of *Mackeson and Bennett*, the American case of *U.S. v. Toscanino* (1974) 500 F. 2d 267 held that the accused, who had been illegally abducted from Uruguay, then tortured and surrendered to American authorities, was entitled to have the courts consider their jurisdiction as a result of the manner of his detention. Three factors were considered by the court beyond the matter of his torture:

- The involvement of American authorities
- The lack of any attempt to request extradition
- The violation of Uruguayan territorial sovereignty

This case was later distinguished by the American courts, which held the decision to its restricted facts, emphasizing the brutality of torture inflicted on the accused.

The leading case in America is *U.S. v. Alvarez-Machain* (1992) USSC. The accused in this case was abducted from Mexico to the United States by bounty hunters hired by American federal law-enforcement authorities. While the

²⁶¹ This is similar to the South African case of *S. v. Ebrahim*, S Afr. L. Rep., Apr.-June 1991, 8-9, in which the South African Court of Appeal stated, "[A]bduction represents a violation of the applicable rules of international law, that these rules are part of law, and that this violation of the law deprives the Court ... of its competence to hear [the] case."

abduction violated the extradition treaty between the states and resulted in a formal protest by Mexico, the majority of the court held that the extradition treaty did not specifically prohibit the kidnapping of individuals. The majority stated that the extradition agreement did not purport to specify the only method by which a person could be brought into custody; the minority of the court emphasized the state involvement in the action and the comprehensive nature of the treaty.

There are many other examples of case law that cover the full range of possible findings. Shearer summarizes the situation in the following terms: "Abduction is such a manifestly extra-legal act, and in practice so hazardous and uncertain, that it is unworthy of consideration as an alternative method to extradition in securing custody of the offender."²⁶² The case of *Bennett* may be indicative of a general move to reconsider the potential damage to the administration of justice when a court ignores the violations of international law and the suspect's most basic human rights. Yet, at this time, it appears that a fugitive brought before a criminal court in breach of international law may still be tried.²⁶³

All of the above-mentioned cases involved international law as applied in domestic courts. In each of the cases above, with the exception of *Eichmann*, the

²⁶² I. A. Shearer, *Extradition in International Law*, (Manchester: Manchester University Press, 1971), p. 75.

²⁶³ Even Glennon, *State-Sponsored Abduction*, admits that despite his views against the actions of the U.S. government in the *Alvarez-Machain* case, the Court held "...that there is no jurisdictional bar to trying a defendant seized in violation of international law."

courts were considering the question of a national court having jurisdiction to try its own national or a foreign national for the breach of a domestic criminal law. Further, it should also be noted that in the cases where the court did review the manner in which the accused was brought into the jurisdiction of the court, the central issue of concern for the court was the violation of extradition procedures. Whether a court would find in a similar fashion if, with the authority of the Security Council and sufficient notice, a state refused to alter or follow its domestic law to effect the surrender an accused to an international tribunal is entirely uncertain.

The above cases, I suggest, while certainly offering insight into the larger issue, do not assist in determining the central issue of how a court, domestic or international, would consider its jurisdiction over a fugitive — indicted by an international criminal tribunal and accused of crimes that violate the most fundamental laws of the nations — who was captured by the forces or agents of a nation, or group of nations, acting in a third country. I admit that even if the courts did find jurisdiction over such cases, as it appears they would, regardless of the means through which the accused was brought before the court, such a ruling would not, in and of itself, be an endorsement of such actions.²⁶⁴

²⁶⁴ I suggest that if a court did find the person to have been brought into its jurisdiction by “unlawful” means, the remedy of dismissal would be inappropriate. Glennon, also in *State-Sponsored Abduction*, disapprovingly suggests that some — apparently those with whom he would disagree — might suggest: “It makes no sense, the argument would go, to let the guilty go free because the constable erred. The issue before the court is the guilt or innocence of the accused, not the conduct of the arresting officers.” He suggests that international law is increasingly directed at protection of the individual. He asserts that, “‘sovereignty’ misconceives the nature of a state, which is, in the end, merely an aggregate of individuals.” He adds that, “State ... rights or interests ultimately are no more than collective individual rights or interests.” Perhaps his viewpoint has some validity

The only decision by the current international tribunals comes from the trial of Slavko Dokmanovi before the ICTY.²⁶⁵ Dokmanovi was charged with various atrocities committed at Ovara farm, near the city of Vukovar.²⁶⁶ The accused argued that his arrest and detention were illegal and, consequently, that the trial court had no jurisdiction to hear the matter.²⁶⁷ In this case the accused, wishing to make a claim to the UN for losses to his farm, left the Federal Yugoslav Republic and entered Croatia, where, on his arrival at the UNTAES base, he was arrested by UNTAES forces and advised of his rights by a Tribunal prosecutor. The accused argued that his arrest was illegal on several grounds, one of which was that he had been lured to the meeting under false pretences and kidnapped by the UN forces.

The trial chamber, after reviewing national and international law, considered the issue of whether the accused's arrest was arbitrary in violation of human rights customs. The court found, and was supported by the appeals chamber, that the luring of a suspect into a jurisdiction to effect his arrest is not

when considering the matter of individual States using state actors to enforce their own domestic criminal laws in an extra-territorial interdiction. The criminals at issue, however, are persons believed by an international court to have violated the rights of individuals and to committed the most abhorrent moral crimes against men, women and children. Consequently, there is a collective interest of all states, as collections of moral persons, to see these offenders brought to trial.

²⁶⁵ Dokmanovi (IT-95-13a), "Vukovar Hospital."

²⁶⁶ The indictment drafted under the term of former Madam Justice Louise Arbour. The events occurred on 20 November 1991, when 198 Croatian men and two Croatian women were taken from the Vukovar Hospital by the JNA First Guards Motorized Brigade, placed on buses and transported to the Ovara farm. There the prisoners were tortured, beaten and eventually executed. It was alleged that Slavko Dokmanovi, president of the Vukovar Municipality, was present at the farm during this period, aiding, abetting and participating in the atrocities.

²⁶⁷ Hearing date Monday, 8 September 1997 (IT-95-13a-PT), Prosecutor *v.* Slavko Dokmanovi.

an abuse of process or an abuse of his rights.²⁶⁸ Although this arrest did involve the use of military forces, it was conducted in a somewhat different manner than the “snatch and grab” operations executed against other indictees. In the other cases, to date, the argument that the ICTY trial chamber has no jurisdiction over the accused due to the manner of their arrest has not been advanced.

U.S. Senator Arlen Specter, in 1986, suggested that the United States apprehend abroad the wanted criminals and bring them back for trial.²⁶⁹ This idea was not particularly well received when it was made,²⁷⁰ and I am not now suggesting that the views of a U.S. senator carry any weight in the legal debate, but as far as they may apply to terrorists or criminals wanted for their crimes against humanity or gross violations of human rights, Senator Specter’s views do raise an issue that also requires consideration.

²⁶⁸ The court did note, however, that if this arrest had been conducted in order to circumvent an extradition treaty or if the arresting troops had used excessive force to effect the arrest, the court may have found otherwise. Further, it is interesting to note that the court found that the accused had been arrested when detained in Croatia and against the accused’s position that only Federal Republic of Yugoslav (FRY) authorities had the right to arrest him. The court noted that Article 20 of the ICTY Statute (see Appendix 3) did not restrict the arresting of an indictee to States only. As UNTAES was the UN Security Council mandated international authority operating in Croatia and since FRY authorities had failed to co-operate with the ICTY as was their duty, the prosecutor had to engage in other means of executing the warrant and effecting the arrest. See trial chamber decision, Case no. IT-95-13a-PT, *Prosecutor v. Slavko Dokmanovi*, 22 October 1997.

²⁶⁹ U.S. Senator Arlen Specter suggested in 1986 to the U.S. public that: “[I]f the terrorist is hiding in a country ... where the government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial. We have the ability to do that right now, under existing law. Under current constitutional doctrine, both U.S. citizens and foreign nationals can be seized and brought to trial in the United States without violating due process of law.” Statement of Sen. Specter, Cong. Rec. S1384, daily ed. 19 February 1986.

²⁷⁰ See Glennon, *State-Sponsored Abduction*, p. 748, in which he cites the Senator’s speech and then notes that, unlike the Senator, “To his credit, however, Legal Advisor Sofaer pointedly declined to endorse such unlawfulness.”

It could be argued that Article 2(4) of the United Nations Charter²⁷¹ provides support for the extraterritorial use of force in general to prevent or stop war atrocities and gross violation of human rights.²⁷² As such, I suggest that it could also be considered as support for the extraterritorial use of force to arrest those responsible for the atrocities once they have occurred. It is suggested that the general proscription in Article 2(4) is not as broad as it may first appear in that the specific objectives of the article — the protection of territorial integrity of

²⁷¹ Charter of the United Nations, Article 2(4), states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

²⁷² Such intervention would fall within the concept of humanitarian intervention. Arnold Kanter, a Senior Fellow at the Forum for International Policy and at the RAND Corporation, former Under Secretary of State and advisor to the State Department and National Security Council, writing the memorandum, "Policy on 'Armed Humanitarian Intervention,'" to the U.S. President on behalf of the National Security Advisor in *Humanitarian Intervention: Crafting a Workable Doctrine*, Washington, Council on Foreign Affairs, 2000, at pp. 3-4, defines, from an American perspective, the concept of armed humanitarian intervention. He writes:

"The concept of 'armed humanitarian intervention' and its various synonyms typically are vaguely defined and elusively broad. There is, however, a general consensus on at least some of its essential characteristics. It is 'armed' in the sense that the threat and employment of military force is a central feature. That is, we clearly are not talking about sending personnel and equipment into non-hostile Humanitarian Intervention environments to provide relief from natural disasters such as a typhoon that strikes Bangladesh. We also mean something more than actions such as the water purification team and equipment dispatched to Rwanda in response to the manmade disaster there.

It is 'intervention' in the sense that it entails sending military forces across the sovereign borders or into the sovereign airspace of another country that has not committed international 'aggression' against another state. Without getting bogged down in semantic disputes about whether armed humanitarian intervention entails the 'offensive' or 'defensive' employment of military force, we clearly are talking about something other than the well-understood concept of repelling or defeating an invasion across internationally recognized boundaries. On the contrary, armed humanitarian intervention constitutes an extreme case of interference in the internal affairs of another state.

It is typically referred to as 'humanitarian' because it entails the threat or use of U.S. force in situations that do not pose direct, immediate threats to U.S. strategic 'interests.' It is tempting to go on to say that it is 'humanitarian' because it refers to circumstances in which our moral sense and human sensibilities are being massively assaulted. As will be discussed below, however, the term 'humanitarian' should not be construed either narrowly or literally.

First, even when our motives are relatively disinterested (at least in the sense that the defence of U.S. interests is not a principal reason for becoming involved), interventions inevitably have political consequences that make them anything but impartial in their effects. Indeed, efforts to behave as though we are impartial may be not only self-deceiving but also self-defeating, in the sense that they inhibit action to deal decisively with the perpetrators of the outrage.

Second, the very term 'armed humanitarian intervention' borders on being an oxymoron in the sense that it entails the threat or use of violence for what purport to be humanitarian purposes."

a state and the political independence of a state — are the two grounds for forbidding the use or threat of use of inter-State force. It has been argued that force used against a State will not violate the intent of art. Article 2(4) provided the purpose of the force utilization does not threaten the political independence or territorial integrity of the “victim” state.²⁷³

The above reasoning has been used to justify armed humanitarian interventions by various States into the territory of other States for the purpose of forcing the cessation of wide scale violations of international human rights.²⁷⁴ Holly Burkhalter, Advocacy Director of Physicians for Human Rights, Coordinator of the U.S. Campaign to Ban Landmines and former Advocacy Director of Human Rights Watch, wrote in 1999 on the need for humanitarian intervention:

²⁷³ Dinstein, *War, Aggression and Self-Defence*, pp. 84-85; A.A. D’Amato, *International Law: Process and Prospect*, (Dobbs Ferry, N.Y.: Transnational Publishers, 1987), pp. 58-59. Dinstein does not agree with this interpretation and, in fact, states that it “... fails to give proper account to the conjunctive phrase ‘or in any other manner inconsistent with the Purposes of the United Nations’.” The purpose of the UN Dinstein finds in Article 1(1), which reads:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

²⁷⁴ This argument has been used with mixed success in such military interventions as Bangladesh, Grenada, the Falklands, Kosovo and most recently, at least in part, as *post facto* justification for the 2003 invasion of Iraq. For more on this subject from both sides of the argument, see: F. K. Abiew, “The Evolution of the Doctrine and Practice of Humanitarian Intervention” (The Hague : Kluwer Law International, 1999); M.V. Bhatia, *War and Intervention : Issues for Contemporary Peace Operations*, (Bloomfield : Kumarian Press, 2003); M.S. McDonald and W.M. Reisman, “Response,” 3 *Int.Law* 438 (1968-1969); *Humanitarian Intervention: Crafting a Workable Doctrine*, (Washington, D.C.: Council on Foreign Affairs, 2000; D. Chandler, *From Kosovo to Kabul : Human Rights and International Intervention*, (London: Pluto Press, 2002); S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, (Oxford: Oxford University Press, 2001); J.-P.L. Fonteyne, “The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter,” 4 *C.W.I.L.J.* 203, (1973-1974); M.E. O’Hanlon, *Expanding Global Military Capacity For Humanitarian Intervention*, M.E. Sharpe, *International Intervention in the Post-Cold War World : Moral Responsibility and Power Politics*, (Armonk: privately printed, 2004); N. J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, (Oxford: Oxford University Press, 2000).

In my view, unchecked mass killing anywhere is a threat to global peace and stability, and thus to American interests. Each such occasion requires an active and concerted diplomatic and political effort commensurate with the resources and international stature of the United States. On some occasions, effective action to suppress genocide or crimes against humanity may require an American military response as well.²⁷⁵

Yoram Dinstein, however, suggests that those who make such arguments, through minimizing the issue of nationality and emphasizing the use of forcible measures for the protection of all individuals or groups of individuals, distort the meaning of Article 2(4).²⁷⁶ And yet, to use this article as legal support for limited,

²⁷⁵ H. J. Burkhalter, writing the memorandum "Intervention to Stop Mass Killing or Genocide" to the President on behalf of the Secretary of State in *Humanitarian Intervention: Crafting a Workable Doctrine*, (Washington, D.C.: Council on Foreign Affairs, 2000), at page 21, went on to state:

"The inherent integrity of individual human beings is a universal value embodied in the founding of this country, in our Constitution, and in the international human rights treaties we have signed. Unrestrained depredations against innocent men, women, and children are an assault on these values and upon human dignity everywhere. This moral imperative should not be seen as separate from, competitive with, or antithetical to other American interests. The moral necessity of countering crimes against humanity is inextricably linked to pragmatic and self-interested reasons for action. Just as it is in America's vital national interest to deter those who engage in international terrorism, drug trafficking, nuclear proliferation, and environmental degradation, so too is it in our vital interest to prevent and quell mass killings of non-combatants, wherever such crimes occur."

Ms. Burkhalter writes, as does Mr. Kantor, from the position of the American administration of the time. It is interesting to note, however, the degree of interest and willingness to venture into intervention to stop atrocities on the basis that they represent a threat to peace and an affront to human dignity.

²⁷⁶ Dinstein, *War, Aggression and Self-Defence*, pp. 88-89. Dinstein argues that if the violations alleged are pervasive and consistent enough to warrant intervention to be considered a treat to the peace of the international community, collective action under the Security Council should result. He concludes that, "...[N]o individual State is authorized to act unilaterally, in the domain of human rights or in any other sphere, as is it were the policeman of the world." Dinstein's position is certainly consistent with the Israeli position, as the argument of a humanitarian exception in Article 2(4) could adversely affect Israel through creating a justification for Arab nations to intervene in support of the Palestinian people. Despite the legal reasoning and validity of Dinstein's position, it would appear that it is not a consistent policy with the actions of the government of the United States, which has been acting, when in its interests, precisely as the world policeman. There are those who take a very different view from Dinstein's, including M.E. O'Hanlon in his book *Expanding Global Military Capacity For Humanitarian Intervention*, (Washington, D.C.: Brookings Institute Press, 2003), where at p. 4 he states: "The frequent failure of the industrial democracies to do much about such conflicts weakens their moral authority and international legitimacy as global leaders. The world community cannot excuse its neglect of many civil conflicts on the grounds that humanitarian intervention would violate international law and the UN Charter..." Further, at pp. 4-5, he notes that organizations of nations have taken steps to deal with this matter, including the NATO intervention in Kosovo and the new African Union. Citing the Organization of African Unity, Constitution Act of the African Union, Lome, Togo, June 12, 2000, he quotes from Article 4 of the Constitution, which addresses "...the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war, genocide and crimes against humanity." Even Kofi Annan, Secretary General of the United Nations, recognized the validity of humanitarian intervention, although not without concern for the effect on the role of the United Nations

extraterritorial "law-enforcement" in the form of the interdiction and arrest of an indicted international fugitive, when the State in which they reside is either unable or unwilling to it, could, I suggest, be a use of force in a manner not inconsistent with the purposes of the United Nations, and conducted without risk to the territorial integrity or political independence of the harbouring state.

We are left with several unanswered questions on problems that bear on the legal authority of states to act in the forced arrest of indicted suspects. Can the Security Council "legislate laws" that would legalize abductions of wanted war criminals in violation of the international legal norms of national sovereignty? Could a military force, acting under Security Council authority, abduct an indicted suspect, violate national sovereignty and still legitimately bring that person before a tribunal? The question of an International Tribunal, established by convention or by Security Council authority, trying an accused who was abducted by national or multinational forces in violation of international law has not been considered.

E. Political Considerations

Aside from the legal and moral justifications for detaining and arresting indicted suspects, several practical problems arise at both the political and operational levels. The decision to employ force in an interdiction mission is

and the Security Council. See Appendix 6 for a copy of the text of that speech by the Secretary General to the General Assembly.

fraught with issues that must be considered prior to the "go" order. These decisions have ramifications for the international community as well as for the domestic governments of the member states involved in the action. The discussions below address the matter of consequences as they affect all leadership elements: international, national and non-governmental.

(i) Political Consequences

While there are many compelling reasons to ensure that wanted criminals are brought to justice, the identity and position of the selected suspect will affect the decision to act. The removal of particular leaders can impair the ability of the international community to negotiate possible political resolutions to the crisis in one of several ways:

- The wanted suspect may negatively influence any current discussions on negotiated solutions in order to protect their own position and security.
- If the particular individual is removed from a position of power, would the new leadership be easier or more difficult to work with? The old adage, "Better the devil you know than the devil you don't," holds particularly true in these circumstances.²⁷⁷
- If new leaders are also in fear of potential arrest, they may be much more resistant to diplomatic approaches by international parties. The international community could then find itself in the uncomfortable position of having to enter immunity agreements for specific individuals in order to achieve a negotiated settlement.
- The new leadership, backed by nationalist support, may become more hostile to the international community and military, thus effectively increasing and/or prolonging the hostilities. It may also influence the

²⁷⁷ This was one of the reasons generally ascribed to the reluctance of the international community to indict Slobodan Milosevic. It was suggested it was necessary to leave him in a position where there was at least some hope for an eventual peaceful solution in Kosovo and that by making him a declared suspect, any discussions would be imperilled. Additionally, the optics of the international community and world leaders being seen negotiating with a wanted war crimes suspect are very negative.

leadership to attempt violent acts against international forces²⁷⁸, international leaders²⁷⁹ or innocent civilians.²⁸⁰

- Any deterioration in relations with the new leadership and the international community could adversely influence UN and NGO humanitarian missions in the affected areas.

If any of the above were to occur, the overall cost of maintaining a firm position on prosecutions could cost many innocent people their lives, including members of multinational forces. The international body seeking to enforce the arrest would need to consider the international and domestic political consequences of creating a more hostile, difficult or intractable situation.

Directly linked to the above problem of creating a negative result from a positive act is the cost of failure. Should a mission be attempted and the suspect not be captured, the resultant consequences could imperil the overall objectives of the intervention. Where subterfuge was employed, any pre-existing trust in the international forces or their leadership would evaporate. One can imagine the increased level of paranoia in a suspect after an unsuccessful raid and the resultant influence this may have on their future actions.²⁸¹ It must also be

²⁷⁸ Following the detention of Milan Kovacevic and the death of Simo Drljaca in mission "Tango," 10 July 1977, by twenty-two SAS, a grenade attack occurred at a British military outpost that caused damage but no injuries. Thomas B. Hunter, "Stalking the Devil: SOF Join the Hunt for War Criminals," *Journal of Counterterrorism and Security International* 8, (Fall 1998), p. 10.

²⁷⁹ The planned assassination of former U.S. President George Bush would be an example in point.

²⁸⁰ It was suggested in the media that the assassination of BBC reporter Jill Dando on 23 April 1999 in London was a professional hit and was in retaliation for her coverage of the Kosovo conflict. See "BBC star's murder may be Serb 'revenge,' police say," *Vancouver Sun*, 28 April 28 1999, p. A20; see also *Vancouver Sun*, 1 May 1999, p. A19.

²⁸¹ The failure of the U.S. mission in Somalia to capture General Mohammed Farrah Aidid greatly influenced the strength of Aidid's position and the eventual negotiations.

remembered that a "failed" mission could involve the death of the suspect,²⁸² collateral assets (innocent individuals, including the suspect's family members)²⁸³ and the loss through death or capture of international force members.²⁸⁴ Any one of these scenarios could have a devastating effect on a domestic government or on the ability of the UN to continue to pursue a mission.

The domestic political leadership must consider the costs involved in allowing their troops to undertake these high-risk missions. These costs appear in different forms, but they all have direct political implications for member states that participate. The concern for the loss of soldiers has a number of facets. First, there is the direct cost of losing a member of the most elite units of any country's military.²⁸⁵ It takes several years of training and selection to produce a

²⁸² There have been two deaths of indicted suspects in the former Yugoslavia. The effect of these losses does not appear to have influenced the political situation but, should such a fatality occur with a higher-placed accused, pronounced ramifications should be expected.

²⁸³ Vlatko Kupreskic (IT-95-16) and Anto Furundzija (IT-95-17/1), two ICTY indicted suspects, were seized from homes by Dutch and British Special Forces. In the case of Kupreskic, despite the precautions taken by the forces, he was able to gain access to an automatic weapon and engaged in a brief firefight. He was wounded in three places. No other innocent parties were injured, but there was considerable potential for collateral injuries or deaths. See Hunter, "Stalking the Devil," pp. 9-10.

²⁸⁴ The political and military consequences of the loss of U.S. service men in the Mogadishu operation and the media footage of their bodies being abused by mobs of Somalis has continued to affect U.S. missions through to today. From an interview by the author with a former American Rangers officer, November 1998, name withheld by request; see also Mark Bowden, *Black Hawk Down: A Story of Modern War* (New York: Atlantic Monthly Press, 1999). At p. 311 and pp. 333-35 respectively, Bowden describes the American administration's response and the forces' situation in Somalia after the so-called Battle of the Black Sea as well as the later reaction by U.S. commanders to the problems faced by the U.S.S. *Harlan County* at Port-au-Prince, Haiti, one week after the Mogadishu fight.

²⁸⁵ For more information on the number, type and some of the capabilities of Special Forces around the world see: Peter Harclerade, *Secret Soldiers: special forces in the war against terrorism*, (London: Cassell, 2000); James Adams, *Secret Armies, the full story of the SAS, Delta Force and spetsnaz*, (London: Hutchinson, 1987); Rodger A. Beaumont, *Special Operations and Elite Units 1939-1988; a research guide*, (New York: Greenwood Press, 1988); Terry White, *Swords of lightning: special forces and the changing face of warfare*, (London; Washington: Brassey's (UK), 1992); Ross S. Kelly, *Special Operations and National Purpose*, (Lexington, Mass.: Lexington Books, c. 1989); The Israeli Special Forces Database at <http://www.isayert.com>; A general listing and overview of many national "special force" assets, <http://www.specwar.net.com/sf.ftm>.

member of a United Kingdom Special Air Service (SAS), Special Boat Service (SBS), Canadian Joint Task Force 2 (JTF2) or United States SEAL or Ranger unit, and the actual financial investment in that development is considerable. While it may be pointed out that these are the specific types of missions the Special Operation Forces (SOF) train for and that high risks are part of having any such unit, the primary mission for special forces is in pursuit of national military and security interests. The political leadership must be sure of its willingness to endure a financial and capability loss with the death of Special Forces personnel employed for an international cause.

Second, the political leadership must be prepared to be accountable to the families of the casualties as well as to the population in general. The U.S. is still haunted by images of fine young men coming home in body bags from Vietnam, and the effect of the resultant public anger has heavily influenced American policy on the use of its military forces. The television coverage of the bodies of American servicemen being dragged through the streets of Mogadishu had a similar effect on the U.S. mission to Somalia.

It should be noted that there are always Special Forces troops dying in pursuit of their missions through either hostile action or training accidents. Many of these deaths are reported as accidents, and the return of remains to their home

countries are carefully conducted away from media scrutiny in order to avoid some of these same difficulties.²⁸⁶

Third, the loss of personnel will affect unit capability, effectiveness and possibly integrity. These effects will be directly dependent on the number of soldiers seriously injured or killed and the subsequent mission-tasking planned for the unit. While SOF are trained to accept loss both on an emotional level and in terms of combat readiness, there are effects on the men and their abilities,²⁸⁷ and these factors must be considered by the political leaders.

Closely related to the above concern for the degradation of mission capability is the dissipation of military assets resulting from fielding one or more Special Forces units. American Special Forces units or members, were as of 1999 employed in more than fifty missions worldwide.²⁸⁸ The ability to support these missions can come at a serious cost to the needs of other military activities and at a cost to the units themselves. The overextension of speciality units means they are not able to maintain their training, op and post-op rotational cycles. The failure to have sufficient training time puts the soldiers and their missions at risk.

²⁸⁶ From an interview by the author with Andreas Lindgren, an NCO with Swedish Special Forces, March 1999.

²⁸⁷ See Gary McKay, *Delta Four: Australian Rifleman in Vietnam* (St. Leonards: Allean & Unwin, 1996), pp. 165-68.

²⁸⁸ From an interview by the author with Lt. Col. Hayes Parks, *supra* note 221. Given the various developments since 1999 including but not limited to the terrorist attacks on American foreign assets prior to 2001, the terrorist attacks on American soil - 11 September, 2001 - the American led invasion of Afghanistan, and the American led invasion and occupation of Iraq from 2003, I suggest that the number of missions must have grown considerably by necessity, although no exact information is, to the best of my knowledge, available to the general public.

The lack of adequate rest or leave time places an additional burden on the men and their families, often depriving them of the opportunity to sufficiently unwind from the effects of constant immersion in high-stress, high-risk environments.²⁸⁹

(ii) Political Responsibilities

"We shall not fail or falter; we shall not weaken or tire. Neither the sudden shock of battle, nor the long-drawn trials of vigilance and exertion wear us down. Give us the tools, and we will finish the job."²⁹⁰ The words of Winston Churchill, while addressing a different threat and challenge, aptly describe, in my opinion, the sense of the determination and fortitude required by political leaders today in the struggle to successfully obtain the arrest of indictees. Once the decision is made to use national military assets in interdiction missions, the politicians must ensure that the soldiers are given all the tools necessary to do the job successfully. The first tool the political leadership must provide is a clear and appropriate mandate that responds to the needs of the situation and the resources available.²⁹¹ Several of the military personnel interviewed in the course of research expressed frustration at the lack of clear, unambiguous orders being

²⁸⁹ See Scott Taylor and Brian Nolan, *Tested Mettle* (Ottawa: Esprit de Corps Books, 1998); see also Tom Clancy, *Marine: A Guided Tour of a Marine Expeditionary Unit* (New York: Berkley Books, 1996), p. 41.

²⁹⁰ Winston Spencer Churchill, in remarks addressed to U.S. President Theodore Roosevelt, from a radio address, 9 February 1941, quoted from, Winston S. Churchill, *Never Give In! The Best of Winston Churchill's Speeches*, (London: Random House, 2003), p. 262.

²⁹¹ Michael. C. Williams, "Civil-Military Relations and Peacekeeping," Adelphi Paper 321, (August 1998).

given at the political level.²⁹² Considering the charged atmosphere of hyper-scrutiny by the press on all things military, it is natural that force commanders will not attempt, in any way, to interpret mission orders. The current position of various military commanders is to "read down" the mandates in order to protect the armed forces from charges of exceeding their authority.²⁹³ There appears to be a general suspicion on the part of many in the military that politicians have no intent of assuming responsibility for the consequences of their orders. The concern is that the political directives and orders will be so ambiguous that should it be necessary, the politicians can divert any blame for the consequences of the directed action back onto the military.²⁹⁴

In conjunction with taking responsibility for their decisions by producing clear orders, the political leaders must ensure that the required assets to accomplish the missions are in place. The recent history of budget cutbacks in Canada and the subsequent inability of the Canadian military to field equipment of the minimal necessary quality, in the required quantity and at the appropriate time, has placed Canadian soldiers at unnecessary risk.²⁹⁵ The United States, in their mission to Somalia, faced the same problem. Due to so-called political

²⁹² From an interview by phone, 1999, with Col Garraway, *supra* note 215.

²⁹³ From an interview by the author with Lt. Col. Hayes Parks, *supra* note 221, and a 1999 interview with Col. Kim Carter, Office of the Judge Advocate General, National Defence Headquarters, Ottawa.

²⁹⁴ *Ibid.*

²⁹⁵ Taylor and Nolan, *Tested Mettle*, pp. 36-37, 48-51, 69, 78, 99, 112 and 244; also see James R. Davis, *The Sharp End: A Canadian Soldier's Story* (Vancouver: Douglas and McIntyre, 1997), chap. 3.

considerations and to optics, the U.S. forces did not receive the equipment requested by the force commanding officer General Thomas Montgomery.²⁹⁶ In particular, he wished to have M1A1 Abrams tanks, Bradley armoured vehicles and C-130 Spectre gunships to support the various missions being undertaken by American forces. It is suggested that if political leadership had properly supported the military's requests, many of the deaths suffered by the Rangers and SEALs in Mogadishu would not have occurred.²⁹⁷

Lastly, there must be dialogue among all players in mission planning and execution. The political leadership must be willing to take the tactical advice of the commanders who will implement the orders.²⁹⁸ The simple fact that forces capable of executing a snatch-and-grab exist does not mean that such missions will always be technically feasible or cost-productive. As has been repeatedly mentioned in the media, the former Yugoslavia is geographically challenging to any forces hoping to mount a mission. Somalia and the urban environment of Mogadishu created many difficulties for U.S. troops who were not used to military operations on urbanized terrain (MOUT). Tactical or pragmatic realities

²⁹⁶ Tom Clancy, *Airborne: A Guided Tour of an Airborne Task Force* (New York: Berkley Books, 1997), p. 215.

²⁹⁷ It is important to note that while eighteen Americans were killed and many more wounded in that action, more than five hundred Somalis were also killed and more than a thousand wounded. If the Rangers had the Bradley fighting vehicles requested, the withdrawal of the special forces would not have encountered the problems they did. Additionally, even if the task force had needed to be extracted, the availability of American armour and more effective air cover would have made the rescue much easier and much faster. In either case, the number of wounded and killed on both sides of the fighting would have been greatly reduced.

²⁹⁸ See Williams, "Civil-Military Relations and Peacekeeping" for a general discussion on this issue; see also A. H. Cordesman and A.R. Wagner, *The Lessons of Modern War*, Vol. 4, *The Gulf War* (Boulder: Westview, 1996), p. 755.

can never be forgotten and, while the military wishes to have clear orders, the decisions to commit to specific missions will need to be a co-operative effort. This must also include support for and agreement to realistic Rules of Engagement (ROEs) that allow the forces to carry out their missions without undue risk to themselves or to third parties.

CHAPTER 5

This Hound Won't Hunt? Challenges in Using Force

A. Police *v.* Military

Once the political decision has been reached to engage in interdiction missions, the application of particular troops to the task needs to be resolved. Before deciding on the appropriate military units for the task, however, it should be questioned whether the task is appropriate for the military.

There have been arguments raised by various members of academia, Prof. Hans Geser of the University of Zurich,²⁹⁹ in particular, the appropriate units for forced interdictions in UN missions should be some form of international police force. Their central concern focuses on the operational considerations of effecting arrests and the skill or ability differences that are found between the police and military establishments.

Additionally, some American jurists have raised the issue of the domestic *Posse Comitatus Act* 1878³⁰⁰ that created a clear delineation between police and soldiers by prohibiting soldiers from carrying out policing responsibilities. They therefore argue that U.S. service personnel should not be used to detain and arrest indicted war crimes suspects. I believe that this argument, and the

²⁹⁹ Professor Hans Geser, *International Policing: A new Evolutionary Stage of Military Organization? Peace-Keeping Missions in a Sociological Perspective* (Zurich: University of Zurich-Institute of Sociology, 1996).

³⁰⁰ Although commonly known as the *Posse Comitatus Act* 1878, the Act is correctly cited as: *Army Appropriations Act*, ch 263, § 15, 20 Stat. 145, 152 (1878)(codified as amended at 18 U.S.C. § 1385 (1994)).

operational concerns raised by Prof. Geser, can be resolved once the issue of mission-tasking and execution requirements is considered.

The central issue of employing a police or military force to facilitate detentions focuses on the traditional roles of each force in relationship to the mission objectives. According to Geser, a police force is designed on a bottom-up structure, where the lowest-ranking members are charged with the responsibility of moral integrity, sound judgement and personal authority. The accused, in the police officer's eyes, is always to be viewed as innocent until proven guilty.³⁰¹

He argues that the soldier, however, is trained to view one group as "the enemy" and that their primary role is to defeat that group at arms. The structure of the military unit is generally top-down, Geser continues, with considerably less emphasis on the individual actor's decision-making capacities. He suggests that the soldier's behaviour is shaped by intra-organizational structures and processes rather than by autonomous perceptions.³⁰²

While this may be true of the regular police patrol officer or of the normal infantry or marine soldier, if one is to compare the factual and structural differences between a police Special Weapons and Tactical unit (SWAT)³⁰³ and a military Special Forces group (particularly one specializing in counter-terrorist

³⁰¹ Geser, *International Policing*.

³⁰² *Ibid.*

³⁰³ Sometimes also referred to as an Emergency Response Team (ERT).

operations), they would be virtually indistinguishable. Police forces around the world have found it necessary to develop special teams that can effectively deal with terrorist or hostage situations in major centres, and these forces employ the same weapons, uniforms, equipment and tactics as the military, including fully automatic weapons, helicopters and armoured vehicles. In many countries, including the U.S., military Special Forces personnel train these police officers. Joint exercises and additional training throughout the year further foster this relationship.

The military's development of highly specialized and often secret operations units has also focused on the counter-terrorist or covert roles for the units. These units are highly motivated and the selected members must be able to exercise discretion and individual resourcefulness, much in the same way as is described in the "police officer model" by Geser. These Special Forces members are trained to use personal authority and autonomous perception in situations such as hostage rescue and covert interdiction.

Therefore, the concerns of Geser are a somewhat artificial construct, as there are portions of both enforcement organizations that greatly resemble each other. As for the concern over the *Posse Comitatus Act*, any actions taken by U.S. service personnel would be taken outside of U.S. sovereign jurisdictional territory, thus eliminating the concerns that gave rise to the 1878 Act. Beyond that, with the *de facto* changes in enforcement roles, training and actions, the

original delineation has now blurred to the point where the distinction is no longer valid.

While it can be argued that both military Special Operations units and police SWAT/ERT teams are qualified and capable to conduct the actual interdictions, as will be explained below in the sections on military requirements, there are a number of other operational considerations that must be examined beyond the abilities of the abduction team. These requirements include:

- The ability to collect intelligence information
- Insertion and extractions capabilities
- Experience and training in long-term covert operations
- Support and logistical infrastructure

While the idea of employing an international police unit may appear appealing at first, as the central task for an interdiction unit *is* the successful arrest of the accused, the reality of this force's operational capabilities precludes its consideration for the task. Until now, such police forces have been responsible for local policing duties in UN mission areas as well as the training of local police forces in acceptable policing techniques. They have been composed of police officers from a number of countries who are chosen because of their ability to work well at the community level and are not made up of SWAT/ERT members.

The multinational constituted units must operate closely with the local populations and need to maintain their neutral posture in order to achieve their mission objectives. Any attempt by these forces to take part in forced arrests will

have a deleterious effect on their capacity to continue assisting the local communities. Additionally, due to the nature of their work, these units have been either unarmed or only lightly armed. If international police forces were considered as a possible mechanism for detaining and arresting suspects, there would need to be a total revision of the force capabilities. This would include such issues as:

- Individual members' operational skills
- State willingness to offer special police units for extended periods of time
- Unit cohesion
- Equipment requirements
- Training
- Similarity of operational standards within diverse international policing backgrounds

B. Regular Forces *v.* Special Forces

Given the difficulties involved in the use of police forces in accomplishing arrests and the particular abilities and exceptional training of Special Operations Forces (SOF), it is clear that the use of military units would not inhibit successful arrests and would avoid many of the pitfalls a police force would encounter. It is interesting to note that all press releases from NATO and the ICTY mention only

that IFOR or SFOR troops were involved in an arrest, and they may or may not give the nationality of the forces involved.³⁰⁴ It has become very clear over the past five years, however, that the forces being used in these types of missions are not the IFOR/SFOR troops conducting peacemaking or peacekeeping missions but rather Special Operations units from various nations.³⁰⁵

The military's reasons for tasking Special Forces rather than the regular troops for interdiction missions are threefold. The first issue is simply one of competence. The regular forces assume many responsibilities and missions, but they are not trained or equipped for the difficulties that are experienced in a special operations environment.³⁰⁶ Bowden describes the U.S. Rangers (an elite but not Special Forces unit) as "fitter, faster and first." They were "the cream, the most motivated young soldiers of their generation, selected to fit the army's ideal," yet out of 120 Ranger applicants, fewer than 15 percent would meet the qualification standards of Delta Force, the army's top Special Forces unit.³⁰⁷

Second, and related to the first issue, the use of conventional forces to effect an arrest would require a deployment of a large number of troops. This

³⁰⁴ See Appendix 1 for a copy of the published NATO list of forces in field in the former Yugoslavia.

³⁰⁵ See Thomas Sancton and Gilles Delafon, "The Hunt for Karadzic" (1998) August *Time* magazine 34-37; also see "Stalking the Devil," at p. 8.

³⁰⁶ J. M. Collins, *Green Berets, Seals, and Spetsnaz* (Washington: International Defense Publishing, 1987) at 84-87: for further information on "special force" units and agencies, see: Tom Clancy, *Special Forces: A Guided Tour of U.S. Army Special Forces*, (New York: Berkley Books, 2001); Tom Clancy, *Shadow Warriors: Inside the Special Forces*, (New York: G.P. Putnam's Sons, 2002); William Seymour, *British Special Forces*, (London: Sidgwick & Jackson, 1985); Barry Davies, B.E.M., *The Complete Encyclopedia of the SAS*, (London: Virgin Books, 2001); Hugh McManners, *Commando: Winning the Green Beret*, (London: BBC Books, 1994).

³⁰⁷ Bowden, *Black Hawk Down*, pp. 5-10.

may not be possible, given political circumstances. Additionally, the use of a large force would be inadvisable tactically, as any element of surprise would be at risk.

Third, the employment of Special Forces rather than regular troops can reduce the potential for direct retaliation. Even though there have been limited attacks arising from the actions taken thus far³⁰⁸, the temptation for retaliatory acts would be far greater if the soldiers who carried out the forcible detention were based in the area. The likelihood of direct retaliation is greatly reduced when the nameless or unascribed unit is safely out of the country again.

C. Mission Capability Requirements

(i) Intelligence

The single most important commodity for a successful mission is the quality and currency of the intelligence information.³⁰⁹ The units that undertake forced detentions need to know the routine of the target, their security assets, routes of transit, building layouts and a myriad of other details far in advance of executing the assault.

The methods used to gather this intelligence can be broken down into several sub-categories. Signals, imagery, technical and measurement intelligence

³⁰⁸ Hunter, "Stalking the Devil: SOF Join the Hunt for War Criminals," pp. 8-10.

³⁰⁹ From interviews with Sgt. Andreas Lindgren, *supra* note 286; LCol Parks, *supra* note 221; LCol McAlea, *supra* note 221; see also B. D. Berkowitz and A. E. Goodman, *Strategic Intelligence for American National Security* (Princeton: Princeton University Press, 1989); and Collins *Green Berets, Seals, and Spetsnaz*, pp. 84-87.

(SIGINT, IMINT, TECHINT and MASINT) all contribute to the necessary understanding of the target group. However, there is no substitute for human intelligence (HUMINT) in Special Operations environments. Individual operators are better able to conduct long-range surveillance in hostile situations than mechanical forms of observation simply because of their ability to comprehend and analysis the information as it occurs. This will often involve the insertion of several small teams into a hostile environment and their ability to observe and report undetected.³¹⁰

John Keegan, Defence Editor of *The Daily Telegraph*, makes these points on the nature and utility value of intelligence:³¹¹

1. Acquisition. Intelligence has to be found. It may be readily available in published, but overlooked form. A former director of the CIA warned his analysts against what he called the *Encyclopaedia Britannica* factor: do not waste effort in seeking information which may freely be found in newspapers, scholarly journals or academic monographs. Stalin's Russia took precautions to make information as difficult to acquire as possible, by restricting the distribution of such everyday material as telephone directories and street maps. As a general principle, however, it may be taken that information useful to an opponent is what may be called "secret" and has to be collected by clandestine means. The most usual methods are spying, in all its forms, not technically known as "human intelligence" or "humint"; by the interception of an opponent's communication, which will probably require decryption, "signal intelligence" or "signit"; by visual surveillance or imaging, through photographic or sensory reconnaissance by aircraft or satellite.

2. Delivery. Intelligence once collected has to be sent to its potential user. Delivery is often the most difficult stage, particularly for the

³¹⁰ S. C. Sarkesian, *Unconventional Conflicts in a New Security Era* (Westport: Greenwood Press, 1993); see also Col. William V. Kennedy, *The Intelligence War: Penetrating the Secret World of Today's Advanced Technology Conflict* (London: Salamander Books, 1983).

³¹¹ John Keegan, *Intelligence in War: Knowledge of the Enemy from Napoleon to Al-Qaeda* (Toronto: Key Porter Books, 2003).

transmitter of humint. The humint agent may be watched, or may rightly fear overhearing or interception, or may be vulnerable to arrest at points of meeting. Moreover, the sender is always under the pressure or urgency. Intelligence goes stale, or is overtaken by events. Unless sent in timely fashion, preferably in "real time," which allows it to be acted upon, it loses its value.

3. Acceptance. Intelligence has to be believed. Agents who volunteer their services have to establish their credentials; they may be a plant. One's own operatives may have been turned or have fallen under the control of an opponent's counter-espionage service. Even what they honestly offer may be wrong, or only half true. Intercepts appear more dependable but they may be bogus. Even if not, they can tell only part of the truth. Henry Stimson, American Secretary of State, rightly warned of the difference between reading a man's mail and reading his mind.

4. Interpretation. Most intelligence comes in scraps. For a complete canvas to be assembled, the scraps have to be pieced together into whole cloth. That often requires the effort of many experts, who will have difficulty in explaining to each other what they understand by individual clues and who will disagree over their relative importance. Ultimately the assembly of a complete picture may require a superior to make an inspired guess, which may or may not be correct.

5. Implementation. Intelligence officers work at a subordinate level; just as they have to be convinced of the reliability of their raw material, so also they have to convince the decision-makers, political chiefs and commanders in the field of the reliability of their submissions. There is no such thing as the golden secret, the piece of 'pure intelligence', which will resolve all doubt and guide a general or admiral to an infallible solution of his operational problem. Not only is all intelligence less than completely accurate; its value is altered by the unrolling of events. As Moltke the elder, architect of Prussia's brilliant victories over Austria and France in the nineteenth century and perhaps the supreme military intellectual of all time, memorably observed, 'No plan survives the first five minutes of encounter with the enemy.' He might as truthfully have said that no intelligence assessment, however solid its foundation, fully survives the test of action.

The failure of intelligence information, through either poor fieldwork or faulty analysis, will cost the best-planned mission dearly. In what is called the Battle of the Black Sea, the initial insertion into Mogadishu was planned without sufficient knowledge of the operational area or of the possible escape routes for

the force withdrawal. There was also a gross underestimation of the Somali resistance to the incursion and the ability of the Somali fighters to raise the number of combatants that they did.³¹² The attack went ahead despite the mission planners' awareness of previous reliability problems with informants.

The mission was executed with "the slickest intelligence support America had to offer, including satellites, a high-flying P3 Orion spy plane and three OH-58 observation helicopters.... It was a well-oiled, fully equipped, late-twentieth-century fighting machine."³¹³ Yet without the necessary HUMINT information being available at the initial planning stages, the technical wizardry could not prevent considerable losses.

In a joint French and American plan to arrest Karadzic, both countries' intelligence-gathering forces spent months observing the suspect. It was reported that French covert troops literally had Karadzic in the cross-hairs of their sights on several occasions,³¹⁴ yet the initial plan for his capture was properly abandoned in the fall of 1997, in part due to a lack of adequate intelligence. The difficulty that mission planners faced in attempting Karadzic's abduction

³¹² Bowden, *Black Hawk Down*, *supra* note 284. It is also interesting to note that prior to the Battle of the Black Sea, there had been attempts at abductions of Aidid supporters in Mogadishu. Two of these incidents, which are noted in the book, resulted in embarrassing errors where Red Cross workers or U.S. supporters were detained by mistake. In both of those incidents, faulty intelligence caused the difficulty for the interdiction forces.

³¹³ *Ibid.* at 11. The U.S.-led invasion of Grenada in 1983, although generally successful, did suffer from intelligence failures. Kelly, *Special Operations and National Purpose* (Lexington: Lexington Books 1989) at p. 15 states: "The principle SOF utility could have been, should have been, but was not, in obtaining the one commodity the expeditionary force almost totally lacked: accurate intelligence." He goes on to describe a number of incidents that could have been prevented had the forces had that necessary intelligence.

³¹⁴ Collins *Green Berets, Seals, and Spetsnaz*, pp. 84-87.

highlights another problem that military planners face with intelligence information. The initial organizational composition suffered from "leaky" intelligence as much as it faced inadequate information.

This particular scheme had been part of a joint planning group of forces from Great Britain, France, Germany and the Netherlands. It was hoped that coordinated multi-force planning would result in a more cohesive and focused approach to interdictions. It became obvious after a period of time that the intelligence pipeline linking NATO commanders was not satisfactory and that vital information was being leaked, and this loss of security integrity led to the abandonment of several missions, including the attempt on Karadzic.³¹⁵ It was later discovered that a French Intelligence officer had been passing on the operational details of the abduction plan to Karadzic and that he was fully informed of the mission plan.³¹⁶ In the September 1997 meeting that decided against the pre-existing plan, a new mission was undertaken, code-named "Torn Victor," and despite all the previous efforts, the hunt began again.³¹⁷

All military commands fear the betrayal of their intelligence networks. The failure of intelligence security creates costly and often insurmountable delays in restructuring mission plans. Also, particularly where sensitively placed informants or sophisticated technology may be compromised, there is concern

³¹⁵ Hunter, "Stalking the Devil: SOF Join the Hunt for War Criminals," pp. 8-10.

³¹⁶ Collins *Green Berets, Seals, and Spetsnaz*, pp. 84-87.

³¹⁷ Hunter, "Stalking the Devil: SOF Join the Hunt for War Criminals," pp. 8-10.

not only for the mission in question but for any future applications of the compromised intelligence sources. This has caused difficulties when forces operate in a multinational situation such as NATO-led or UN-led operations. The necessity of sharing information has made many countries reluctant either to plan joint missions where they risk compromising their intelligence assets or risk their forces by depending on less-than-reliable information from other states' intelligence sources.

This concern has been approached in various missions undertaken in a variety of ways. In some cases, the intelligence-gathering was performed by joint units that were sufficiently secure and reliable enough to ensure quality and integrity in the material gathered. In other situations, the whole of the planning for the operation has been executed by one nation's forces while another state's troops executed the plan. While there have been successful missions involving U.S., French, Dutch and British Special Forces, the concern for intelligence security in multinational environments persists.³¹⁸ It is important to note that these concerns arise even in operations undertaken by NATO, a military alliance of friendly nations.

The concern for security is even greater with missions involving UN command and control. The UN security establishment is viewed as "a leaky sieve" that is incapable of maintaining any level of informational integrity.³¹⁹

³¹⁸ *Ibid.*

³¹⁹ From interviews with LCol Hayes Parks and LCol McAlea, *supra* note 221.

This and other factors will affect the cooperation and structure of UN missions, particularly where issues of shared intelligence information are at stake.

(ii) Combat Skills

The combat skills and training, particularly the anti-terrorist and hostage rescue experience of many of these units, is directly analogous to the skill sets required for forcible arrests. All of the national units have extensive experience in MOUT, with particular emphasis being placed on stealth, forced entry, marksmanship and physical conditioning.³²⁰ Additionally, the discipline and command structure of these forces allows them the flexibility and unit integrity to undertake high-risk missions.³²¹ Generally, most Special Forces units, regardless of nationality, are manned by non-commissioned officers (NCOs). As NCOs, these troops have all had some experience in leading men as well as being led. The emphasis on small-unit work with great latitude in action suits the covert nature of the missions.³²²

An essential element in combat capability for Special Forces is the availability and variety of special weapons. The amount of experience and training on alternative weapons afforded these units gives them the capability to

³²⁰ Adams, *Secret Armies: The Full Story of S.A.S., Delta Force, and Spetsnaz* p. 87; see also Kelly, *Special Operations and National Purpose*.

³²¹ Hunter, "Stalking the Devil: SOF Join the Hunt for War Criminals," p. 9 and interview with LCol Hayes Parks, *supra* note 221; see also Mark Urban, *Big Boys' Rules: The SAS and the Secret Struggle with the IRA*, (London: Faber and Faber, 1992).

³²² Hunter, "Stalking the Devil: SOF Join the Hunt for War Criminals," pp. 8-10 and Kelly, *Special Operations and National Purpose*, p. 18-20.

succeed in unusual and dangerous environments. Many of the weapons employed by the Special Forces have been developed specifically for the covert mission or have been adapted to suit the situational needs of the mission. All of the various forces have common training and skills, including the use of explosives, all manner of firearms as well as a variety of silent weapons. The Special Forces units also employ special communications and visualization equipment that allows them to operate behind enemy lines without detection in daytime or night time operations and without the support of vehicular transportation.

(iii) Insertion and Extraction

The efficacy of any insertion force can be only as good as the ability to transport the troops to the target area. Various national Special Force units have developed unique capabilities to operate in different environments. The British forces Special Air Service (SAS) and Special Boat Service (SBS) give a clear indication of their specialities. American armed forces have units that are trained for marine, land, parachute (HALO) or helicopter insertions.

Beyond the actual ability of the combat element, Special Force units require specialized support units that are trained in aerial, land or marine operations of a covert nature. These transportation assets also require speciality equipment such as highly modified helicopters, high-speed inflatable boats and

even specially modified nuclear submarines.³²³ Along with this equipment, each of the Special Forces transport units requires specially trained crews who can operate under the tactical situations such missions often face. These units are responsible for getting the teams into the target area, supporting their mission while they remain in country, performing the extraction of the unit at mission end and being prepared to act as a rescue force should things go wrong.³²⁴

(iv) Force-Capable Countries

The list of requirements for Special Forces units limits the number of countries that are capable or willing to field such troops. Great Britain and America support the largest or most capable Special Operations Capable forces in the world today. Both of these states' units have had extensive operational experience in every continent and in every climatic and structural environment. The British and American units operate out of their home countries on a regular basis and are used to project the national security interests of their domestic governments. Belgium, France, and Russia also have very capable SOF that have been used extraterritorially over the past thirty years. Australia, Canada, Israel, Italy, the Netherlands, Norway, Denmark, Poland, Spain, Sweden and Turkey all have forces of varying capabilities, used primarily for domestic counter terrorist activities.³²⁵ Several of these countries, however, have been sending units of their

³²³ Collins *Green Berets, Seals, and Spetsnaz*, p. 27; see also Kelly, *Special Operations and National Purpose*, pp. 22-25.

³²⁴ Kelly, *Special Operations and National Purpose*, p. 15 and Bowden, *Black Hawk Down*, chap. 2.

³²⁵ Kelly, *Special Operations and National Purpose*, pp. 36-87.

Special Forces to UN- and NATO-lead missions in order to enhance the larger missions' capabilities. They collect intelligence inside the hostile territory, act as forward air targeters seeking out, designating and illuminating targets for air strikes or operate as the rescue force for any downed pilots or captured troops.

D. Difficulties of Special Operations with a Multinational Force

All the military personal with whom I spoke made it very clear that if the military is ordered to undertake a mission, those orders will be fully carried out. The fact that the military exists to execute orders does not mean they are without concerns for certain types of missions or particular operations. The following two sections of this paper attempt to touch on some areas of possible difficulty that may be experienced in an interdiction assignment. As has been noted above, there are several concerns about the integrity of intelligence confidentiality. Other issues arise with respect to joint operations, particularly the compatibility of the national forces.

(i) Training

Diversity in mission capability, training, experience, equipment, communications, language skills and cultural perspectives can seriously degrade or impair the effectiveness of multinational missions. Many of the state forces

have limited and narrowly focused training suitable to their domestic conditions and operational requirements, and while their abilities may be very high, the adaptability of the units to foreign environments may be less than acceptable. Many of the NATO countries train their forces in joint exercises annually, often pitting the forces of each state against one another in the roles of aggressor and hunter. These training opportunities, as well as the exchange programs for individual unit members, go a long way toward alleviating the aforementioned concerns for those states. The UN missions, however, may not always employ forces familiar with one another's capabilities, and tensions and potential problems will continue to exist.³²⁶

(ii) Equipment

The ability to have integrated or compatible weapons can also make the difference between success and failure. The strength of many nations' domestic arms industries has meant that most forces carry weapons particular to their military. Again in the case of NATO, most of the ammunition for smaller firearms is compatible, yet there are examples even within the alliance of some difficulties. The extent of this issue is noted in that, partly due to the additions of Poland, Hungary and the Czech Republic into the alliance, NATO is facing US\$8.3 billion in costs over the next fifteen years in order to achieve interoperability and

³²⁶ Cordesman and Wagner, *The Lessons of Modern War*, p. 752; and Kelly, *Special Operations and National Purpose*, Chapter 2.

modernization.³²⁷ Interrelated with training and weapons compatibility is the matter of the familiarity of various national troops with the equipment of other militaries. Night-vision equipment and special weapons may be required for particular missions, and it is essential that all of the forces be familiar with the materials.³²⁸

(iii) Communications

The ability of the various constituent parts of the mission to communicate is also an essential element of mission success. This will require equipment compatibility as well as adequate language skills.³²⁹ Even within individual national forces, the lack of compatibility among command, air and ground forces equipment can be found. It is only within the last few years that the American Forces have developed the "Single Channel Ground-Air Radio System" (SINCGARS) that will finally allow communication between the Army and Air Force on common frequencies.³³⁰ In the Gulf War, some American units were incapable of communicating with other forces' elements, not all national forces could communicate directly with other allied forces and the ground forces were often unable to have radio communications with various air assets in their

³²⁷ *The Military Balance 1998/99*, (London: the International Institute for Strategic Studies, 1999).

³²⁸ See Kelly, *Special Operations and National Purpose*, pp. 27-28.

³²⁹ Cordesman and Wagner, *The Lessons of Modern War*, p. 752.

³³⁰ Bowden, *Black Hawk Down*, pp. 112-113 and 123-124; also see Clancy, *Airbourne*, p. 98.

sector.³³¹ Considering the unique nature of much of the Special Forces equipment, the problem of communication compatibility among all units involved raises concerns.³³²

³³¹ See Tom Clancy, *Armoured Cav: A Guided Tour of an Armoured Cavalry Regiment* (New York: Berkley, 1994) p. 41; also see Tom Clancy, *Marine: A Guided Tour of a Marine Expeditionary Unit*, p. 93; and Kelly, *Special Operations and National Purpose*, chapter 8.

³³² See Kelly *Special Operations and National Purpose*, pp. 25-27 and chapter 8.

CHAPTER 6

Biting the Hand: Operational Considerations

A. Mission Impairment

The use of military forces to abduct or apprehend indicted suspects can have a serious impact on the ability of the other troops in the region who are carrying out peacekeeping or peacemaking operations. The regular NATO/UN field forces require a high degree of cooperation from local communities and community leaders.

This need for cooperation is exemplified in the mission expected of SFOR troops in Bosnia-Herzegovina as detailed in the Dayton Accord, particularly Annex 1A, UN Security Council Resolution 1031 and Resolution 1088.³³³ Such troops are tasked with establishing law and order in hostile and often volatile environments, and there therefore must be a minimal degree of respect and trust between the local community and the force if the mission is to be successfully executed.

The forcible taking of a suspect can have serious effects on that relationship of trust. The local community perception of the NATO/UN soldiers as neutral parties will be damaged when one of their own is arrested and

³³³ "The NATO-led Stabilization Force (SFOR) in Bosnia and Herzegovina," NATO Basic Facts Sheet No. 11, April 1997.

transported for trial.³³⁴ It may take a great deal of effort and time to re-establish the trust and to assure the population that the troops are not in fact agents for the other combatants. The loss of effort, time and money can seriously impede the peacemaking roles of the forces.

B. Mission Creep

This factor is a concern in all missions but especially in those where multiple forces are directed to conduct several and possibly conflicting missions. Mission creep can be defined as doing more than originally directed or ordered, often through follow-on orders being generated at political levels.³³⁵ The constant assuming of more responsibility than had originally been ordered allows the forces to be drawn into military and non-military tasks that may be beyond the forces' physical or technical means.

This phenomenon was especially evident in Vietnam, where the original mission of the American troops as advisors to the South Vietnamese military eventually led to tens of thousands of American soldiers fighting and dying in the war. The deeper a force is allowed to get into a situation, the harder it will be for the military or the politicians to extract them.³³⁶

³³⁴ See Mark H. Milstein, "The Boys of Brcko," *Soldier of Fortune*, November 1997, pp. 56-59, for a description of the atmosphere in the American patrol sector a few days after a joint British and American operation to arrest two indicted suspects.

³³⁵ From an interview with LCol McAlea, *supra* note 221.

³³⁶ From interviews with LCol Hayes Parks and LCol McAlea, *supra* note 221.

The American presence in Somalia was likewise an example of a mission that continued to develop and grow without the prior planning that was needed. What was a basic humanitarian mission to ensure the distribution of aid expanded with ever-increasing diverse and complex missions, including the detention and arrest of local warlords and their leading supporters.³³⁷

The issue of mission creep is evident in two conflicting views of the current NATO mission in Bosnia-Herzegovina. One view holds that the original mission given to IFOR and SFOR was specific in nature, including the containment of heavy weapons, enforcement of negotiated provisions within a particular zone and the facilitation of elections. Assuming responsibilities beyond this would draw assets away from specific tasks assigned the force. An alternative way of looking at the NATO-led missions is to view the orders as assigning a series of non-specified tasks that accomplish specific goals.

Any other potential assignments must be evaluated on whether they violate the principles behind the force deployment or not. If there is no conflict between the new mission and the central principles, the new tasking can, and should, be given to the force. One can see how the latter interpretation of orders can lead to an open-ended mission with unclear boundaries and roles. It is also clear why, as mentioned above, the military leadership would like unequivocal and unambiguous orders for the arrest and detention of suspects. Given the

³³⁷ From an interview with LCol Hayes Parks *supra* note 221.

potential for forcible arrest and detention missions to interfere with other duties, to complicate local relations, to place excessive demands on limited resources and, as will be explained below, the potential for retaliation, the prudent military command structure will act only where it feels sufficient consideration has been given this issue.

C. Retaliation

Retaliation, a subset issue to the concern for mission creep, is also acknowledged as a serious matter for military commanders and planners. As was mentioned above, there have been examples of retaliatory acts by the local populations following detention of an accused. The grenade attack on the British base inflicted no casualties,³³⁸ but the determination that the perpetrator was a member of the Bosnia Serb special police force³³⁹ increases the concern for possible organized attacks by paramilitary forces of the respective target group. The American forces in Brcko have faced local vandalism in the wake of an arrest action, and there were links suggested between the stabbing of a U.S. soldier in Pale, as well as the bombing of the UN motor pool in Banja Luka, with the detention operation of July 10, 1997.³⁴⁰

³³⁸ Hunter, "Stalking the Devil: SOF Join the Hunt for War Criminals," p. 10.

³³⁹ Cordesman and Wagner, *The Lessons of Modern War*, p. 755.

³⁴⁰ See Hunter, "Stalking the Devil: SOF Join the Hunt for War Criminals," pp. 8-10 and Milstein, "The Boys of Brcko," pp. 56-59.

A serious example of retaliation occurred subsequent to the first forced detention in June 1997. In that raid, the Polish *Grupa Reagowania Operacyjno Mobilnego* (GROM, the Operational Mobile Response Group) was used to capture General Slavko Dokmanovic in Eastern Slovinia. The accused, known as the "Butcher of Vukovar," was captured in an extremely well-executed mission despite protection by a large force of bodyguards. Immediately after the arrest, however, a group of Serbian soldiers took the inhabitants of a nearby village as hostages, threatening their execution if the general were not returned. The GROM returned to the area and rescued the captives while eliminating their kidnappers.³⁴¹

The concern for violent reprisal also extends to symmetrical or asymmetrical retaliation against units of any international forces. Symmetrical or direct retaliation involves attacks against the forces executing the abduction or, at least, forces of the same nationality. Asymmetrical retaliation would arise with violent acts committed against forces of other nations. The use of Special Forces helps limit the potential for any direct counter-strike, because these units are fielded only for the forced detention.

Additionally, those nations that are Special Forces-capable have a generally high military capability. Military or paramilitary forces would be reluctant to attempt a reprisal raid against other units of these states, because the

³⁴¹ Hunter, "Stalking the Devil: SOF Join the Hunt for War Criminals," pp. 8-10.

defensive capabilities and military response to any such actions create a credible deterrence. The most likely target of a retaliatory act is the soft underbelly of a multinational force, the less-prepared or less-competent troops from less-capable nations.

The potential for such an asymmetrical attack also raises the matter of force command. While an American or British commander may not have undue worry over retaliatory attacks, one must consider the problems faced by a UN commander who is responsible for the safety and security needs of all forces under his control. This concern would be amplified should the UN commander represent a nation whose troops were more likely than other forces to be exposed to attack and less able to defend themselves.

A certain tension will also continue to exist between the assignment of Special Forces from any state to the command and control of another command body. Considering the extremely high value placed on these units, the necessity of organizing an effective, efficient but dependable command structure will require consideration.

CHAPTER 7

Conclusions

*It is not the critic who counts,
not the one who points out how the strong man stumbled,
or where the doer of deeds could have done better.
The credit belongs to the man who is actually in the arena;
whose face is marred by the dust and sweat and blood;
who strives valiantly;
who errs and comes up short again and again;
who knows the great enthusiasms,
the great devotion and spends himself in a worthy cause;
who at the best,
knows in the end the triumph of high achievement;
and who, at worst if he fails,
at least fails while daring greatly;
so that his place shall be with those cold and timid souls
who know neither victory or defeat.*

Theodore Roosevelt
Sorbonne, Paris
April 23, 1910

No court of law will be considered effective in the administration of justice if it is unable to ensure that those indicted will be brought within its jurisdiction. The hopes of the victims rest with the international tribunals, and the eyes of the world are scrutinizing whether promises for justice will ever be attained. The tribunals have to a great extent done their part in seeking the arrest of the wanted suspects, but now, to make it happen, individual nations must recognize and act on their responsibility as part of the international body.

One major question is whether capture and prosecution of these individuals has served to restore law and order in the regions in question. In the

former Yugoslavia, the process has been only partly completed. The central character, Milosevic, is on trial, and the others, Radovic and Miladic, are still on the loose. The situation in Rwanda is even less clear, since fewer have been brought to trial than in the former Yugoslavia, and a number of other social, economic and security issues are currently in play. At this time, in my opinion, it is impossible to say whether or not the arrest of persons indicted has succeeded in bringing peace. Although it is too soon to tell and although processes are still evolving, justice for the victims and their families is being done and is being seen to be done. This much, at least, must be acknowledged.³⁴² Moreover, I suggest that should justice for the victims and punishment for the guilty be the only results of the current prosecutions, then the process can still be considered a success.

There are compelling and, I would suggest, irrefutable arguments that morally compel all nations to continue the processes to ensure that the guilty do

³⁴² On this issue I can only reiterate the words of Ms Arbour:

"I would suggest that, in addition to this rationale for leaders' personal criminal responsibility, the holding of an international trial is in itself a major positive step towards peace and reconciliation. Not that the trial process itself has an immediate calming effect – quite the opposite. The issuance of indictments, the arrest of indictees and the unfolding of the story in the dramatic stage of an international courtroom disturb the semblance of peace that comes sometimes from ignorance, often from silence. But more even than the punishment of the perpetrator, it is the process itself, from beginning to end, that speaks the language of peace. The integrity of the criminal justice system in Canada, and in many other countries, is so well entrenched that we easily forget what it tells us about who we are and how we live.

Our willingness to submit our disputes to legal process and, more important, to forgo all responses to injury except those sanctioned by law, is the hallmark of our choice to live in peace with each other. It is exceedingly rare in domestic criminal law that, regardless of its outcome, a criminal trial does not suffice to "stay the hand of vengeance." Gary Bass chose that expression as his title, referring to the way U.S. Justice Robert Jackson so powerfully expressed this idea in his opening statement at Nuremberg: "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason."

Arbour, *War Crimes and the Culture of Peace*, *supra* note 23.

not escape prosecution by the international community. There is legal justification for state action to ensure that the accused are brought into the jurisdiction of international tribunals, yet the current tribunals face difficulties in gaining access to the indicted criminals. The ICC may face even greater problems in ensuring the arrest of its suspects.

Confidence and trust in the ability of the ICC or of any other international criminal tribunal to "do justice" will depend on the ability of the ICTY and ICTR to effect expedient and fair prosecutions. There will never be assurance of future justice in the world until nations fulfil their commitments and obligations under international law.

We cannot allow those who have acted against the fundamental laws of humanity to escape punishment and remain at large. We must muster the political will to act in ensuring that these criminals are hunted, caught, tried and punished for their acts. The international community must utilize the full array of sanctions found in international criminal law to ensure that fugitive offenders who have grossly violated the international norms of human behaviour receive their just desserts.

These actions need to include but not be limited to, fiscal, political, commercial and industrial isolation for states that harbour the criminals. Such sanctions affect the well-being of citizens within those states but may well not produce the intended strategic effects, so the international commitment must also include the capability of using military force and the willingness to use it

where necessary. This can occur only where there is enough political fortitude to carry out the necessary actions, regardless of the costs, for the detention of indicted suspects.

There are operational and political concerns that must be taken into account, yet these are nothing more than challenges or considerations to be met and overcome. The skills, technology and manpower exist in theory and practice to find and arrest the fugitive accused, but it will take cooperation and some accommodation among politicians, bureaucrats and military commanders on national and international levels to make that potential a reality.

For the sake of past and future victims and to give credence to the moral authority of the international community, these skills must be used. We must not forget the terrible cost that past inaction has inflicted on humanity. The history of war crimes prosecutions has, as noted above, often been slow and incomplete. For the sake of the victims we must not allow past failings to cloud our perception of the task ahead but rather, let the international community's actions resolutely bring forth the accused to justice. In a speech to the United Kingdom House of Commons, on 9 April 1941, Winston Churchill stated:

"I have some ... lines ... which seem apt and appropriate to our fortunes tonight, and I believe they will be so judged wherever the English language is spoken or the flag of freedom flies..." reflected in the words of the verse:

For while the tired waves, vainly breaking,
Seem here no painful inch to gain,
Far back, through creeks and inlets making,
Comes silent, flooding in, the main.
And not by eastern windows only,
When daylight comes, comes in the light;
In front the sun climbs slow, how slowly!

But westward, look, the land is bright.³⁴³

The actions of the international community must act, if necessary with force, to ensure fugitive indictees are brought before the courts, thus the actions of the world community will flood in like the main and afford the victims of unspeakable violence the visage of a world resplendent in the light of justice.

Member nations of the international community have been stepping forward with national legislation supporting the premise of the international tribunals and acknowledging thereby, that the processes of justice in these entities are appropriate. The discussions and implementation of the processes for the apprehension of indicted suspects are, therefore, crucial at this point in the history of war crime prosecutions.

Those responsible for the worst of crimes must be identified and apprehended. To hearken back to the words of Churchill quoted above in chapter 4, I suggest that the international community has the tools to do the job. For the sake of justice for the Bala family, Selman Morina, Hamis Kamuhanda, Valentina Iribagiza, Severa Mukakinani and the hundreds of thousands of similar victims, the international community must not fail or falter, it must not weaken or tire, but rather it must finish the job each and every time. We must not be afraid to act.

³⁴³ From a speech to the United Kingdom House of Commons, on 9 April 1941, by Winston Churchill quoted from, Churchill "Never Give In!" *supra* 290, p. 274.

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APPENDIX 1

History of Former Yugoslavia

The Trial Courts at the ICTY and ICTR have, in several decisions, given the Court's finding as to the history of the former Yugoslavia and its various states and to Rwanda respectively. Rarely before has a court of any jurisdiction given a judicial finding on the history of a nation or peoples. For example, the Nuremberg Trial decisions did address some aspects of the Nazi regime in Germany and its acts throughout the war. The International Tribunals, however, have given a clear understanding of the political and social structure leading up to and during the times in question.

In Tadic IT-94-1 "Prijedor," Opinion and Judgment 7 May 1997, the ICTY gave, in part, the following overview on the history of the Yugoslavian situation and history. At para. 56, the Court stated:

56. For centuries the population of Bosnia and Herzegovina, more so than any other republic of the former Yugoslavia, has been multi-ethnic. For more than 400 years Bosnia and Herzegovina was part of the Ottoman Empire. Its western and northern borders formed the boundary with the Austro-Hungarian Empire or its predecessors; a military frontier along that boundary was established as early as the sixteenth century to protect the Hapsburg lands from the Ottoman Turks. The presence of this old military frontier is said to account for the presence there of much of its present-day Serb population, encouraged centuries ago to move into and settle on the frontier, forming there a loyal population base as a potential border defence force. The large Muslim population of Bosnia and Herzegovina owes its religion and culture, and hence its identity, to the long Turkish occupation, during which time many Slavs adopted the Islamic faith. The third ethnic population living in Bosnia and Herzegovina, also sizeable, are the Croats, living principally in the south-west adjacent to Croatia's Dalmatian coast. Since all three population groups are Slav it is, no doubt, inaccurate to speak of three different ethnic groups; however, this appears to be accepted common usage.

57. Each of these peoples has had, in medieval times, its era of empire and greatness. For Serbs the heroic but unsuccessful resistance of the Serb nation to Turkish invasion, culminating in their defeat in the battle of Kosovo, remains an emotional event, symbolic of Serb courage. Nationalistic Serbs and Croats in particular each rely on long-past days of empire in support of

their claims, necessarily conflicting, to a Greater Serbia and a Greater Croatia. For each, Bosnia and Herzegovina is of particular interest, containing as it does substantial Serb and Croat populations as well as an even larger Muslim population but having no single ethnic group as a majority of the population; as of 1991, some 44 percent of Bosnians were Muslim, 31 percent Serb and 17 percent Croat.

58. Until 1878 Bosnia and Herzegovina remained under Ottoman rule. In that year, the Austro-Hungarian Empire occupied Bosnia and Herzegovina and began to administer it. Then, in 1908, it formally annexed Bosnia and Herzegovina. Immediately after the First World War, and as part of the breakup of the Hapsburg empire, the Kingdom of Serbs, Croats and Slovenes was created out of the union of the Kingdom of Serbia, which in the nineteenth century had already achieved hard-won independence from Turkey, with Montenegro, which had also been an independent principality, Croatia, Slovenia, and Bosnia and Herzegovina. In 1929 that Kingdom changed its name to the Kingdom of Yugoslavia, that is, the Kingdom of the southern Slavs. For many centuries Roman Catholicism had predominated in the northern and western sectors whereas Orthodox Christianity and Islam prevailed in its southern and eastern sectors under the rule of the Ottoman Empire. This same general religious division persisted into this century and indeed still persists.

59. The concept of a state of the south Slavs, who shared a common language and common ethnic origins, had evolved in the minds of Croatian intellectuals during the nineteenth century side by side with the growth amongst Serbs of the concept of a Greater Serbia. With the disintegration of the Ottoman and Austro-Hungarian Empires after the First World War, these two disparate concepts, coupled with the status of Serbia as one of the Allied powers, led to the creation of the postwar state of Yugoslavia. It was, however, an uneasy marriage of two ill-matched concepts and in the interwar years the nation experienced acute tensions of an ethno-national character.

60. Until the Second World War and the invasion of the Kingdom by Italy and Germany in 1941, Yugoslavia, with its capital in Belgrade, underwent internal administrative boundary changes but its external boundaries remained unaltered. Then, during the time of Axis occupation, a portion of the territory of the state was annexed by Italy and two other areas were transferred to Bulgarian and Hungarian control respectively. Much of what remained became the formally independent but in fact Axis puppet state of Croatia, extending far beyond previous, and subsequent, Croatian boundaries and divided between Italian and German zones; a much reduced Serbia became a so-called German protectorate.

61. Although this wartime situation was short-lived, lasting only from 1941 to 1945, it left bitter memories, not least in Bosnia and Herzegovina, large parts of which, including opstina Prijedor, were included in the puppet state of Croatia. The Second World War was for Yugoslavia a tragic time, marked by harsh repression, great hardship and the brutal treatment of minorities. It was a time of prolonged armed conflict, in part the product of civil war, in part a struggle against foreign invasion and subsequent occupation. Three distinct Yugoslav forces each fought one another: the Ustasa forces of the strongly nationalist Croatian State, supported by the Axis powers, the Chetniks, who were Serb nationalist and monarchist forces, and the Partisans, a largely communist and Serb group. At the same time the latter two opposed the German and Italian armies of occupation. The Partisans, under Josip Broz, later better known as Marshal Tito, did so consistently and with ultimate success, whereas the Chetniks' role in this opposition to the invaders still remains a matter of great controversy. Although none of these three forces was predominantly Muslim, Muslims were to be found in the ranks of both the Ustasa and the Partisans.

62. Many of these hard-fought and bloody conflicts took place in Bosnia and Herzegovina and many of the outrages against civilians, especially though by no means exclusively by Ustasa forces against ethnic Serbs, also took place there, particularly in the border area between Croatia and Bosnia and Herzegovina, where the Partisans were especially active and which is the very area in which Prijedor lies. A minister of the wartime Croatian puppet government had promised to kill a third of the Serbs in its territory, deport a third and by force convert the remaining third to Catholicism. Another urged the cleansing of all of the greatly enlarged Croatia of "Serbian dirt". Wholesale massacres of Serbs ensued; in six months of 1941 the Ustasa may have killed well over a quarter of a million Serbs, although the exact number is a subject of much controversy. Bulgarian and Hungarian occupying forces in other parts of Yugoslavia also engaged in massacres of Serbs and in ethnic cleansing. However, other ethnic groups also suffered in Prijedor, the Partisans killing many prominent Muslims and Croats in 1942 and again, in nearby Kozarac, in 1945.

63. The subsequent revenge of the Serbs for Ustasa atrocities was especially felt by the Croatian puppet army which, following its surrender to the Allies at war's end, was handed over to Marshal Tito's victorious Partisans who immediately began the execution of up to 100,000 Croat soldiers, often in the most summary way.

64. This is the legacy with which the population of Bosnia and Herzegovina has had to live. Yet in the postwar years until about 1991 and, despite past horrors or perhaps having learned better from them, the multi-ethnic population of Bosnia and Herzegovina apparently lived happily enough together. However, at least in opstina Prijedor, particularly in rural areas, the three populations, Serbs, Croats and Muslims, tended to live separately so that in very many villages one or another nationality so predominated that they were generally regarded as Serb or Croat or Muslim villages. Many witnesses speak of good intercommunal relations, of friendships across ethnic and coincident religious divides, of intermarriages and of generally harmonious relations. It is only subsequent events that may suggest that beneath that apparent harmony always lay buried bitter discord, which skilful propaganda readily brought to the surface, with terrible results.

65. The years from 1945 to 1990 had no tales of ethnic atrocities to tell. Marshal Tito and his communist regime took stern measures to suppress and keep suppressed all nationalist tendencies. Under its Constitution of 1946, the country was to be composed of six Republics: Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro and two autonomous regions, Vojvodina and Kosovo, these two being closely associated with Serbia. The peoples of the Republics other than Bosnia and Herzegovina were regarded as distinct nations of federal Yugoslavia. The situation of Bosnia and Herzegovina was unique; although it was one of the six Republics, it, unlike the others, possessed no one single majority ethnic grouping and thus there was no recognition of a distinct Bosnian nation. However, by 1974 the Muslims were considered to be one of the nations or peoples of federal Yugoslavia.

66. Throughout the years of Marshal Tito's communist Yugoslavia, religious observance was discouraged with the result that, by the 1980s, in Bosnia and Herzegovina churchgoing and attendance at the mosque was very much in decline. Divisive nationalism and open advocacy of national ethnic identity were also severely discouraged; nevertheless the population remained very conscious of so-called ethnic identity, as Serb, Croat or Muslim.

67. Historically the territorial division between Roman Catholic and Orthodox branches of the Christian faith had run through the territory of Yugoslavia for many centuries. When the Ottoman empire, not stopping at the conquest of Constantinople, extended throughout much of the Balkans, the fluctuating boundary between Catholic Christianity and Islam, which also

sheltered a numerous Christian Orthodox population, was usually to be found passing through or near Bosnia. Today, in Bosnia and Herzegovina, whether practising or non-practising, the great majority of Serbs remain Orthodox Christian and the Croats Roman Catholic, while the title Muslim speaks for itself. This difference of religion (and to a degree of custom and culture) apart, all three groups are, and often pride themselves in being, Slav and, with minor regional differences and distinct regional accents, speak much the same language, often intermarry and frequently bear surnames common to all three groups. The first names of Muslims are, however, often very distinctive.

68. Initially Marshal Tito's Yugoslavia had a close relationship with the Soviet Union, its Constitution framed on the Soviet model. Hence postwar Yugoslavia was at first a highly centralist State, with substantial power exercised federally from Belgrade. Then, in the 1960s and on into the 1970s, there was a trend towards devolution of power to the governments of the Republics, a trend enhanced by a new Constitution adopted in 1974 and which continued on into the 1980s. Were these newly-empowered governments also to encourage, or in some cases merely to rekindle, strongly nationalist and ethnocentric beliefs and to adopt policies to give effect to such beliefs, the scene would clearly be set for conflict. This is what in fact occurred. In 1990 multi-party elections were for the first time held in the separate Socialist Republics of Yugoslavia which led to strongly nationalist parties being elected, heralding the breakup of the federation and seen by nationalists in both Croatia and Serbia as opening the way to expansion of their territories.

69. In the mid to late 1980s, the Republic of Serbia had already begun measures to deprive Yugoslavia's two autonomous provinces, Vojvodina and Kosovo, of their separate identity and effectively to incorporate them into the Republic. This it achieved in substance in 1990, thereby ending what Serbs regarded as a discriminatory feature of the federation, that the one entire nation of Serbs, consisting of Serbia and the two provinces, was, alone of the Republics, denied a single, united identity. Some Serbs had long dreamed of a Greater Serbia, a nation which would include within its borders all ethnic Serbs. The effective extension of Belgrade's direct rule over the two provinces was a step in this direction and one that was implemented despite the fact that in Kosovo ethnic Albanians had come to far outnumber Serbs. Kosovo is part of the homeland of the Serbs of past centuries, the battle of Kosovo was fought there, and the province has particular significance for present-day Serbs who regarded its autonomy as a province to be especially hurtful, depriving Serbia of coherent statehood and of control over what it considered to be ancestral Serbian territory.

2. The Disintegration of the Socialist Federal Republic of Yugoslavia

70. What developed into the total disintegration of Yugoslavia as Marshal Tito knew it perhaps began, to the extent that gradual political processes have a definite beginning, in the late 1980s. It was preceded by grave financial problems leading to a protracted economic crisis. Yugoslavia had long pursued its own unique system of socialist self-management which set it apart from the rest of the communist world. During the 1980s this system came to be widely regarded as responsible for the country's economic woes. Towards the end of the 1980s, what had begun as an economic crisis developed into a major political one. Yugoslavia's one-party state, with all political power in the hands of the League of Communists, was increasingly regarded as outmoded. At the same time Eastern European communism was everywhere in decline.

71. Accordingly, in 1988 a sweeping reform of the political and constitutional scene occurred. The whole structure of socialist self-management, entrenched as it had been in the federal Constitution, was abolished, the many constitutional references to the working class as the political actors and possessors of political power were removed and the leading political role of

the League of Communists was brought to an end. Nationalism took the place in the Republics of the country's own brand of communism but with very many of the former communist leaders still in positions of power.

72. In 1988 and 1989 events in both Serbia and Slovenia suggested impending threats to the unity of the federation. Serbian action to end the autonomy of the province of Kosovo was carried out with a degree of ruthlessness that alarmed many non-Serbs, who saw it as symptomatic of what they might themselves experience in the future at the hands of Serbia. In 1989 at the fourteenth Congress of the League of Communists, Serbian delegates had also sought to alter to the advantage of more populous Republics such as Serbia a fundamental feature of the Constitution, that of the voting equality of Republics, substituting for it the one person one vote principle. This caused the resignation of the Slovenian leadership from the League and a walkout from the Congress of the representatives of Croatia and of Bosnia and Herzegovina. It was in that year, the 600th anniversary of the battle of Kosovo, that many Serb gatherings were held in celebration of that battle, all of which sought to foster Serb nationalism. For Serbs their fourteenth century struggle against the Turkish foe, unaided by other Balkan peoples, serves as a rallying cry for a Greater Serbia. Slobodan Milosevic, already a powerful political figure in Serbia as a party chief, spoke at a mass rally at the site of the battlefield itself. He spoke as the protector and patron of Serbs throughout Yugoslavia and declared that he would not allow anyone to beat the Serb people. This greatly enhanced his role as the charismatic leader of the Serb people in each of the Republics, after which he rapidly rose in power.

73. In Slovenia in the 1980s there had been a growing sense of nationalism, of Slovenia for the Slovenes, and with it growing hostility towards those Yugoslavs who were not ethnic Slovenes. It would seem that the Slovenes were the first ethnic group to determine that they no longer wanted to be part of the federal Yugoslavia. Perhaps in part as a reaction to what was occurring in Serbia, the Slovene leadership adopted a nationalistic political platform of their own and in 1989 formally amended the Republic's Constitution to empower the Slovene Assembly to take measures to protect the Republic's status and rights from violation by organs of the federation. This amendment was declared unconstitutional by Yugoslavia's constitutional court but in December 1989 Slovenia chose to ignore the decision of the court. In the following 18 months other Republics increasingly ignored federal authority. Then, in December 1990, a plebiscite was held in Slovenia, resulting in an overwhelming majority vote for independence from Yugoslavia.

74. In Croatia the elections of 1990 produced a strongly nationalistic government led by Franjo Tudman who, upon assuming power, amended the Republic's Constitution to recreate Croatia as the national state of the Croatian nation, with citizens of other ethnic groups as minorities, not having the status of nations. Franjo Tudman declared that in Croatia, the Croats alone were sovereign. A plebiscite in Croatia in May 1991 produced an overwhelming majority for independence.

75. Just before the holding of the Croatian plebiscite, Serbia and Montenegro, aided by the votes of the two formerly autonomous provinces now controlled by Serbia, blocked for a time the customary rotation of the collective presidency of the federation, preventing the appointment of a Croat whose turn it was, according to convention, to be president of the federation. This caused intense disquiet in other Republics.

76. There had already been growing intercommunal tension within Croatia in 1990, spreading into parts of Bosnia and Herzegovina, and troops of the Yugoslav national army, the Yugoslav People's Army ("JNA"), controlled from the federal capital of Belgrade, had been deployed in affected areas, ostensibly so as to maintain order. A consequence was that along the Bosnian border, in strongly Serb areas, local Serbs began to declare autonomous regions within Croatia;

one in Krajina, another further to the east in Eastern Slavonia, thereby effectively excluding Croatian influence and control from those regions.

77. On 25 June 1991 Slovenia and Croatia declared their independence from the Socialist Federal Republic of Yugoslavia. Their independence, ultimately recognized by the European Community on 15 January 1992, was challenged militarily by the JNA. Meanwhile the two autonomous Serb regions within Croatia had proclaimed themselves to be the Republic of Serbian Krajina on 19 December 1991.

78. In Bosnia and Herzegovina, the Parliament declared the sovereignty of the Republic on 15 October 1991, whereupon the Serb deputies of that Parliament proclaimed a separate Assembly of the Serb Nation on 24 October 1991. In March 1992 Bosnia and Herzegovina declared its independence following a referendum in February sponsored by the Bosnian Muslims with some support from Bosnian Croats; the holding of the referendum had been opposed by Bosnian Serbs, who very largely abstained from voting. The European Community and the United States of America recognized the independence of the Republic of Bosnia and Herzegovina in April 1992. Meanwhile the Republic of the Serbian People of Bosnia and Herzegovina was declared on 9 January 1992, to come into force upon any international recognition of the Republic of Bosnia and Herzegovina. That entity later became the *Republika Srpska*.

79. Macedonia had likewise declared its independence in September 1991. Serbia and Montenegro meanwhile continued to support the concept of a federal state, no longer under its old name but to be called the Federal Republic of Yugoslavia and wholly Serb dominated, consisting only of Serbia and Montenegro; it was formally established in April 1992. This completed the dissolution of the former Socialist Federal Republic of Yugoslavia. What had in effect taken the place of state socialism in Yugoslavia were the separate nationalisms of each of the Republics of the former Yugoslavia other than Bosnia and Herzegovina, which alone possessed no single national majority.

3. Bosnia and Herzegovina

80. This being the political situation reached by mid-1992 it is now necessary to look back to 1990, 1991 and early 1992 and specifically to events in or particularly affecting Bosnia and Herzegovina during those years. The Indictment relates to events in 1992 which can only be understood in the light of events in Bosnia and Herzegovina and indeed elsewhere in Yugoslavia in the two preceding years.

81. In 1990 the first free, multi-party elections were held in Bosnia and Herzegovina, for both opstina assemblies and for the Republican Legislature. A number of recently formed political parties contested the poll. Of these parties the most prominent were the Muslim Party of Democratic Action ("SDA"), the Serb Democratic Party ("SDS") and the Croat Democratic Union ("HDZ"). Some of the other parties were the successors to or reformed versions of the now dissolved Communist party. In both ballots, for opstina Prijedor and for the Republican Assembly, the SDA party gained a narrow margin over the SDS. The outcome of the elections was, in effect, little more than a reflection of an ethnic census of the population, each ethnic group voting for its own nationalist party.

82. In the Republican Assembly, cooperation between the Muslim and Serbian political parties proved increasingly difficult as time went by. What was initially a coalition government of the Republic broke down in October 1991 and failed completely in January 1992.

83. The disintegration of multi-ethnic federal Yugoslavia was thus swiftly followed by the disintegration of multi-ethnic Bosnia and Herzegovina and the prospect of war in Bosnia and Herzegovina increased. Both Bosnian Serbs and Croats made it apparent that they would have recourse to armed conflict rather than accept minority membership of a Muslim-dominated State. Further, its large Serbian minority retained vivid memories, albeit now some 50 years old, of their wartime suffering at Croat hands. Among much other suffering, many Serbs, including the accused's mother, had been forcibly deported by the Ustasa to a concentration camp at Jasenovac where many died and all were ill-treated. The premier of Serbia, Slobodan Milosevic, had for some years not only exercised a high degree of personal power in Serbia but had also established a very effective control of the Serbian media and it, together with the media in Serb-dominated areas of Bosnia and Herzegovina, was very effectively directed towards stirring up Serb nationalist feelings and converting an apparently friendly atmosphere as between Muslims, Croats and Serbs in Bosnia and Herzegovina into one of fear, distrust and mutual hostility. Communism had formerly preserved the unity of the federation; with the decay of Yugoslav communism and the substitution for it of distinct nationalisms, Bosnia and Herzegovina, which possessed no single ethnic majority, had, as a single entity, nothing to put in its place. Politics began to divide along the lines of ethno-national communities.

84. The objective of Serbia, the JNA and Serb-dominated political parties, primarily the SDS, at this stage was to create a Serb-dominated western extension of Serbia, taking in Serb-dominated portions of Croatia and portions, too, of Bosnia and Herzegovina. This would then, together with Serbia, its two autonomous provinces and Montenegro, form a new and smaller Yugoslavia with a substantially Serb population. However, among obstacles in the way were the very large Muslim and Croat populations native to and living in Bosnia and Herzegovina. To deal with that problem the practice of ethnic cleansing was adopted. This was no new concept. As mentioned earlier, it was familiar to the Croat wartime regime and to many Serb writers who had long envisaged the redistribution of populations, by force if necessary, in the course of achieving a Greater Serbia. This concept was espoused by Slobodan Milosevic, with ethnic Serbs widely adopting it throughout the former Yugoslavia, including Serb political leaders in Bosnia and Herzegovina and in Croatia. In addition to the concept of a Greater Serbia, there was also a concept on the part of Croats of the creation of a Greater Croatia that would include all Croats living in the territory of the former Yugoslavia.

4. Greater Serbia

85. The concept of a Greater Serbia has a long history. It emerged at the forefront of political consciousness in close to its modern-day form as early as 150 years ago and gained momentum between the two World Wars. Kept in check during the years of Marshal Tito's rule, it became very active after his death. Greater Serbia involved two distinct aspects: first, the incorporation of the two autonomous provinces of Vojvodina and Kosovo into Serbia, already referred to; and secondly, the extension of the enlarged Serbia, together with Montenegro, into those portions of Croatia and Bosnia and Herzegovina containing substantial Serb populations.

86. Associated with the first of these aspects was the Serbian opposition to the equal representation federally of each of the Republics, regardless of population size. This, together with the existence of the two autonomous provinces, was the subject of much agitation and received strong support in the second half of the 1980s from the Serbian Academy of Arts and Sciences in its widely distributed but not officially published memorandum urging major constitutional change. As mentioned above, the two provinces were effectively incorporated into Serbia in 1990 but the move to achieve federal representation by population rather than by Republics, with a resulting increased power for Serbia, was not achieved before the breakup of the federation.

87. The second aspect of a Greater Serbia was strongly pursued in the late 1980s and on into the 1990s, much encouraged by nationalist writings of earlier days, some of which advocated a Serbian state extending throughout Bosnia and Herzegovina and including the Dalmatian coast and parts of Croatia north of the River Sava. It was promoted actively by Serb propaganda, a key element of the campaign; by recalling the atrocities of the Croat Ustasa in the Second World War its proponents sought to arouse the fears of Serbs everywhere and in the end to have them seek protection within a Greater Serbia.

88. The propaganda campaign that accompanied this movement began as early as 1989, with the celebration of the 600th anniversary of the Battle of Kosovo. During this celebration, the Serb-controlled media declared that Serbs had been let down by others in the area when the Ottoman Turks invaded. Through public speeches and the media, Serbian political leaders emphasised a glorious past, and informed their audiences that if Serbs did not join together they would be again subject to attack by "Ustasa", a term used to inspire fear in Serbs. The danger of a "fundamentalist, politicised" Muslim community was also represented as a threat. After the disintegration of the former Yugoslavia began, the theme of the Serb-dominated media was that "if for any one reason Serbs would become a minority population . . . their whole existence could be very perilous and endangered . . . and therefore they had no choice but a full-scale war against everyone else, or to be subjected to the old type concentration camp, the symbol being Jasenovac".

89. In the early 1990s there were rallies that advocated and promoted the idea, with Serbian leaders in attendance. In 1992 Radoslav Brdanin, President of the Crisis Staff of the Serb Autonomous Region of the Banja Luka area, declared that 2 percent was the upper tolerable limit on the presence of all non-Serbs in this region. Radoslav Brdanin advocated three stages of ridding the area of non-Serbs: (1) creating impossible conditions that would have the effect of encouraging them to leave of their own accord, involving pressure and terror tactics; (2) deportation and banishment; and (3) liquidating those remaining who would not fit into his concept for the region.

90. The propaganda continued throughout the war in Croatia and Slovenia, which was fought primarily by the JNA on the one side and those seeking independence on the other. Colonel Vukelic, the Assistant for Ethics of the Commander of the 5th Corps of the 1st Military District of the JNA in 1991 and 1992, a Bosnian Serb responsible for moral and ethical preparation of military units and for maintaining relations with the media, political bodies and socio-political organizations, made many declarations against Muslim and Croat populations. He characterized Croats and Muslims as the enemies of Serbs and proclaimed that the Serbs in Bosnia and Herzegovina were in danger and needed to be protected, a need which should inspire Serb members of the JNA to join the struggle to save the Serbs from genocide.

91. Over time, the propaganda escalated in intensity and began repeatedly to accuse non-Serbs of being extremists plotting genocide against the Serbs. Periodicals from Belgrade featured stories on the remote history of Serbs intended to inspire nationalistic feelings. Slobodan Kuruzovic, Commander of the Territorial Defence ("TO") of Prijedor, who became the head of the local newspaper *Kozarski Vjesnik* and the commander of the Trnopolje camp, stated that the "interests of Serbian people in Republika Srpska will be the main guidelines for my editorial policies". In articles, announcements, television programmes and public proclamations, Serbs were told that they needed to protect themselves from a fundamentalist Muslim threat and must arm themselves and that the Croats and Muslims were preparing a plan of genocide against them. Broadcasts from Belgrade caused fear among non-Serbs because only the Serb nation was presented positively, and it was represented that the JNA supported the Serbs. The theme that,

for the Serbs, the Second World War had not ended was expressed on television and radio by Vojislav Seselj, Zeljko Raznjatovic, otherwise known as "Arkan", and other Serb politicians and leaders.

92. By the spring of 1992 only Serb-controlled television channels and programmes were available in many parts of Bosnia and Herzegovina. This was achieved by the take-over of television transmitters throughout the Serb-controlled areas, including the transmitter on Kozara Mountain which was taken over by the Wolves, a paramilitary unit acting in full cooperation with both military and political leaders. In consequence, by the spring of 1992 residents in Prijedor and elsewhere in eastern Bosnia and Herzegovina were no longer able to receive television from Sarajevo or from Zagreb but only from Belgrade or Novi Sad in Serbia, and Pale or Banja Luka in Bosnia and Herzegovina, all of which broadcast anti-Muslim and anti-Croat propaganda.

93. In opstina Prijedor, during the days following the take-over of the town of Prijedor by JNA forces on 30 April 1992, as discussed below, Serb nationalist propaganda intensified. The "need for the awakening of the Serb people" was stressed and derogatory remarks against non-Serbs increased. Muslim leaders who attempted to speak on the radio were barred while SDS leaders had free access to it. Even more open propaganda against Muslims and Croats began in earnest after an incident in the Hambarine region on 22 May 1992, discussed below. Examples include statements that a Croat doctor castrated newborn Serb boys and was performing sterilization surgery on Serb women and that a Muslim doctor intentionally administered the wrong drug in an attempt to kill his Serb colleague.

94. This propaganda campaign continued on into 1993. For example, on 6 August 1993 an article in *Kozarski Vjesnik*, under the headline "Preventing a Repetition of the Serbian Massacre of 1941", extensively quoted Simo Miskovic, the SDS chairman, as saying:
 'The Serbian people had instinctively sensed the danger posed by the SDA and HDZ and have formed Republika Srpska in time Two years ago the Serbian people sensed instinctively that once again they were faced with the danger of the same villains who in 1941 started the extermination process of the Serbian people and therefore formed their own party. On 2nd August 1991 we in the District of Prijedor have formed the SDS Prior to that we tried hard to reach an agreement with the Muslim and Croatian party regarding our continued coexistence. Although they agreed to it in words they continued to arm themselves in order to destroy us. The SDS leadership saw what they were planning and started to arm their own people in order to prevent the tragedy of 1941 Quickly we formed our army and our police forces and on 30 April 1992 without a single shot being fired and without a single casualty, we established our authority in Prijedor which we were able to maintain [until] now and we have to consolidate it through a democratic process.' (Prosecution Exhibit 100.)
 The article also stated that Simo Miskovic then mentioned a woman who had to watch her children "being slaughtered by the Ustasa butchers" and continued in editorial fashion: There were thousands of such and similar cases in the Bosanska Krajina and this must never be allowed to happen again. SDS had prevented this happening in Prijedor in May last year when SDA and HDZ hatched a devilish plan of retribution against the Serbs in Prijedor.

95. Another article quoted Milomir Stakic, chair of the Serbian Municipal Assembly of Prijedor, who claimed that questioning conducted at the camps where Muslims who had been rounded up were imprisoned showed that the Muslims were determined to carry out a detailed plan for the liquidation of the Serbian population of Prijedor. Similarly, Simo Drljaca, the Chief of Police of Prijedor, stated that he had proof that 1,500 Muslims and Croats participated in the genocide of the Serb people and that "instead of receiving their just punishment, the white world mighty men forced us to release them all from Manjaca [a Serb prison camp]". (Prosecution Exhibit 92.)

96. The witness Edward Vulliamy summed up the propaganda campaign, stating that the message from the government in Belgrade was relentless and was very "cogent and potent. It was a message of urgency, a threat to your people, to your nation, a call to arms, and, yes, a sort of an instruction to go to war for your people. . . . It pushed and pushed. It was rather like a sort of hammer bashing on peoples' heads I suppose." Edward Vulliamy, a journalist for the Guardian Newspaper, London, travelled to the areas in conflict in Bosnia and Herzegovina during 1992. Although Roy Gutman, author of the Pulitzer Prize book entitled *A Witness to Genocide*, was the first to discover the Omarska camp through interviews with people who had been detained there, Edward Vulliamy was with the first group of outside journalists actually to enter the camp. The media attention generated by Roy Gutman, Edward Vulliamy and others regarding Omarska ultimately led to the closure of the camp.

5. Formation of Serb Autonomous Regions

97. The Greater Serbia theory was put into practice after the 1990 elections and before the beginning of the war. In April 1991 several communities joined a Serbian association of municipalities. These structures were formed in areas predominantly inhabited by Bosnian Serbs, generally by vote of the predominantly Bosnian Serb Local Assemblies. At first, this association was a form of economic and cultural cooperation without administrative power. However, separate police forces and separate Assemblies rapidly developed. In September 1991 it was announced that several Serb Autonomous Regions in Bosnia and Herzegovina had been proclaimed, including Krajina, Romanjija and Stara Herzegovina, with the aim of separating from the Republican government agencies in Sarajevo and creating a Greater Serbia.

98. Bosanski Krajina, as the Serb Autonomous Region of Krajina was initially called, consisted of the Banja Luka region and surrounding municipalities where the Serbs constituted a clear majority. Several of the municipalities that the SDS leadership had planned on joining the autonomous region, including Prijedor, did not in fact join it in 1991. This left Prijedor virtually isolated, surrounded by other municipalities which had joined the association.

99. In November 1991 the SDS sponsored, organized and conducted a plebiscite primarily for the Bosnian Serb population. Voters were given different ballots depending upon whether they were Serb or non-Serb. The difference between the two ballots was significant: for Bosnian Serbs, the ballot asked: "Are you in favour of the decision reached by the Assembly of the Serbian People in Bosnia and Herzegovina on 24 October 1991 whereby the Serbian people shall remain in the common State of Yugoslavia which would include Serbia, Montenegro, Serb Autonomous Region Krajina, Serb Autonomous Region Slavonija, Baranja, Western Srem along with all others willing to remain in such a State?" while the question for non-Serbs was: "Are you in favour of Bosnia and Herzegovina remaining a republic with equal status in a common State of Yugoslavia with all the other republics which also declare themselves willing to do so?" (Prosecution Exhibit 97.) The great majority who did vote were Serbs; those Serbs who did not being branded as traitors. Most non-Serbs regarded the plebiscite as directed only to Serbs.

100. The outcome of the plebiscite purported to be 100 percent in favour. The SDS leadership used this outcome as a basis on which to develop the separate Serb political structure. The plebiscite was cited as justification for all subsequent moves such as the ultimate walk-out of the SDS representatives from the Bosnia and Herzegovina Assembly, the various negotiations conducted at the federal and international levels and the proclamation, on 9 January 1992, of the Republic of the Serbian People of Bosnia and Herzegovina. It was "used as a pretext, as an excuse, explanation, for everything that they did".

101. Also on the basis of the plebiscite, the SDS and military forces in each region including the JNA, paramilitary organizations, local TO units, and special police units, began to establish physical and political control over certain municipalities where it had not already gained control by virtue of the elections. In these regions, which included opstina Prijedor, the SDS representatives in public office in some cases established parallel municipal governments and separate police forces. Physical control was asserted by positioning military units, tanks and heavy artillery around the municipalities and setting up checkpoints to control the movement of non-Serbs.

102. In March 1992 the Assembly of Serbian People of Bosnia and Herzegovina promulgated the Constitution of the Serb Republic of Bosnia and Herzegovina and proclaimed itself a distinct republic. This Assembly session was transmitted live on television, as were the final declarations. In the course of the session, Radoslav Brdanin, a member of the Serb Republic parliament, said: "At long last I have lived to see Bosnian Krajina become western Serbia"; and Radislav Vukic, President of the Municipal Committee of the SDS in Banja Luka, declared: "Now the Turks will shake with fear from us", "Turks" being a derogatory reference to Bosnian Muslims.

6. Formation of Crisis Staffs

103. Crisis Staffs were formed in the Serb Autonomous Regions to assume government functions and carry out general municipal management. Members of the Crisis Staffs included SDS leaders, the JNA Commander for the area, Serb police officials, and the Serb TO Commander. For example, Lieutenant-General Momir Talic, Commander of the 5th Corps (which became the 1st Krajina Corps), was a member of the Crisis Staff in Banja Luka ("ARK Crisis Staff"), thus demonstrating the relationship between the political and military branches of the Bosnian-Serb-run government. The ARK Crisis Staff, which had jurisdiction over opstina Prijedor, was established in April or May 1992 as an organ of the Autonomous Region of Krajina, the statute of which provided for the creation of Crisis Staffs in the case of war or immediate danger of war. In early May, after the official decision on its establishment was taken by the Executive Council of Krajina, the ARK Crisis Staff took over all powers of the government and other agencies. It was the highest-level decision-maker in the Autonomous Region of Krajina and its decisions had to be implemented throughout the Autonomous Region of Krajina by means of municipal Crisis Staffs. The municipal Crisis Staffs had to report to the ARK Crisis Staff daily regarding the steps taken to implement the decisions of the Main Board located in Banja Luka.

7. The Role of the JNA

(a) The JNA in disintegrating Yugoslavia

104. The JNA has been described as taking part in attacks on Croatia and on Bosnia and Herzegovina. In the course of this Opinion and Judgment there will be other references to the JNA as acting as a hostile force so far as Bosnian Muslims were concerned. The relationship between the JNA and the armed forces of *Republika Srpska* will be examined in Section VI.B of this Opinion and Judgment. However, at the risk of some subsequent repetition, some explanation is called for as to how the JNA, as the national army of Yugoslavia, and what had been a truly multiethnic national army, could become the instrument of the policy of the Federal Republic of Yugoslavia (Serbia and Montenegro). It is perhaps best expressed, if not explained, by General Veljko Kadijevic, in the early 1990s the Yugoslav Federal Secretary for Defence, who in 1993 published his own description of the disintegration of Yugoslavia in his book *My view of the break-up: an Army without a State*. (Prosecution Exhibit 30.) Of the JNA he writes that by 1991 it was no longer an army with a cohesive state to defend; the state which it was its duty to defend was

disintegrating and just as its ranks were now substantially filled with ethnic Serbs, so its task in the immediate future would be to regroup its forces and equipment, scattered throughout the former Yugoslavia including the seceding Republics, back into what was left of the nation and then to concentrate upon the protection and defence of those ethnic Serbs who in the course of this disintegration found themselves outside Serbia and Montenegro. This, it was envisaged, would lead ultimately to the creation of a new, substantially Serb, Yugoslavia with its core in Serbia and Montenegro but including also parts of Bosnia and Herzegovina and Croatia, principally but not exclusively those parts presently having a majority Serb population.

105. Until the late 1980s the armed forces of Yugoslavia were typical of many national defence forces, unexceptional in composition or character save, perhaps, that they had a specific constitutional role under the 1974 Constitution not only to protect against external threat but also to protect the sovereignty, territorial integrity and social system established by that Constitution. The JNA had also a right of representation, equal to that of an autonomous province, on the central committee of the League of Communists of Yugoslavia, then the key body within the governing system of the Socialist Federal Republic of Yugoslavia. The totality of Yugoslav armed forces included the regular army, navy and air force, collectively known as the JNA, consisting of an officer corps, non-commissioned officers and conscripts, together with a reserve force, and, as well as and distinct from the JNA, the TOs. Whereas the JNA was an entirely federal force, with its headquarters in Belgrade, there was a distinct TO in each Republic, funded by that Republic and under the control of the Minister of Defence of that Republic. The JNA was a powerful national army, equipped with all the conventional weapons and equipment that modern European armies possess; the TOs, on the other hand, were equipped with essentially infantry weapons; rifles, light machine-guns, some small calibre artillery, mortars, anti-personnel mines and the like; they had no tanks and their transport would vary depending on the adequacy of a particular Republic's funding of its TO and on how much each received by way of JNA cast-offs.

106. In July 1991, on instructions from headquarters in Belgrade, the JNA seized from the Republic's Secretariat for Defence in Bosnia and Herzegovina and from municipalities all the documentation relating to conscription including all the registers of conscripts. In consequence, thereafter the conscription process was exclusively in the hands of the JNA and no longer in those of the Republic's Ministry for Defence. This done, it was ensured that only ethnic Serbs were recruited into the armed forces. Then in the second half of 1991 military units were formed in Serb-populated villages in Bosnia and Herzegovina and supplied with weapons and with uniforms. Bosnia and Herzegovina was a vital base for JNA operations in Croatia in the second half of 1991 and Bosnian Serbs were an important source of manpower both for the JNA and for the TO. Those TO units in predominantly Muslim and Croat areas of Bosnia and Herzegovina were at the same time largely disbanded by the JNA. General Kadijevic in his book describes how "naturally we used the territorial defence (the TO) of Serb regions in Croatia and Bosnia and Herzegovina in tandem with the JNA" to paralyse territorial defence where it might provide a basis for creating the armies of secessionist republics.

107. The TO of Bosnia and Herzegovina had in any event been to a degree neutralised by the action taken by the JNA to disarm it. Traditionally all TO weapons were stored locally, within each municipality, but in late 1991 and early 1992 the JNA removed all local stocks of weapons from TO control, at least in Muslim-populated areas. This left those local TO units virtually disarmed whereas units which were drawn from Serb-populated areas, and only those, were substantially re-equipped.

(b) The transformation of the JNA

108. A particular point had long been made, enshrined in Yugoslavia's Constitution, of ensuring that the JNA, at conscript level, should accurately reflect the overall Yugoslav population mix. However, at officer level, Serbs (including Montenegrans) had traditionally been over represented; some 60 percent of career officers were ethnic Serbs whereas Serbs formed only 34 to 36 percent of the total Yugoslav population. In the early 1990s this predominance of Serb officers swiftly increased so that very soon very few non-Serb officers remained in the JNA.

109. The change that overtook the JNA in the early 1990s is best illustrated by the change in the ethnic mix of conscripts between pre-June 1991 and early 1992. During that time, the Serb component rose from just over 35 to some 90 percent. Similarly, whereas in an army in which Serbs had formerly made up some 40 percent of the total of officers and other ranks, by early 1992 that percentage had risen to some 90 percent. These increases were in large measure attributable to the departure from the federation of both Slovenia and Croatia and, in the case of Bosnia and Herzegovina, to the substantial failure of non-Serbs to perform their compulsory military service or respond to mobilization calls. However, other factors were also in operation. Several witnesses, non-Serbs, have told of being discriminated against and being encouraged or indeed obliged to leave the JNA during 1991; they were no longer regarded as reliable members of an army that was ceasing to be Yugoslav and was becoming an instrument of Serb nationalist policy. By 1992 many senior officers of the JNA, rejecting this transformation of the force in which they had long served, left the service or were retired. From this and other causes, including transfer to other armed forces, the number of officers of the rank of General in the JNA fell from 150 in mid-1991 to only 28 after March 1992.

110. One consequence of all this was that the JNA experienced a shortage of manpower, especially when it came to play the role of an occupying force in hostile territory, as was the case in Croatia and, during 1992, in non-Serb parts of Bosnia and Herzegovina. In consequence, increasing reliance was placed on Serbian paramilitary forces, recruited in Serbia and Montenegro and much employed in control of non-Serb communities in Bosnia and Herzegovina. Membership in them was attractive to those Serbs who wished to aid the Serb cause in Croatia and Bosnia and Herzegovina but who regarded the JNA as retaining to a degree a Yugoslav, as distinct from Serb, character and accordingly as being insufficiently single-minded in the Serb cause. These paramilitary forces operated in conjunction with the JNA and were used as infantry shock troops to make up for declining numbers in the regular army. They included Zeljko Raznjatovic's Serbian Volunteer Guard (later known as "Arkan's Tigers") and Vojislav Seselj's Chetniks, both of which came to be particularly feared by the Muslim population for their brutality and indiscipline. The JNA and in particular its air force, arm actively co-operated with and assisted these paramilitary units during 1991 and 1992 in operations in Croatia and Bosnia and Herzegovina and liberally supplied them with arms and equipment.

111. With the secession of Slovenia and Croatia in June 1991 and the subsequent disintegration, republic by republic, of the federation, the way seemed to nationalists open for both a Greater Serbia and a Greater Croatia. Slovenia, containing very few Serbs and playing no part in the history and traditions of the Serb nation, was allowed to secede with relatively little intervention from Belgrade. The JNA was mainly intent on securing the successful withdrawal of JNA units and equipment once it became clear that Slovenia, having retained substantial supplies of arms and equipment for its TO units, would not readily succumb to such JNA forces as Belgrade was prepared to venture in an effort to retain it within the federation.

112. It was a different story with Croatia; it too had retained for its own TO substantial weaponry but Croatia, unlike Slovenia, had a large Serb population and what were regarded as Serb lands, which were not to be allowed to remain unchallenged within the boundaries of the now independent Republic of Croatia. War ensued between the JNA and the Croatian Serbs on the

one hand and, on the other, the forces that the Croatian government could rally. The outcome of the initial phase of that conflict was substantial success for the Serbs. By the end of 1991 those portions of the old Republic of Croatia in which large numbers of Serbs lived had been occupied by the JNA, including, of course, the two self-declared autonomous Serb territories. The JNA, although by now a substantially Serbian and Montenegrin force, had its constitutional function of ensuring the integrity of the federation and its attack on Croatia could be represented in that light.

(c) The division of the JNA

113. With the secession of the non-Serb Republics and the recognition by Serbia and Montenegro that the Socialist Federal Republic of Yugoslavia no longer existed, the JNA could no longer function as a national army. At a meeting of Ministers for Foreign Affairs of the European Community on 6 October 1991 alarm had been expressed at the reports that the JNA had "shown itself to be no longer a neutral and disciplined institution" (Prosecution Exhibit 48). Yet it remained in substantial force in Bosnia and Herzegovina, despite the secession of that Republic. This posed a problem: how was the JNA to be converted into an army of what remained of Yugoslavia, namely Serbia and Montenegro, yet continue to retain in Serb hands control of substantial portions of Bosnia and Herzegovina while appearing to comply with international demands that the JNA quit Bosnia and Herzegovina. On 15 May 1992 the Security Council, by resolution 752²⁶, demanded that all interference from outside Bosnia and Herzegovina by units of the JNA cease immediately and that those units either be withdrawn, be subject to the authority of the Government of the Republic of Bosnia and Herzegovina, or be disbanded and disarmed.

114. The solution as far as Serbia was concerned was found by transferring to Bosnia and Herzegovina all Bosnian Serb soldiers serving in JNA units elsewhere while sending all non-Bosnian soldiers out of Bosnia and Herzegovina. This ensured seeming compliance with international demands while effectively retaining large ethnic Serb armed forces in Bosnia and Herzegovina. What was to become the army of *Republika Srpska* within Bosnia and Herzegovina and to be known as the VRS would be officered by former JNA officers. This new army thus inherited both officers and men from the JNA and also substantial arms and equipment, including over 300 tanks, 800 armoured personnel carriers and over 800 pieces of heavy artillery. The remainder of the former JNA was to become the army of the new Federal Republic of Yugoslavia (Serbia and Montenegro) and was to be known as the VJ.

115. The formal withdrawal of the JNA from Bosnia and Herzegovina took place on 19 May 1992; the VRS was in effect a product of the dissolution of the old JNA and the withdrawal of its non-Bosnian elements into Serbia. However, most, if not all, of the commanding officers of units of the old JNA who found themselves stationed with their units in Bosnia and Herzegovina on 18 May 1992, nearly all Serbs, remained in command of those units throughout 1992 and 1993 and did not return to Serbia. This was so whether or not they were in fact in origin Bosnian Serbs. This applied also to most other officers and non-commissioned officers. Although then formally members of the VRS rather than of the former JNA, they continued to receive their salaries from the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the pensions of those who in due course retired were paid by that Government. At a briefing of officers concerned with logistics, General Dorde Dukic, then of the VRS but who had, until 18 May 1992, been Chief of Staff of the Technical Administration of the JNA in Belgrade, announced that all the active duty members of the VRS would continue to be paid by the federal government in Belgrade, which would continue to finance the VRS, as it had the JNA, with the same numerical strengths of officers as were registered on 19 May 1992. The weapons and equipment with which the new VRS was armed were those that the units had had when part of the JNA. After

18 May 1992 supplies for the armed forces in Bosnia and Herzegovina continued to come from Serbia.

116. General Kadijevic, writing of the role of the JNA in Bosnia and Herzegovina, recounts how "the units and headquarters of the JNA formed the backbone of the army of the Serb Republic (Republic of Srpska) complete with weaponry and equipment" and adds that "first the JNA and later the army of the Republic of Srpska, which the JNA put on its feet, helped to liberate Serb territory, protect the Serb nation and create the favourable military preconditions for achieving the interests and rights of the Serb nation in Bosnia and Herzegovina by political means" (Prosecution Exhibit 30.)

117. It is noteworthy that in his report of 3 December 1992 the Secretary General of the United Nations referred to what had occurred regarding the JNA and its purported withdrawal from Bosnia and Herzegovina and concluded that: "Though JNA has withdrawn completely from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic'."

118. Despite the announced JNA withdrawal from Bosnia and Herzegovina in May 1992, active elements of what had been the JNA, now rechristened as the VJ, co-operated with the VRS in Bosnia and Herzegovina. In particular VJ air crew and aircraft remained in Bosnia and Herzegovina after the May withdrawal and worked with the VRS throughout 1992 and 1993. The former Commander of the 2nd Military District of the JNA, based in Sarajevo, General Ratko Mladic, became the Commander of the VRS following the announced withdrawal of the JNA from Bosnia and Herzegovina.

119. In the early months of 1992, after hostilities against the Mostar area of Bosnia and Herzegovina in 1991, the JNA undertook a number of attacks against other areas of Bosnia and Herzegovina. Throughout April 1992 these attacks resulted in the capture of a number of cities and towns. The Podgrica Corps of what had been the JNA and was now the VJ remained in Bosnia and Herzegovina for much of 1992 and, under the command of General Momcilo Perisic, was involved in the killing of Muslims and Croats in the Mostar region. That Corps, from Montenegro, remained in Bosnia and Herzegovina throughout the summer and autumn of 1992 as late as September of that year. General Perisic later became Commander in Chief of the VJ.

120. The Banja Luka Corps, the 5th Corps of the old JNA, became part of the VRS in Bosnia and Herzegovina, and was named the 1st Krajina Corps, but retained the same Commander, Lieutenant-General Talic. Excluding the Rear Base troops, it numbered some 100,000 men, expanded from a peacetime strength of 4,500 men. It relied for logistics, as it had when a Corps of the JNA, on the Rear Service Base at Banja Luka commanded, as in the days of the JNA, by the same Commander, Colonel Osman Selak, who gave evidence before the Trial Chamber. Units of this Corps took part in the attack on the town of Kozarac on 24 May 1992. These units were all supplied with food and ammunition by that Rear Service Base, the same logistics base from which the Corps had been supplied when part of the JNA.

121. Shortly before the attack on Kozarac, in a declaration of 12 May 1992, the Committee of Senior Officials of the Conference for Security and Cooperation in Europe declared that the aggression against Bosnia and Herzegovina continued with a "relentless attack on Sarajevo and continuous fighting elsewhere with the use of air force and heavy weaponry by the JNA" (Prosecution Exhibit 77) and concluded that this clearly established violations of commitments by the authorities in Serbia and by the JNA.

8. Military Action

122. The formation of Serb Autonomous Regions and all that followed was only possible because of the military power of Serbia. The conflict between Serbia and Croatia played a significant part in the division of Bosnia and Herzegovina along ethnic lines, paving the way for all the events that were to occur later. That conflict, taking formal shape following the declaration of independence by Croatia in June 1991, served greatly to exacerbate the tension between Bosnia and Herzegovina's three ethnic groups, with Bosnian Serbs and Croats sympathetic to their warring fellow nationals across the border and with very many Bosnian Muslims entirely unsympathetic to what they saw as an aggressive Serbian invasion of Croatia, in which the JNA supported the Croatian Serbs. The Muslim-dominated government of Bosnia and Herzegovina instructed the Bosnian population not to comply with the JNA's mobilization order, regarding the war as an act of aggression by Serbia in which Bosnia and Herzegovina wanted no part. In consequence, whereas many Bosnian Serbs responded to the mobilization, very few Bosnian Muslims or Bosnian Croats did so. It will be noted later how, combined with similar incidents elsewhere, this resulted in the JNA, which had in the 1980s been a truly national, federal army, rapidly becoming one that was almost exclusively Serb at all levels.

123. By its incursion into Croatia, the JNA, which the Government of the Republic of Croatia declared in October 1991 to be an invading force, intended to safeguard the integrity of the Serb people by protecting Serbs in predominantly Serb areas of Croatia and, if possible, by defeating Croatia in the field and toppling the Croatian government. That second objective proved beyond its capability although it did succeed in supporting the autonomous Serb regions within Croatia and in extracting the bulk of its weapons and troops from the now independent Croatia. The Government of the Republic of Bosnia and Herzegovina thus found itself in 1991 with Serb-dominated regions on its western and northern borders in what had hitherto been Croatian territory and with large, heavily-armed JNA forces stationed in Bosnia and Herzegovina itself.

124. The entry of large JNA forces into Bosnia and Herzegovina retiring from Croatia brought with it an atmosphere of high tension. By early 1992 there were some 100,000 JNA troops in Bosnia and Herzegovina with over 700 tanks, 1,000 armoured personnel carriers, much heavy weaponry, 100 planes and 500 helicopters, all under the command of the General Staff of the JNA in Belgrade. The Government of the Republic of Bosnia and Herzegovina, still nominally representative of its three ethnic groups and which had not yet declared itself independent, faced two major problems, that of independence and that of defence, involving control over the mobilization and operations of the armed forces. In April 1992 with independence came the setting up of its own defence staff and in July it officially established its own army. The SDS disassociated itself from the legislature and government of the independent Republic of Bosnia and Herzegovina and formed the independent Serb government of *Republika Srpska*.

125. One immediate consequence which occurred before the announced withdrawal of the JNA on 19 May 1992 was the Serb assumption of exclusive administrative power in Serbdominated areas. Moreover, between March and May 1992, there were several attacks and take-overs by the JNA of areas that constituted main entry points into Bosnia or were situated on major logistics or communications lines such as those in Bosanski Brod, Derventa and Bijeljina, Kupres, Foca and Avornik, Visegrad, Bosanski Samac, Vlasencia, Brcko and Prijedor. The first attack was in Bosanski Brod on 27 March 1992. At the same time, there were clashes at Derventa. On 2 April 1992 there was an incident at Bijeljina and around this time also at Kupres. These were immediately prior to the recognition of Bosnia and Herzegovina's independence on 7 April 1992 by the European Community, with a retroactive date of 6 March 1992. In Bosanski Samac, the 4th Detachment of the JNA entered the town, cut off telephones and fired shots in the town. There was some non-Serb resistance quickly squelched by the arrival of JNA tanks and armoured cars.

On 22 April 1992 conflict began in Vlasencia with a police vehicle driving through the streets announcing through a loudspeaker that all armaments were to be surrendered. All vital functions of the town were taken over by JNA forces, including the town hall, bank, post office, police and courthouse, and there were present very many uniformed men as well as some local Serbs with arms. On 29 April 1992 there was a bloodless take-over of the town of Prijedor, as noted elsewhere, and on 30 April 1992 two bridges were blown up by Serb forces in Brcko. On 19 May 1992 the withdrawal of JNA forces from Bosnia and Herzegovina was announced but the attacks were continued by the VRS.

126. In general, the military take-overs involved shelling, sniping and the rounding up of non-Serbs in the area. These tactics often resulted in civilian deaths and the flight of non-Serbs. Remaining non-Serbs were then forced to meet in assembly areas in towns for expulsion from the area. Large numbers of non-Serbs were imprisoned, beaten and forced to sing Chetnik songs and their valuables seized. This was accompanied by widespread destruction of personal and real property.

APPENDIX 2

Historical Context of the 1994 Events in Rwanda

As noted in Appendix 1, the Trial Court of the ICTR in the matter of ICTR-96-4-T, the Prosecutor *v.* Jean-Paul Akayesu, provided the Court's finding on the history of Rwanda. In the decision of 2 September 1998 before Judge Laïty Kama, presiding, Judge Lennart Aspegren and Judge Navanethem Pillay, the court stated at para. 78:

78. It is the opinion of the Chamber that, in order to understand the events alleged in the Indictment, it is necessary to say, however briefly, something about the history of Rwanda, beginning from the pre-colonial period up to 1994.

79. Rwanda is a small, very hilly country in the Great Lakes region of Central Africa. Before the events of 1994, it was the most densely populated country of the African continent (7.1 million inhabitants for 26,338 square kilometres). Ninety per cent of the population lives on agriculture. Its per-capita income is among the lowest in the world, mainly because of a very high population pressure on land.

80. Prior to and during colonial rule, first, under Germany, from about 1897, and then under Belgium which, after driving out Germany in 1917, was given a mandate by the League of Nations to administer it, Rwanda was a complex and an advanced monarchy. The monarch ruled the country through his official representatives drawn from the Tutsi nobility. Thus, there emerged a highly sophisticated political culture which enabled the king to communicate with the people.

81. Rwanda then, admittedly, had some eighteen clans defined primarily along lines of kinship. The terms Hutu and Tutsi were already in use but referred to individuals rather than to groups. In those days, the distinction between the Hutu and Tutsi was based on lineage rather than ethnicity. Indeed, the demarcation line was blurred: one could move from one status to another, as one became rich or poor, or even through marriage.

82. Both German and Belgian colonial authorities, if only at the outset as far as the latter are concerned, relied on an elite essentially composed of people who referred to themselves as Tutsi, a choice which, according to Dr. Alison Desforges, was born of racial or even racist considerations. In the minds of the colonizers, the Tutsi looked more like them, because of their height and colour, and were, therefore, more intelligent and better equipped to govern.

83. In the early 1930s, Belgian authorities introduced a permanent distinction by dividing the population into three groups which they called ethnic groups, with the Hutu representing about 84% of the population, while the Tutsi (about 15%) and Twa (about 1%) accounted for the rest. In

line with this division, it became mandatory for every Rwandan to carry an identity card mentioning his or her ethnicity. The Chamber notes that the reference to ethnic background on identity cards was maintained, even after Rwanda's independence and was, at last, abolished only after the tragic events the country experienced in 1994.

84. According to the testimony of Dr. Alison Desforges, while the Catholic Church which arrived in the wake of European colonizers gave the monarch, his notables and the Tutsi population privileged access to education and training, it tried to convert them. However, in the face of some resistance, the missionaries for a while undertook to convert the Hutu instead. Yet, when the Belgians included being Christian among the criteria for determining the suitability of a candidate for employment in the civil service, the Tutsi, hitherto opposed to their conversion, became more willing to be converted to Christianity. Thus, they carried along most Hutu. Quoting a witness from whom she asked for an explanation for the massive conversion of Hutu to Christianity, Dr. Desforges testified that the reasons for the conversion were to be found in the cult of obedience to the chiefs which is highly developed in the Rwandan society. According to that witness, "you could not remain standing while your superiors were on their knees praying". For these reasons, therefore, it can be understood why at the time, that is, in the late 1920s and early 1930s, the church, like the colonizers, supported the Tutsi monopoly of power.

85. From the late 1940s, at the dawn of the decolonization process, the Tutsi became aware of the benefits they could derive from the privileged status conferred on them by the Belgian colonizers and the Catholic church. They then attempted to free themselves somehow from Belgian political stewardship and to emancipate the Rwandan society from the grip of the Catholic church. The desire for independence shown by the Tutsi elite certainly caused both the Belgians and the church to shift their alliances from the Tutsi to the Hutu, a shift rendered more radical by the change in the church's philosophy after the second world war, with the arrival of young priests from a more democratic and egalitarian trend of Christianity, who sought to develop political awareness among the Tutsi- dominated Hutu majority.

86. Under pressure from the United Nations Trusteeship Council and following the shift in alliances just mentioned, Belgium changed its policy by granting more opportunities to the Hutu to acquire education and to hold senior positions in government services. This turn-about particularly angered the Tutsi, especially because, on the renewal of its mandate over Rwanda by the United Nations, Belgium was requested to establish representative organs in the Trust territory, so as to groom the natives for administration and, ultimately, grant independence to the country. The Tutsi therefore began the move to end Belgian domination, while the Hutu elite, for tactical reasons, favoured the continuation of the domination, hoping to make the Hutu masses aware of their political weight in Rwanda, in a bid to arrive at independence, which was unavoidable, at least on the basis of equality with the Tutsi. Belgium particularly appreciated this attitude as it gave it reason to believe that with the Hutu, independence would not spell a severance of ties.

87. In 1956, in accordance with the directives of the United Nations Trusteeship Council, Belgium organized elections on the basis of universal suffrage in order to choose new members of local organs, such as the grassroots representative Councils. With the electorate voting on strictly ethnic lines, the Hutu of course obtained an overwhelming majority and thereby became aware of their political strength. The Tutsi, who were hoping to achieve independence while still holding the reins of power, came to the realization that universal suffrage meant the end of their supremacy; hence, confrontation with the Hutu became inevitable.

88. Around 1957, the first political parties were formed and, as could be expected, they were ethnically rather than ideologically based. There were four political parties, namely the

Mouvement démocratique républicain, Parmehutu ("MDR Parmehutu"), which clearly defined itself as the Hutu grassroots movement; the Union Nationale Rwandaise ("UNAR"), the party of Tutsi monarchists; and, between the two extremes, the two others, Aprosoma, predominantly Hutu, and the Rassemblement démocratique rwandais ("RADER"), which brought together moderates from the Tutsi and Hutu elite.

89. The dreaded political unrest broke out in November 1959, with increased bloody incidents, the first victims of which were the Hutu. In reprisal, the Hutu burnt down and looted Tutsi houses. Thus became embedded a cycle of violence which ended with the establishment on 18 October 1960, by the Belgian authorities, of an autonomous provisional Government headed by Grégoire Kayibanda, President of MDR Parmehutu, following the June 1960 communal elections that gave an overwhelming majority to Hutu parties. After the Tutsi monarch fled abroad, the Hutu opposition declared the Republic of Gitarama, on 28 January 1961, and set up a legislative assembly. On 6 February 1961, Belgium granted self-government to Rwanda. Independence was declared on 1 July 1962, with Grégoire Kayibanda at the helm of the new State, and, thus, President of the First Republic.

90. The victory of Hutu parties increased the departure of Tutsi to neighbouring countries from where Tutsi exiles made incursions into Rwanda. The word *Inyenzi*, meaning cockroach, came to be used to refer to these assailants. Each attack was followed by reprisals against the Tutsi within the country and in 1963, such attacks caused the death of at least ten thousand of them, further increasing the number of those who went into exile. Concurrently, at the domestic level, the Hutu regime seized this opportunity to allocate to the Hutu the lands abandoned by Tutsi in exile and to redistribute posts within the Government and the civil service, in favour of the Hutu, on the basis of a quota system linked to the proportion of each ethnic group in the population.

91. The dissensions that soon surfaced among the ruling Hutu led the regime to strengthen the primacy of the MDR Parmehutu party over all sectors of public life and institutions, thereby making it the *de facto* sole party. This consolidated the authority of President Grégoire Kayibanda as well as the influence of his entourage, most of who came from the same region as he, that is the Gitarama region in the centre of the country. The drift towards ethnic and regional power became obvious. From then onwards, a rift took root within the Hutu political Establishment, between its key figures from the Centre and those from the North and South who showed great frustration. Increasingly isolated, President Kayibanda could not control the ethnic and regional dissensions. The disagreements within the regime resulted into anarchy, which enabled General Juvénal Habyarimana, Army Chief of Staff, to seize power through a coup on 5 July 1973. General Habyarimana dissolved the First Republic and established the Second Republic. Scores of political leaders were imprisoned and, later, executed or starved to death, as was the case with the former President, Grégoire Kayibanda.

92. Following a trend then common in Africa, President Habyarimana, in 1975, instituted the one-party system with the creation of the Mouvement révolutionnaire national pour le développement (MRND), of which every Rwandan was a member *ipso facto*, including the newborn. Since the party encompassed everyone, there was no room for political pluralism. A law passed in 1978 made Rwanda officially a one-party State with the consequence that the MRND became a "State-party", as it formed one and the same entity with the Government. According to Dr. Desforges, the local administrative authority was, at the same time, the representative of the party within his administrative unit. There was therefore a single centralized organization, both for the State and the party, which stretched from the Head of State down to basic units known as *cellules*, with even smaller local organs, each comprising ten households, below the *cellules*. The *cellules* and local organs were, indeed, more of party organs, than administrative units. They were the agencies for the implementation of Umuganda, the

mobilization programme which required people to allocate half a day's labour per week to some communal project, such as the construction of schools or road repairs.

93. According to testimonies given before the Chamber, particularly that of Dr. Desforbes, Habyarimana's accession to power aroused a great deal of enthusiasm and hope, both inside and outside the country, and also among members of the Tutsi ethnic group. Indeed, the regime at the outset did guard against pursuing a clearly anti-Tutsi policy. Many Tutsi were then prepared to reach a compromise. However, as the years went by, power took its toll and Habyarimana's policies became clearly anti-Tutsi. Like his predecessor, Grégoire Kayibanda, Habyarimana strengthened the policy of discrimination against the Tutsi by applying the same quota system in universities and government services. A policy of systematic discrimination was pursued even among the Hutu themselves, in favour of Hutu from Habyarimana's native region, namely Gisenyi and Ruhengeri in the north-west, to the detriment of Hutu from other regions. This last aspect of Habyarimana's policy, considerably weakened his power: henceforth, he faced opposition not only from the Tutsi but also from the Hutu, who felt discriminated against and most of whom came from the central and southern regions. In the face of this situation, Habyarimana chose to relentlessly pursue the same policy like his predecessor who favoured his region, Gitarama. Like Kayibanda, he became increasingly isolated and the base of his regime narrowed down to a small intimate circle dubbed "Akazu", meaning the "President's household". This further radicalized the opposition whose ranks swelled more and more. On 1 October 1990, an attack was launched from Uganda by the Rwandan Patriotic Front (RPF) whose forebear, the Alliance rwandaise pour l'unité nationale ("ARUN"), was formed in 1979 by Tutsi exiles based in Uganda. The attack provided a pretext for the arrest of thousands of opposition members in Rwanda considered as supporters of the RPF.

94. Faced with the worsening internal situation that attracted a growing number of Rwandans to the multi-party system, and pressured by foreign donors demanding not only economic but also political reforms in the form of much greater participation of the people in the country's management, President Habyarimana was compelled to accept the multi-party system in principle. On 28 December 1990, the preliminary draft of a political charter to establish a multi-party system was published. On 10 June 1991, the new constitution introducing the multi-party system was adopted, followed on 18 June by the promulgation of the law on political parties and the formation of the first parties, namely :

- the Mouvement démocratique républicain (MDR), considered to be the biggest party in terms of membership and claiming historical links with the MDR-Parmehutu of Grégoire Kayibanda; its power-base was mainly the centre of the country, around Gitarama;
- the Parti social démocrate (PSD), whose membership included a good number of intellectuals, recruited its members mostly in the South, in Butare;
- the Parti libéral (PL); and
- the Parti démocrate chrétien (PDC).

95. At the same time, Tutsi exiles, particularly those in Uganda organized themselves not only to launch incursions into Rwandan territory but also to form a political organization, the Rwandese Patriotic Front (RPF), with a military wing called the Rwandan Patriotic Army (RPA). The first objective of the exiles was to return to Rwanda. But they met with objection from the Rwandan authorities and President Habyarimana, who is alleged to have said that land in Rwanda would not be enough to feed all those who wanted to return. On these grounds, the exiles broadened their objectives to include the overthrow of Habyarimana.

96. The above-mentioned RPF attack on 1 October 1991 sent shock waves throughout Rwanda. Members of the opposition parties formed in 1991, saw this as an opportunity to have an informal alliance with the RPF so as to further destabilize an already weakened regime. The

regime finally accepted to share power between the MRND and the other political parties and, around March 1992, the Government and the opposition signed an agreement to set up a transitional coalition government headed by a Prime Minister from the MDR. Out of the nineteen ministries, the MRND obtained only nine. Pressured by the opposition, the MRND accepted that negotiations with the RPF be started. The negotiations led to the first cease-fire in July 1992 and the first part of the Arusha Accords⁴⁸. The July 1992 cease-fire tacitly recognized RPF control over a portion of Rwandan territory in the north-east. The protocols signed following these accords included the October 1992 protocol establishing a transitional government and a transitional assembly and the participation of the RPF in both institutions. The political scene was now widened to comprise three blocs: the Habyarimana bloc, the internal opposition and the RPF. Experience showed that President Habyarimana accepted these accords only because he was compelled to do so, but had no intention of complying with what he himself referred to as "un chiffon de papier", meaning a scrap of paper.

97. Yet, the RPF did not drop its objective of seizing power. It therefore increased its military attacks. The massive attack of 8 February 1993 seriously undermined the relations between the RPF and the Hutu opposition parties, making it easy for Habyarimana supporters to convene an assembly of all Hutu. Thus, the bond built on Hutu kinship once again began to prevail over political differences. The three blocs mentioned earlier gave way to two ethnic-based opposing camps: on the one hand, the RPF, the supposed canopy of all Tutsi and, on the other hand, the other parties said to be composed essentially of the Hutu.

98. In March 1992, a group of Hutu hard-liners founded a new radical political party, the Coalition pour la défense de la république (CDR), or Coalition for the Defence of the Republic, which was more extremist than Habyarimana himself and opposed him on several occasions.

99. To make the economic, social and political conflict look more like an ethnic conflict, the President's entourage, in particular, the army, persistently launched propaganda campaigns which often consisted of fabricating events. Dr. Alison Desforges in her testimony referred to this as "mirror politics", whereby a person accuses others of what he or she does or wants to do. In this regard, in the morning hours of 5 October 1990, the Rwandan army simulated an attack on Kigali and, immediately thereafter, the Government claimed that the city had just been infiltrated by the RPF, with the help of local Tutsi accomplices. Some eight thousand Tutsi and members of the Hutu opposition were arrested the next morning. Several dozens of them died in jail. Another example of mirror politics is the March 1992 killings in Bugesera which began a week after a propaganda agent working for the Habyarimana government distributed a tract claiming that the Tutsi of that region were preparing to kill many Hutu. The MRND militia, known as Interahamwe, participated in the Bugesera killings. It was the first time that this party's militia participated in killings of this scale. They were later joined by the militia of other parties or wings of Hutu extremist parties, including, in particular, the CDR militia known as the Impuzamugambi.

100. Mirror politics was also used in Kibulira, in the north-west, and in the Bagoguye region. In both cases, the population was goaded on to defend itself against fabricated attacks supposed to have been perpetrated by RPF infiltrators and to attack and kill their Tutsi neighbours. In passing, mention should be made of the role that Radio Rwanda and, later, the RTL, founded in 1993 by people close to President Habyarimana, played in this anti-Tutsi propaganda. Besides the radio stations, there were other propaganda agents, the most notorious of whom was a certain Léon Mugesera, vice-president of the MRND in Gisenyi Préfecture and lecturer at the National University of Rwanda, who published two pamphlets accusing the Tutsi of planning a genocide of the Hutu⁴⁹. During an MRND meeting in November 1992, the same Léon Mugesera called for

the extermination of the Tutsi and the assassination of Hutu opposed to the President. He made reference to the idea that the Tutsi allegedly came from Ethiopia and, hence, that after they had been killed, they should be thrown into the Rwandan tributaries of the Nile, so that they should return to where they are supposed to have come from⁵⁰. He exhorted his listeners to avoid the error of earlier massacres during which some Tutsi, particularly children, were spared.

101. On the political front, a split was noticed in almost all the opposition parties on the issue of the proposed signing of a final peace agreement. This schismatic trend began with the MDR party, the main rival of the MRND, whose radical faction, later known as MDR Power, affiliated with the CDR and the MRND.

102. On 4 August 1993, the Government of Rwanda and the RPF signed the final Arusha Accords and ended the war which started on 1 October 1990. The Accords provided, *inter alia*, for the establishment of a transitional government to include the RPF, the partial demobilization and integration of the two opposing armies (13,000 RPF and 35,000 FAR troops), the creation of a demilitarized zone between the RPF-controlled area in the north and the rest of the country, the stationing of an RPF battalion in the city of Kigali, and the deployment, in four phases, of a UN peace-keeping force, the United Nations Assistance Mission for Rwanda (UNAMIR), with a two-year mandate.

103. On 23 October 1993, the President of Burundi, Melchior Ndadaye, a Hutu, was assassinated in the course of an attempted coup by Burundi Tutsi soldiers. Dr. Alison Desforbes testified that in Rwanda, Hutu extremists exploited this assassination to prove that it was impossible to agree with the Tutsi, since they would always turn against their Hutu partners to kill them. A meeting held at the Kigali stadium at the end of October 1993 was entirely devoted to the discussion of the assassination of President Ndadaye, and in a very virulent speech, Froduald Karamira, senior national vice-President of the Interahamwe, is alleged to have called for unreserved solidarity among all the Hutu, solidarity transcending the divide of political parties. He reportedly concluded his speech with a call for "Hutu-Power".

104. The assassination of President Ndadaye gave President Habyarimana and the CDR the opportunity to denounce, in a joint MRND - CDR statement issued at the end of 1993, the Arusha Accords, calling them treason. However, a few days later, pursuing his policy of prevarication towards the international community, Habyarimana signed another part of the peace accords. Indeed, the Arusha Accords no longer existed, except on paper. The President certainly did take the oath of office, but the installation of a transitional government was delayed, mainly by divisions within the political parties and the ensuing infightings.

105. The leaders of the CDR and the PSD were assassinated in February 1994. In Kigali, in the days that followed, the Interahamwe and the Impuzamugambi massacred Tutsi as well as Habyarimana's Hutu opponents. The Belgian Foreign Minister informed his representative at the UN of the worsening situation which "could result in an irreversible explosion of violence"⁵¹. At the same time, as he stated in his testimony before the Tribunal, UNAMIR commander, Major-General Dallaire, alerted the United Nations in New York of the discovery of arms caches and requested a change in UNAMIR's engagement rules to enable him to seize the arms; but the request was turned down. Meanwhile, anti-Tutsi propaganda on the media intensified. The RTLM constantly stepped up its attacks which became increasingly targeted and violent.

106. At the end of March 1994, the transitional government was still not set up and Rwanda was on the brink of bankruptcy. International donors and neighbouring countries put pressure on the Habyarimana government to implement the Arusha Accords.

On 6 April 1994, President Habyarimana and other heads of State of the region met in Dar-es-Salaam (Tanzania) to discuss the implementation of the peace accords. The aircraft carrying President Habyarimana and the Burundian President, Ntaryamirai, who were returning from the meeting, crashed around 8:30 pm near Kigali airport. All aboard were killed.

107. The Rwandan army and the militia immediately erected roadblocks around the city of Kigali. Before dawn on April 7 1994, in various parts of the country, the Presidential Guard and the militia started killing the Tutsi as well as Hutu known to be in favour of the Arusha Accords and power-sharing between the Tutsi and the Hutu. Among the first victims, were a number of ministers of the coalition government, including its Prime Minister, Agathe Uwilingiyimana (MDR), the president of the Supreme Court and virtually the entire leadership of the parti social démocrate (PSD). The constitutional vacuum thus created cleared the way for the establishment of the self-proclaimed Hutu-power interim government, mainly under the aegis of retired Colonel Théoneste Bagosora.

108. Soldiers of the Rwandan Armed Forces (FAR) executed ten Belgian blue helmets, thereby provoking the withdrawal of the Belgian contingent which formed the core of UNAMIR. On April 21 1994, the UN Security Council decided to reduce the peace-keeping force to 450 troops.

109. In the afternoon of 7 April 1994, RPF troops left their quarters in Kigali and their zone in the north, to resume open war against the Rwandan Armed Forces. Its troops from the north moved south, crossing the demilitarized zone, and entered the city of Kigali on April 12 1994, thus forcing the interim government to flee to Gitarama.

110. On April 12 1994, after public authorities announced over Radio Rwanda that "we need to unite against the enemy, the only enemy and this is the enemy that we have always known...it's the enemy who wants to reinstate the former feudal monarchy", it became clear that the Tutsi were the primary targets. During the week of 14 to 21 April 1994, the killing campaign reached its peak. The President of the interim government, the Prime Minister and some key ministers travelled to Butare and Gikongoro, and that marked the beginning of killings in these regions which had hitherto been peaceful. Thousands of people, sometimes encouraged or directed by local administrative officials, on the promise of safety, gathered unsuspectingly in churches, schools, hospitals and local government buildings. In reality, this was a trap intended to lead to the rapid extermination of a large number of people.

111. The killing of Tutsi which henceforth spared neither women nor children, continued up to 18 July 1994, when the RPF triumphantly entered Kigali. The estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more.

3. Genocide in Rwanda in 1994?

112. As regards the massacres which took place in Rwanda between April and July 1994, as detailed above in the chapter on the historical background to the Rwandan tragedy, the question before this Chamber is whether they constitute genocide. Indeed, it was felt in some quarters⁵² that the tragic events which took place in Rwanda were only part of the war between the Rwandan Armed Forces (the RAF) and the Rwandan Patriotic Front (RPF). The answer to this question would allow a better understanding of the context within which the crimes with which the accused is charged are alleged to have been committed.

113. According to paragraph 2 of Article 2 of the Statute of the Tribunal, which reflects verbatim the definition of genocide as contained in the Convention on the Prevention and Punishment of

the Crime of Genocide (hereinafter, "the Convention on Genocide")⁵³, genocide means any of the following acts referred to in said paragraph, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, namely, *inter alia*: killing members of the group; causing serious bodily or mental harm to members of the group.

114. Even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings were perpetrated throughout Rwanda in 1994.

115. Indeed, this is confirmed by the many testimonies heard by this Chamber. The testimony of Dr. Zachariah who appeared before this Chamber on 16 and 17 January 1997 is enlightening in this regard. Dr. Zachariah was a physician who at the time of the events was working for a non-governmental organisation, "Médecins sans frontières." In 1994 he was based in Butare and travelled over a good part of Rwanda upto its border with Burundi. He described in great detail the heaps of bodies which he saw everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed. At the church in Butare, at the Gahidi mission, he saw many wounded persons in the hospital who, according to him, were all Tutsi and who, apparently, had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles' tendon, to prevent them from fleeing. The testimony given by Major-General Dallaire, former Commander of the United Nations Assistance Mission for Rwanda (UNAMIR) at the time of the events alleged in the Indictment, who was called by the defence, is of a similar vein. Major-General Dallaire spoke of troops of the Rwandan Armed Forces and of the Presidential Guard going into houses in Kigali that had been previously identified in order to kill. He also talked about the terrible murders in Kabgayi, very near Gitarama, where the interim Government was based and of the reports he received from observers throughout the country which mentioned killings in Gisenyi, Cyangugu and Kibongo.

116. The British cameraman, Simon Cox, took photographs of bodies in many churches in Remera, Biambi, Shangi, between Cyangugu and Kibuye, and in Bisesero. He mentioned identity cards strewn on the ground, all of which were marked "Tutsi". Consequently, in view of these widespread killings the victims of which were mainly Tutsi, the Chamber is of the opinion that the first requirement for there to be genocide has been met, the killing and causing serious bodily harm to members of a group.

117. The second requirement is that these killings and serious bodily harm, as is the case in this instance, be committed with the intent to destroy, in whole or in part, a particular group targeted as such.

118. In the opinion of the Chamber, there is no doubt that considering their undeniable scale, their systematic nature and their atrociousness, the massacres were aimed at exterminating the group that was targeted. Many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi. In this connection, Alison Desforges, an expert witness, in her testimony before this Chamber on 25 February 1997, stated as follows: "on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that-as they said on certain occasions - their children, later on, would not know what a Tutsi looked like, unless they referred to history books". Moreover, this testimony given by Dr. Desforges was confirmed by two prosecution witnesses, witness KK and witness OO, who testified separately before the Tribunal that one Silas Kubwimana had said during a public meeting chaired by the accused himself that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like.

119. Furthermore, as mentioned above, Dr. Zachariah also testified that the Achilles' tendons of many wounded persons were cut to prevent them from fleeing. In the opinion of the Chamber, this demonstrates the resolve of the perpetrators of these massacres not to spare any Tutsi. Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group. Witness OO further told the Chamber that during the same meeting, a certain Ruvugama, who was then a Member of Parliament, had stated that he would rest only when no single Tutsi is left in Rwanda".

120. Dr. Alison Desforges testified that many Tutsi bodies were often systematically thrown into the Nyabarongo river, a tributary of the Nile. Indeed, this has been corroborated by several images shown to the Chamber throughout the trial. She explained that the underlying intention of this act was to "send the Tutsi back to their place of origin", to "make them return to Abyssinia", in keeping with the allegation that the Tutsi are foreigners in Rwanda, where they are supposed to have settled following their arrival from the Nilotic regions.⁵⁴

121. Other testimonies heard, especially that of Major-General Dallaire, also show that there was an intention to wipe out the Tutsi group in its entirety, since even newborn babies were not spared. Even pregnant women, including those of Hutu origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father's group of origin. In this regard, it is worthwhile noting the testimony of witness PP, heard by the Chamber on 11 April 1997, who mentioned a statement made publicly by the accused to the effect that if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found in order "for the pregnancy to be aborted". According to prosecution witnesses KK, PP and OO, the accused expressed this opinion on other occasions in the form of a Rwandese proverb according to which if a snake wraps itself round a calabash, there is nothing that can be done, except to break the calabash' ("Iyo inzoka yiziritse ku gisabo, nta kundi bigenda barakimena")⁵⁵. In the context of the period in question, this proverb meant that if a Hutu woman married to a Tutsi man was impregnated by him, the foetus had to be destroyed so that the Tutsi child which it would become should not survive. It should be noted in this regard that in Rwandese culture, breaking the "gisabo", which is a big calabash used as a churn was considered taboo. Yet, if a snake wraps itself round a gisabo, obviously, one has no choice but to ignore this taboo in order to kill the snake.

122. In light of the foregoing, it is now appropriate for the Chamber to consider the issue of specific intent that is required for genocide (*mens rea* or *dolus specialis*). In other words, it should be established that the above-mentioned acts were targeted at a particular group as such. In this respect also, many consistent and reliable testimonies, especially those of Major-General Dallaire, Dr. Zachariah, victim V, prosecution witness PP, defence witness DAAX, and particularly that of the accused himself unanimously agree on the fact that it was the Tutsi as members of an ethnic group which they formed in the context of the period⁵⁶ in question, who were targeted during the massacres⁵⁷.

123. Two facts, in particular, which suggest that it was indeed the Tutsi who were targeted should be highlighted: Firstly, at the roadblocks which were erected in Kigali immediately after the crash of the President's plane on 6 April 1994 and, later on, in most of the country's localities, members of the Tutsi population were sorted out. Indeed, at these roadblocks which were manned, depending on the situation, either by soldiers, troops of the Presidential Guard and/or militiamen, the systematic checking of identity cards indicating the ethnic group of their holders, allowed the separation of Hutu from Tutsi, with the latter being immediately apprehended and killed, sometimes on the spot. Secondly, the propaganda campaign conducted before and during the tragedy by the audiovisual media, for example, "Radio Television des Mille

Collines"(RTLM), or the print media, like the *Kangura*⁵⁸ newspaper. These various news media overtly called for the killing of Tutsi, who were considered as the accomplices of the RPF and accused of plotting to take over the power lost during the revolution of 1959. Some articles and cartoons carried in the *Kangura* newspaper, entered in evidence, are unambiguous in this respect. In fact, even exhibit 25A could be added to this lot. Exhibit 25A is a letter from the "GZ" staff headquarters dated 21 September 1992 and signed by Deofratas Nsabimana, Colonel, BEM, to which is annexed a document prepared by a committee of ten officers and which deals with the definition of the term enemy. According to that document, which was intended for the widest possible dissemination, the enemy fell into two categories, namely: "the primary enemy" and the "enemy supporter". The primary enemy was defined as "the extremist Tutsi within the country or abroad who are nostalgic for power and who have NEVER acknowledged and STILL DO NOT acknowledge the realities of the Social Revolution of 1959, and who wish to regain power in RWANDA by all possible means, including the use of weapons". On the other hand, the primary enemy supporter was "anyone who lent support in whatever form to the primary enemy". This document also stated that the primary enemy and their supporters came mostly from social groups comprising, in particular, "Tutsi refugees", "Tutsi within the country", "Hutu dissatisfied with the current regime", "Foreigners married to Tutsi women" and the "Nilotic-hamitic tribes in the region".

124. In the opinion of the Chamber, all this proves that it was indeed a particular group, the Tutsi ethnic group, which was targeted. Clearly, the victims were not chosen as individuals but, indeed, because they belonged to said group; and hence the victims were members of this group selected as such. According to Alison Desforges's testimony, the Tutsi were killed solely on account of having been born Tutsi.

125. Clearly therefore, the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. In any case, the Tutsi children and pregnant women would, naturally, not have been among the fighters.

126. Consequently, the Chamber concludes from all the foregoing that genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group. Furthermore, in the opinion of the Chamber, this genocide appears to have been meticulously organized. In fact, Dr. Alison Desforges testifying before the Chamber on 24 May 1997, talked of "centrally organized and supervised massacres". Indeed, some evidence supports this view that the genocide had been planned. First, the existence of lists of Tutsi to be eliminated is corroborated by many testimonies. In this respect, Dr. Zachariah mentioned the case of patients and nurses killed in a hospital because a soldier had a list including their names. There are also the arms caches in Kigali which Major-General Dallaire mentioned and regarding whose destruction he had sought the UN's authorization in vain. Lastly, there is the training of militiamen by the Rwandan Armed Forces and of course, the psychological preparation of the population to attack the Tutsi, which preparation was masterminded by some news media, with the RTLM at the forefront.

127. Finally, in response to the question posed earlier in this chapter as to whether the tragic events that took place in Rwanda in 1994 occurred solely within the context of the conflict between the RAF and the RPF, the Chamber replies in the negative, since it holds that the genocide did indeed take place against the Tutsi group, alongside the conflict. The execution of this genocide was probably facilitated by the conflict, in the sense that the fighting against the RPF forces was used as a pretext for the propaganda inciting genocide against the Tutsi, by branding RPF fighters and Tutsi civilians together, through dissemination via the media of the idea that every Tutsi was allegedly an accomplice of the Inkotanyi. Very clearly, once the genocide got under way, the crime became one of the stakes in the conflict between the RPF and

the RAF. In 1994, General Kagame, speaking on behalf of the RPF, declared that a cease fire could possibly not be implemented until the massacre of civilians by the government forces⁵⁹ had stopped.

128. In conclusion, it should be stressed that although the genocide against the Tutsi occurred concomitantly with the above-mentioned conflict, it was, evidently, fundamentally different from the conflict. The accused himself stated during his initial appearance before the Chamber, when recounting a conversation he had with one RAF officer and Silas Kubwimana, a leader of the Interahamwe, that the acts perpetrated by the Interahamwe against Tutsi civilians were not considered by the RAF officer to be of a nature to help the government armed forces in the conflict with the RPF⁶⁰. Note is also taken of the testimony of witness KK which is in the same vein. This witness told the Chamber that while she and the children were taken away, an RAF soldier allegedly told persons who were persecuting her that "instead of going to confront the Inkotanyi at the war front, you are killing children, although children know nothing; they have never done politics". The Chamber's opinion is that the genocide was organized and planned not only by members of the RAF, but also by the political forces who were behind the "Hutu-power", that it was executed essentially by civilians including the armed militia and even ordinary citizens, and above all, that the majority of the Tutsi victims were non-combatants, including thousands of women and children, even foetuses. The fact that the genocide took place while the RAF was in conflict with the RPF, can in no way be considered as an extenuating circumstance for it.

129. This being the case, the Chamber holds that the fact that genocide was indeed committed in Rwanda in 1994.

Footnote 48. Prosecution Exhibit No. 14.

Footnote 49. Prosecution Exhibits Nos. 68 and 69.

Footnote 50. Prosecution Exhibit No. 74.

Footnote 51. Prosecution Exhibit No. 18.

Footnote 52. See the cross examination of Dr. Zachariah (witness) by one of the defence counsel.

Footnote 53. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948.

Footnote 54. See *supra*, in the chapter on the history of Rwanda, the statements made by Léon Mugesera during the meeting of the MRND held on 22 November 1992, referred to the fact that Tutsi had supposedly come from Ethiopia and that, after they were killed, their bodies should be thrown into the Rwandan tributaries of the Nile, so that they can go back to where they supposedly came. See Prosecution Exhibit tendered and recorded as No. 74.

Footnote 55. These are the Kinyarwanda words used by witness PP.

Footnote 56. The term ethnic group is, in general, used to refer to a group whose members speak the same language and/or have the same culture. Therefore, one can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture. However, in the

context of the period in question, they were, in consonance with a distinction made by the colonizers, considered both by the authorities and themselves as belonging to two distinct ethnic groups; as such, their identity cards mentioned each holder's ethnic group. In its findings in chapter 7 of the judgment, the Chamber will come back to this issue.

Footnote 57. However, the Tutsi were not the sole victims of the massacres. Many Hutu were also killed, though not because they were Hutu, but simply because they were, for one reason or another, viewed as having sided with the Tutsi.

Footnote 58. It will be noted in this regard that in the travaux préparatoires of the Genocide Convention, the Yugoslav delegate indicated with regard to the genocide of Jews by the Nazis that the crimes began with the preparation and mobilization of the masses by means of the ideas spread by the necessary propaganda and in circles which financed this propaganda. See the Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September 1948–10 December 1948, Official Records of the General Assembly.

Footnote 59. See the " Report of the United Nations High Commissioner for Human Rights on his mission to Rwanda, 11-12 May 1994" (E/CN.4?S-3?3, 19 May 1994), reproduced in annex "The United Nations and Rwanda, 1993-1996", Department of Public Information, United Nations, New York, 1996, p. 287.

Footnote 60. See transcript of the hearing of 12 March 1998, p. 152.

APPENDIX 3

International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by Security Council resolution 827 on 25 May 1993 as a result of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and, as a response to the "threat to international peace and security" posed by those serious violations. The objectives of the tribunal are:

- to bring to justice the alleged perpetrators of the serious violations of international humanitarian law;
- to render justice to the victims;
- to deter further crimes; and
- to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.

To achieve the objectives, the ICTY, located in The Hague, has been given the authority to prosecute and try four types of offences committed on the territory of the former Yugoslavia since 1991:

- Grave breaches of the 1949 Geneva Conventions;
- Violations of the laws or customs of war;
- Genocide; and
- Crimes against humanity.

The ICTY holds concurrent jurisdiction with national courts over the serious violations of international humanitarian law committed in the former Yugoslavia. However, the ICTY can claim primacy and thus take over investigations and proceedings at any stage from national courts if this is believed to be in the interest of international justice. The ICTY also relies on international cooperation for the collection of evidence, as well as for the detention and transfer of indictees.

As of January 2004, the ICTY has 1,238 staff members from 84 countries and an annual budget for FY04 of \$223,169,800 US to accomplish its mandate. The tribunal has three Trial Chambers and one Appeals Chamber, composed of 16 permanent judges and a maximum at any one time of nine *ad litem* judges representing the main legal systems in the world.

The 16 permanent judges are elected by the General Assembly of the United Nations for a four years, renewable term. The *ad litem* judges are drawn from a pool of 27 judges and are also elected by the General Assembly of the United Nations for a term of four years, but they are not eligible for re-election.

An *ad litem* judge can only serve to sit on one or several specific trials for a period of up to three years.

Each Trial Chamber is composed of three permanent judges and a maximum of six *ad litem* judges at any moment in time, three judges sitting at any given hearing. The Appeals Chamber is composed of seven permanent judges: five of the permanent judges of the ICTY, and two from the judges of the International Criminal Tribunal for Rwanda (ICTR), sitting a five-member bench for any application or appeal.

UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA³⁴⁴

(ADOPTED 25 May 1993 by Resolution 827)
(As amended 13 May 1998 by Resolution 1166)
(As amended 30 November 2000 by Resolution 1329)
(As amended 17 May 2002 by Resolution 1411)
(As amended 14 August 2002 by Resolution 1431)
(As amended 19 May 2003 by Resolution 1481)

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³⁴⁴ ICTY statute, as of 11 January 2004, <http://www.un.org/icty/legaldoc/index.htm>

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| <u>Article 27</u> | Enforcement of sentences |
| <u>Article 28</u> | Pardon or commutation of sentences |
| <u>Article 29</u> | Cooperation and judicial assistance |
| <u>Article 30</u> | The status, privileges and immunities of the International Tribunal |
| <u>Article 31</u> | Seat of the International Tribunal |
| <u>Article 32</u> | Expenses of the International Tribunal |
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| <u>Article 34</u> | Annual report |

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Article 5

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

Article 6

Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9

Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10

Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
 - (a) the act for which he or she was tried was characterized as an ordinary crime; or
 - (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11

Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

- (a) the Chambers, comprising three Trial Chambers and an Appeals Chamber;
- (b) the Prosecutor; and
- (c) a Registry, servicing both the Chambers and the Prosecutor.

Article 12

Composition of the Chambers

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 13 ter, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 13

Qualifications of judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 13 bis

Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and

Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") in accordance with article 12 *bis* of the Statute of that Tribunal;

- (c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;
- (d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 13 *ter*

Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

- (a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
- (b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.
- (c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.
- (d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.
- (e) The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.

2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the

Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 13 *quater*

Status of *ad litem* judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:
 - (a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
 - (b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;
 - (c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
 - (d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.
2. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:
 - (a) Be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
 - (b) Have power:
 - (i) To adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
 - (ii) To review an indictment pursuant to article 19 of the Statute;
 - (iii) To consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute.

Article 14

Officers and members of the Chambers

1. The permanent judges of the International Tribunal shall elect a President from amongst their number.
2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.
3. After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in accordance with Article 13 *bis* of the Statute to the Appeals Chamber and nine to the Trial Chambers.
4. Two of the permanent judges of the International Tribunal for Rwanda elected or appointed in accordance with article 12 *bis* of the Statute of that Tribunal shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal.
5. After consultation with the permanent judges of the International Tribunal, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.

7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.

Article 15

Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 18

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and

non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21

Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

- (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) to be tried without undue delay;
- (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
- (g) not to be compelled to testify against himself or to confess guilt.

Article 22

Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - (a) an error on a question of law invalidating the decision; or
 - (b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27

Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Article 29

Co-operation and judicial assistance

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

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.

Article 30

The status, privileges and immunities of the International Tribunal

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

Article 31**Seat of the International Tribunal**

The International Tribunal shall have its seat at The Hague.

Article 32**Expenses of the International Tribunal**

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

Article 33**Working languages**

The working languages of the International Tribunal shall be English and French.

Article 34**Annual report**

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

AMENDMENT TO THE ARTICLES: RESOLUTION 1481

The Statute of the International Criminal Tribunal for the Former Yugoslavia was amended by a resolution of the United Nations Security Council. Resolution 1481 (2003) was adopted by the Security Council at its 44759th meeting, 19 May 2003.³⁴⁵

The Security Council,

Reaffirming its resolutions 827 (1993) of 25 May 1993, 1166 (1998) of 13 May 1998, 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002,

Having considered the letter from the Secretary-General to the President of the Security Council dated 18 March 2002 (S/2002/304) and the annexed letter from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General dated 12 March 2002,

Having considered also the letter from the Secretary-General to the President of the Security Council dated 7 May 2003 (S/2003/530) and the annexed letter from the President of the International Tribunal for the Former Yugoslavia addressed to the President of the Security Council dated 1 May 2003,

Convinced of the advisability of enhancing the powers of ad litem judges in the International Tribunal for the Former Yugoslavia so that, during the period of their appointment to a trial, they might also adjudicate in pre-trial proceedings in other cases, should the need arise and should they be in a position to do so,

³⁴⁵ United Nations Security Council, S/RES/1481 (2003), Distr. General, 19 May 2003, via EQUIPO NIZKOR, Information 19May03.

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to amend article 13 quater of the Statute of the International Tribunal for the Former Yugoslavia and to replace that article with the provisions set out in the annex to this resolution;

2. *Decides* to remain seized of the matter.

Annex

Article 13 quater

Status of ad litem judges

1. During the period in which they are appointed to serve in the International Tribunal, ad litem judges shall:

(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;

(b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;

(c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;

(d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.

2. During the period in which they are appointed to serve in the International Tribunal, ad litem judges shall not:

(a) Be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;

(b) Have power:

(i) To adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;

(ii) To review an indictment pursuant to article 19 of the Statute;

(iii) To consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute.

NATIONAL LEGISLATION IMPLEMENTING ICTY STATUTE

Agreement on Surrender of Persons between the Government of the United States and the Tribunal:³⁴⁶

- 1993 (Italy) Legislation Implementing the ICTY Statute
- 1994 1994 (Denmark) Legislation Implementing the ICTY Statute
- 1994 1994 (Finland) Legislation Implementing the ICTY Statute
- 1994 1994 (Netherlands) Legislation Implementing the ICTY Statute
- 1994 1994 (Norway) Legislation Implementing the ICTY Statute
- 1994 1994 (Spain) Legislation Implementing the ICTY Statute
- 1994 1994 (Sweden) Legislation Implementing the ICTY Statute
- 1995 1995 (Australia) Legislation Implementing the ICTY Statute
- 1995 1995 (Bosnia and Herzegovina) Legislation Implementing the ICTY Statute
- 1995 1995 (France) Legislation Implementing the ICTY Statute
- 1995 1995 (Germany) Legislation Implementing the ICTY Statute
- 1995 1995 (New Zealand) Legislation Implementing the ICTY Statute
- 1995 1995 (Switzerland) Legislation Implementing the ICTY Statute
- 1996 1996 (Austria) Legislation Implementing the ICTY Statute
- 1996 1996 (Belgium) Legislation Implementing the ICTY Statute
- 1996 1996 (Hungary) Legislation Implementing the ICTY Statute
- 1996 1996 (Republic of Croatia) Legislation Implementing the ICTY Statute
- 1996 1996 (United Kingdom) Legislation Implementing the ICTY Statute
- 1998 1998 (Greece) Legislation Implementing the ICTY Statute
- 1998 1998 (Romania) Legislation Implementing the ICTY Statute

³⁴⁶ http://www.oup.co.uk/best.textbooks/law/cassese_internationalcriminallaw/cases/ch19/
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DISPOSITION OF CASES³⁴⁷

53 Accused currently in custody at Detention Unit

Tihomir Blaskic, Dario Kordic, Mario Cerkez, Mlado Radic, Zoran Zigic, Milorad Krnojelac, Radislav Krstic, Radoslav Brdjanin, Vinko Martinovic, Stanislav Galic, Mitar Vasiljevic, Dragoljub Prcac, Mladen Naletilic, Momcilo Krajisnik, Dragan Nikolic, Blagoje Simic, Milomir Stakic, Dragan Obrenovic, Slobodan Milosevic, Vidoje Blagojevic, Miroslav Tadic, Predrag Banovic, Pasko Ljubcic, Dusan Fustar, Momir Nikolic, Dragoljub Ojdanic, Nikola Sainovic, Milan Martic, Mile Mrksic, Dusan Knezevic, Darko Mrdja, Ranko Cesic, Miroslav Deronjic, Radovan Stankovic, Milan Milutinovic, Haradin Bala, Isak Musliu, Vojislav Seselj, Fatmir Limaj, Naser Oric, Dragan Jokic, Miroslav Radic, Franko Simatovic, Jovica Stanisic, Ivica Rajic, Veselin Sljivancanin, Zeljko Mejakic, Mitar Rasevic, Vladimir Kovacevic, Milan Babic, Enver Hadihasanovic, Amir Kubura, Pavle Strugar

5 Accused provisionally released

Sefer Halilovic (14 December 2001), Rahim Ademi (20 February 2002) and Momcilo Gruban (17 July 2002), Miodrag Jokic (20 February 2002 until 2 December 2003, since 5 December 2003), Miroslav Kvočka (since 19 December 2003)

20 Arrest warrants issued against the following accused currently at large

Goran Borovnica, Radovan Karadzic, Ratko Mladic, Gojko Jankovic, Dragan Zelenovic, Milan Lukic, Sredoje Lukic, Stojan Zupljanin, Ante Gotovina, Vladimir Kovacevic, Dragomir Milosevic, Savo Todovic, Vinko Pandurevic, Ljubomir Borovcanin, Vujadin Popovic, Drago Nikolic, Ljubisa Beara, Nebojsa Pavkovic, Vladimir Lazarevic, Vlastimir Djordjevic, Sreten Lukic.

2 Persons charged with contempt of the Tribunal

Duko Jovanovic, Milka Maglov

26 Accused transferred / released following completion of proceedings

•2 accused acquitted by the Trial Chamber, proceedings completed: Zejnil Delalic, Dragan Papic

•3 accused found not guilty by the Appeals Chamber, proceedings completed: Zoran Kupreskic, Mirjan Kupreskic et Vlatko Kupreskic

³⁴⁷ Online at <http://www.un.org/icty/glance/index.htm>.

•**13 accused transferred to serve sentence:** Anto Furundzija (Finland), Dusko Tadic (Germany), Stevan Todorovic (Spain), Drago Josipovic (Spain), Vladimir Santic (Spain), Dusko Sikirica (Austria), Radomir Kovac (Norway), Zoran Vukovic (Norway), Dragoljub Kunarac (Germany), Goran Jelusic (Italy), Biljana Plavsic (Sweden), Hazim Delic (Finland) and Esad Landzo (Finland)

•**7 sentences served:** Zlatko Aleksovski (Finland), Drazen Erdemovic (Norway), Dragan Kolundzija (early release granted before transfer), Milojica Kos (early release granted before transfer), Damir Dosen (Austria), Zdravko Mucic (early release granted before transfer), Milan Simic (early release granted before transfer)

35 Completed cases

•**21 Indictments withdrawn including 5 after commencement of proceedings**

•**14 accused died including 5 after commencement of proceedings** (see below "Terminated cases")

Stipo Alilovic, Slavko Dokmanovic, Simo Drljaca, Dorde Djukic, Dragan Gagovic, Milan Kovacevic, Slobodan Miljkovic, Nikica Janjic, Janko Janjic, Zeljko Raznjatovic, Vlajko Stojiljkovic, Mehmed Alagic, Janko Bobetko and Momir Talic.

91 ACCUSED HAVE APPEARED IN PROCEEDINGS BEFORE THE TRIBUNAL

26 Accused at pre-trial stage

Milan Martic (IT-95-11), Ivica Rajic (IT-95-12), Miroslav Radic (IT-95-13/1), Mile Mrksic (IT-95-13/1), Veselin Sljivancanin (IT-95-13/1), Radovan Stankovic (IT-96-23/2), Mitar Rasevic (IT-97-25/1), Milan Milutinovic, Dragoljub Ojdanic et Nikola Sainovic (IT-99-37), Momcilo Krajisnik (IT-00-39&40), Pasko Ljubicic (IT-00-41), Vladimir Kovacevic (IT-01-42/2), Rahim Ademi (IT-01-46), Sefer Halilovic (IT-01-48), Zeljko Mejakic, Momcilo Gruban, Dusan Knezevic et Dusan Fustar (IT-02-65), Fatmir Limaj, Haradin Bala et Isak Musliu (IT-03-66), Vojislav Seselj (IT-03-67), Naser Oric (IT-03-68), Jovica Stanisic and Franko Simatovic (IT-03-69)

7 Accused currently at trial

- Pavle Strugar (IT-01-42), commenced on 16 December 2003
- Enver Hadzihasanovic et Amir Kubura (IT-01-47), commenced on 2 December 2003
- Vidoje Blagojevic and Dragan Jokic (IT-02-60), commenced on 14 May 2003
- Radoslav Brdjanin (IT-99-36), commenced on 23 January 2002

- Slobodan Milosevic (IT-02-54), commenced on 12 February 2002

5 Accused awaiting Trial Chamber Judgement or Sentencing

Awaiting Sentencing

- Milan Babic (IT-03-72) pleaded guilty on 27 January 2004
- Darko Mrdja (IT-02-59), pleaded guilty on 24 July 2003
- Miodrag Jokic (IT-01-42), pleaded guilty on 27 August 2003
- Miroslav Deronjic (IT-02-61), pleaded guilty on 30 September 2003
- Ranko Cesic (IT-95-10/1), pleaded guilty on 8 October 2003

46 Accused tried

16 persons at appeal stage

- Dragan Nikolic (IT-94-2), pleaded guilty on 4 September 2003, Sentencing Judgement rendered on 18 December 2003
- Momir Nikolic (IT-02-60/1), pleaded guilty on 7 May 2003, Sentencing Judgement rendered on 2 December 2003
- Stanislav Galic (IT-98-29), 3 December 2001 - 9 May 2003, Judgement rendered on 5 December 2003
- Blagoje Simic (IT-95-9): Trial from 10 September 2001 - 4 July 2003, Judgement rendered on 17 October 2003
- Milomir Stakic (IT-97-24), Trial from 16 April 2002 - 15 April 2003, Judgement rendered on 31 July 2003,
- Vinko Martinovic and Mladen Naletilic (IT-98-34), Trial from 10 September 2001 - 31 October 2002, Judgement rendered on 31 March 2003
- Mitar Vasiljevic (IT-98-32), Trial from 10 September 2001 - 14 March 2002, Judgement rendered on 29 November 2002
- Miroslav Kvočka, Mladen Radic, Zoran Zigic and Dragoljub Prcac (IT-98-30/1), Trial from 28 February 2000 - Adjourned from 6 March 2000 to 2 May 2000 - 19 July 2001, Judgement rendered on 2 November 2001
- Radislav Krstic (IT-98-33), Trial from 13 March 2000 - 26 June 2001, Judgement rendered on 2 August 2001
- Dario Kordic and Mario Cerkez (IT-95-14/2), Trial from 12 April 1999 - 15 December 2000, Judgement rendered on 26 February 2001
- Tihomir Blaskic (IT-95-14), Trial from 24 June 1997 - 30 July 1999, Judgement rendered on 3 March 2000

25 persons received their final sentence

Awaiting transfer:

- Dragan Obrenovic (IT-02-60/2), Sentencing Judgement rendered on 10 December 2003 (sentence of 17 years)
- Miroslav Tadic (IT-95-9): Judgement rendered on 17 October 2003 (sentence of 8 years)
- Predrag Banovic (IT-02-65/1): Sentencing Judgement on 28 October 2003

(sentence of 8 years)

•Milorad Krnojelac (IT-97-25): Judgement on 15 March 2002, Appeals
Judgement on 17 September 2003 (sentence of 15 years)

Transferred to serve their sentence:

•Hazim Delic (IT-96-21)- the "Celebici" case: Judgement on 9 October 2001
(sentence of 18 years)

Transferred to Finland since 9 July 2003

•Esad Landzo (IT-96-21)- the "Celebici" case: Judgement on 9 October 2001
(sentence of 15 years)

Transferred to Finland since 9 July 2003

•Biljana Plavsic (IT-00-39&40/1): Sentencing Judgement on 27 February 2003
(sentence of 11 years)

Transferred to Sweden since 26 June 2003

•Goran Jelisic (IT-95-10): Judgement on 5 July 2001 (sentence of 40 years)
Transferred to Italy since 29 May 2003

•Dragoljub Kunarac (IT-96-23)(IT-96-23/1): Judgement on 12 June 2002
(sentence of 28 years)

Transferred to Germany since 12 December 2002

•Radomir Kovac (IT-96-23)(IT-96-23/1), : Judgement on 12 June 2002 (sentence
of 20 years)

•Zoran Vukovic ((IT-96-23)(IT-96-23/1) : Judgement on 12 June 2002 (sentence
of 12 years)

Transferred to Norway since 28 November 2002

•Dusko Tadic (IT-94-1): Judgement on 26 January 2000 (sentence of 20 years)
Transferred to Germany since 31 October 2000

•Anto Furundzija (IT-95-17/1): Judgement on 21 July 2000 (sentence of 10
years)

Transferred to Finland since 22 September 2000

•Stevan Todorovic (IT-95-9/1): Judgement on 31 July 2001 (sentence of 10
years)

Transferred to Spain since 11 December 2001

•Drago Josipovic (IT-95-16): Judgement on 23 October 2001 (sentence of 12
years)

Transferred to Spain since 9 April 2002

•Vladimir Santic (IT-95-16): Judgement on 23 October 2001 (sentence of 18
years)

Transferred to Spain since 11 April 2002:

•Dusko Sikirica (IT-95-8): Judgement on 13 November 2001 (sentence of 15
years)

Transferred to Austria since 10 May 2002

Sentence served:

- Simo Zaric (IT-95-9): Judgement rendered on 17 October 2003 (sentence of 6 years)

Granted early release 21 January 2004, effective 28 January 2004.

- Milan Simic (IT-95-9/2): Judgement on 17 October 2002 (sentence of 5 years)
Granted early release 27 October 2003, effective 3 November 2003. Actual release 4 November 2003;

- Zdravko Mucic (IT-96-21): the "Celebici" case; Judgement on 9 October 2001 (sentence of 9 years)

Granted early release 18 July 2003;

- Drazen Erdemovic (IT-96-22): Judgement on 5 March 1998 (sentence of 5 years)

In Norway from 26 August 1998 until August 2000

- Zlatko Aleksovski (IT-95-14/1): Judgement on 24 March 2000 (sentence of 7 years)

In Finland from 22 September 2000 until 14 November 2001

- Milojica Kos (IT-98-30/1): Judgement on 2 November 2001 (sentence of 6 years)

Granted early release 31 July 2002

- Dragan Kolundzija (IT-95-8): Judgement on 13 November 2001 (sentence of 3 years)

Granted early release 6 December 2001

- Damir Dosen (IT-95-8): Judgement on 13 November 2001 (sentence of 5 years)

In Austria from 10 May 2002 until 28 February 2003

3 persons found not guilty by the Appeals Chamber

- Zoran Kupreskic, Mirjan Kupreskic and Vlatko Kupreskic (IT-95-16):
Judgement on Appeal on 23 October 2001

2 accused acquitted by the Trial Chamber

- Zejnil Delalic - the "Celebici" case (IT-96-21): Judgement on Appeal on 21 February 2001

- Dragan Papic (IT-95-16): Judgement on Appeal on 14 January 2000

10 terminated cases**5 Indictments withdrawn after transfer of the accused to the Tribunal**

- Marinko Katava, Ivan Santic and Pero Skopljak

Charges withdrawn on 19 December 1997, released immediately

- Nenad Banovic

Charges withdrawn on 10 April 2002, released immediately

- Agim Murtezi:

Charges withdrawn on 28 February 2003, released immediately

5 deaths

•Slavko Dokmanovic (IT-95-13A),

Committed suicide while at the Detention Unit, 29 June 1998

•Milan Kovacevic (IT-97-24)

Died of natural causes at the Detention Unit, 1 August 1998

•Dordje Djukic (IT-96-20)

Provisionally released for health reasons, 24 April 1996; died, 18 May 1996

•Mehmed Alagic (IT-01-47)

Died while on provisional release, 9 March 2003

•Momir Talic (IT-99-36/1),

Died while on provisional release, 28 May 2003

APPENDIX 4

International Criminal Tribunal for Rwanda

Recognizing that serious violations of humanitarian law were committed in Rwanda, and acting under Chapter VII of the United Nations Charter, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 of 8 November 1994.³⁴⁸ The intent of the Security Council in creating the Tribunal was to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region. By resolution 977, 22 February 1995, the Security Council decided that the seat of the Tribunal would be located in Arusha, United Republic of Tanzania.

The ICTR was given jurisdiction for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It may also prosecute Rwandan citizens responsible for genocide and other similar violations of international law committed in neighbouring States during the same period.

The ICTR has three Trial Chambers and an Appeals Chamber, composed of 16 independent judges elected - for four year, renewable terms - by the General Assembly from a list submitted by the Security Council. No two judges may be nationals of the same State. Three judges sit in each of the Trial Chambers and five judges sit in the Appeals Chamber which is shared with the International Criminal Tribunal for the former Yugoslavia.

A specially designed Detention Facility was constructed for the ICTR within the compound of the Tanzanian prison in Arusha. The high security facility, was the first prison to have been built and managed by the United Nations. As would be expected, the facility meets all international standards and is regularly inspected by the International Committee of the Red Cross.

The Tribunal issued its first indictment against eight indictees on 28 November 1995. Thus far, over seventy suspects have been indicted, more than sixty of whom have been arrested and transferred to the Tribunal's custody. Since its inception, the ICTR chambers have issued over thirteen hundred judicial decisions on important legal questions of jurisdiction, procedure and evidence.

The trials of eighteen indictees have been held so far with over eight hundred witnesses having been called and resulting in seventeen convictions and one acquittal. The Appeals Chamber has confirmed eight convictions and one acquittal with nine appeals still pending. In total, the completed cases and trials in progress constitute virtually half of the total number of persons arrested. Including those cases on appeal, there are currently 47 cases before the chambers of the ICTY.

The following is the list of completed trials and their dispositions:

AKAYESU, Jean Paul (ICTR-96-4) - guilty
 BAGILISHEMA, Ignace (ICTR-95-1) - acquitted
 BARAYAGWIZA, Jean Bosco (ICTR-97-19) - guilty

¹ This material on the ICTR background and mandate are to be found online at the ICTR website, <http://www.ictr.org/default.htm>.

KAJELIJELI, Juvénal (ICTR-98-44A) - guilty, under appeal
 KAMBANDA, Jean (ICTR-97-23) - guilty
 KAMUHANDA, Jean de Dieu (ICTR-99-54) - guilty, under appeal
 KAYISHEMA, Clément (ICTR-95-I) - guilty
 MUSEMA, Alfred (ICTR-96-13) - guilty
 NAHIMANA, Ferdinand (ICTR-96-11) guilty, under appeal
 NGEZE, Hassan (ICTR-97-27) guilty, under appeal
 NIYITEGEKA, Eliezer (ICTR-96-14) guilty, under appeal
 NTAKIRUTIMANA, Gérard (1: ICTR-96-10; 2: ICTR-96-17) - guilty, under appeal
 NTAKIRUTIMANA, Elizaphan (1: ICTR-96-10; 2: ICTR-96-17) - guilty, under appeal
 NTUYAHAGA, Bernard (ICTR-98-40) - indictment withdrawn, released
 RUGGIU, Georges (ICTR-97-32) - guilty
 RUSATIRA, Léonidas (ICTR-2002-80-I) - indictment withdrawn
 RUTAGANDA, George (ICTR-96-3) - guilty, under appeal
 RUZINDANA, Obed (1: ICTR-95-1; 2: ICTR-96-10) - guilty
 SEMANZA, Laurent (ICTR-97-20) - guilty, under appeal
 SERUSHAGO, Omar (ICTR-98-39) - guilty

Of those convicted by the ICTR, Jean Kambanda, the Prime Minister of the Rwandan Government during the genocide was the first head of Government to be indicted and subsequently convicted for genocide. Fourteen Ministers of the 1994 interim government of Rwanda are also in the Tribunal's custody as well as senior military commanders, high ranking central and regional government officials, prominent businessmen, church leaders, journalists, and intellectuals. Arrests have been affected with the assistance of judicial and police authorities in twenty two countries, including fifteen African States where suspects are located.

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

(As amended)

As amended by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;

- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

**Article 4: Violations of Article 3 Common to the Geneva Conventions
and of Additional Protocol II**

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
- (h) Threats to commit any of the foregoing acts.

Article 5: Personal Jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7: Territorial and Temporal Jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8: Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.
2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9: *Non Bis in Idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.
2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:
 - (a) The act for which he or she was tried was characterised as an ordinary crime; or
 - (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10: Organisation of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

- (a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;
- (b) The Prosecutor;
- (c) A Registry.

Article 11: Composition of the Chambers

1. The Chambers shall be composed of 16 permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of four *ad litem* independent judges appointed in accordance with article 12 *ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of four *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12: Qualification and Election of Judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 12 *bis*: Election of Permanent Judges

1. Eleven of the permanent judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - (a) The Secretary-General shall invite nominations for permanent judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
 - (b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 12 of the present Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as 'the International Tribunal for the Former Yugoslavia') in accordance with article 13 *bis* of the Statute of that Tribunal;
 - (c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall

establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven permanent judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 12 of the present Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 12 *ter*: Election and Appointment of *Ad Litem* Judges

1. The *ad litem* judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than thirty-six candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eighteen *ad litem* judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;

- (e) The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.

2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal for Rwanda, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal for Rwanda shall bear in mind the criteria set out in article 12 of the present Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 12 *quarter*: Status of *Ad Litem* Judges

1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:

- (a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal for Rwanda;
- (b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;
- (c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda.

2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not:

- (a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;
- (b) Have power:
 - (i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;
 - (ii) To review an indictment pursuant to article 18 of the present Statute;
 - (iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute;
 - (iv) To adjudicate in pre-trial proceedings.

Article 13: Officers and Members of the Chambers

1. The permanent judges of the International Tribunal for Rwanda shall elect a President from amongst their number.
2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.
3. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign two of the permanent judges elected or appointed in accordance with article 12 *bis* of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda.
4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.
5. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal for Rwanda to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of that Trial Chamber as a whole.

Article 14: Rules of Procedure and Evidence

The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

Article 15: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.
3. The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16: The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17: Investigation and Preparation of Indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.
4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18: Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19: Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 20: Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

- (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
- (g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21: Protection of Victims and Witnesses

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22: Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24: Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - (a) An error on a question of law invalidating the decision; or
 - (b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26: Enforcement of Sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28: Cooperation and Judicial Assistance

1. States shall co-operate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29: The Status, Privileges and Immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30: Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31: Working Languages

The working languages of the International Tribunal for Rwanda shall be English and French.

Article 32: Annual Report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

NATIONAL LEGISLATION IMPLEMENTING ICTR STATUTE

1996 Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the ICTR.

1999 Agreement between the Government of the Republic of Mali and the UN on the Enforcement and Sentences of the ICTR.

APPENDIX 5

Rome Statute of the International Criminal Court

In light of the establishment of the Permanent Secretariat of the Assembly of States Parties to the Rome Statute (by resolution ICC-ASP/2/Res.3, adopted at the second session of the Assembly on 12 September 2003), the United Nations Secretariat will cease to serve as the Secretariat of the Assembly on 31 December 2003. This website,³⁴⁹ therefore, only reflects developments up until that date. Information on subsequent activities should be obtained from the website of the International Criminal Court itself.³⁵⁰ The Rome Statute entered into force on 1 July 2002.³⁵¹

Preamble

- Part 1 Establishment of the Court
- Part 2 Jurisdiction, Admissibility and Applicable Law
- Part 3 General Principles of Criminal Law
- Part 4 Composition and Administration of the Court
- Part 5 Investigation and Prosecution
- Part 6 The Trial
- Part 7 Penalties
- Part 8 Appeal and Revision
- Part 9 International Cooperation and Judicial Assistance
- Part 10 Enforcement
- Part 11 Assembly of States Parties
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- Part 13 Final Clauses

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

³⁴⁹ Text of statute as given at ICC site: <http://www.un.org/law/icc>.

³⁵⁰ Text of ICC statute includes website address: online at <http://www.icc-cpi.int/index.php>.

³⁵¹ U.N. Doc. A/CONF.183/9*: online at <http://www.un.org/law/icc/statute/romeofra.htm>.

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1 The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2 Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3

Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;

- (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
 - (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) 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;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9 Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority;
 - (c) The Prosecutor.
 Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

1. Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11

Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13

Exercise of jurisdiction

1. The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
 - (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
 - (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
 - (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14

Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15

Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16

Deferral of investigation or prosecution

1. No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall

defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.
4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.
5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.
6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.
7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
 - (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
 - (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
 - (c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a

challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

- (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
- (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
- (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21

Applicable law

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23

Nulla poena sine lege

1. A person convicted by the Court may be punished only in accordance with this Statute.

Article 24

Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29

Non-applicability of statute of limitations

1. The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
 - (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
 - (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
 - (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
 - (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and

reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34

Organs of the Court

1. The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35

Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.
3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.
4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36

Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37

Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38

The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their

respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39 Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40

Independence of the judges

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.
2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

 (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

 (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43

The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.
3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.
5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.
6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44 Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.
2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8.
3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.
4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45 Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn

undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46

Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:
 - (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
 - (b) Is unable to exercise the functions required by this Statute.
2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:
 - (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;
 - (b) In the case of the Prosecutor, by an absolute majority of the States Parties;
 - (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.
3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.
4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48

Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.
2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

- (a) A judge or the Prosecutor may be waived by an absolute majority of the judges;
- (b) The Registrar may be waived by the Presidency;
- (c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;
- (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50

Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority; or
- (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52

Regulations of the Court

- 1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.
- 2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.
- 3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53

Initiation of an investigation

- 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
 - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - (b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

- (a) In accordance with the provisions of Part 9; or
- (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

- (a) Collect and examine evidence;
- (b) Request the presence of and question persons being investigated, victims and witnesses;
- (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
- (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
- (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
- (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

- (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
- (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
- (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
- (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial

Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

- (a) The name of the person and any other relevant identifying information;
 - (b) The specified date on which the person is to appear;
 - (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
 - (d) A concise statement of the facts which are alleged to constitute the crime.
- The summons shall be served on the person.

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.
2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
 - (a) The warrant applies to that person;
 - (b) The person has been arrested in accordance with the proper process; and
 - (c) The person's rights have been respected.
3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.
4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).
5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.
6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.
7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.
3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.
4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.
5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.
2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:
 - (a) Waived his or her right to be present; or
 - (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.
3. Within a reasonable time before the hearing, the person shall:
 - (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
 - (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62

Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
 - (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
 - (b) Determine the language or languages to be used at trial; and
 - (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.
5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

- (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
- (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
- (c) Provide for the protection of confidential information;
- (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
- (e) Provide for the protection of the accused, witnesses and victims; and
- (f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

- (a) Rule on the admissibility or relevance of evidence; and
- (b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

- (a) The accused understands the nature and consequences of the admission of guilt;
- (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

- (c) The admission of guilt is supported by the facts of the case that are contained in:
 - (i) The charges brought by the Prosecutor and admitted by the accused;
 - (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
 - (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.
- 2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
- 3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.
- 4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:
 - (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
 - (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.
- 5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

- 1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
- 2. The onus is on the Prosecutor to prove the guilt of the accused.
- 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

- 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- (c) To be tried without undue delay;
- (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
- (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;
- (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (h) To make an unsworn oral or written statement in his or her defence; and
- (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.

In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69 Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
- (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
- (e) Retaliating against an official of the Court on account of duties performed by that or another official;
- (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.
2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.
2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.
3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.
4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.
5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:
 - (a) Modification or clarification of the request;
 - (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
 - (c) Obtaining the information or evidence from a different source or in a different form; or
 - (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74

Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as

available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.
2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.
3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.
4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77

Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
 - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
 - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
 - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
 - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30

years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79 Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80 Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81 Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
 - (a) The Prosecutor may make an appeal on any of the following grounds:
 - (i) Procedural error,
 - (ii) Error of fact, or
 - (iii) Error of law;
 - (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
 - (i) Procedural error,
 - (ii) Error of fact,
 - (iii) Error of law, or
 - (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.
3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.
4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83

Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.
2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:
 - (a) Reverse or amend the decision or sentence; or
 - (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.
3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.
4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.
5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84

Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:
 - (a) New evidence has been discovered that:

- (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
 - (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
 - (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
 - (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.
2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:
- (a) Reconvene the original Trial Chamber;
 - (b) Constitute a new Trial Chamber; or
 - (c) Retain jurisdiction over the matter, with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.
3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90
Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.
2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:
 - (a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
 - (b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.
3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.
4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.
5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.
6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:
 - (a) The respective dates of the requests;
 - (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
 - (c) The possibility of subsequent surrender between the Court and the requesting State.
7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:
 - (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92
Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.
2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:
 - (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
 - (b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;
 - (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and
 - (d) A statement that a request for surrender of the person sought will follow.
3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.
4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
 - (a) The identification and whereabouts of persons or the location of items;
 - (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
 - (c) The questioning of any person being investigated or prosecuted;
 - (d) The service of documents, including judicial documents;
 - (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
 - (f) The temporary transfer of persons as provided in paragraph 7;

- (g) The examination of places or sites, including the exhumation and examination of grave sites;
 - (h) The execution of searches and seizures;
 - (i) The provision of records and documents, including official records and documents;
 - (j) The protection of victims and witnesses and the preservation of evidence;
 - (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
 - (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.
2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.
3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.
4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.
5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.
6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.
7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:
- (i) The person freely gives his or her informed consent to the transfer; and
 - (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94

Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95

Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96

Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97 Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

- (a) Insufficient information to execute the request;
- (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98 Cooperation with respect to waiver of immunity and consent to surrender

- 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
- 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99 Execution of requests under articles 93 and 96

- 1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.
- 2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.
- 3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100

Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101

Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or

course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102

Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103

Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104

Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105

Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106

Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.
2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.
3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall decide the matter after having heard the views of the sentenced person.
3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.
2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
 - (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
 - (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
 - (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.
5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112

Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.
2. The Assembly shall:
 - (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
 - (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
 - (c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

- (d) Consider and decide the budget for the Court;
 - (e) Decide whether to alter, in accordance with article 36, the number of judges;
 - (f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
 - (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.
3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.
- (b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.
- (c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.
4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.
5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.
6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.
7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:
- (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;
 - (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.
8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.
9. The Assembly shall adopt its own rules of procedure.
10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113

Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114

Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115

Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116

Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117

Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118

Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119

Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120

Reservations

No reservations may be made to this Statute.

Article 121

Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.
6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122

Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.
2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123

Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.
3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124

Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October

1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126

Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

NATIONAL LEGISLATION IMPLEMENTING ICC STATUTE

The following ratification status report is presented on the CICC International Criminal Court homepage³⁵² in country-by-country format and via clickable maps.

(The Netherlands) Bill on International Crimes

- 2001 (Scotland) ICC Bill
- 2000 (Canada) Crimes Against Humanity and War Crimes Act
- 2001 (South Africa) ICC Bill
- 2001 (Switzerland) Swiss Federal Law on Co-operation with the ICC
- 2001 (UK) ICC Act
- 2002 (Australia) ICC Act (Co-operation Provisions)
- 2002 (Congo) ICC Implementation Act

State Parties to the Rome Statute (81)

(Ratifications and accessions (a) in chronological order)

| | |
|---------------------|-------------------|
| Senegal | 2 February 1999 |
| Trinidad and Tobago | 6 April 1999 |
| San Marino | 13 May 1999 |
| Italy | 26 July 1999 |
| Fiji | 29 November 1999 |
| Ghana | 20 December 1999 |
| Norway | 16 February 2000 |
| Belize | 5 April 2000 |
| Tajikistan | 5 May 2000 |
| Iceland | 25 May 2000 |
| Venezuela | 7 June 2000 |
| France | 9 June 2000 |
| Belgium | 28 June 2000 |
| Canada | 7 July 2000 |
| Mali | 16 August 2000 |
| Lesotho | 6 September 2000 |
| New Zealand | 7 September 2000 |
| Botswana | 8 September 2000 |
| Luxembourg | 8 September 2000 |
| Sierra Leone | 15 September 2000 |
| Gabon | 20 September 2000 |
| Spain | 24 October 2000 |
| South Africa | 27 November 2000 |
| Marshall Islands | 7 December 2000 |
| Germany | 11 December 2000 |
| Austria | 28 December 2000 |
| Finland | 29 December 2000 |
| Argentina | 8 February 2001 |
| Dominica | 12 February 2001a |

³⁵² The ICC homepage address as given in the document text is:

<http://www.iccnw.org/rome/html/ratify.html>. Last updated to include ratification by Malawi on 19 September 2002.

| | |
|--|--------------------|
| Andorra | 30 April 2001 |
| Paraguay | 14 May 2001 |
| Croatia | 21 May 2001 |
| Costa Rica | 7 June 2001 |
| Antigua & Barbuda | 18 June 2001 |
| Denmark | 21 June 2001 |
| Sweden | 28 June 2001 |
| Netherlands | 17 July 2001 |
| Yugoslavia | 6 September 2001 |
| Nigeria | 27 September 2001 |
| Liechtenstein | 2 October 2001 |
| Central African Republic | 3 October 2001 |
| United Kingdom | 4 October 2001 |
| Switzerland | 12 October 2001 |
| Peru | 10 November 2001 |
| Nauru | 12 November 2001 |
| Poland | 12 November 2001 |
| Hungary | 30 November 2001 |
| Slovenia | 31 December 2001 |
| Benin | 22 January 2002 |
| Estonia | 30 January 2002 |
| Portugal | 5 February 2002 |
| Ecuador | 5 February 2002 |
| Mauritius | 5 March 2002 |
| Macedonia, FYR | 6 March 2002 |
| Cyprus | 7 March 2002 |
| Panama | 21 March 2002 |
| Bosnia-Herzegovina, Bulgaria, Cambodia, the Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania and Slovakia | 11 April 2002 * |
| Greece | 15 May 2002 |
| Uganda | 14 June 2002 |
| Brazil | 20 June 2002 |
| Namibia | 25 June 2002 |
| Bolivia | 27 June 2002 |
| Uruguay | 28 June 2002 |
| Gambia | 28 June 2002 |
| Latvia | 28 June 2002 |
| Australia | 1 July 2002 |
| Honduras | 1 July 2002 |
| Colombia * | 5 August 2002 |
| Tanzania | 20 August 2002 |
| East Timor * | 6 September 2002 a |
| Samoa | 16 September 2002 |
| Malawi * | 19 September 2002 |

Rome Statute Signatories (139)

in alphabetical order

| | |
|----------------------------------|-------------------|
| Albania | 18 July 1998 |
| Algeria | 28 December 2000 |
| Andorra | 18 July 1998 |
| Angola | 7 October 1998 |
| Antigua and Barbuda | 23 October 1998 |
| Argentina | 8 January 1999 |
| Armenia | 1 October 1999 |
| Australia | 9 December 1998 |
| Austria | 7 October 1998 |
| Bahamas | 29 December 2000 |
| Bahrain | 11 December 2000 |
| Bangladesh | 16 September 1999 |
| Barbados | 8 September 2000 |
| Belgium | 10 September 1998 |
| Belize | 5 April 2000 |
| Benin | 24 September 1999 |
| Bolivia | 17 July 1998 |
| Bosnia and Herzegovina | 17 July 2000 |
| Botswana | 8 September 2000 |
| Brazil | 7 February 2000 |
| Bulgaria | 11 February 1999 |
| Burkina Faso | 30 November 1998 |
| Burundi | 13 January 1999 |
| Cambodia | 23 October 2000 |
| Cameroon | 17 July 1998 |
| Canada | 18 December 1998 |
| Cape Verde | 28 December 2000 |
| Central African Republic | 7 December 1999 |
| Chad | 20 October 1999 |
| Chile | 11 September 1998 |
| Colombia | 10 December 1998 |
| Comoros | 22 September 2000 |
| Congo (Brazzaville) | 17 July 1998 |
| Costa Rica | 7 October 1998 |
| Cote d'Ivoire | 30 November 1998 |
| Croatia | 12 October 1998 |
| Cyprus | 15 October 1998 |
| Czech Republic | 13 April 1999 |
| Democratic Republic of the Congo | 8 September 2000 |
| Denmark | 25 September 1998 |
| Djibouti | 7 October 1998 |
| Dominican Republic | 8 September 2000 |
| Ecuador | 7 October 1998 |
| Egypt | 26 December 2000 |
| Eritrea | 7 October 1998 |
| Estonia | 27 December 1999 |
| Fiji | 29 November 1999 |
| Finland | 7 October 1998 |

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|---------------------------------|-------------------|
| France | 18 July 1998 |
| Gabon | 22 December 1998 |
| Gambia | 7 December 1998 |
| Germany | 10 December 1998 |
| Georgia | 18 July 1998 |
| Ghana | 18 July 1998 |
| Greece | 18 July 1998 |
| Guinea | 8 September 2000 |
| Guinea-Bissau | 12 September 2000 |
| Guyana | 28 December 2000 |
| Haiti | 26 February 1999 |
| Honduras | 7 October 1998 |
| Hungary | 15 December 1998 |
| Iceland | 26 August 1998 |
| Iran | 31 December 2000 |
| Ireland | 7 October 1998 |
| Israel | 31 December 2000 |
| Italy | 18 July 1998 |
| Jamaica | 8 September 2000 |
| Jordan | 7 October 1998 |
| Kenya | 11 August 1999 |
| Kuwait | 8 September 2000 |
| Kyrgyzstan | 8 December 1998 |
| Latvia | 22 April 1999 |
| Lesotho | 30 November 1998 |
| Liberia | 17 July 1998 |
| Liechtenstein | 18 July 1998 |
| Lithuania | 10 December 1998 |
| Luxembourg | 13 October 1998 |
| Macedonia, Former Yugoslav Rep. | 7 October 1998 |
| Madagascar | 18 July 1998 |
| Malawi | 3 March 1999 |
| Mali | 17 July 1998 |
| Malta | 17 July 1998 |
| Marshall Islands | 6 September 2000 |
| Mauritius | 11 November 1998 |
| Mexico | 7 September 2000 |
| Monaco | 18 July 1998 |
| Mongolia | 29 December 2000 |
| Morocco | 8 September 2000 |
| Mozambique | 28 December 2000 |
| Namibia | 27 October 1998 |
| Nauru | 13 December 2000 |
| Netherlands | 18 July 1998 |
| New Zealand | 7 October 1998 |
| Niger | 17 July 1998 |
| Nigeria | 1 June 2000 |
| Norway | 28 August 1998 |
| Oman | 20 December 2000 |
| Panama | 18 July 1998 |
| Paraguay | 7 October 1998 |
| Peru | 7 December 2000 |

| | |
|--------------------------|-------------------|
| Philippines | 28 December 2000 |
| Portugal | 7 October 1998 |
| Poland | 9 April 1999 |
| Republic of Korea | 8 March 2000 |
| Republic of Moldova | 8 September 2000 |
| Romania | 7 July 1999 |
| Russian Federation | 13 September 2000 |
| Samoa | 17 July 1998 |
| San Marino | 18 July 1998 |
| Sao Tome and Principe | 28 December 2000 |
| Senegal | 18 July 1998 |
| Seychelles | 28 December 2000 |
| Sierra Leone | 17 October 1998 |
| Slovakia | 23 December 1998 |
| Slovenia | 7 October 1998 |
| Solomon Islands | 3 December 1998 |
| South Africa | 17 July 1998 |
| Spain | 18 July 1998 |
| St. Lucia | 27 August 1999 |
| Sudan | 8 September 2000 |
| Sweden | 7 October 1998 |
| Switzerland | 18 July 1998 |
| Syria | 29 November 2000 |
| Tajikistan | 30 November 1998 |
| Tanzania | 29 December 2000 |
| Thailand | 2 October 2000 |
| Trinidad and Tobago | 23 March 1999 |
| Uganda | 17 March 1999 |
| Ukraine | 20 January 2000 |
| United Arab Emirates | 27 November 2000 |
| United Kingdom | 30 November 1998 |
| United States of America | 31 December 2000 |
| Uruguay | 19 December 2000 |
| Venezuela | 14 October 1998 |
| Yemen | 28 December 2000 |
| Yugoslavia | 19 December 2000 |
| Zambia | 17 July 1998 |
| Zimbabwe | 17 July 1998 |

APPENDIX 6

Address of the Secretary-General to the UN General Assembly

The following is the complete transcript of a speech by UN Secretary-General Kofi Annan to the UN General Assembly, 20 September 1999,³⁵³ in which he discusses the friction between the traditional legal model of the Sovereign State, invulnerable to foreign interference in domestic affairs, and the rising demands for international interventions to curb large-scale abuses of human rights.

I am deeply honoured to address this last session of the General Assembly of the twentieth century and to present my annual report on the work of the Organization. The text of the report is before the Assembly.

On this occasion, I should like to address the prospects for human security and intervention in the next century. In the light of the dramatic events of the past year, I trust that the Assembly will understand this decision.

As Secretary-General, I have made it my highest duty to restore the United Nations to its rightful role in the pursuit of peace and security, and to bring it closer to the peoples it serves. As we stand at the brink of a new century, this mission continues.

But it continues in a world transformed by geopolitical, economic, technological and environmental changes whose lasting significance still eludes us. As we seek new ways to combat the ancient enemies of war and poverty, we will succeed only if we all adapt our Organization to a world with new actors, new responsibilities and new possibilities for peace and progress.

The sovereign state, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The state is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty — and by this I mean the human rights and fundamental freedoms of each and every individual, as enshrined in our Charter — has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny.

³⁵³ Fifty-fourth Session, fourth plenary meeting, Monday, 20 September 1999, 10 a.m., New York, UN doc A/54/PV.4.

These parallel developments — remarkable and in many ways welcome — do not lend themselves to easy interpretations or simple conclusions.

They do, however, demand of us a willingness to think anew about how the United Nations responds to the political, human rights and humanitarian crises affecting so much of the world; about the means employed by the international community in situations of need; and about our willingness to act in some areas of conflict while limiting ourselves to humanitarian palliatives in many other crises whose daily toll of death and suffering ought to shame us into action.

Our reflections on these critical questions derive not only from the events of the past year but from a variety of challenges that confront us today, most urgently in East Timor.

From Sierra Leone to the Sudan to Angola to the Balkans and to Cambodia, and then to Afghanistan, there are a great number of peoples who need more than just words of sympathy from the international community. They need a real and sustained commitment to help end their cycles of violence and launch them on a safe passage to prosperity.

While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community.

It has cast in stark relief the dilemma of what has been called "humanitarian intervention": on one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences.

The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests — universal legitimacy and effectiveness in defence of human rights — can be viewed only as a tragedy.

It has revealed the core challenge to the Security Council and to the United Nations as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human rights — wherever they may take place — should not be allowed to stand.

The Kosovo conflict and its outcome have prompted a wide debate of profound importance to the resolution of conflicts, from the Balkans to Central Africa to East Asia. And to each side in this critical debate, difficult questions can be posed.

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council

authorization, should such a coalition have stood aside and allowed the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for

enforcing international law, one might ask: is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?

In response to this turbulent era of crises and interventions, there are those who have suggested that the Charter itself — with its roots in the aftermath of global inter-State war — is ill-suited to guide us in a world of ethnic wars and intra-State violence. I believe they are wrong.

The Charter is a living document whose high principles still define the aspirations of peoples everywhere for lives of peace, dignity and development. Nothing in the Charter precludes a recognition that there are rights beyond borders.

Indeed, its very letter and spirit are the affirmation of those fundamental human rights. In short, it is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era — an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms.

The sovereign States that drafted the Charter over a half century ago were dedicated to peace, but experienced in war.

They knew the terror of conflict, but knew equally that there are times when the use of force may be legitimate in pursuit of peace. That is why the Charter's own words declare that "armed force shall not be used, save in the common interest". But what is the common interest? Who shall define it? Who will defend it — under whose authority and with what means of intervention? These are the monumental questions facing us as we enter the new century. While I will not propose specific answers or criteria, I shall identify four aspects of intervention which I believe hold important lessons for resolving future conflicts.

First, it is important to define intervention as broadly as possible, to include actions along a wide continuum from the most pacific to the most

coercive. A tragic irony of many of the crises that continue to go unnoticed and unchallenged today is that they could be dealt with by far less perilous acts of intervention than the one we witnessed recently in Yugoslavia. Yet the commitment of the international community to peacekeeping, to humanitarian assistance and to rehabilitation and reconstruction varies greatly from region to region and crisis to crisis.

If the new commitment to intervention in the face of extreme suffering is to retain the support of the world's peoples, it must be, and must be seen to be, fairly and consistently applied, irrespective of region or nation. Humanity, after all, is indivisible.

It is also necessary to recognize that any armed intervention is itself a result of the failure of prevention. As we consider the future of intervention, we must redouble our efforts to enhance our preventive capabilities, including early warning, preventive diplomacy, preventive deployment and preventive disarmament.

A recent powerful tool of deterrence has been the actions of the Tribunals for Rwanda and for the former Yugoslavia. In their battle against impunity lies a key to deterring crimes against humanity. With these concerns in mind, I have dedicated the introductory essay of my annual report to exploring ways of moving from a culture of reaction to a culture of prevention. Even the costliest policy of prevention is far cheaper, in lives and in resources, than the least expensive of armed force.

Secondly, it is clear that sovereignty alone is not the only obstacle to effective action in human rights or humanitarian crises. No less significant are the ways in which the States Members of the United Nations define their national interest in any given crisis.

Of course, the traditional pursuit of national interest is a permanent feature of international relations and of the life and work of the Security Council. But I believe that as the world has changed in profound ways since the end of the cold war, our conceptions of national interest have failed to follow suit.

A new, more broadly defined, more widely conceived definition of national interest in the new century would, I am convinced, induce States to find far greater unity in the pursuit of such basic Charter values as democracy, pluralism, human rights and the rule of law. A global era requires global engagement. Indeed, in a growing number of challenges facing humanity, the collective interest is the national interest.

Thirdly, in the event that forceful intervention becomes necessary, we must ensure that the Security Council, the body charged with authorizing force under international law, is able to rise to the challenge.

As I said during the Kosovo conflict, the choice must not be between, on the one hand, Council unity and inaction in the face of genocide, as in

the case of Rwanda and, on the other, Council division and regional action, as in the case of Kosovo.

In both cases, the States Members of the United Nations should have been able to find common ground in upholding the principles of the Charter and in acting in defence of our common humanity.

As important as the Council's enforcement power is its deterrent power. Unless it is able to assert itself collectively when the cause is just and when the means are available, its credibility in the eyes of the world may well suffer. If States bent on criminal behaviour know that frontiers are not the absolute defence and if they know that the Security Council will take action to halt crimes against humanity, they will not embark on such a course of action in expectation of sovereign impunity.

The Charter requires the Council to be the defender of the common interest, and unless it is seen to be so in an era of human rights, interdependence and globalization, there is a danger that others could seek to take its place.

Let me say that the Council's prompt and effective action in authorizing a multinational force for East Timor reflects precisely the unity of purpose that I have called for today. Already, however, far too many lives have been lost and far too much destruction has taken place for us to rest on our laurels. The hard work of bringing peace and stability to East Timor still awaits us.

Finally, after the conflict is over, in East Timor as everywhere, it is vitally important that the commitment to peace be as strong as the commitment to war.

In this situation, too, consistency is essential. Just as our commitment to humanitarian action must be universal if it is to be legitimate, so our commitment to peace cannot end with the cessation of hostilities. The aftermath of war requires no less skill, no less sacrifice and no fewer resources in order to forge a lasting peace and avoid a return to violence.

The Kosovo Mission and other United Nations missions currently deployed or looming over the horizon present us with just such a challenge. Unless the United Nations is given the means and the support to succeed, not only the peace, but the war, too, will have been lost. From civil administration and policing to the creation of a civil society capable of sustaining a tolerant, pluralist, prosperous society, the challenges facing our peacekeeping, peacemaking and peace-building missions are immense.

But if we are given the means — in Kosovo, in Sierra Leone and in East Timor — we have a real opportunity to break the cycles of violence, once and for all.

We leave a century of unparalleled suffering and violence. Our greatest, most enduring test remains our ability to gain the respect and

support of the world's peoples. If the collective conscience of humanity — a conscience which abhors cruelty, renounces injustice and seeks peace for all peoples — cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice. If it does not hear in our voices, and see in our actions, reflections of its own aspirations, its needs and its fears, it may soon lose faith in our ability to make a difference.

Just as we have learned that the world cannot stand aside when gross and systematic violations of human rights are taking place, so we have also learned that intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world's peoples.

This developing international norm in favour of intervention to protect civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community.

Any such evolution in our understanding of state sovereignty and individual sovereignty will, in some quarters, be met with distrust, scepticism and even hostility. But it is an evolution that we should welcome.

Why? Because, despite its limitations and imperfections, it is testimony to a humanity that cares more, not less, for the suffering in its midst; and a humanity that will do more, and not less, to end it. It is a hopeful sign at the end of the twentieth century.

APPENDIX 7

Reference: War Crimes

The following list is a guide to some materials specifically on war crimes.

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APPENDIX 8

ICTY: Arrests and Voluntary Surrenders

The following information has been provided³⁵⁴ by the International Criminal Tribunal for the Former Yugoslavia on the status of accused within the court's jurisdiction, the date of arrest, date of voluntary surrender if such occurred and date of transfer, if applicable.

| <i>Accused</i> | <i>Arrested</i> | <i>Voluntary Surrender</i> | <i>Transferred</i> |
|--------------------|----------------------|--------------------------------|--------------------|
| Tihomir Baskic | | 01/04/1996 | |
| Dario Kordic | | 06/10/1997 | |
| Mario Cerkez | | 06/10/1997 | |
| Mlado Radic | 08/04/1998 (SFOR) | | |
| Zoran Zigic | | 16/04/1998 | |
| Milorad Krnojelac | 15/06/1998 (SFOR) | | |
| Radislav Krstic | 02/12/1998 (SFOR) | | |
| Radoslav Brdjanin | 06/07/1999 (SFOR) | | |
| Vinko Martinovic | 26/02/1997 (Croatia) | | |
| Stanislav Galic | 20/12/1999 (SFOR) | | |
| Mitar Vasiljevic | 25/01/2000 (SFOR) | | |
| Dragoljub Prcac | 05/03/2000 (SFOR) | | |
| Mladen Naletilic | 1997 (Croatia) | | |
| Momcilo Krajisnik | 03/04/2000 (SFOR) | | |
| Dragan Nikolic | 21/04/2000 (SFOR) | | |
| Blagoje Simic | | 12/03/2001 | |
| Milomir Stakic | 23/03/2001 (Serbia) | | |
| Dragan Obrenovic | 15/04/2001 (SFOR) | | |
| Slobodan Milosevic | 01/04/2001 (Serbia) | | |
| Vidoje Blagojevic | 10/08/2001 (SFOR) | | |
| Miroslav Tadic | | 14/02/1998 | |
| Predrag Banovic | 08/11/2001 (Serbia) | | |
| Pasko Ljubicic | | 21/11/2001 | |
| Dusan Fustar | | 31/01/2002 | |
| Momir Nikolic | 01/04/2002 (SFOR) | | |

(continued)

³⁵⁴ ICTY list, the most current information with respect to the status of the accused, provided to the author 27 February 2004 by the informational officer, public affairs office of the ICTY, via fax #3170528668.

| <i>Accused</i> | <i>Arrested</i> | <i>Voluntary Surrender</i> | <i>Transferred</i> |
|----------------------|-----------------------|--------------------------------|--------------------|
| Dragoljub Ojdanic | | | 25/04/2002 |
| Nikola Sainovic | | | 02/05/2002 |
| Milan Martic | | | 15/05/2002 |
| Mile Mrksic | | | 15/05/2002 |
| Dusan Knezevic | | | 18/05/2002 |
| Darko Mrdja | | | 13/06/2002 |
| Ranko Cesic | 25/05/2002 (Serbia) | | |
| Miroslav Deronjic | 07/07/2002 (SFOR) | | |
| Radovan Stankovic | 09/07/2002 (SFOR) | | |
| Milan Milutinovic | | | 20/01/2003 |
| Haradin Bala | 17/02/2003 (KFOR) | | |
| Isak Musliu | 17/02/2003 (KFOR) | | |
| Vojislav Seselj | | 24/02/2003 | |
| Fatmir Limaj | 18/02/2003 (Slovenia) | | |
| Naser Oric | 10/04/2003 (SFOR) | | |
| Dragan Jokic | | 15/08/2001 | |
| Miroslav Radic | | | 17/05/2003 |
| Franko Simatovic | 13/03/2003 (Serbia) | | |
| Jovica Stanisic | 13/03/2003 (Serbia) | | |
| Ivica Rajic | 05/04/2003 (Croatia) | | |
| Veselin Sijivancanin | 13/06/2003 (Serbia) | | |
| Zeljko Mejakic | | | 04/07/2003 |
| Mitar Rasevic | | | 15/08/2003 |
| Vladimir Kovacevic | | | 23/10/2003 |
| Milan Babic | | 26/11/2003 | |
| Enver Hadzihasanovic | | 02/08/2001 | |
| Amir Kubura | | 02/08/2001 | |
| Pavle Strugar | | 21/10/2001 | |