

JUSTICE

The magazine of the International Association of Jewish Lawyers and Jurists

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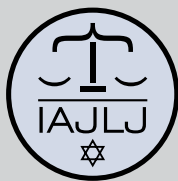
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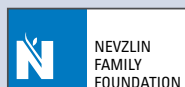
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President's Message

Only three weeks ago we returned from the convention which we had convened at The Hague and which in the opinion of all participants, was highly successful. In this issue of *JUSTICE* we are publishing a number of articles based on lectures that were given at the conference.

The Peace Palace which is celebrating its first centenary added to the special atmosphere in the city which hosts the international courts discussed during the conference. Along with explanations regarding the activities of the various courts, the lecturers analyzed the problems entailed by these activities and occasionally offered criticisms of specific operations of the courts.

We were fortunate to obtain the participation of key judicial figures, among them Mr. Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia (ICTY); Judge Philippe Kirsch, the first President of the International Criminal Court (ICC), and the current Deputy Prosecutor of the ICC, as well as various eminent law professors whose talks proved both fascinating and enlightening.

As always, the interaction between the members taking part in the conference was warm and friendly. Recently a fresh wave of lawyers from around the world joined our Association, and we hope to encourage and nurture this development.

You may have noticed that every few months we have been distributing newsletters to members of the Association in which we draw our readers' attention to original documents that we have sent to national and international authorities on matters on the Association's agenda. The purpose of these newsletters is to inform members of the prolific and diverse activities in which we are engaged and encourage an interest and desire to actively participate in our work.

Unfortunately, we are continuing to witness mounting antisemitism around the world. Antisemitic activities have occurred in numerous locations and there is a sense that the phenomena is expanding. Where possible, our Association, working in collaboration with the local community, intervenes by sending letters to the relevant authorities, and in most cases the local authorities respond by condemning the antisemitic activity; however, our objective is to bring about the prosecution of those responsible for incitement to racism and we plan to continue with this program with even greater energy.

Attacking this issue from a different angle, the

Association organized a seminar on the issue of "Price Tag operations", which was reported in our last newsletter. During that seminar, participants expressed concern over the activities of extremist elements in society, whose activities may well endanger our very democracy.

With regard to the issue of incitement to racism, the Association applied to the Israeli Supreme Court for leave to submit an *amicus curiae* brief in the petition submitted against the Attorney General in respect of his decision not to indict the rabbinical authors of the book "*Torat Hamelech*" and the article "*Tit for Tat, Strategy*". In the opinion of the 11 petitioners, representing pluralistic movements that preach tolerance and more, these publications incite racial hatred and sedition. The Israeli Penal Law contains provisions designating such acts as criminal offences and, in the view of the petitioners, the Attorney General erred by closing the cases against the rabbis who wrote the book and the article.

In view of its NGO status at the UN, its position as a human rights organization fighting incitement against the Jewish people and the State of Israel, and the many developments that have taken place in relation to these issues in recent years, our Association applied to the Supreme Court for leave to join as a friend of the court. Our Association seeks to interest the Court on recent developments relating to incitement to racism around the world, before the Court issues its ruling on the principal petition. The Supreme Court has summoned the Association to present its arguments on this application and we expect the hearing to be held shortly.

Another issue with which we are currently dealing concerns UNRWA. The Association believes that UNRWA is transforming the refugee issue into an obstacle to peace by its lack transparency and by vastly inflating the refugee numbers in an unaudited and unverified manner. The Association is in contact with countries that support UNRWA in order to make them aware of the information in our possession. In the next stage we plan to hold a seminar in the United States that will deal with this matter. As soon as a date is set for this seminar, we shall of course inform members.

In the last issue of *JUSTICE* I referred to the phenomena known as the "Arab Spring" which has been followed by severe violations of human rights. Recently, it has become apparent that women in particular have suffered from developments in the Arab countries. In the past three



years, Egyptian women have suffered increased sexual harassment; in Yemen young girls are being forced to marry instead of going to school and in Syria women understand that the post-Assad period is likely to be less egalitarian. These are just a few examples of what is happening in other countries and are developments to which we must increasingly turn our attention.

Before concluding my message, I ask members of the Association to encourage their colleagues to join the Association. If each member would bring one friend, our

numbers would be doubled and our activities would take on an exponentially greater and broader significance.

Finally, no date has yet been set for the next conference in which elections will be held for the presidency and institutions of the Association. We hope to announce the date shortly; the conference will take place in Israel, in accordance with our best traditions.

Irit Kohn
IAJLJ President

Challenges of International Criminal Justice

Albin Eser¹

Why should international criminal justice be employed?

A couple of years ago, after delivering a lecture in Jerusalem on international criminal justice, I was asked by a participant why Israel should care about international criminal justice – certainly as long as Israel had not acceded to the Rome Statute of the International Criminal Court (ICC).

I seriously wonder, however, whether one can simply afford to ignore what is happening in the international criminal justice arena. Even members of the United Nations Security Council, such as China, Russia and the United States of America, that insist on excluding themselves from the ICC are prepared to refer suspicious situations (in terms of Article 13(b) of the Rome Statute) which occur on the territory of non-member states to the ICC. Further, one must be aware that the door to the ICC may also be open to organizations with some sort of international observer status.

Thus, I think, one can no longer ignore developments in international criminal justice. This view is not meant as a threat but as advice; instead of ignoring international criminal justice, one must become actively involved in it.

This does not mean that international criminal justice can already be considered a perfect judicial instrument for putting an end to the traditional impunity of international crimes. On the contrary, there are still many deficiencies that make it difficult for certain countries to join the international judicial club. However, with all due respect for the understandable criticism which may be voiced against the present structure and practice of international criminal justice, can this criticism seriously justify completely abolishing it?

Whoever supports abolition should reflect for a moment on what we would have missing or what mankind may lose were there not some form of supranational criminal justice. Would all those high-ranking Nazi criminals have been brought to justice without an International Military Tribunal in Nuremberg or a similar one in Tokyo? Let us recall some of the numbers over 65 years of international criminal justice: how many of the 172 proceedings

involving 356 defendants, out of which 281 were convicted by a supranational court or other transnational tribunal,² would have been prosecuted at all, had they been left to the free discretion of national authorities?

Therefore, instead of raising deficiencies as an argument against international criminal justice, they should rather be taken as a challenge to improve international criminal justice in the best possible way.

How can this be done? This must be reflected upon on two levels. When asking whether the concept and performance of the supranational ad hoc-tribunals for Ruanda (ICTR) and former Yugoslavia (ICTY) as well as the permanent ICC were a success or a failure, one will receive controversial answers – depending very much

on what one expects. The picture becomes even more confusing when one realizes that the criteria for success or failure may often be very different, if not inconsistent. Different criteria will necessarily entail divergent results and consequently lead to an unfavorable picture of international criminal justice. If, for instance, one considers that international crimes merit harsh punishments, one will be disappointed if the court shows leniency in order to promote mutual reconciliation. Or, if restoring social peace is considered the main purpose of international proceedings, the employment of criminal justice can appear



1. This is an updated part of my inaugural lecture of the George Fletcher Lecture Series on International and Comparative Criminal Law at the Hebrew University in Jerusalem on March 4, 2013, partly based on my publication on “Transnational Measures against the Impunity of International Crimes”, in 10 *Journal of International Criminal Justice* (2012), 621-634, and in full length to be published by the Law Faculty of the Hebrew University. The article is also based on the lecture given within the framework of the Hague Conference held by the Association.
2. Alette Smeulers, Barbara Hola & Tom van den Berg, “Sixty-Five Years of International Criminal Justice: The Facts and Figures”, 13 *Inter'l Crim. L. Rev.* (2013), 7-41.

counterproductive from the very beginning.

References to flaws in individual trials are even worse grounds for drawing misleading conclusions about international criminal justice. These arguments confuse individual procedural flaws with the international criminal justice system as a whole. International criminal justice as an institution and its performance in individual proceedings: these are, in fact, two different phenomena. Hence they need separate consideration.

In this article, however, I can only address the first phenomenon: the need for some form of supranational justice at least for certain types of crimes. In this regard I would like to present some insights gained from a comparative project which I initiated and supervised at the Max Planck Institute for Foreign and International Criminal Law in Freiburg.

Transnational criminal justice as necessary *ultima ratio*

With all due respect to national criminal justice, one of the reasons why I think that the protection of human rights and the fight against the usual impunity of international crimes requires supranational backing is the lesson learned from our comparative project on criminal reaction to state supported crime.³ Covering more than twenty countries with a totalitarian past significantly marked by state supported crime, the project's aim was to find out in what way these states, after having overcome their lawless past, would react to criminal acts committed prior to the change of their regime and political system: Would they strive primarily for criminal prosecutions? Or, would they think it advisable for them to come to terms with the past by means of other non-punitive measures? And if neither one nor the other of these alternatives were acceptable, what other approaches would these countries follow? If legal measures, not least among them criminal sanctions, were indispensable, would it suffice to leave the outcome of the transition process entirely to the discretion of the national authorities? Or, rather, would some kind of transnational involvement be required?

It is not surprising that different countries follow different routes, be it for political, ideological or pragmatic reasons, or simply because of total indifference. In particular, regarding the role of criminal law in the attempt to come to terms with unlawful activities committed prior to the change of a criminal regime, the approaches taken by the various countries analyzed by the project proved to be ambivalent.⁴ On the one hand, we found that in most countries in which crimes of the former regime were prosecuted at all or at least to a certain extent, the employment of criminal law was not considered to be the sole response, but one of a range of possible responses.

Considered of equal necessity, and sometimes even of primary significance, were investigations conducted by truth and reconciliation commissions, the restitution and compensation of victims and similar non-punitive measures.

On the other hand, however, it was revealed by our comparative research that even when the criminal law was not employed as the sole or primary answer to state supported crime, it had to be kept available as a "last resort".

Deficiencies and necessary improvements in national-domestic law

Even where countries adopt criminal law provisions, their mere existence, however, does not necessarily guarantee success, rather the criminal law provisions must be shaped in a manner that allows them to be efficiently applied.

In the first place, this is essential on the level of domestic criminal law. As is described in more detail in the observations of our comparative project,⁵ criminal law can be an effective instrument for preventing and sanctioning state supported offenses and similar grave crimes only if the following essential requirements are fulfilled: (a) if prohibitions are clearly defined, (b) if grounds for excluding criminal liability are precluded, in particular self-serving immunities and amnesties which perpetrators in power concoct to shield themselves from later prosecution,⁶ and (c) if the procedure provides

3. The publication of this project, titled *Strafrecht in Reaktion auf Systemunrecht / Criminal Law in Reaction to State Crime*, comprises 14 volumes: vols. 1-7 edited by Albin Eser, Jörg Arnold, Freiburg 2000-2003, vols. 8-14 edited by Albin Eser, Ulrich Sieber & Jörg Arnold, Berlin 2005-2011. An intermediary project report in English was published by Albin Eser, Jörg Arnold & Helmut Kreicker, *Criminal Law in Reaction to State Crime. Comparative Insights into Transitional Processes*, (2002), available at www.freidok.uni-freiburg.de/volltexte/6349 (last visited November 21, 2013).
4. For details of the findings and conclusions cf. Albin Eser, *Rechtspolitische Reflexionen zur Aufarbeitung und Verhinderung von Systemunrecht*, in: Albin Eser & Jörg Arnold, *Transitionsstrafrecht und Vergangenheitspolitik*, vol.14 of *Strafrecht in Reaktion auf Systemunrecht* (*supra* note 3), Berlin 2012, 392-470, at 363 et seq., 410 et seq.
5. Eser, *Reflexionen supra* note 4, at 451 et seq.
6. This is not to ignore, however, the ambivalent nature of amnesties which in certain circumstances may play a reconciliatory role; Eser, *Reflexionen, supra* note 4, at 442 et seq.

adequate guarantees both for rendering victims appropriate satisfaction and offering suspects a fair trial.

Yet, even if these requirements are strengthened by constitutional safeguards, so long as they exist in national law only, full compliance with them and their effective application will still depend on the good will and political discretion of the competent national authorities. Therefore, the question is whether and to what extent the employment of criminal law in the fight against impunity of state supported and other international crimes can be left to national prosecution or alternatively should require supranational support. It appears that the latter is necessary for two reasons: first by requiring supranational reinforcement of the national law and the administration of criminal justice on the domestic level and, secondly, by asking for the complementary employment of inter- and supranational institutions.

Supranational reinforcement of the national law

In this regard, as to the reinforcement of national law by supranational measures, one must be aware that even constitutions can be changed. This fact seems to be overlooked by those who believe that constitutional guarantees provide sufficient safeguards against abuse by state supported crimes. Once an unlawful regime has reached and secured power and proved willing to give wrongdoing the appearance of justice, that regime would certainly not shy away from perverting the constitution. The likelihood of this happening is greater the less a regime needs to be afraid of penal consequences following loss of power. There is little hope for fundamental change as long as the prevention and prosecution of crimes committed with the support of state officials is reserved exclusively to national guarantees and the very same domestic authorities that are responsible for the crimes. An unjust regime, in power, is not only able to break the law without consequences, but it can also institute constitutional impediments by means of which the holders of power and their accomplices are able to shirk their responsibilities. For if a new government, after having replaced an unjust regime, is now bound to abide by the rule of law and seeks to avoid its own breaches of law, it will not easily be able to suspend legal impediments to prosecution instituted by its predecessor on the basis of a constitution, even if the legitimacy of that constitution is dubious. This consequence that, under the rule of law, a state may be bound by constitutional guarantees introduced by an illegitimate predecessor will be avoidable only if one is prepared to overcome the inherent system of a purely positivist understanding of state and law and measure a national constitution not only against itself and the self-set and – thus arbitrarily changeable – rules,

but also against the requirements of international law and principles of natural law.⁷

Thus, a lesson learned from our findings is that one must not be satisfied with criminal provisions in national law that is changeable at any time, but rather that some sort of supranational guarantee and enforcement is warranted. This is particular necessary in order to prevent penal prohibitions from being undermined by self-serving defences, such as immunities and amnesties anticipated by a lawless regime while still in power. Thus, grounds for excluding criminal responsibility or barring prosecutions that are manifestly open to abuse should be precluded by means of international law.

This precaution is particularly important in relation to the following defences: on the one hand, (a) the exclusion of immunity of heads of state or high ranking officials, (b) the exclusion of amnesties introduced by leaders and supporters of a regime for their own benefit, (c) the exclusion of a justification or excuse based on having acted under a superior order, (d) the exclusion of the statute of limitation for all, or at least particularly grave, international crimes or, if the statute of limitation is not completely abolished, suspending its operation for the period in which the lawless regime is in power, and, on the other hand, (e) disregarding non-retroactivity in cases of international crimes, at least in cases where the wrongfulness is generally known, or where domestic crime provisions were suspended, restricted or open to justifications or other defences in breach of international humanitarian law.

Supplementary employment of inter and supranational institutions

In this regard, one must be aware that the mere existence of national criminal provisions, even if in full compliance with international requirements, does not suffice. This is because even in that case one cannot be sure that the national authorities, and in particular the criminal justice system, are able and willing to fulfil their primary responsibilities. With all due respect for national priorities in coming to terms with a criminal past or ongoing transnational crimes, it is the world community that ultimately has to live up to its responsibility to ensure that grave human rights violations are prevented or, if still occurring, do not go unpunished.

To the extent that this global responsibility requires

7. For more details regarding the weaknesses of national law in this regard and the different approaches to overcoming them. Eser, *Transnational Measures*, *supra* note 1, at 626 *et seq.*

criminal prosecution, it can be achieved in two ways. The traditional way would be that concurrently with or even instead of the jurisdiction of the territory where the crime was committed, other national jurisdictions, employing the principle of universality or the principle of passive personality – i.e., acting on behalf of their citizen victims – may step in and prosecute the crimes concerned in accordance with their own domestic law.⁸

The more modern way would be on the inter- or supranational level by employing courts or tribunals that are not exclusively national. The latter approach is necessary in cases where the national criminal justice system is open to abuse. In particular, this can occur where a suspect is being shielded from serious prosecution and, in order to pre-empt the intervention of an international tribunal, the domestic court holds a “fake trial” leading to an acquittal and subsequently an international court cannot retry the offender by reason of the prohibition against “double jeopardy”. In order to prevent the perversion of the true purpose of the principle of “*ne bis in idem*”, an abuse clause is needed in the terms of Article 20(3) of the Rome Statute. In this way one can ensure that the complementary intervention of international criminal justice is not obstructed. Indeed, what could be more obvious proof of the failure of a national justice system in the fight against impunity, with the ensuing need for supranational intervention, than a case in which the domestic court tries to protect the suspect of a state supported or another international crime from serious prosecution by conducting a fake trial?

The possible conclusion that the preceding demands favour the internationalisation of national responsibilities for a lawless past is both partially right and partially wrong. On the one hand, my discourse would be radically misjudged if it were to be understood as a concealed plea to incapacitate the individual state in terms of its responsibility for performing a national accounting for its criminal past. Quite the contrary, it must be emphasized that the wounds inflicted by an unlawful regime should be healed as close as possible to the location of the crime and its victims and that the primary responsibility for regaining sustainable peace lies on the national courts.

On the other hand, and this is also a significant lesson to be learnt from our MPI project, we must not ignore the fact that national endeavours to come to terms with the past and ongoing violations of human rights can have their limits: whether it be due to the absence of a serious intention to expose the past because it is still being suppressed by strong old powers or because it is hoped that social healing will be more quickly obtained by silence, or for that matter because temporary efforts have stalled and ultimately failed. The same also applies to the national

denial of ongoing crimes and political unwillingness to prosecute them; this is the latest time at which the international community may step in: in subsidiary terms of individual solidarity with the victims as well as in terms of ultimate global responsibility for the repression of criminal national injustices. This is true even though the structure of international criminal justice and its performance in individual proceedings are not yet in the best possible shape and are in need of improvement.⁹ ■

Albin Eser is Professor Dr. Dr. h.c. mult., Director Emeritus at the Max Planck Institute for Foreign and International Criminal Law in Freiburg / Germany, former Judge at the International Criminal Tribunal for Former Yugoslavia (ICTY) at The Hague / The Netherlands.

8. For more details regarding the transnational employment of domestic criminal law in relation to extraterritorial crimes Albin Eser, “National Jurisdiction over Extraterritorial Crimes within the Framework of International Complementarity”, in: Albin Eser, *Transnationales Strafrecht / Transnational Criminal Law, Gesammelte Beiträge / Collected publications*, (G. Heine / B. Burkhardt / W. Gropp eds.) (2011), 276-279 available at www.freidok.uni-freiburg.de/volltexte/3800/ (last visited November 21, 2013).
9. As to this special question regarding what type of procedure would best cope with the particular challenges of international crimes, I would refer to my publications on The “Adversarial” Procedure: A Model Superior to Other Trial Systems in International Criminal Justice?, in *ICTY: Towards a Fair Trial* (Thomas Krüssmann ed., 2008), 207-227 available at www.freidok.uni-freiburg.de/volltexte/6317 (last visited November 21, 2013), and on “Procedural Structure and Features of International Criminal Justice: Lessons From the ICTY”, in *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Bert Swart, Alexander Zahar & Göran Sluiter (eds., 2011), 108-148.

The Achilles Heel of ICC Prosecutions: The Principle of Evenhandedness

G.J. Alexander Knoops¹

Introduction: The contemporary ICC duality

In recent years the prosecutorial policy of the International Criminal Court (ICC) in The Hague has attracted criticism – predominantly from the African Union (AU) – because of the seemingly unequal targeting of African states. All eight situations currently under investigation by the ICC concern African states,² while it is uncontested that war crimes and crimes against humanity occur all over the world and not just in Africa.

When Ms. Fatou Bensouda took office as Chief Prosecutor of the ICC in 2011, she was – as a Gambian national – expected to restore the relationship between the ICC and the AU. Yet, today this relationship remains fragile because of the apparent arbitrary selection of cases by the ICC Prosecutor predominantly aiming at African States.³ The cases against the former president of Ivory Coast, Mr. Laurent Gbagbo, and against the incumbent president of Kenya, Mr. Uhuru Kenyatta, illustrate this ongoing controversy between the AU and the ICC. The ICC Prosecutor's office denies its selective prosecutorial policy, claiming that it applies law and not politics. This article examines the veracity of this stance, particularly in view of the principle of evenhandedness.



and Kenya both commenced *proprio muto* (i.e. at the prosecutor's own initiative). Alleged victims and non-governmental organizations are not authorized to refer a situation to the Court; the rationale being the assumption that bestowing such a right would result in numerous potentially "frivolous or unfounded" complaints.⁵ States, on the other hand, would be "expected to carefully screen allegations of crimes made by the victims or by private organizations, with a view to ascertaining whether they are supported by reliable evidence."⁶ It is questionable whether such constraints can be expected from states having political agendas considering that, as ICC Watch Director Marc Glendening stresses:

"[I]n accepting State referrals, the Court inevitably ignores any war crimes

The nature and function of the principle of evenhandedness

At the heart of the concept of 'international justice', one finds the notion of evenhandedness; people should be treated equally by the law. 'Equality' is the core of the matter. Equality cannot be defined in legal terms or measured *in abstracto*. Within the prosecutorial equation, equality externally transcends into the principle of evenhandedness. Within international war crimes trials, evenhandedness may imply that both parties within an armed conflict may face prosecution for potential war crimes.

Adherence to the principle of evenhandedness is pertinent once an investigation is initiated. The ICC may initiate an investigation on the basis of a UN Security Council Resolution, a referral by a State Party or at the prosecutor's own initiative.⁴ The situation in Ivory Coast

1. This article is based on the lecture given during the Association's conference in The Hague on "Three Aspects of International Justice", held in October 2013. The author is indebted to Ms. Evelyn Bell M.Sc. of the academic department of Knoops' advocaten for assisting in the process of writing this article.
2. The current (as of August 15, 2013) situations under investigation are: Uganda, Democratic Republic of the Congo, Central African Republic, Darfur (Sudan), Kenya, Libya, Ivory Coast and Mali.
3. "Ceremony for the solemn undertaking of the ICC Prosecutor, Fatou Bensouda", *ICC Press Release*, June 16, 2006, available at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr811.aspx (last visited November 16, 2013); Afua Hirsch, "Fatou Bensouda: the woman who could redeem the international criminal court", *The Guardian* June 14, 2012.
4. Art. 13, 14 and 15 of the Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9*).
5. Antonio Cassese, *International Criminal Law*, (2nd ed, 2008), p. 396.
6. *Id.*

committed by state forces and only focuses on alleged rebel excesses. This has comprehensively de-legitimised the Court.”⁷

It is also debatable whether evenhandedness can be pursued through ICC prosecutions upon referrals pursuant to a UN Security Council Resolution. For a resolution to be accepted all five permanent members of the UN Security Council must vote in favor of the resolution. Thus, the permanent members can prevent an investigation into their own possible situations, equally they are able to block a resolution that might harm one of their allies. This was in fact the case with Russia blocking a UN resolution that declared Ouattara as the winner of the elections in Ivory Coast.⁸

From a defense perspective, evenhandedness may be seen as a derivative of abuse of process; a doctrine relied upon within International Criminal Law.⁹ For instance, the defense team of President Charles Taylor of Liberia argued before the Special Tribunal for Sierra Leone, that Mr. Taylor had been selectively prosecuted, something that constituted an abuse of process. The defense contended that Taylor’s prosecution was driven by political motives and that similarly situated persons such as the (late) Libyan leader Muammar Gaddafi and Blaise Compaoré of Burkina Faso were not being prosecuted.¹⁰ This argument was based *inter alia* on leaked diplomatic telegrams sent by prosecutor David Crane to the U.S. Congress insinuating that financial aid would be cut if Mr. Taylor was not prosecuted.¹¹ Yet, the Trial Chamber ruled that Mr. Taylor had not been selectively prosecuted; the statements made by Mr. Crane did not support evidence of “unlawful and improper motive” and according to the Chamber, Gaddafi and Compaoré were not “similarly situated”.¹²

Illustrations of the axiomatic nature of the principle of evenhandedness can also be found within UN Security Council efforts to intervene in conflict situations. Beyond the current criticism voiced by the African Union, the proliferation of the political dimension within the ICC system is also apparent in regard to Syria. While in 2005 and 2011, the UN Security Council was able to adopt a resolution referring the situation of Sudan and Libya to the ICC, such consensus is absent in regard to Syria.¹³ It is likely that this is due to political controversies.

It can be argued that the (Western) world had an interest in a revolution in Libya, because of Libya’s wealth in natural resources. Oil and natural gas in Libya account for 95% of all export earnings and 80% of Government revenue. Yet, despite its oil wealth, infrastructure in Libya is severely underdeveloped and the Libyan people do not share in the country’s wealth.¹⁴ During Gaddafi’s period

his Green Book of political ideology was mandatory, while English was not taught.¹⁵ Thus, oil companies could gain a great deal from intervention in Libya, more particularly so if it improved the country’s education and infrastructure. Yet, an argument to the contrary can also be made since wars, in general, have a devastating effect on countries.¹⁶

Syria, on the other hand, exports ten times less oil than Libya; 0.15 million barrels a day for Syria versus 1.5 million barrels a day for Libya.¹⁷ When taking into account these

7. “New ICC Prosecutor Repeats Old Prosecutor’s Mistakes”, *ICC Watch*, January 17, 2013, available at www.iccwatch.org/pdf/Press%20Release%202017Jan13.pdf (last visited November 16, 2013).
8. See sec. 3.2 of this article.
9. See G.J. Alexander Knoops, “Redressing Miscarriages of Justice: Practice and Procedure” in *(International) Criminal Cases* (2nd ed., 2013).
10. *Prosecutor v. Charles Ghankay Taylor*, Trial Chamber II Judgment, May 18, 2012, Case No. SCSL-03-01-T, para. 73; the conviction of Charles Taylor was upheld on appeal, Appeals Chamber Judgment, September 26, 2013, Case No. SCSL-03-01-A.
11. *Id.*
12. *Id.*, paras. 82–83; see also Knoops, *Miscarriages of Justice*, *supra* note 9, pp. 179–180.
13. Russia and China blocked three Western backed UN Security Council Resolutions against President Bashar al Assad from Syria until a Resolution on raiding Syria of its chemical weapons was blocked on September 28, 2013, see: “Syria chemical weapons: UN discusses draft resolution”, *BBC News*, September 27, 2013, available at www.bbc.co.uk/news/world-middle-east-24292989 (last visited November 16, 2013); *U.N. Security Council Passes Syria Resolution*, *Rianovosti*, September 28, 2013, available at en.ria.ru/world/20130928/183799964.html (last visited November 16, 2013); U. N. SCOR Res. 1593 (2005), U.N. Doc. S/RES/1593, March 31, 2005; U. N. SCOR Res. 1970 (2011), U.N. Doc. S/RES/1970, February 26, 2011.
14. U.N., Full Report of the International Commission of Inquiry to investigate all alleged violations of international law in Libya, para. 36, Annex I to Report of the International Commission of Inquiry on Libya, U.N. Doc. A/HRC/19/68, March 8, 2012, para. 36.
15. *Id.*, para. 35.
16. See also G.G.J. Knoops, “Prosecuting the Gaddafi’s: Swift or political justice?”, 4 *Amsterdam Law Forum*, (2012).
17. “How Syria and Libya compare”, *The Guardian*, April 28, 2011, available at www.theguardian.com/world/2011/apr/28/syria-libya-how-they-compare (last visited November 16, 2013); see also *supra* note 16.

numbers it can be argued that the (Western) world is less inclined to intervene in Syria than it was in Libya.

A UN Resolution calling for intervention in Syria was blocked three times by Russia and China, until a resolution calling to disarm Syria of its chemical weapons was adopted on September 28, 2013.¹⁸ Whereas Russia tried to protect its long-term ally Bashar al-Assad stating that intervening in Syria would violate Syria's sovereignty, Muammar Gaddafi was not backed by such international political support. This probably was due to economic and strategic interests: the Russian arms industry benefits from the Syrian war and Russia has been able to augment its naval presence around Syria.¹⁹

We shall next examine whether the prosecutions of Mr. Gbagbo and Mr. Kenyatta, two former African leaders who both represented parties in a domestic electoral conflict, reflect evenhandedness. To date, their political opponents have been left untouched by the ICC, while, for instance, on September 30, 2013 an ally of Mr. Gbagbo, Mr. Charles Blé Goudé, was indicted by the ICC for crimes against humanity allegedly committed during the post-2010 election crisis in the Ivory Coast.²⁰ These developments reflect the ICC's struggle for legitimacy, especially within a continent where almost one-third (28%) of its ratifying states are situated. These cases also exemplify the antagonistic roles of law and political motives.

Prosecutorial evenhandedness at the ICC

The Kenyan situation: The ICC's indefinite mandate?

The highly disputed election results of December 27, 2007 in Kenya led to violent outbreaks resulting in over 1,000 deaths and at least 500,000 displaced persons.²¹ The conflict evolved out of a long-term governance crisis mainly due to corruption and abuse of office by public officials inherent in the Kenyan political landscape.²²

In order to resolve the electoral conflict a panel of prominent Africans chaired by former UN Secretary General Kofi Annan was established. This panel negotiated a power-sharing agreement that came to be known as the National Accord and Reconciliation Act. The signing of this power-sharing agreement by Kenya's President Mwai Kibaki and the opposition leader Raila Odinga, who became Prime Minister, led to the establishment of a coalition government on February 28, 2008.²³

The Kenyan government established an international Commission of Inquiry on Post-Election Violence, also known as the Waki Commission after its chairman Philip Waki.²⁴ In November 2008 the Waki Commission submitted its report to the Kenyan government. The main recommendation stipulated that a special tribunal be composed of national and international judges in order

to investigate the alleged crimes that had been committed in the aftermath of the 2007-elections and to prosecute those responsible for the alleged crimes.²⁵ On December 15, 2008 the deadline that had been set for the Kenyan government to vest such a tribunal expired. After unsuccessfully urging the Kenyan government to establish such a tribunal in order to resolve the conflict at a national level, Kofi Annan submitted a document to the ICC containing the Waki Commission's evidence and its sealed list of suspects.²⁶

The ICC prosecutor acted upon this information by requesting the Pre-Trial Chamber to open an investigation into the Kenyan situation; a request that was granted on

18. See *supra* note 13.

19. See for example: Michael R. Gordon & Eric Schmitt, "Russia Sends More Advanced Missiles to Aid Assad in Syria", *N.Y. Times*, May 16, 2013; *Contract to supply Russian S-300 missiles still in force – Syrian deputy PM*, RT, July 22, 2013, available at rt.com/news/west-blame-syria-suffring-409/ (last visited November 16, 2013).

20. The ICC arrest warrant against Mr. Goudé was issued by the Pre-Trial Chamber III on December 21, 2011 and was reclassified as Public on September 30, 2013 by the Pre-Trial Chamber I; see *The Prosecutor v. Charles Blé Goudé*, 'Warrant Of Arrest For Charles Blé Goudé', Pre-Trial Chamber III, ICC-02/11-02/11, December 21, 2011 and *The Prosecutor v. Charles Blé Goudé*, 'Decision on reclassifying the warrant of arrest against Charles Blé Goudé and other documents', Pre-Trial Chamber I, ICC-02/11-02/11, September 30, 2013.

21. "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Governance", 20 *Human Rights Watch*, March 2008, available at www.hrw.org/sites/default/files/reports/kenya0308web.pdf (last visited November 16, 2013).

22. *Id.*, p. 11.

23. "Key points: Kenya power-sharing deal", *BBC News*, February 28, 2008, available at news.bbc.co.uk/2/hi/africa/7269476.stm (last visited November 16, 2013); "Kenya: Deliver Justice for Victims of Post-Election Violence", *Human Rights Watch*, August 3, 2009, available at www.hrw.org/news/2009/08/02/kenya-deliver-justice-victims-post-election-violence (last visited November 16, 2013).

24. "The International Criminal Court Kenya Monitor", *Open Society Justice Initiative*, available at www.icckkenya.org/background/ (last visited November 16, 2013).

25. "Timeline of Events", *Open Society Justice Initiative*, available at www.icckkenya.org/background/timeline/ (last visited November 16, 2013).

26. Kenya: Deliver Justice for Victims of Post-Election Violence, *supra* note 15.

March 31, 2010.²⁷ Judge Hans Peter Kaul dissented, opining that the approach taken by the ICC might infringe on state sovereignty and the actions of national courts.²⁸

Initially, two cases each involving three accused, were subjected to an ICC investigation. Kenya challenged the admissibility of the cases, contending that the ICC was violating its complementarity principle. Kenya argued that it was well aware of the necessary “fundamental and far-reaching constitutional and judicial reforms” that it had to undertake and that Kenya was “able to conduct national criminal proceedings for all crimes arising from the post-election violence”.²⁹ The Pre-Trial Chamber rejected these arguments and held that the case was admissible.³⁰ On appeal Kenya argued that it had investigated the alleged crimes itself, claiming that “the investigation into all [...] Suspects had been underway from the time when the names of the [...] Suspects were made public by the ICC Prosecutor”.³¹ Yet, the majority of the Appeals Chamber found that the Pre-Trial Chamber was correct in its finding that the Kenyan Government had provided insufficient evidence to substantiate that it was investigating the cases.³² Since the ICC was already served with the sealed list of suspects, this raises the suspicion that ICC proceedings were given undue preference.

On January 23, 2012 the Pre-Trial Chamber confirmed the charges against four of the accused, divided into two cases: *The Prosecutor v. Ruto and Sang* and *The Prosecutor v. Muthaura and Kenyatta*.³³ On March 11, 2013 the ICC prosecutor withdrew the charges against Muthaura due to a lack of evidence; witnesses proved unwilling to testify for the prosecution and several witnesses had died or had been killed.³⁴ Noticeably, the case of Muthaura was initially prosecuted jointly with the Kenyatta case because of the linkage between the charges. The Pre-Trial Chamber had confirmed the charges against both accused because it had found substantial grounds for believing that Kenyatta and Muthaura were responsible as indirect co-perpetrators for charges of crimes against humanity, for example in “the killing of perceived ODM supporters”.³⁵ Nonetheless, even though the cases were initially based on basically identical evidence, the charges against Muthaura were eventually dropped.

ICC Chief Prosecutor Ms. Bensouda indicated in 2013 that the *proprio motu* investigation of the ICC had gained the support of both President Kibaki and Prime Minister Odinga.³⁶ This was possibly due to both having escaped ICC prosecution and their realization that they might potentially benefit from the prosecution of their political opponents, thereby reinstating their power. This situation endangered evenhandedness.

During the political campaign for the Kenyan elections

of March 2013 cooperation with the ICC was politically sensitive. Two of the ICC accused, Uhuru Kenyatta and William Ruto, were running for president and vice-president respectively. During the first presidential debate in Kenya the question arose why President Kibaki and Prime Minister Odinga had not been included in the ICC investigations. Noticeably, the violence initially erupted

27. Situation in the Republic of Kenya, ‘Decision Pursuant to Article 15 of the Rome Statute on the authorization of an Investigation into the Situation in the Republic of Kenya’, Pre-Trial Chamber II, ICC-01/09, March 31, 2010.
28. *Id.*, Dissenting Opinion of Judge Hans Peter Kaul, para. 10.
29. Situation in a republic of Kenya in the case of Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Pre-Trial Chamber II, ICC-01/09-01/11, 30 May 2011, para. 13; Situation in a republic of Kenya in the case of Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Pre-Trial Chamber II, ICC-01/09-02/11, May 30, 2011, para. 12.
30. *Id.*
31. Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ‘Judgment on appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of May 30, 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”’, Appeals Chamber, ICC-01/09-02/11 OA, August 30, 2011, para. 51;
32. “Situation in Kenya: Appeals Chamber confirms the admissibility of the cases”, ICC Press Release, August 30, 2011.
33. Prosecutor v. Ruto, Kosgey and Sang, ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, Pre-Trial Chamber II, ICC-01/09-01/11, January 23, 2012; Situation in a republic of Kenya in the case of Prosecutor v. Muthaura, Kenyatta and Ali, ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, Pre-Trial Chamber II, ICC-01/09-02/11, January 23, 2012.
34. Situation in a republic of Kenya in the case of Prosecutor v. Muthaura and Kenyatta, ‘Prosecution Notification of Withdrawal of the Charges Against Francis Kirimi Muthaura’, Trial Chamber V, ICC-01/09-02/11, March 11, 2013, para. 11.
35. Prosecutor v. Muthaura, Kenyatta and Ali, ‘Decision on the Confirmation of Charges’, *supra* note 33, para. 428.

among their supporters after Kibaki was declared the winner of the 2007-elections, while the results were denounced by Odinga.³⁷ On the other hand, there was also a question whether Kenyatta and Ruto could run for president, while facing charges before the ICC.³⁸ This latter issue was also litigated before a five-judge High Court panel in Kenya. The court ruled that it had no authority to decide whether Kenyatta and Ruto could run for office while facing charges before the ICC.³⁹ A different outcome would have violated the presumption of innocence; neither man had yet been convicted and both denied the charges. Political influence pending the ICC proceedings was exerted by Kofi Annan who urged Kenyans not to vote for ICC indictees. A trial before the ICC would damage Kenya's external relations, it would make a president unable to travel and be distrusted by the international community.⁴⁰ The reaction of U.S. officials was that the Kenyan people were free to make their own choice, but the officials underlined that "choices have consequences".⁴¹

On March 4, 2013 Kenyatta was elected president during relatively peaceful elections, Ruto became vice-president. According to analysts the ICC prosecution against President Kenyatta and Vice-President Ruto has strengthened their electoral position in Kenya, because the Kenyan people perceive this prosecution as foreign (political) interference with internal affairs.⁴² Despite the risk that their future president might have to appear before the ICC, the Kenyans voted for Kenyatta. The Kenyan election has also been referred to as a "referendum against the ICC". Both Kenyatta and Ruto emphasized that political opponents and former colonial powers were the driving force behind the ICC's investigation.⁴³

The ICC prosecution of Kenyatta and Ruto also met resistance from the AU. During the 21st AU summit in Addis Ababa on May 26, 2013 African leaders supported a petition brought by Uganda calling upon the ICC to drop the charges against President Kenyatta and Vice-President Ruto. More than 50 African presidents supported the petition.⁴⁴ An ICC representative responded by stating that:

"The AU resolution is a political resolution and the ICC is purely a judicial decision that is governed by the Rome Statute [...]. Political decisions will not influence the ICC judicial processes."⁴⁵

Yet, on September 5, 2013 Kenya announced its intention to withdraw from the ICC, an example that might be followed by other African states.⁴⁶ The Western community must be cautious when legally targeting African states

without support from within the continent. Although the ICC calls the AU resolution "political" there are indications to the contrary.

In conclusion, the Kenyan situation emphasizes the vulnerability of the ICC's legitimacy once the principle of evenhandedness is not well applied. The case against Kenyatta is an example of how forces behind an ICC prosecution may not be purely "judicial" or are not perceived to be "judicial". The ICC prosecution did have

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36. Fatou Bensouda, "Current Question on Africa: Is the International Criminal Court (ICC) targeting Africa inappropriately", ICC Office of the Prosecutor, March-July 2013, available at iccforum.com/africa (last visited November 16, 2013).
 37. CNN Wire Staff, "Top ICC prosecutor in Kenya to probe post-poll violence", CNN, May 8, 2010, available at edition.cnn.com/2010/WORLD/africa/05/08/kenya.icc/index.html (last visited November 16, 2013).
 38. Tom Maliti, "ICC generates heat during Kenya's first presidential debate", *The Open Society Justice Initiative*, February 12, 2013.
 39. Johnstone Turana, "Kenya's Chief Justice Gets Death Threat Over Kenyatta ICC Case", *Bloomberg*, February 20, 2013.
 40. "Kofi Annan urges Kenyans not to vote for indicted politicians", *BBC News*, December 4, 2012, available at www.bbc.co.uk/news/world-africa-20602232 (last visited November 16, 2013).
 41. Jeffrey Gettleman, "Leader of Vote Count in Kenya Faces U.S. With Tough Choices", *N.Y. Times*, March 7, 2013.
 42. "Afrikaanse Unie: Internationaal Strafhof op 'rassenjacht' naar Afrikanen", *De Volkskrant*, May 27, 2013, www.volkskrant.nl/vk/nl/2664/Nieuws/article_detail/3448008/2013/05/27/Afrikaanse-Unie-Internationaal-Strafhof-op-rassenjacht-naar-Afrikanen_dhtml (last visited November 16, 2013).
 43. Thomas Hansen, "Kenyatta in State House: what's next for Kenya and the ICC?", *Open Democracy*, April 19, 2013.
 44. Edith Fortunate, "African Leaders put ICC to task over Uhuru trial", *Africa Review*, May 27, 2013.
 45. Dave Opiyo, "African Union decision on Kenya irrelevant, says ICC", *Africa Review*, May 28, 2013.
 46. MG Zimeta, "What Kenya's withdrawal means for the international criminal court", *The Guardian*, September 6, 2013; on October 13, 2013 the AU held a special summit in Addis Ababa to discuss the possible withdrawal of the 34 African ICC member states, fueled by a growing discontent over the Kenyan ICC prosecutions, see "African Union summit on ICC pullout over Ruto trial", *BBC News*, September 20, 2013, available at www.bbc.co.uk/news/world-africa-24173557 (last visited November 16, 2013); Aaron Maasho, "African leaders to hold summit on Kenya's ICC" cases, *Reuters*, September 19, 2013.

adverse effects in that it triggered a “referendum” that reinforced the sentiments of independence from the West.⁴⁷

The Ivory Coast situation: Second chances or politics?

Similar to the *Kenyan case*, the *Gbagbo case* revolves around electoral violence. The former president of Ivory Coast, Laurent Gbagbo, has been charged with four counts of crimes against humanity committed in the aftermath of the 2010 presidential elections in Ivory Coast. After international watchdogs declared Gbagbo’s opponent Alassane Ouattara as the winner of the elections, President Gbagbo refused to step down. This led to violent outbreaks where armed forces of both sides committed violence resulting in more than 3,000 deaths and the rape of more than 150 women.⁴⁸ In April 2011 President Gbagbo was captured by pro-Ouattara forces supported by French and UN troops.⁴⁹ The principle of evenhandedness features in the Gbagbo case, making it controversial for several reasons.

From the outset of the conflict in Ivory Coast political sentiments surrounded the investigation. The elections in Ivory Coast were a close call between the two opponents. Notwithstanding the fact that an “independent” electoral commission supported by international watchdogs claimed Ouattara to be the winner of the elections, not everyone agreed with this commission and its results. President Zuma of South Africa openly contested the election results and Russia did not agree with the UN’s expressions of support for Ouattara.⁵⁰ Russia – having closer ties to Mr. Gbagbo – was able to prevent a UN Security Council statement in which Ouattara would be identified as the winner of the elections.⁵¹

The political context of the *Gbagbo case* ensued from the “Western states” attitude favoring pro-Western President Ouattara rather than the nationalistic President Gbagbo. Ouattara has close relations with Western states and has even been accused of being too westernized.⁵² France, which has maintained close ties with Ivory Coast since its independence in 1960, has been accused of using “the Ouattara forces as a smokescreen to cover their neocolonialism business”.⁵³ The support for Ouattara arose after President Gbagbo revived anti-colonialist sentiments in Ivory Coast. This, while Ivory Coast is important to the West for its natural resources and its potential to become the world’s leading cocoa producer as it was in the past.⁵⁴

ICC Prosecution of Gbagbo

To date no one from the Ouattara camp has been prosecuted while allegedly both sides of the conflict

committed crimes.⁵⁵ President Ouattara repeatedly promised that individuals from both sides would be prosecuted, but until now 150 persons from the Gbagbo side have been prosecuted at a national level versus zero from the Ouattara side.⁵⁶ It seems that Ivory Coast adopts the policy of the ICC prosecutor who focuses solely on President Gbagbo and his wife Simone Gbagbo. Apart from the political influences that might have affected Gbagbo’s arrest and the one-sided prosecution the ICC’s – continuing – procedures themselves fuelled criticisms as to the political nature of the *Gbagbo case*.

In an effort to permanently stay the proceedings, Gbagbo’s defense cited his cruel and inhumane treatment by pro-Ouattara forces during his detention in Ivory Coast. Yet, the Pre-Trial Chamber took the view that “the mere fact that the prosecutor was in contact with Ivorian authorities does not suggest that there was any involvement”.⁵⁷ The Chamber also found that the

47. Tom Zwart and Alexander Knoops, “The Kenyatta case shows that the International Criminal Court needs to reset its relations with Africa”, *Culture and Human Rights*, May 14, 2013.

48. Côte d’Ivoire: 2 Years in, Uneven Progress, *Human Rights Watch*, May 21, 2013, available at www.hrw.org/news/2013/05/21/cote-d-ivoire-2-years-uneven-progress (last visited November 16, 2013).

49. Adam Nossiter, “Scott Sayare and Dan Bilefsky, Leaders Arrest in Ivory Coast Ends Standoff”, *N.Y. Times*, April 11, 2011.

50. Siphokazi Mthathi, “President Zuma Should Be on the Side of Justice in Ivory Coast”, *Human Rights Watch*, February 22, 2011; “Russia blocks UN statement Backing Ouattara”, *France 24*, December 8, 2010, available at www.france24.com/en/20101208-ivory-coast-security-council-russia-blocks-un-support-ouattara-gbagbo-us-france (last visited November 16, 2013).

51. “Russia blocks UN statement backing Ouattara”, *supra* note 50.

52. David Smith, “Alassane Ouattara reaches summit but has more mountains to climb”, *The Guardian*, April 15, 2011.

53. *Id.*

54. *Id.*

55. “Turning Rhetoric Into Reality: Accountability for Serious International Crimes in Côte d’Ivoire”, *Human Rights Watch*, April 2013, available at www.hrw.org/sites/default/files/reports/CDI0413_ForUpload.pdf (last visited November 16, 2013), p. 25-26.

56. Côte d’Ivoire: 2 Years in, *Uneven Progress*, *supra* note 48.

57. *Situation in the Republic of Côte d’Ivoire in the case of Prosecutor v. Laurent Koudou Gbagbo*, ‘Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of the Pre-Trial Chamber I on jurisdiction and stay of the proceedings’, Appeals Chamber, ICC-02/11-01/11 OA 2, December 12, 2012, para. 94.

prosecutor had no duty of care with regard to Gbagbo's detention by national authorities, ruling that "the powers of the prosecutor may only be exercised in the context of, or in relation to, proceedings before the Court".⁵⁸ This reasoning raises concern as the ICC deliberated with Ivorian authorities about Gbagbo's transfer as soon as he was arrested.⁵⁹

A controversial and potentially political approach was apparent again during the confirmation of charges phase in the *Gbagbo case*. In its decision of June 3, 2013, the Pre-Trial Chamber adjourned the confirmation of the charges and granted the prosecution additional time to collect further evidence.⁶⁰ Although this is a legal avenue provided for in Article 67(7)(c) of the ICC Statute, it was applied by the judges in the instant case in a way that could fuel the perception of a politically motivated case. According to Article 67(5) the prosecutor was under an obligation to provide "substantial evidence" during the confirmation hearing in relation to each charge. However, the prosecutor failed to meet this burden in relation to the charges against Gbagbo.

The evidence adduced by the prosecutor in the *Gbagbo case* was comprised solely of NGO reports and press releases and did not entail any direct witness accounts. Such reports were characterized by anonymous sources, making it impossible for the accused to challenge the allegations against him.⁶¹ Evidence based on anonymous sources made it virtually impossible to detect whether the sources existed independently of each other.⁶²

As a result of the prosecutor's failure to fulfill the requisite evidentiary burden during the confirmation of the charges phase, the Pre-Trial Chamber ordered the adjournment of the confirmation of the charges.⁶³

The Pre-Trial Chamber held that the prosecutor had "presented her strongest possible case based on a nearly completed investigation".⁶⁴ Yet, this "strongest possible case" proved insufficient to confirm the charges against the accused. Nonetheless, the judges were willing to giving the prosecutor a second chance, which in itself is permissible under Article 67(7)(c) of the ICC Statute. Salient though, is that this second chance was accompanied by detailed instructions to the prosecutor as to how to meet the requisite burden of proof. Thus, for example, the Pre-Trial Chamber instructed the prosecutor to further investigate the "position(s), movements and activities of all armed groups opposed to the "pro-Gbagbo forces" [...], including specific information about confrontations between those groups and the "pro-Gbagbo forces".⁶⁵

The provision of detailed instructions on how to comply with the burden of proof is not an obligation directly derived from Article 67(7)(c) of the ICC Statute. It is the prosecutor's responsibility to determine in advance what

evidence complies with the burden of proof in order to have the charges confirmed. On the one hand, the Chamber noted the higher standard of evidence required during the confirmation phase and the rationale for it, namely safeguarding judicial economy and preventing miscarriages of justice; however, on the other hand, the Chamber provided the prosecutor with a second opportunity, including an indication of how to implement that opportunity, despite the Chamber acknowledging that the Prosecution had failed to present a case.

The decision to adjourn the confirmation proceedings may reinforce the perception that political sentiments influenced the Gbagbo proceedings. The ICC Pre-Trial Chamber had never previously applied its judicial power to adjourn charges under Article 61(7)(c) of the ICC Statute. The case of *The prosecutor v. Callixte Mbarushimana* is illustrative.⁶⁶ In that case, the Trial Chamber declined to confirm the charges against Mr. Mbarushimana due to the absence of substantial grounds to believe that Mr. Mbarushimana had contributed to the commission of the crimes charged.⁶⁷ This decision was confirmed by the Appeals Chamber on May 30, 2012, saying in paragraph

58. *Id.*; the Appeals Chamber ruled that the grounds of appeal with regard to Gbagbo's detention were inadmissible, paras. 105-106.

59. Tom Zwart and Alexander Knoops, "Who is persecuting Laurent Gbagbo?", *New African*, April 4, 2013.

60. *Situation in the Republic of Côte d'Ivoire in the case of Prosecutor v. Gbagbo*, 'Decision adjourning the hearing on the confirmation of the charges pursuant to Article 61(7)(c)(i) of the Rome Statute', Pre-Trial Chamber I, ICC-02/11-01/11, June 3, 2013.

61. *Id.*, para. 29.

62. *Id.*, para. 30.

63. *Id.*, para. 41.

64. *Id.*, para. 25.

65. *Id.*, para. 44.

66. *Situation in the Democratic Republic of Congo in the case of Prosecutor v. Callixte Mbarushimana*, 'Decision on the confirmation of the charges', Pre-Trial Chamber I, ICC-01/04-01/10, December 16, 2011; *Situation in the Democratic Republic of Congo in the case of Prosecutor v. Mbarushimana*, 'Judgment on the appeal of the prosecutor against the decision of Pre-Trial Chamber I of December 16, 2011 entitled "Decision on the confirmation of charges"', Appeals Chamber, ICC-01/04-01/10 OA 4, May 30, 2012.

67. *Situation in the Democratic Republic of Congo in the case of Prosecutor v. Callixte Mbarushimana*, 'Decision on the confirmation of the charges', Pre-Trial Chamber I, ICC-01/04-01/10, December 16, 2011.

44 that “the investigation should largely be completed at the stage of the confirmation of the charges hearing”.⁶⁸ The Appeals Chamber held that at that stage “most of the evidence should therefore be available”.⁶⁹ This observation therefore triggers the question why the outcome in the *Gbagbo* case was different at that stage. The observation of the Appeals Chamber in the *Mbarushimana* case in paragraph 48 of its decision that the Pre-Trial Chamber need not reject the charges but could adjourn the hearing and request the prosecutor to provide further evidence, does not take away the apparent discrepancy between these two Pre-Trial Chamber decisions. The future will reveal whether this perception is presumptuous. For now, it seems that the pledge of the ICC prosecutor to also scrutinize the “other side” in the Ivory Coast situation, has not been honored. It is questionable whether this policy will be reversed in the future as the ICC is assured of a new ally in Mr. Ouattara who, amidst all African resistance to the ICC, ratified the Rome Statute in February 2013.⁷⁰ The ICC’s prosecutorial policy towards Ivory Coast may set a dubious precedent in that its national authorities have adopted the same approach, namely, domestically, only to prosecute allies of the Gbagbo camp. This policy has recently nourished the disputes between the groups while tensions in Ivory Coast have increased.⁷¹

Conclusions: curing the Achilles heel

The ICC faces growing criticism within the African continent due to its seemingly selective prosecutorial targeting of African states. Providing arguments for Africa’s overrepresentation by the ICC prosecutor does not take away perceptions and sentiments that are detrimental to the Court’s position. The cases against Gbagbo and Kenyatta raise the impression that political motives are an overriding force behind the ICC prosecution.

These mere perceptions should make the ICC and the Western community more cautious when pursuing their prosecutorial policies within the international justice arena. The case against Kenyatta obviously had the opposite effect since the Kenyans by majority voted for this ICC indictee, thereby revealing their resistance towards the Court and certainly towards foreign interference. This is also illustrated by Kenya’s intention to withdraw from the ICC. The case against Gbagbo has recently increased tensions in Ivory Coast which is contrary to the objectives of the Court and Western powers.

Concerns as to the legitimacy of the ICC’s own appraisal of its mandate have not only evolved at a national level. They feature within almost the entire African continent as is shown by the criticisms voiced by the AU. If the ICC

were to disconnect from the African continent, its maneuvering power would be seriously hampered. If it intends to pursue a constructive relationship with the AU it must thoroughly reform its prosecutorial policy in terms of its adversary effects. The ICC prosecutor should rethink the application of the even-handedness principle, in cases of armed conflicts. After all, the Achilles heel of our system of international criminal law revolves around evenhandedness. ■

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68. *Prosecutor v. Mbarushimana*, ‘Judgment on the appeal of the prosecutor against the decision of Pre-Trial Chamber I of December 16, 2011 entitled “Decision on the confirmation of charges”’, Appeals Chamber, ICC-01/04-01/10 OA 4, May 30, 2012, para. 44.

69. *Id.*

70. “Côte d’Ivoire ratifies the Rome Statute”, *ICC Press Release*, February 18, 2013, available at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr873.aspx (last visited November 16, 2013).

71. “Turning Rhetoric Into Reality”, *supra* note 55, p. 10.

Law and Policy in U.S. Military Operations: Some Thoughts on the Impact of Decisions by the International Court of Justice, International Criminal Tribunal for the former Yugoslavia, and the International Criminal Court

Fred L. Borch

Beginning with the 1986 International Court of Justice (ICJ) decision concerning U.S. involvement in Nicaragua, an increasing number of judicial decisions from international legal tribunals have had a decisive impact on American law and policy---and consequently on U.S. military operations. While the well-reasoned opinions of International Criminal Tribunal for the former Yugoslavia (ICTY) have had the most significant impact on the development of the Law of Armed Conflict (LOAC)---and the greatest influence on the United States---the decisions of the ICJ and International Criminal Court (ICC) also have had an impact. This article discusses those cases of the ICTY, ICJ and ICC that have influenced U.S. law, policy and military operations, and explains why these decisions have been influential.



International Criminal Tribunal for the former Yugoslavia (ICTY)

When the ICTY was established by the United Nations (UN) in 1993, few (if any) commentators or scholars could have foreseen that the decisions of this tribunal would be so important in the evolution of LOAC.¹ Prior to the ICTY, there was little guidance on LOAC in internal or non-international armed conflicts (NIACs), if for no other reason than that the Nuremburg and Tokyo tribunals, and the Geneva Conventions of 1949, grew out of international (state-versus-state) conflict. The turmoil, bloodshed---and horrific criminal acts---occurring in the former Yugoslavia appeared, however, to be *both* international and non-international in character. Consequently, the creation of the ICTY meant that, for

the first time, a judicial tribunal would be deciding cases arising in both types of conflicts---and giving important LOAC guidance badly needed by the United States and every other country.

The landmark ICTY case is *Prosecutor v. Dusho Tadić*. It is to the development of twenty-first century international law what the Nuremburg tribunal was to the evolution of the law of armed conflict in the twentieth century. Although in theory the case is only binding on the parties before the court (there is no *stare decisis* in the decisions of an international tribunal), the rulings in *Tadić* are persuasive. Additionally, since lawyers trained in Anglo-American law naturally look to precedent as the foundation for legal reasoning, *Tadić* has

had a major impact on U.S. law and policy.

Tadić was the first case (as opposed to ICTY guidance) to provide a test for determining the existence of an armed conflict for the purposes of applying the Geneva Conventions and 1977 Additional Protocols. According to the ICTY in *Tadić*, “the intensity of the conflict and the organization of the parties to the conflict” are controlling.

1. The ICTY was created by United Nations Security Council Resolution 827 on May 25, 1993. As the intent was to bring some measure of justice to those who had suffered from the horrors of fighting in the Balkans, the tribunal was given jurisdiction over crimes committed in the territory of the former Yugoslavia since 1991, including “grave breaches” under the Geneva Conventions of 1949, violations of LOAC, genocide and crimes against humanity.

As the court put it:

... we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. (Emphasis supplied).

In examining the facts, the court in *Tadić* also concluded that the conflicts in the former Yugoslavia have “both internal and international aspects.” Clashes between the Croatian Army in Bosnia-Herzegovina and the Yugoslav National Army (“JNA”) in Croatia were found to be state-on-state (international). Fighting between Bosnian government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, however, were held to be internal or NIAC. The import of *Tadić* then is that it not only provided clear guidance on when an armed conflict exists, but also that it was possible to have a “mixed” conflict where both international and internal conflicts existed at the same time and in the same conflict. This was a first in the development of LOAC.

Besides conflict classification, *Tadić* also signaled to the United States—and other states—that as matter of law, war crimes were no longer restricted to state-versus-state conflicts but could now occur in NIACs. While the Nuremberg Military Tribunal acknowledged that the law of war “is not static, but by continual adaption follows the needs of a changing world,”² traditionalists were very much wedded to the concept that war crimes could only occur in international armed conflicts. The Trial Chamber hearing *Tadić*, however, concluded that “grave breaches”—and individual criminal responsibility for such war crimes—were offenses that now could arise in NIACs. Although the Appellate Chamber later reversed the *Tadić* trial court on this issue, the ICTY subsequently reversed the Appellate Chamber in *Prosecutor v. Delalić (Celebici)* and, now endorsing the rationale first expressed in *Tadić*, held that

to maintain a legal distinction between the two legal regimes [international and non-international armed conflict] and their criminal consequences in respect of similarly egregious acts because of the differences in the nature of conflicts would ignore the very purpose of the Geneva Conventions.

Tadić opened the door; *Delalić (Celebici)* pushed it wide open. The result: although agreement is not universal, the majority of American international legal practitioners—

and lawyers advising commanders in the U.S. armed forces—recognize that the ICTY has changed the law on war crimes in NIACs. As an aside, the participation of two American military lawyers in *Tadić*—an Air Force lieutenant colonel and Marine Corps major both served on the prosecution team—evidences U.S. military support of the work of the ICTY and a recognition of its impact on U.S. law and policy.³

Another ICTY case of importance to American practitioners looking for guidance on when a common Article 3 conflict exists is *Prosecutor v. Fatmir Limaj*. This 2005 case concluded that “periodic armed clashes” occurring “at intervals averaging three to seven days over a widespread and expanding geographic area” between Serbian forces and the Kosovo Liberation Army constituted a NIAC—thus triggering common Article 3. (It would seem that *Limaj* is even instructive in determining when a common Article 2 conflict exists. If one accepts that the attack on the USS Liberty in 1967 and the 1981 Osirak nuclear plant bombing are “incidents” that do not rise to the level of an international armed conflict, then the “periodic armed clashes” reasoning in *Limaj* also can be used to determine when common Article 2 is triggered. Of course, international politics plays a significant role in conflict classification. There have been a number of recent and past events that would seem to arise to the level of “armed conflicts” of one classification or the other, only to have them called “incidents.”)

Prosecutor v. Galić is yet another decision of significance for military lawyers, because it provides detailed guidance on when attacking civilians constitutes a grave breach or crime against humanity. Since “military necessity” is a fundamental principle governing the use of force against any target, *Galić*’s discussion of “military objective” as defined in Additional Protocol I, Article 52, is particularly important.⁴

2. Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge Univ. Press, 2010), 99 quoting *Trial of the Major War Criminals Before the International Military Tribunal*, vol. I (Nuremberg, 1947), Judgment, at 221.
3. *Id.* 174. Lt. Col. Brenda Hollis and Maj. Michael Keegan were both assigned temporary duty with the ICTY and were on the five-member *Tadić* prosecution team.
4. *Prosecutor v. Galić*, IT-98-29-T (December 5, 2003). Stanislav Galić, a commander in the Serbian Army, deliberately launched attacks against civilians and civilian objects during the siege of Sarajevo. The ICTY subsequently convicted him of murder and crimes against humanity for his intentional disregard of the LOAC principle of distinction.

Other ICTY decisions of great importance to American lawyers involve gender crimes. Rape and other forms of sexual violence generally were ignored in LOAC until the establishment of the ICTY. Rape, for example, is not listed as a grave breach in the Geneva Conventions (although it is prohibited in Geneva Convention IV, Article 27, in relation to protected persons.) In *Prosecutor v. Delalic*, *Prosecutor v. Furundzija*, *Prosecutor v. Kunarac*, and cases following in the footsteps of those decisions, however, an international criminal tribunal held that rape was a crime against humanity and, because it involves severe pain or suffering, may also constitute the war crime of torture. The accused in *Delalic* was convicted of torture for forcibly penetrating his victims during multiple rapes. In *Furundzija*, the accused interrogated a civilian woman for eleven days, while a co-accused raped her multiple times before an audience of jeering and laughing paramilitary members; he was convicted of rape as torture and as a war crime even though he did not actually rape the victim (because he had facilitated the rape).⁵ In *Kunarac*, the accused was the commander of a reconnaissance unit in the Bosnian Serb Army. He and two other soldiers took civilian women from a detention camp and sexually enslaved them for weeks or months. Kunarac and his co-accused were convicted of rape and enslavement as crimes against humanity.⁶ For American lawyers advising commanders in U.S. military operations, this means that “sex crimes are justiciable as war crimes regardless of whether they are committed in international or internal armed conflict.”⁷

A final ICTY case of great interest to American military lawyers---and which demonstrates the importance attached to ICTY cases by the U.S. military---is *Prosecutor v. Gotovina & Markač*.⁸

Colonel General Ante Gotovina was the overall commander of *Operation Storm*, a Croatian military operation to retake territory seized by Serbian forces. Mladen Markač was the commander of the Croatian Special Police in the operation. Both men were indicted for grave breaches of LOAC, and in 2011, both were convicted by the ICTY. Gotovina was sentenced to 24 years confinement; Markač to 18 years in jail. Both appealed their convictions and sentences.⁹

The key issue on appeal was whether the Croatian artillery and rocket fire directed by Gotovina and Markač against four Serbian-held towns was unlawful. In determining legality, the trial court used a “200-meter” standard, holding that “any artillery fire impacting 200 meters or more beyond a military target [in or near those towns] was *prima facie* evidence of the unlawful targeting of civilians and civilian objects.”¹⁰ This 200-meter standard was, in fact, the foundation upon which the trial court

based its conviction of the two Croat defendants.

American military lawyers were alarmed by this ICTY opinion since, carried to its logical conclusion, any shelling outside the 200 meter standard would be a violation of the LOAC principles of distinction and military necessity, and consequently a violation of the principle of proportionality as well.¹¹

Outspoken critics of the trial court’s 200 meter standard included Professor Geoffrey B. Corn, a retired Army lawyer who now teaches at the South Texas College of Law (Houston, Texas), and Major General Walter B. Huffman, U.S. Army (Retired) who served as the top lawyer in the Army from 1997 to 2001, and now teaches law at Texas Tech University (Lubbock, Texas).¹² Corn, Huffman and other interested experts submitted an amicus brief to the ICTY Appeals Chamber, urging it to reverse the convictions of both Gotovina and Markač for war crimes. Their rationale was that no reasonable trier of fact could rely on such a standard to determine culpability, given the many factors that determine where an artillery or rocket shell will strike, including: distance from the gun to the

5. Solis, *supra* note 2, at 312.
6. In addition to these ICTY cases, decisions handed down by the International Criminal Tribunal for Rwanda have provided landmark guidance on gender war crimes. *See, for example, Prosecutor v. Akayesu*, ICTR-96-4 (September 2, 1998) (leading decision confirming rape as a crime against humanity).
7. Kelly D. Askin, “A Decade of Development of Gender Crimes in International Courts and Tribunals,” *Human Rights Brief* (Spring 2004), at 19.
8. Case No. IT-06-90T, Trial Judgment, Int’l Crim. Trib. for the Former Yugoslavia, April 15, 2011.
9. Case No. IT-06-90A, Appeal Judgment, Int’l Crim. Trib. for the Former Yugoslavia, Nov. 16, 2012.
10. Gary D. Solis, “The Gotovina Acquittal: A Sound Appellate Course Correction,” 215 *Military Law Rev.* 78, 79 (2013).
11. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 57.2(b) provides that “an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
12. Walter B. Huffman, “Margin of Error: Potential Pitfalls of the Ruling in *Prosecutor v. Ante Gotovina*,” 211 *Military Law Rev.* 1, 29-51 (2012).

target; expertise of the gun crew; atmospheric conditions; the quality of the ammunition; and the number of lawful targets in an area being fired upon. Of particular importance to the American lawyers was the fact that a 200 meter standard was especially problematic when it came to evaluating the lawfulness of an attack on so-called 'targets of opportunity.' Such targets (e.g., moving enemy tanks or other military vehicles) might make an unanticipated appearance on the battlefield and launching a quickly planned in-direct fire attack against them necessarily was less accurate than an artillery or rocket attack on a fixed or otherwise stationary target.¹³

At least in part due to the amicus brief submitted by these U.S. military legal experts, the Appeals Chamber reversed the trial court and acquitted the two defendants of all charges. They were released and returned to their homes in Croatia. Some commentators decried the result. Former ICTY Chief Prosecutor Carla Del Ponte, for example, insisted that "this is not justice."¹⁴ But the fact is that had the 200-meter standard been upheld by the Appeals Chamber, this ICTY decision would have set an important (albeit erroneous) international legal precedent for artillery and other in-direct fires in international armed conflict---and consequently would have been of great concern to American Army lawyers advising commanders on the use of artillery.

International Court of Justice

In the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*,¹⁵ the United States challenged the jurisdiction of the Court, withdrew from participation in the proceedings after the Court assumed jurisdiction in 1984, and was profoundly disappointed by the Court's 1986 judgment on the merits.

Starting in December 1981, when Congress initially authorized \$19 million to finance the "Contras" fighting against the Government of Nicaragua, the United States directly supported military action against the lawfully elected government. The intent was to weaken the Nicaraguan government---because the United States viewed it as a threat to its interests in Central America. Contra forces repeatedly launched military operations against both military targets and civilian infrastructure in Nicaragua. This included destroying Nicaragua's only oil pipeline, the sabotage of its oil storage facilities, and the mining of Nicaraguan harbors. Evidence presented at the ICJ (by Nicaragua) showed that that more than 3,800 civilians and military personnel had been killed and almost 5,000 wounded. Property damage resulting from Contra military operations exceeded \$375 million.

Nicaragua complained before the ICJ that the United States was violating Article 2(4) of the UN Charter, and

that it had breached international law by violating the sovereignty of Nicaragua in using force and the threat of force against it, and by intervening in the internal affairs of Nicaragua. The United States responded that it was exercising collective self-defense (asserting that it was defending neighboring El Salvador against Nicaraguan aggression), and that it was not appropriate for the Court to intervene in ongoing conflict, which was being handled by the Security Council and the Contadora process.

In its 1986 judgment on the merits, the ICJ, in a 275-page opinion, concluded that the United States was "in breach of its obligations under customary international law not to use force against another State", "not to intervene in its affairs", "not to violate its [Nicaraguan] sovereignty" and "not to interrupt peaceful maritime commerce." The Court also held that the United States breached "its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956."

The ICJ decision was strongly criticized, both on factual and legal grounds, by the American judge on the bench, Stephen M. Schwebel, and by many prominent American legal scholars. They felt that the ICJ had ignored both state practice and broad and long-standing scholarly views on the issues of collective self-defense, the indirect use of force, and the LOAC principle of proportionality.¹⁶

13. Solis, *supra* note 10, at 95-98.

14. Tamara Spaic, Carla Del Ponte: "This is Not Justice, This is Denial of a Huge Crime," BLIC ONLINE, Nov. 20, 2012, <http://english.blic.rs/In-Focus/9224>.

15. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, Jurisdiction and Admissibility, ICJ. Reports 1984 (26 November 1984), p. 392; Merits, ICJ Reports 1986, (27 June 1986), p. 14 For U.S. explanation of its decision to withdraw from further participation on the merits, *see* State Department statement of January 18, 1985. The Court's decision to proceed to the merits in the absence of one of the parties is based on Article 53 of the ICJ Statute.

16. Prominent American legal scholars sharply criticized the ICJ decision, especially its analysis of collective self-defense. *See, for example*, John Norton Moore, "The Nicaragua Case and the Deterioration of World Order," 81 *AJIL* (1987), 159 (stating that the Court "certainly has produced the most spectacular example to date of failure of the international immune system against aggressive attack"); Thomas M. Franck, "Some observations on the ICJ's Procedural and Substantive Innovations," *id.* 116, at 120 (the consequence of the new rule espoused by the Court was that "fire might be fought with water, but not with fire"); John Lawrence

Nevertheless, the ICJ decision also was, to an extent, a public relations fiasco for America, especially after the ICJ ruled that the American government should pay \$17 billion in reparations and the UN General Assembly (by a vote of 94-3) passed a non-binding resolution calling on the United States to comply with the ICJ judgment and pay reparations.¹⁷

In the years following the ICJ's *Nicaragua* decision, the United States has been reluctant to participate fully in international dispute settlements, especially when it comes to any judicial examination involving the use of military force by the United States. Even before the Court's decision on the merits, the United States terminated its 1946 declaration under the Article 36(2) Optional Clause, and has never reversed this decision.¹⁸ At least one commentator called this reticence on the part of the United States as "the most serious negative impact" of the *Nicaragua* case.¹⁹ Moreover, the Court's handling of the self-defense argument in the 2003 *Oil Platforms* case did nothing to allay American concerns.²⁰

Another ICJ opinion is worth mentioning, because of its application to the development of absolute universal jurisdiction for grave breaches. Although some international commentators would disagree, many believe that *Tadić* (and subsequent ICTY cases interpreting it), establish that grave breaches, as well as war crimes, may be committed in NIACs. This raises the question of whether there is absolute universal jurisdiction for such offenses. Legislation enacted in Denmark, Germany, Spain and the Netherlands, for example, would appear to permit national courts to exercise such jurisdiction. In 1994, for instance, the Danes prosecuted Refik Saric for grave breaches (e.g. "causing grievous bodily harm . . . punching and kicking . . . Omar Kohnic . . . which ill-treatment resulted in [his] death). The offenses had occurred in the Croatian prison camp of Dretelj in Bosnia but, as Saric was present in Denmark, the court concluded it had jurisdiction over the offense.²¹ Similarly, in February 2008, Spain issued an indictment charging 40 Rwandan military officials with war crimes, terrorism, crimes against humanity and genocide---even though these Rwandans were not present in Spain. But the ICJ's opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* is instructive for U.S. policy makers because that court held that absolute universal subject matter jurisdiction for grave breaches is not reflected in current state jurisdiction.²² Despite these cases (which represent an evolutionary advance in LOAC), most States still practice a limited form of universal jurisdiction, in that they require the accused to be present in the charging State at the time of the charging. Nevertheless, the *Saric* and *Congo* cases demonstrate that true universal

jurisdiction for grave breaches is a practical legal possibility and not the mere musings of ivory tower writers and pie-in-the-sky ICTY scholars.

International Criminal Court

Initially, the United States supported the creation of an international criminal court that would have jurisdiction over, *inter alia*, war crimes. But, as the International Criminal Court (ICC) became a reality, political leaders

Hargrove, "The Nicaragua Judgment and the Future of the Law of Force and Self-Defense," *id.* 135 at 143 (concluding that the Court had "left the law of force and self-defense a feeble, poorer thing than it found it . . . with weakened prospects for actual relevance to international life.") The United States insisted that since Nicaragua was attempting to overthrow the government of El Salvador, the United States had the right under customary international law to take "necessary actions" in support of El Salvador. The ICJ rejected this defense and found for Nicaragua. *See, e.g.,* Zia Modabber, "Collective Self-Defense: *Nicaragua v. United States*", 10 *Loy.L.A.Int'l & Comp. L. Rev.* 449, 450 (1988).

That the debate within the U.S. is still raging can be seen from the recent exchange between Judge Schwebel and Paul S. Reichler, who had acted as counsel for Nicaragua, regarding the facts of the *Nicaragua* case. *See* Stephen M. Schwebel, "Celebrating a Fraud on the Court," 106 *AJIL* (2012) 102-105; Paul S. Reichler, "The Nicaragua Case: A Response to Judge Schwebel," *id.* 316-321.

17. Nicaragua withdrew its complaint from the ICJ in September 1992, which rendered the payment of reparations moot.
18. Article 36 (2) of the Statute of the International Court of Justice provides that "states parties to the present Statute may . . . declare that they recognize as compulsory *ipso facto* and without special agreement . . . the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;
 - b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.

The American acceptance of this general jurisdiction was never unconditional. The main reservations related to domestic jurisdiction – the "Connally reservation" which included self-judgment; and the Vandenberg multilateral treaty reservation, which the U.S. invoked in the *Nicaragua* case, but which the Court, in its 1986 judgment, interpreted in a way that rendered it meaningless. For the American

in the United States had misgivings. Believing that the new ICC was dangerous to American sovereignty, the administration of President George W. Bush announced that it was “renouncing” the U.S. signature on the Rome Treaty.

The United States then worked to undermine, if not wreck the ICC, by negotiating Article 98 agreements and by enacting the American Service-Members’ Protection Act, sometimes referred to as “The Hague Invasion Act.”²³

Article 98 of the Rome Treaty forbids the ICC from requesting that a state extradite an individual (or provide similar assistance) to the court if this would require the state to “act inconsistently” with its obligations under international law. As a result, the United States began negotiating agreements with other states prohibiting the extradition (or transfer) of American citizens to the ICC. Although these so-called “bilateral immunity agreements” (or BIAs) were signed by more than 100 countries, more than 50 nations rejected U.S. offers to enter into them. Today, these Article 98 agreements are being quietly ignored by the current American administration.

As for “The Hague Invasion Act,” this legislation, signed by President Bush into law on August 2, 2002, is intended “to protect United States military personnel and other elected and appointed officials ... against criminal prosecution by an international criminal court to which the United States is not a party.” Since the legislation authorizes the President to use “all means necessary and appropriate to bring about the release” of such personnel, the Act seems to authorize the U.S. to violate the territorial sovereignty of the Netherlands.²⁴

As the ICC begins its second decade, however, an increasing number of American leaders are realizing that the ICC is not the boogeyman that it was thought to be. The Rome Statute of the ICC is routinely viewed by American international legal scholars as authoritative. For example, Article 8, *War crimes*,²⁵ identifies sixteen “serious violations” of the law that may occur in common Article 3 conflicts. Since all but one of the sixteen is a war crime or grave breach, this adds force to the view that, in fact, there are war crimes and grave breaches in NIAC.

In the eyes of most international and American scholars and writers, the actions of the ICC have been reasonable and, in some cases endorsed by the United States. In April 2013, for example, the United States offered a reward of up to \$5 million each for Ugandan warlord Joseph Kony and his top aides in the Lord’s Resistance Army rebel group.²⁶ Since the ICC has indicted Kony and his compatriots for war crimes, the American decision to offer a reward for information on Kony and his fellow fugitives shows support for the ICC—since the arrest of Kony and others ultimately means their transfer to ICC custody

and the court’s criminal jurisdiction.

After ten years in existence, the ICC has produced a number of thoughtful and well-reasoned opinions, and these are increasingly persuasive to U.S. international lawyers advising the military. While there are still vocal naysayers,²⁷ no serious American commentator questions the fairness of the ICC trial proceedings against Charles Taylor, the former president of Liberia. Similarly, no one questions the appropriateness of the ICC’s attempted exercise of jurisdiction over Sudanese president Omar al-Bashir for alleged war crimes in Darfur.

A final thought on the ICC: There is little question that the United States will continue to *cooperate* with the ICC when it is in its national interest. But will it join the court? Perhaps. It is entirely possible that, at some point in the not so distant future, the United States may swallow any misgivings it may have about the ICC and ratify the Treaty

explanation of its decision to terminate its Optional Clause Declaration, *see* the State Department statement of 7 October 1985.

19. Lori F. Damrosch, “The Impact of the *Nicaragua Case* on the Court and Its Role: Harmful, Helpful, or In Between?” *Leiden Journal of International Law* 25: 135-147 (2012).
20. *Oil Platforms (Iran v.U.S.)*, Merits, 2003 ICJ Reports , 6 November 2003, p. 161. The Court’s decision to address the self-defense issue, and even more, to incorporate its conclusions in the judgment’s operative part, aroused considerable displeasure within the bench. *See* the separate opinions of Judges Buergenthal, Higgins, Kooijmans, Parra-Aramguren, and Owada. Once the Court determined that the U.S. attacks on the Iranian oil platforms did *not* constitute a breach of the bilateral commercial treaty invoked by Iran, it was technically unnecessary to deal with the legality of the U.S. actions. Thus, the Court’s conclusions on this matter were, at best, to be seen as non-binding *obiter dicta*; and, if, as some of the judges argued, the Court had exceeded its jurisdiction in dealing with it altogether (since it was not raised in the parties’ submissions), the Court’s pronouncement was not “entitled to be treated as an authoritative statement of the law applicable to the actions of the United States”. Buergenthal separate opinion, para. 9. For the reaction of the then-Legal Adviser of the U.S. State Department, William H. Taft IV, *see* “Self-Defense and the *Oil Platforms* Decision,” 29 *Yale Journal of International Law* (2004), pp. 295-306; and excerpts of Taft’s statement in 98 *American Journal of International Law* (2004), pp. 598-601. The U.S. took strong objection to the Court’s statements regarding such issues as the gravity of the attack; an implied need for specific intent and greater leniency to indiscriminate attacks; the necessity for prior

of Rome. Since every important ally of the United States is an ICC member, when American forces deploy in coalition operations with these partners, their adherence to the principles enunciated in the Treaty of Rome necessarily means that the United States must be cognizant of the treaty's provisions. By analogy, the United States has not ratified Additional Protocol I but, when it deploys with British, German, Dutch, Italian, Polish and other North Atlantic Treaty Organization members, all of whom have ratified this protocol, American military forces must observe the provisions of Additional Protocol I if their joint operations are to be lawful in the eyes of these allies. Regardless of whether it ultimately joins the ICC, however, it is clear that American cooperation with the court will continue.

Conclusion

The decisions of the ICTY, ICJ and ICC have had a significant impact on U.S. law and policy. This has been true despite the fact that the United States was never a party to the opinions issued by the ICTY, refused to accept the jurisdiction of the ICJ in the case involving Nicaragua, and has declined to ratify the Treaty of Rome.

Lawyers advising commanders in U.S. military operations look mostly to decisions of ICTY for guidance on LOAC, if for no other reason than it is the only post-World War II LOAC source from an international tribunal. As the ICTY winds down its operations in the near future and the ICC enters its second decade of existence, there is reason to hope and believe that the decisions of the ICC will emerge as guidance for international lawyers advising military commanders in U.S. operations, especially when the ICC wrestles with legal issues involving NIAC. ■

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complaints; and proportionality as linked to specific prior attacks rather than to the overall threat and the need to deter future attacks.

21. *Prosecutor v. Reflik Saric*, 25 November 1994, 3rd Chamber of the Eastern Division of the Danish High Court; Solis, *supra* note 2, at 307.
22. *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ Reports 3 (2002).
23. Public L. 107-206, 116 Stat. 820 (August 2, 2002).
24. U.S. 'Hague Invasion Act' Becomes Law," *Human Rights Watch Press Release*, August 3, 2002.
25. Article 8, subparagraphs 8.2(c) and (e).
26. "Reward Offered for Information on Kony," *New York Times*, April 4, 2013, at A11.
27. *See, for example*, the blistering criticism of the ICC by Chicago University Law School professor Eric Posner, "... with the benefit of hindsight, it is clear that the ICC will serve no country's interests, let alone international justice, whatever that might mean. It is too weak to deter atrocities, end impunity, or keep the peace, but is strong enough to serve as an irritant to international relations." Eric Posner, "The Absurd International Criminal Court," *Wall Street Journal*, Jun. 10, 2012; see <http://online.wsj.com/news/articles/SB10001424052702303753904577452122153205162>.

The IAJLJ Hague Conference: Three Aspects of Justice at The Hague: ICJ, ICC and ICTY

Tom Gal

During the second week of October 2013, the International Association of Jewish Lawyers and Jurists held its annual conference at The Hague, the Netherlands. The objective of the conference was to discuss three international judicial institutions, their impact on national judicial systems and the challenges they face. During the course of the conference, well-known scholars and practitioners presented their views on the work of the International Court of Justice (ICJ), the International Criminal Court (ICC) and the International Tribunal for the former Yugoslavia (ICTY); analyzed the importance of these courts and considered the difficulties encountered by them in terms of their activities within the international sphere.

At the opening ceremony, the keynote speaker, *Mr. James Stewart* (Deputy-Prosecutor of the ICC), openly shared his views on the challenges presently facing the ICC and his expectations for the future. Discussing pressing issues and criticisms currently being addressed by the ICC, Mr. Stewart talked of the situations now within the ICC's jurisdiction, all of which are located in Africa. Mr. Stewart explained the difficulties entailed by the Prosecutor's work in the field, under pressure, in combat zones and with almost no cooperation on the part of the "host" states. Mr. Stewart emphasized the importance of the ICC as an international judicial body.

On the following day, the morning session was dedicated to an analysis of each court. *Prof. Michla Pomerance* (Professor of International Law, Hebrew University, Jerusalem) presented a thorough analysis of the ICJ's work, particularly in relation to its advisory opinion capacity. Applying an historical perspective, Prof. Pomerance reviewed the differences between the Permanent Court of International Justice (PCIJ) and the ICJ, identifying the vulnerable areas of the ICJ in light of its history and background as well as its role within the UN system. In particular, Prof. Pomerance focused on the difficulties and tensions stemming from the ICJ's drift towards becoming a "UN court" as opposed to remaining

an international judicial body. This tension is slowly increasing in light of the shift of power within the UN General Assembly.



As can be read in the current issue of *JUSTICE*, *Prof. Albin Eser* (former judge of the ICTY) analyzed the role played by the ICTY in the last two decades and noted the lessons that should be learnt from its work, in particular he recalled the criticisms directed at the court and explained that since no better alternative is on offer efforts should be concentrated on improving the existing situation. Following Prof. Eser, *Judge Philippe Kirsch* (Q.C., Canada) shared his experiences as the first President of the ICC. According to Judge Kirsch the ICC can expect a prominent future. Judge Kirsch

explained that the ICC faces many challenges at the procedural level relating to the participation of victims in the judicial process, evidence gathering and processing as well as dealing with large numbers of witnesses and protecting them during ongoing processes. All these issues affect the work of the ICC. According to Judge Kirsch the ICC should be regarded and reviewed within the political context in which it operates, in terms of its interaction with the Security Council and ability to obtain the cooperation of states. At the same time, he noted that the ICC continues to develop, establish international jurisprudence, reaffirm international criminal law and gradually advance towards the comprehensive implementation of international criminal law standards in national legislation.

The afternoon session was dedicated to a review of the courts' influence on international law. *Judge Meron*, the current President of the ICTY, spoke of his experiences regarding the tremendous contribution made by the ICTY to international jurisprudence. As the first operating tribunal since the international military tribunals of Tokyo and Nuremberg, the ICTY shaped the definitions of international crimes: war crimes, crimes against humanity and genocide. Accordingly, the ICTY has exceeded all expectations by creating an international judicial body

possessing the appropriate technical support, administration and procedures. Today, the ICTY serves as a model for tribunals and courts established for the prosecution of international crimes. Judge Meron was followed by *Prof. Knoops* (Professor of International Criminal Law, Utrecht University), who practices as a defence attorney before the international courts. Prof. Knoops' contribution may also be read in this issue, and relates to the legitimacy of the ICC from the perspective of a defence lawyer. *Prof. Ruth Wedgwood* (Professor of International Law and Diplomacy, John Hopkins University) then offered an enlightening presentation on the politicization of the law as reflected in the ICJ's work. Prof. Wedgwood described the ICJ as dealing bravely with "low-politic" issues but failing on "high-level" matters concerning the use of force. Prof. Wedgwood described a number of cases, including the *Nuclear Weapon advisory opinion*, the *Wall advisory opinion* and the *Nicaragua case* as examples of the ICJ's questionable capacity to deal with these issues. The day ended with the presentation of the book *The Hague Odyssey* by Mr. Richard D. Heideman which criticizes the ICJ for its controversial *Wall advisory opinion*. The principal criticisms discussed by Heidemann concerned the inaccuracy of the facts placed before the ICJ and its biased interpretation of Israel's security needs.

The Friday morning session addressed the international tribunals' influence and contribution to national legislation and jurisprudence, with the distinguished panel members analyzing their own national systems. *Prof. Yuval Shany* (Dean of the Faculty of Laws in the Hebrew University) discussed the general impact of international jurisprudence on national courts' decisions, and supported his arguments with statistics; comparing the number of international decisions cited by national courts over the last two decades. According to Prof. Shany there has been a dramatic increase in the number of international decisions cited by national courts. Prof. Shany reviewed three trends in this regard: increased penetration by international law in decisions affecting the behavior of the state; the emergence of work conducted in tandem between international courts like the European Court of Justice and national courts – encouraging national courts to implement international standards – and thirdly, international legislation requiring national legislation to implement it. Mr. Daniel Reisner, (partner in the well respected Israeli law firm Herzog, Fox, Neeman), then reviewed the impact which the courts in The Hague have on Israel. Mr. Reisner discussed three main issues: first, how the decisions made by the courts affect military operations as they interpret the boundaries of such operations; second, at the political level, how these courts are being used as political tools to achieve political aims,

primarily in the Israeli-Palestinian conflict; and third, why decisions made by these courts, and particularly the ICJ are in tension with those rendered by the Israeli Supreme Court in connection with security matters. According to Mr. Reisner, a key difficulty concerns the double standards applied to Israel by these bodies. In his presentation Mr. Stephen Oola (Makerere University, Kampala) reviewed the impact of the ICC on the African states, which are its main focus (all cases currently before the ICC are from that continent). Mr. Oola expressed doubt as to whether in the context of many African conflicts, the ICC will actually be able to achieve the goals for which it has been established and bring justice to the victims. One of Mr. Oola's main criticisms related to the ability of the UN Security Council to decide on the referral of situations to the ICC. In this issue of *JUSTICE* it is also possible to read the presentation given by Col. Frederic L. Borch III, (formerly of the US Army Judge Advocates Corp.), regarding his experiences as an army legal officer, in relation to the international courts' impact on US military law and operation. Prof. Herman Van der Wilt (Chair, International Criminal Law, the University of Amsterdam) closed the debate with his notable presentation on these international courts' impact on the Dutch judicial system with a review of four test cases which have made their way through the Dutch tribunals over the past ten years. In a thorough analysis, Prof. Van der Wilt raised a number of questions that require further consideration if we wish to assess the true contributions made by the international judicial system. In particular Prof. Van der Wilt suggested reviewing in detail the role played by national courts and their ability to work with, implement and affect international law.

The Hague conference presented the thoughts of prominent lecturers, all of whom are well known and respected for their practical and scholarly experience. The discussions held within as well as outside the lecture halls reflected the diverse views of the participants regarding the international courts, their importance and impact on both the national and international community.

The Resolutions passed by the Association during the Hague Conference may be read at page 47 of this issue of *JUSTICE*. ■

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Does the Jerusalem Light Rail Unlawfully Carry its Inhabitants from East to West?

Marc Levy & Emmanuel Eskinazi

Increasingly numerous attempts are being made at importing the Arab-Israeli conflict into French courts.

These efforts, when made by the Palestinians, attempt to present the State of Israel as a “rogue state”. Cooperation with Israel, in particular when this cooperation involves the territories administered by Israel since 1967, is presented as a colonial act which is judicially condemnable.

In this regard, the decision reached on March 22, 2013 by the Versailles Court of Appeal in the *Jerusalem Light Rail case*, described below, is particularly interesting.

This decision has sounded the death-knell¹ for Palestinian efforts in this context, underscoring that a corporation is not at fault when it participates in a project, part of which takes place in territories administered by Israel since 1967.

The numerous lessons to be learned from the decision will be analyzed below in terms of procedure, public international law, and perspectives regarding the boycott.

On December 15, 1999, the State of Israel issued an international call for bids for the construction and operation of a public transportation service in the city of Jerusalem.

On June 15, 2000, Israeli corporations together with the French corporations Alstom and Veolia, formed an Israeli corporation, called Citypass Ltd.

Citypass Ltd. was selected by the bidding committee and on September 22, 2004 this corporation and the State of Israel entered into a public service concession contract, for a term of 30 years, for the financing, conception, construction, operation and maintenance of a light rail system in Jerusalem.

Construction began in 2006 and ended in 2011.

This project has awakened numerous controversies, mainly due to the fact that the light rail system crosses East Jerusalem, a territory placed under Israeli administration since 1967.

The project has also given rise to judicial proceedings.

In February 2007, the Association France Palestine Solidarity (AFPS) filed suit against the corporations Veolia Transport and Alstom before the Tribunal de Grande Instance of Nanterre in order to rescind the public service

concession contract which had been signed with the State of Israel for the construction of the light rail system; obtain an injunction against continued performance of the contract and receive compensation.

The PLO voluntarily joined the proceedings.

At the same time, the AFPS brought a case before an administrative court, applying for an order holding the French government liable for failing to prevent and even encouraging the participation of French corporations in the above concession contract.

However, the Conseil d’Etat, the French Supreme Court for administrative cases, decided on October 3, 2012, that, on the one hand, the government could not be held liable since Articles 49 and 53² of the Fourth Geneva Convention were inapplicable to the facts of the case, and on the other hand that no clause of this convention, nor any principle of public international law, could be relied upon in order to impose liability upon the government for alleged breaches by French corporations of clauses of the Fourth Geneva Convention.



Mark Levy



Emmanuel Eskinazi

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1. Subject to any appeal to the French Supreme Court for civil cases, the Cour de Cassation.
 2. “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

The decision of the Versailles Court of Appeal was reached on March 22, 2013, and upheld the lower court decision of the Tribunal of Nanterre. This completed the decision regarding jurisdictional competence, reached on December 17, 2009.

The decisions rejected all the claims brought by the AFPS and the PLO, finding that the corporations Veolia, Alstom and Alstom Transport had not been at fault when they had entered the contract for the construction of the Jerusalem Light Rail, and holding the plaintiffs liable to pay the defendants the sum of 90,000 euros for their litigation costs.

It follows that a French corporation cannot be found liable for cooperating with an Israeli corporation, even if this cooperation relates to the territories administered by Israel since 1967. This decision teaches a number of lessons in terms of both procedure and public international law. Furthermore, the decision is not without consequence as regards the anti-boycott campaign.

Teachings in Terms of Procedure

A. The PLO has standing and an interest to sue

The courts hearing the cases had to decide whether the PLO and the AFPS had standing and an interest to sue.

As regards the AFPS, the judges clearly applied the regime relevant for a legal action by an association, which requires, according to classic principles of jurisprudence, that the association demonstrates that it is acting in the context of the purposes set out in its bylaws and that “*it judicially requests reparation for damage done to the collective interests of its members*”,³ with the specification that the collective interest is distinct from the public interest.

In this particular case, these conditions had not been fulfilled since “*The drafting of its bylaws’ social purpose in general terms “develop the friendship...the solidarity between the French people and the Palestinian people”...“act for the establishment of a peace...founded on the recognition of the national rights of Palestinians” is not enough to determine that, in requesting the rescission or prohibition of international contracts to which it is a third-party, the association seeks the defense of a collective interest peculiar to its members, distinct from the general interest of the Palestinians...*”.

However, as regards the PLO, it was decided that the PLO which, for formal reasons exclusively - relating to irregularity of power - had been held by the lower court not to have standing to sue, could – after regularization of the power – step in at the appeal stage, on the ground that “*the affirmation of the PLO that it has standing to sue*” had not been controverted.

It seems to the authors that this decision was arguably wrong for at least two reasons:

The judges seem to have shifted the burden of proof.

It was up to the PLO to demonstrate that it had standing to defend the general interest of the Palestinian people, and it was not for the defendant to show that it had no such standing.

The judges declined to specify whether the PLO was the representative of the Arab inhabitants of the territories administered by Israel as an association (albeit it does not seem that they applied the corresponding legal regime) or as a legal person in public international law.

Perhaps the judges were reluctant to judicially deny the PLO the legitimacy to negotiate treaties which so far it had enjoyed on the international scene.

B. French courts are competent to hear a suit questioning the liability of French corporations abroad

Alstom and Veolia claimed that the French courts were not competent to hear the cases, essentially emphasizing two elements:

- The signed contracts were governed by Israeli law;
- The State of Israel, which was the only serious defendant, enjoyed immunity.

The judges avoided these difficulties by holding that the suit was in fact intended to determine civil liability and not to void the contract, and that therefore, since the defendants had their place of business in France, the French courts were competent.

Teachings in Terms of Public International Law

A. The Geneva and Hague Conventions do not create rights that the Palestinian people or the PLO can invoke before a tribunal

The decision denied Palestinians or the PLO, which claimed to represent the Palestinians, the right to invoke the Geneva and the Hague Conventions.

The decision noted that the object of these conventions was not to create subjective rights for the benefit of individuals, and that therefore the conventions did not have a vertical effect.

Indeed, none of the norms invoked by the Palestinians allowed one to “*infer the drafters’ intent to produce such an effect, and is sufficiently expressive in the designation of individuals as recipients.*”

On the contrary, with regard to the Geneva Convention, the International Court of Justice (ICJ) had indicated that “*the preparatory works contained only obligations on the part of the States and that the power for individuals to take advantage of it was not mentioned.*”

The Court proceeded to analyze each of the invoked norms, as it was required to do, to determine in respect of each norm whether it granted rights to identifiable

3. Cass. Civ. 1^{er} 15 mai 1990.

private persons.

The Court held that the set of invoked norms did not grant any rights to private persons, and exclusively provided for obligations of “the Occupying Power” or the “Contracting Parties”. The Court also indicated that some of the norms were only applicable in case of bombing, which was not the case in Jerusalem.

It should be recalled that in the interim period between the lower court decision of the Tribunal de Grande Instance of Nanterre and the decision of the Versailles Court of Appeal, a major administrative law decision was reached: the second decision of the Conseil d’Etat in the *GISTI* case on April 11, 2012.

The latter decision specified the conditions enabling a private person to invoke an international treaty (emphasizing that France had adopted the monist system):

“The stipulations of a treaty or of an agreement legally introduced in the internal legal order in conformity with Article 55 of the Constitution can be invoked...when they create rights which private persons can directly avail themselves of; that, subject to cases involving a treaty for which the International Court of Justice possesses an exclusive competence to determine whether it is of direct effect, a stipulation must be recognized of direct effect by the administrative judge when, taking into consideration the parties’ expressed intent and the general structure of the invoked treaty as well as its content and its terms, it does not exclusively aim at governing the relations between States and does not require the intervention of any complementary action to produce effects for private persons; that the absence of such effects cannot be deduced from the mere circumstance that the stipulation designates the Member States as subjects of the obligation it defines.”

The PLO and the AFPS attempted to draw conclusive arguments from this new jurisprudence, and more particularly from the fact that it specified that the absence of direct effect could not “be deduced from the mere circumstance that the stipulation designates the Member States as subjects of the obligation it defines.”

On this particular point, a ruling was thus eagerly awaited.

The judges rightfully rejected the argument.

Indeed, if the second *GISTI* decision excludes that one exclusively relies on the drafting of the norm, it took up the classic, subjective criteria (the intent to create rights to the benefit of private persons) and objective criteria (the general structure of the Treaty), to clarify them.

Thus, the judge (administrative, at the very least) could not stop at the fact that the drafting of the norm made the State the subject of the obligation, but he also had to conclude that “the norm enables the creation of rights and obligations for private persons in the domestic order and to this end contains sufficiently precise elements as to which

individuals can benefit from them.”

As indeed mentioned by the judges, this conformed with the past jurisprudence of the Cour de cassation, which had only recognized a direct effect where the recipient was precisely identified.

It has been considered that this applies in the case of children, according to Article 10 of the January 26, 1990 New-York Convention on the Rights of the Child, and employees under Articles 2, 4 of the June 22, 1982 International Termination of Employment Convention.

B. International norms do not create any effect between private persons who are not signatories or recipients

The judges had to consider the existence of a horizontal effect of the norms, that is to say an effect enabling a private person to invoke the norm against another private person.

The judges logically noted that such an effect had to be excluded since:

- Corporations are not subject to international law (generally only States and international organizations are subject to international law), so that they are not bound by the content of international norms.
- The obligations contained in the norms are formulated against States and do not concern legal persons.

C. The concepts “international custom”, “international public order” or “Jus cogens” cannot be used to impede the non-opposability of the invoked norms

a. International custom

The PLO and the AFPS attempted to circumvent the non-opposability of the norms by alleging that the invoked articles of the Geneva and the Hague Conventions were part of “international custom”, the “public international order” or the “Jus cogens”, so that they could unquestionably engage the liability of corporations.

It should be pointed out that in some cases, French judges are willing to resort to the notion of “international custom”, as was noted by Prof. Nicolas Maziau, auxiliary judge of the criminal chamber of the Cour de cassation, in his excellent article “*La reception du droit international public.*”⁴

Prof. Maziau observed that the international custom which prohibits bringing officiating heads of state before the criminal courts of a foreign State,⁵ in the absence of contrary international dispositions applicable to the parties involved, applies.

4. *Journal du droit international*, 03/2013, p. 791.

5. Note 42 Cass. crim., 13 mars 2001, n° 00-87.215 : Bull. civ. 2001, IV, n° 64.

This is also the case in connection with the custom which requires the legalization of acts established by a foreign authority and intended to be produced before French courts (the Decree for the Marine of August 1681 having been abrogated).⁶

However, the Cour de cassation decided that international custom can only guide the interpretation of a convention it cannot compensate for its non-existence.⁷

Independent of the question of the value of international custom in the hierarchy of norms, the ruling is especially interesting in that it clarifies two points.

- The set of rules of humanitarian law is not part of international custom, only those which deal with fundamental human rights seem to fall within that framework.

This was deduced from the wording of the June 8, 1996 advisory opinion of the ICJ itself:

"It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession.

Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."

- Moreover, custom cannot be invoked against persons who are not subject to international law.

b. *The international public order and Jus cogens*

Relying on the notion of "international public order", the judge can also hold that the fundamental rights guaranteed by the European Convention on Human Rights supersede the custom granting immunity.⁸

But on occasion the Court has reached a contrary decision, holding that the customary exception of immunity trumped the right to an effective remedy guaranteed by the Convention on Human Rights.⁹

As for the notion of *Jus cogens* which is being invoked before the courts more and more frequently, it is fitting to recall that, according to the Treaty of Vienna, *Jus cogens* is "a peremptory norm of general international law... accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

France has refused to ratify the Treaty of Vienna on the ground that this notion is too imprecise.

According to some scholars this concept is strictly limited to governing conflicts between treaties of international law.

It seems that this was the interpretation upheld by the Tribunal de Grande Instance.

Other scholars understand *Jus cogens* more extensively as lying at the heart of human rights and at the core of international public order, from which it is impossible to derogate.

French courts have long refused to grant any scope to *Jus cogens*, even in its strict meaning.

However, in a decision of the Cour de cassation given on March 9, 2011 (no. 09-14.743) in the *UTA Flight 772 case*, a change of direction seems to have taken place; the Court held:

"that assuming that the prohibition of terrorist acts could be taken to the rank of norm of jus cogens of international law, which trumps other rules of international law and can thus constitute a legitimate restriction to jurisdictional immunity, such a restriction would, in the present case, be disproportionate as regards the pursued goal since the proceedings against the foreign State is not based on the commission of acts of terrorism but on its moral liability."

Presently, the acceptance of the notion of *Jus cogens* seems still hypothetical and the Court in the *Jerusalem Light Rail case* indeed ignored it and expressly indicated that it declined to apply this notion in domestic law.

Independent of this inapplicability, the judges noted very rightfully on the one hand that Alstom and Veolia were not subjects of international law, and on the other hand that the invoked rules did not deal with subjective fundamental human rights.

This observation is important: the economic exploitation of a territory, even in violation of a norm of international law, does not constitute a violation of the human rights of the populations of these territories.

That is to say that all norms of international law do not necessarily create an enforceable "human right."

Thus, in the absence of a "personal" fault committed by corporations, it is impossible to conclude that they have incurred liability.

A contract can no longer be voided for lack of cause or for unlawful cause, the lower court judge having indicated in this regard that the various contracts were governed

6. Cass. 1re civ., 28 nov. 2012, n° 12-30.090 : JurisData n° 2012-026879.

7. Cass. crim., 17 juin 2003, n° 02-80.719 : JurisData n° 2003-019616 ; Bull. civ. 2003, IV, n° 122

8. Cass. soc., 25 janv. 2005, n° 04-41.012 : JurisData n° 2005-026904 ; Bull. civ. 2005.

9. Cass. 1re civ., 28 mars 2013, n° 11-10.450 : JurisData n° 2013-005665. - Cass. 1re civ., 28 mars 2013, n° 11-13.323 : JurisData n° 2013-005668.

by Israeli law and that the articles of the French Civil Code which were invoked, were irrelevant.

Positive law has thus been clarified; but what of the enterprise of justice?

The judges did not reach a decision on Israel's alleged violation of international humanitarian law by constructing the light rail train.

However, and independent of the very arguable applicability of the Geneva Convention, they offered a number of explanations when countering the purported injustice:

1. Relying on Article 43 of the Regulations Respecting the Laws and Customs of War on Land, appended to the 1907 Hague Convention, which specifies that:

"...The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

The Court of Appeal stated that *"the occupying power could and even should restore a normal public activity in the occupied land, and agreed that measures of public management could involve all activities generally exercised by state authorities (social, economic and commercial life) (1947 control commission court of criminal appeal); as such, a lighthouse, a hospital, could be built. It was even recognized that the introduction of a public transportation system was one of these acts relevant to public management by an occupying power (construction of a subway system in occupied Italy) so that the construction of a light rail system by the State of Israel was not prohibited."*

2. As Prof. Robert Kolb noted, *"The good administration of a territory can, in such a case, demand measures of reform and social transformation capable of keeping up with the evolution of the world. These reforms are necessary for the well-being of the local populations...the only power to undertake and enable such developments is the occupying power. Furthermore, in order to get out of the situation of occupation, it may be necessary to reach transitional agreements providing for some compromises...These transitional concessions may need to somewhat move away from a strict reading of the law of territorial occupation, among other texts the law of Convention 4. The archetypical example that it is possible to mention is the Israeli-Palestinian process."*

This observation necessarily leads to a limitation, in terms of *Jus cogens*, of the value of Articles 49 and 53 of the 1949 Geneva Convention, and Articles 23 and 46 of the 1907 Hague Regulation.

3. Polls, carried out by independent institutes, demonstrate the satisfaction of the inhabitants of East Jerusalem, irrespective of their origin.

Should the PLO's political demands have overridden

the well-being of the inhabitants?

Litigants should now draw pragmatic lessons from the decision, not only in terms of participation of French corporations in Israeli projects, but also in terms of boycott and the call to boycott Israeli products.

III. Perspectives in Terms of Boycott

It is fitting to recall that Article 225-1 of the Criminal Code provides that:

"Constitutes (...) a discrimination any distinction operated between legal persons on the basis of origin,..., political opinions,..., affiliation or non-affiliation, real or assumed, with a determined ethnicity, nation, race or religion of members, or of some members, of these legal persons."

This text originally comes from the so-called "anti-boycott" law, Law no. 77-574 of June 7, 1977, specifically designed to counter the boycott against Israel, by prohibiting French corporations from conceding to the requirements of Arab countries which, in order to trade with French corporations, demand that the latter demonstrate that they have not engaged in any commercial relations with Israel.

In a December 18, 2007 decision,¹⁰ the Cour de cassation held that a French corporation seeking to enter into a contract with an Arab company, could not submit to the latter's demands by providing it with certificates guaranteeing that the manufacture of its products did not involve any Israeli material, manpower or transport.

The court noted that *"an economic discrimination cannot be justified by the existence of a prohibited boycott which Article 225-2 precisely aims at punishing."*

In addition, Article 24 of the law of July 29, 1881 prohibits invitations to discriminate.

The *Willem case* is a particularly instructive illustration of this mechanism.

Briefly the facts are as follows: in 2002, during the meeting of the City Council of the city of Seclin, and in the presence of journalists, Mr. Willem, mayor of the municipality of Seclin, announced that in his municipality he intended to boycott Israeli products, and in particular fruit juices .

This was reported in the October 5, 2002 edition of the newspaper *"la Voix du Nord"*; Mr. Willem justified his decision by his desire to protest against the allegedly "anti-democratic" policy of the government of Israel.

Similarly, the municipality website reported the Mayor's decision.

The Cour de cassation, in its September 28, 2004 decision, upheld the ruling of the Douai Court of Appeal

10. No 06-82.245.

which had held that the Mayor's discourse did not constitute discrimination but an invitation to discriminate, and held in turn that:

"The reporting, on the website of the municipality, of the decision reached by the Mayor to boycott Israeli products, accompanied by an activist commentary, was likely to trigger discriminatory behaviors."

Mr. Willem filed an appeal to the European Court of Human Rights, alleging that his freedom of expression had been violated.

In addition to the domestic legal framework described above, the European Court stated that a boycott against a State **could only be based upon a decision of the Security Council of the United Nations according to Article 41 of Chapter VII of the Charter of the United Nations, or upon a governmental decision made by a State in "retaliation" against another State, and emphasized that such a decision on the part of the Security Council or a government did not exist in the present case.**

While acknowledging that the Mayor possessed the right to criticize the State of Israel, the European Court held that the Mayor had overstepped this right by calling for a boycott, a measure necessarily detrimental to Israeli producers.¹¹

Following this decision, some of the more cautious pro-Palestinian associations modified their angle of attack.

Apparently acknowledging the impossibility of calling for the boycott of Israeli products, these associations have limited their actions to producers manufacturing products in plants located in the territories.

Their argument is always the same and can be schematically summarized as follows:

The economic exploitation of the Territories would be in violation of international humanitarian law (in particular, of the Geneva and the Hague conventions,

international custom and *Jus cogens*) and, by some sort of "transitivity" or contamination, corporations which participate in the distribution in France of products manufactured in plants located in the territories, would incur liability. Accordingly, it would be legitimate to request the French jurisdictions to condemn them. Additionally, the boycott of these products and/or services would thus become legal.

This decision gives rise to some important principles:

A French importer of Israeli products manufactured in the administered territories does not commit any offence, the above norms being inapplicable to the importer.

It is irrelevant in this regard that the producers cannot benefit from the preferential customs treatment regime (BRITA decision) or cannot benefit from subsidies from the European Communities (July 2013 guidelines).

Accordingly, pro-Palestinian associations cannot request a ban on the sale of products legally introduced into French territory, by invoking humanitarian law.

Under these conditions, it is now very difficult for pro-Palestinian associations to justify calls for discrimination of these imported products.

Nonetheless, the battle over this issue will undoubtedly continue in the judicial arena. ■

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11. CEDH, 16 juillet 2009, Willem c/ France.

Weak States and Terrorist Organizations: A New Understanding of Sovereignty

Harry Borowski & Ilan Fuchs

The war on terror in the post 9/11 reality brings constant challenges to jurists. One such challenge is fighting terrorism in nations with weak or absent central governments. This article suggests that there should be a reevaluation of sovereignty in light of this reality.

Analysis

A. Definition of a Weak State

A weak state is a state that originally possessed the attributes of statehood when it was formed (an entity with a defined territory, a permanent population, effective governmental control over the territory and population and an ability to engage in formal relations with other states¹) but now does not maintain effective control over the populated territorial entity.² “Weakness” in this context is expressed by the inability to assert effective control over territory through government mechanisms.

Empirical studies have found a correlation between a weak state, failed states and terrorism. The Political Instability Task Force found that terrorism was strongly concentrated in failed or weak states.³ This raises the question, what is the mechanism that allows terrorism to flourish in weak states?

Weak or absent government control over territory leads to a power vacuum that invites internal and external predators.

B. Sovereignty and Self-Defense

State sovereignty is referred to in Article 2(1) of the United Nations Charter (“UN Charter”): “The Organization is based on the principle of sovereign equality of all its Members.”⁴ State sovereignty and equality are better understood nowadays as independence.

States are protected from attacks by Article 2(4) of the UN Charter: “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.”⁵

Article 2(4) of the UN Charter clearly identifies armed

intervention as a major factor threatening a state’s sovereignty. A different danger to state sovereignty rests within the state itself, when it renounces its exclusive control of its territory and population, creating a power vacuum which invites predatory forces.⁶ While a state is responsible for its own sovereignty, should it remain so when its action or inaction against predatory actors⁷ jeopardizes the national security of other nations?⁸

Other nations would then have to contemplate the following issues:

1. What should be the purpose and nature of any counter-measure taken by these foreign nations?
2. How could such counter-measures be implemented in a way that would be both minimally intrusive in terms



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1. See Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19, at 1.
 2. A noteworthy exception to this general principal is found in some states that achieved independence, mainly during the 20th century, after the break-up of empires or republics, or during decolonization.
 3. Gary LaFree et al., “Global Terrorism and Failed States”, in *Peace and Conflict* 39, 41 (J. Joseph Hewitt et al. eds., 2008).
 4. U.N. Charter Art. 2, 1.
 5. U.N. Charter Art. 2, 4.
 6. Gary LaFree et al., “Global Terrorism and Failed States”, in *Peace and Conflict* 39, 41 (J. Joseph Hewitt et al. eds., 2008), (explaining how militias often fill the power vacuum in weak states).
 7. See, Robert D. Crews & Amin Tarzi (eds.), *The Taliban and The Crisis of Afghanistan* (2008), p.70. [hereinafter TALIBAN].
 8. See generally JEREMY M. SHARP, CONG. RESEARCH SERV., RL 33566, *Lebanon: The Israel-Hamas-Hezbollah Conflict* 1 (2006) (illustrating Hezbollah control in Lebanon).

of the “host state’s” sovereignty⁹ and concomitantly reinforce its sovereignty¹⁰?

In this case the principles of territorial integrity¹¹ and self-defense¹² conflict with one another. We can deduce from these two fundamental principles that nothing but aggression can justify the use of force in self-defense. However, we suggest a different approach to self-defense. A state’s unwillingness or inability to act¹³ would lead to the possible use of force by the threatened state in self-defense. This use of force should be oriented towards the entities that threaten the national security of both the host state and the intervening state.

For example, state sovereignty yielded to self-defense after the United States was attacked on September 11, 2001. The United States resorted to military action only after the Taliban, which colluded with Al Qaeda, did not comply with the demand to turn over those responsible for the attacks and close terrorist bases. This use of force was warranted under Article 51 of the UN Charter against both Al Qaeda and the Taliban government,¹⁴ U.N. Security Council Resolutions 1368 and 1378.¹⁵

Corfu Channel established that states must police their territory in order to prevent it from being used in a manner contrary to the rights of other states.¹⁶ Consequently, sovereignty will give way to self-defense when actions taken by a state or extraterritorial actor constitute a threat to international peace and security.¹⁷

C. Preemption and Non-State Actors

The issue here is whether international law compels a state to wait to be first struck before it can defend itself, or whether it can strike *first* in self-defense. International law allows preemptive use of force.

This use of force must be in response to a planned attack by the other party which would be “overwhelming, leaving no choice of means and no moment for deliberation.”¹⁸ The UN Security Council indirectly legitimized Israel’s preemptive use of force during the 1967 Six Day War, as it was about to be attacked, by not condemning Israel’s actions as a violation of Article 2(4) of the UN Charter.¹⁹ This right to preempt aggression is not restricted solely to state-led aggression but has expanded to include other non-state actors that jeopardize the national security of a state or region.²⁰

D. Preempting Terrorism Prevents a Full-Blown War

Terrorism has often been depicted as morally acceptable as being an expression of revolt and a remedy against an “unbearable injustice” and finding excuses in “root causes”.²¹

Terrorism hardly occurs as a desperate act of last resort by angry individuals. Any terrorist act requires logistical

and material support, which is usually available to organized groups rather than individuals.²² Looking at the larger picture, we see that terrorism can be an asymmetrical war tactic.²³ Protracted warfare entails a three step military approach.²⁴ Terrorist tactics are used in the early stages of war where the main objectives are to psychologically wear down enemy forces and the civilian population.²⁵ This military strategy is flexible.²⁶

9. What is sought here is the restoration of the “host state’s” sovereignty, which was taken away by predatory actors, by way of military intervention. See The U.S. Army and Marine Corps Counterinsurgency Manual provides us insight into the consequences a weak state could bear when groups such as militias fill the power-vacuum created by a weak state’s inability to provide for basic security or other state functions. See *Departments Of The Army & Navy, Counterinsurgency* 3-112 (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf> [hereinafter *Counterinsurgency*]
10. Sovereignty has to be reinforced both internally and externally for a state to appear to be independent in its relations with other states. See, e.g., *Counterinsurgency*, *supra* note 10, at 6-2.
11. U.N. Charter Art. 2, 4.
12. U.N. Charter Art. 51.
13. Nations have a positive duty to prevent the commission of wrongs that would harm other nations, caused by parties located in their territory. *United States v. Arjona*, 120 U.S. 479, 484 (1887). *Bis repetita* See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, at. 9.
14. On October 7, 2001 the United States sent a letter to the U.N. Security Council stating it had taken action to prevent and deter future attacks. The United States defended its actions under U.N. Charter Art. 51, Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).
15. U.N. Security Council Resolution 1368 condemns the 9/11 terrorist attacks on the United States as acts of international terrorism and a threat to international peace, holding accountable those responsible for these acts and their abettors. U.N. SCOR Res. 1368, 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001); see also U.N. SCOR Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).
16. See *Corfu Channel*, 1949 I.C.J. at 22.
17. See U.N. SCOR Res. 1368, 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (“Determined to combat by all means threats to international peace and security caused by terrorist act.”) (emphasis in original).
18. Letter from Daniel Webster to Mr. Fox (Apr. 24, 1841), in 29 *British & Foreign State Papers* at 1138 (1857).

The first step is called the *strategic defensive* phase,²⁷ where insurgents use non-military forums to challenge the governmental authority (propaganda, disinformation, terrorism) because governmental forces could easily defeat them militarily,²⁸ while at the same time gaining legitimacy and popular support.

The second phase of this strategy, the *strategic stalemate*, is when guerilla warfare becomes more prevalent in military actions.²⁹ Insurgents will engage in “hit and run” operations inflicting enhanced losses on the government.³⁰ The third phase is the *strategic counteroffensive*.³¹ In this phase, the insurgents will level and possibly surpass the governmental military forces while engaging in conventional warfare tactics.³² At the same time, the insurgents will replace members of the governmental authority.³³ The following cases will familiarize the reader with different scenarios involving weak states.

E. Actual Scenarios and the Weak State Spectrum

The *Kolwezi case* is an example of a weak state dealing with a terrorist organization within its territory.³⁴ In May 1978, the Zairian despot Mobutu requested foreign assistance because Zaire lacked the power to enforce its will. France, with the help of Belgium, successfully mounted a military rescue operation which, together with local military forces, operated on Zairian territory.³⁵ What we can learn from this example is that there has to be an accommodation between sovereignty and the scope of military response. First, we can deduce that a state that is attempting to retake an area, even if it is conducting combat operations to achieve this goal, has more sovereignty than a state that has reached a *status quo* whereby it refrains from entering certain parts of its territory. Second, a state’s assertion of power shows strength. Therefore, intervening nations should take minimal action in the weak state. Another unanswered question is whether terrorism is a phenomenon that poses such danger as to allow infringement of a state’s sovereignty. Does the right of self-defense include acting in a state that does not support the terrorists but that lacks the power to stop them?

F. Terrorism and Conventional Warfare: are they Different or the Same?

After the Second World War, it seemed that the world entered an era of intensity conflicts.³⁶

Military historians have suggested that “new wars” evolve on a spectrum beginning with terrorism and insurgency and end with conventional war.

Yagil Henkin describes how the emergence of insurgency and terrorism has led many scholars to assume that the basic terminology and paradigms of war are obsolete;

however, Henkin convincingly argues that the two are in fact closely related.³⁷

In the case of the first Chechen war, Henkin illustrates that the terms conventional war and terrorism are interchangeable and that some wars begin as conventional, revert to terrorism and back again,³⁸ similar to Mao’s protracted warfare doctrine.³⁹ This article argues that this military phenomenon raises the right of self-defense but

19. U.N. Charter Art. 2, 4.

20. The inherent right to self-defense, as discussed in the above-mentioned article, does not appear to restrict the right to attacks originating from nation states; it mentions armed attacks in general.

21. “The same clarity enabled the Allies to root out Nazism in the twentieth century. They did not look for the ‘root cause’ of piracy or the ‘root cause’ of Nazism . . . because they knew that some acts are evil in and of themselves.” Benjamin Netanyahu, *Fighting Terrorism: How Democracies Can Defeat The International Terrorist Network* (2001). Prince Bandar bin Sultan bin Abdulaziz Al-Saud, A Diplomat’s Call for War, *Saudi-U.S. Relations Information Service*, June 6, 2004, available at <http://www.susris.com/2004/06/06/a-diplomats-call-for-war-prince-bandar-bin-sultan-bin-abdulaziz-al-saud/> (last visited on October 15, 2013) (“[I]f we deal [with them] hesitantly, in hope that [the terrorists] are Muslim youths who have been misled, and that the solution [to the crisis] is that we call upon them to follow the path of righteousness, in hope that they will come to their senses – then we will lose this war.”).

22. *Counterinsurgency*, *supra* note 10, at 3-103 (“Terrorist tactics do not involve mindless destruction nor are they employed randomly. Insurgents choose targets that produce the maximum informational and political effects.”).

23. *See id.* Terrorism has played an important role in conflicts known as protracted wars. The term “protracted war” belongs mainly to Chinese and South-East Asian twentieth century conflicts fought between ill-equipped armies and conventional forces, which is nowadays being used by Al Qaeda. *See generally id.* at 1-30.

24. *Id.*

25. *Counterinsurgency*, *supra* note 10, at 1-32.

26. *Id.* at 1-35.

27. *Id.* at 1-32 (“Insurgents use a variety of subversive techniques to psychologically prepare the populace to resist the government or occupying power. These techniques may include propaganda, demonstrations, boycotts, and sabotage”).

28. *Id.*

29. *Id.* at 1-33.

that this right and specific actions should be exercised gradually and with caution.

G. The Right to Self-Defense

Article 2(4) of the UN Charter states that: “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....”⁴⁰ However, the Charter also allows for an exception in the case of self-defense in Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations [...]”⁴¹

Assistance to a rebel organization violates the territorial integrity or political independence of the affected country.⁴² The above prohibition was addressed in the Declaration on Principles of International Law and Friendly Relations which banned not only direct assistance to rebel forces but also actions carried out from its territory.⁴³

We find a similar notion in the United Nation General Assembly’s resolution that defines “aggression.”⁴⁴ The International Court of Justice (“ICJ”) defined assistance to insurgents as “directing or authorizing” action, thereby setting a very high standard for defining assistance.⁴⁵ The 9/11 attacks strengthened the understanding that an attack carried out by an organization that is not a state can fall under the definition of an armed attack under Article 51.⁴⁶ This lent legitimacy to U.S. operations in Afghanistan.⁴⁷ The fact that terrorism is a phase in a process that ends in conventional war leads to the question of anticipatory self-defense. In the case of Afghanistan, the actual hostilities began when the terrorist organization started to attack.

States are also allowed to act in self-defense to protect civilians who are attacked on foreign soil. Such actions - like the Israeli operation to free hostages who were taken to Entebbe - are justified under Article 51,⁴⁸ or under customary law.⁴⁹

The final basis for the claim of self-defense in the weak state scenario is that international terrorism calls for reconceptualizing traditional definitions. The idea that conventions refer to non-state actors proves beyond any shadow of a doubt that international jurists are acknowledging the changing reality.⁵⁰

The goals of tactics are to inflict damage on the terrorist organization militarily and bolster the weak state’s sovereignty. To do so there has to be a gradual development in the use of force beginning with mild action that, on the one hand, only slightly infringes the weak state’s sovereignty yet, on the other hand, serves as an incentive to act and regain control of areas held by terrorists.

H. Tactical Measures for a Weak State Scenario

a. Non-Kinetic warfare

By using electronic warfare, an enemy can attack intangible targets in cyberspace—like websites of banks, governments, and the media—and electronic infrastructure that will directly affect everyday life, like computer systems that control electric or water supplies. Non-kinetic warfare has been used by states to paralyze or destroy enemy communications (denial of service *etc.*) or infrastructure, in the way that Russia acted against Georgia in the 2008 conflict.⁵¹ Non-kinetic warfare allows an entity

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30. *See id.* at 1-33 (“Two recent examples are Moqtada al Sadr’s organization in Iraq and Hezbollah in Lebanon. Sadr’s Madhi Army provides security and some services in parts of southern Iraq and Baghdad under Sadr’s control. Hezbollah provides essential services and reconstruction assistance for its constituents as well as security”). *See generally id.* at 3-103 (“Guerrilla tactics, in contrast, feature hit-and-run attacks by lightly armed groups”).
 31. *Id.* at 1-34.
 32. *Id.* *See generally* Hew Strachan, “Strategy in the Twenty-First Century”, in *The Changing Character Of War*, 503–23 (Hew Strachan & Sibylle Scheipers eds., 2011).
 33. *See Counterinsurgency*, *supra* note 10, at 1-34 (“As it gains control of portions of the country, the insurgent movement becomes responsible for the population, resources, and territory under its control”).
 34. *See generally* Gregory Mthemba-Salter, *Natural Resource Governance, Boom And Bust: The Case Of Kolwezi In The Drc*, SAIIA Occasional Paper No 35, 10 (June 2009), available at http://www.saiia.org.za/images/stories/pubs/occasional_papers/saia_sop_35_mtehmibu_salter_20090626_en.pdf (last visited on October 15, 2013).
 35. *Id.*
 36. *See generally* MARTIN VAN CREVELD, *The Transformation Of War* (1991) (discussing low-intensity conflicts from the perspective of *military history*).
 37. Yagil Henkin, *Either We Win Or We Perish!: The History Of The First Chechen War 1994–1996*, 13–15, 515–43 (2007) (Hebrew).
 38. *See id.* at 198–215.
 39. *See generally* MAO TSE-TUNG, *On Guerrilla Warfare* (Samuel B. Griffith II trans., 1961) (2000).
 40. U.N. Charter Art. 2, 4.
 41. U.N. Charter Art. 51.
 42. *See* MALCOLM N. SHAW, *International Law*, 1042–44 (5th ed. 2003); Christopher Joyner, “The United States Action in Granada: Reflections on the Lawfulness of Invasion”, 78 *Am. J. Int’l L.* 131, 138 (1984).

to interfere in enemy actions dramatically yet with minimal risk. A major part of it is information warfare in cyberspace.⁵² This issue raises several questions primarily because non-kinetic warfare is a new method of warfare and its ramifications are not clear.⁵³

b. Blockade

A blockade is an action that prevents the free passage of goods to a specified area.⁵⁴ It draws its effectiveness both from its effects on the enemy's supply routes and its impact on the enemy's civilian population.

A blockade is considered an act of aggression—that much has been clearly stated by the UN general assembly.⁵⁵

In our scenario, we are dealing with a situation that involves the intervening force blockading an area in order to prevent the passage of material. The blockade in and of itself does not directly target the host state but affects it indirectly by halting ships and planes.

After the 9/11 attacks, the Security Council adopted resolution 1373 that dealt with the duty to stop the movement of terrorists by “effective border controls.”⁵⁶

Blockades that purport to deny access to food, water, medication, clothing or shelter are illegal. Such actions are prohibited under Article 54 in Protocol I.⁵⁷ The Israeli Supreme Court ruled in a similar way.⁵⁸

On this point, we introduce a different military option that has a more direct impact on sovereignty, namely, targeted killing.

c. Targeted Killing

“Targeted killing” is loosely defined as the premeditated and intentional use of lethal force against one or more individuals.⁵⁹ The legality of “targeted killings” is at the center of recent debates.⁶⁰ While there is consensus that targeted killing is a legitimate recourse in the war on terror,⁶¹ there are those who stress that some form of due process should be applied.⁶² Due process serves not only the internal needs of the rule of law but also offers protection to the host state's sovereignty. Emanuel Gross has suggested that a constitutional model is well equipped to deal with the war on terror.⁶³ He suggests that counterterrorism measures should be subjected to international standards, as well as domestic laws. Even if Prof. Gross does regard the war on terror as an exceptional circumstance, he does not suggest that international standards be set aside.⁶⁴ The Israeli Supreme Court tried to solve this problem by implementing an approach that classifies terrorists and their organizations as unlawful combatants for the purpose of international law.⁶⁵

d. Precision Guided Munitions

Precision-guided munitions (“PGMs”) are weapons that possess the ability to strike targets with a high degree of accuracy.⁶⁶

Current PGMs have unprecedented precision (e.g. Pave

Way bombs) which limits the risk of collateral damage. The potential offered by PGMs to reduce civilian collateral damage and intrusion on the host state's sovereignty make such munitions a weapon of choice while undertaking preventive and preemptive strikes against terrorist entities.

Conclusion

The reality of the twenty-first century demands a reexamination of sovereignty. The philosophical foundation of sovereignty laid down by political theories, placed a burden not only on the infringement of

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43. See Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 121 (Oct. 24, 1970).
 44. See Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex, U.N. Doc. A/Res/29/3314 (Dec. 14, 1974).
 45. See Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14 (June 27); see also Anthony D'Amato, “Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court”, 79 AM. J. INT'L L. 385 (1985); Thomas Franck, “Some Observations on the ICJ's Procedural and Substantive Innovations” 81 AM. J. INT'L L. 116 (1987).
 46. See U.N. SCOR Res. 1373, U.N. Doc S/RES/1373 (Sept. 28, 2001).
 47. See Ian Johnstone, “The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counterterrorism”, 43 *Colum. J. Transnat'l L.* 337, 366 (2005).
 48. See Mitchell Knisbacher, “The Entebbe Operation: A Legal Analysis of Israel's Rescue Action”, 12 *J. Int'l L. & Econ.* 57, 57 (1977–78). This option is relevant in light of the cooperation between the government of Uganda and the terrorists.
 49. See William V. O'Brien, “Reprisals, Deterrence and Self-Defense in Counterterror Operations”, 30 *Va. J. Int'l L.* 421, 443–44 (1990).
 50. An important field that discusses this change is the definitions of combatants. See, e.g., EMILY CRAWFORD, *The Treatment Of Combatants And Insurgents Under The Law Of Armed Conflict* (2010); ANICÉE VAN ENGELAND, *Civilian Or Combatant?: A Challenge For The 21st Century* (2011).
 51. John Markoff, “Before the Gunfire, Cyberattacks”, *N.Y. Times*, Aug. 13, 2008, www.nytimes.com/2008/08/13/technology/13cyber.html?em (last visited October 16, 2013).
 52. For a discussion on the definition of cyber warfare, see Arie J. Schaap, *Cyber Warfare Operations: “Development and Use Under International Law”*, 64 *A.F. L. Rev.* 121, 126–28 (2009).

sovereignty but also demanded an entity enjoying sovereignty to uphold a list of requirements. Failed states present a challenge to international jurists and there is no alternative but to engage in a revaluation of the doctrine of sovereignty. ■

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53. For example, measuring the collateral damage of non-kinetic attacks can be very difficult. See Jefferson D. Reynolds, "Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for Moral High Ground", 56 A.F. L. REV. 1, 96 (2005).
54. See AVI SHLAIM, THE UNITED STATES AND THE BERLIN BLOCKADE, 1948-1949: A STUDY IN CRISIS DECISION-MAKING 35 (1983).
55. See Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex, U.N. Doc. A/Res/29/3314 (Dec. 14, 1974), Art. 3(c); see also See Myres McDougal, "The Soviet-Cuban Quarantine and Self-Defense", 57 AM. J. INT'L L. 597 (1963); (discussing blockades further in the context of the Cuban Missile Crisis); Quincy Wright, "The Cuban Quarantine", 57 AM. J. INT'L L. 546, 553-63 (1963).
56. U.N. SCOR Res. 1373, 2(g), U.N. Doc. S/RES/1373 (Sept. 28, 2001).
57. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 54, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].
58. HCJ 9132/07 *Jaber Al-Bassiouni v. Prime Minister* [Jan. 30, 2008] (unpublished) (Isr.), www.elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf (last visited October 16, 2013); see also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *Customary International Humanitarian Law* 197-99 (Int'l. Comm. of the Red Cross ed., vol. 1 2005).
59. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, U.N. GAOR Hum. Rts. Council, 9, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), available at <http://www.refworld.org/docid/4c0767ff2.html> (last visited October 16, 2013) (attempting to define targeted killings).
60. See generally William C. Banks & Peter Raven-Hansen, "Targeted Killing and Assassination: The U.S. Legal Framework", 37 U. RICH. L. REV. 667, 748-49 (2003); David Kretzmer, "Targeted Killing of Suspected Executions or Legitimate Means of Defense?", 16 EUR. J. INT'L L. 171 (2005).
61. See generally THOMAS B. HUNTER, *Targeted Killing: Self-Defense, Preemption, And The War On Terrorism* (2007), available at <http://www.operationalstudies.com/mootw/Targeted%20Killing%20Research%20PaperOS.pdf> (last visited October 16, 2013).
62. See Amos Guiora, "Targeted Killing as Active Self-Defense", 36 Case W. Res. J. Int'l L. 319, 334 (2004).
63. Emanuel Gross, "The Struggle of a Democracy Against the Terror of Suicide Bombers: Ideological and Legal Aspects", 22 Wis. Int'l L.J. 597, 651-55 (2004).
64. Yigal Mersel, "Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era", 38 N.Y.U. J. Int'l L. & Pol. 67, 101 (2006).
65. See HCJ 769/02 *The Public Committee Against Torture in Israel v. Government of Israel* (2) IsrLR 459 [2006] 24-27 (Isr.), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf (last visited October 16, 2013).
66. See generally ROWLAND F. POCKOCK, *German Guided Missiles Of The Second World War* (1967) (noting the history of the development of these weapons).

No Impunity for Genocide: Israel's Contribution to the Rule of Law in the Balkans

The Extradition of Aleksandar Cvetković from Israel to Bosnia and Herzegovina for Alleged Involvement in the Srebrenica Genocide

Tal Werner-Kling

Introduction

The Israel Police officers knocked on Aleksandar Cvetković's door on January 18, 2011. Cvetković, a former soldier in the Bosnian-Serb army, had immigrated to Israel in 2006 with his family and acquired Israeli citizenship through his marriage to a Jewish woman. Following a request from Bosnia and Herzegovina (BiH) in August 2010, to extradite Cvetković on account of his alleged participation in the massacre of hundreds of Bosnian Muslim men at the Branjevo farm near the Bosnian town of Srebrenica on July 16, 1995, he was arrested in Israel for the purpose of his extradition.

Upon his arrest in Israel, and in accordance with an order signed by the Minister of Justice,¹ the Department of International Affairs at the State Attorney's Office, submitted a petition to the Jerusalem District Court, requesting that Cvetković be declared extraditable for the crime of genocide, for prosecution in the War Crimes Chamber in the Court of BiH (WCC). On August 1, 2011, the District Court accepted the State's petition and declared Cvetković extraditable.² This decision was upheld by the Supreme Court, sitting as a Court of Criminal Appeals, on November 29, 2012.³ The Minister of Justice subsequently issued an order for Cvetković's extradition,⁴ although his extradition was postponed following a petition filed by Cvetković for judicial review of the Minister's decision, which was denied on July 21, 2013.⁵ Cvetković was extradited to BiH on August 15, 2013.⁶

While Israel's strong historic commitment to the fight against impunity for genocide was reflected shortly after its establishment in 1948 by becoming one of the first states to ratify the Genocide Convention in 1950 and to implement it in domestic legislation,⁷ as well as in the precedent-setting trial of Adolf Eichmann in 1961,⁸ the Cvetković case in 2011 was the first time that Israel was called upon to extradite a person for the crime of genocide. This article will describe the extradition proceedings

against Cvetković, focusing on key issues that were considered by the Israeli courts.

The Srebrenica Massacre

BiH declared independence from the Yugoslav Republic in early 1992 with the support of its Muslim and Croat populations. Strong opposition to the move from the Bosnian-Serb minority led to the Republika Srpska being declared as an independent Bosnian-Serb Republic. Ethnic tensions between the various populations rose to a boiling point leading to the outbreak of the Bosnian War.⁹

The eastern Bosnian town of Srebrenica, where the majority of the population was Muslim, is located in an area near the border with Serbia that was of strategic interest to the Bosnian-



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1. The Minister of Justice may order the wanted person to be brought before the District Court in accordance with Section 3 of the Extradition Law 5714-1954 (hereinafter – the Extradition Law).
 2. ExC (Jerusalem) 32196-01-11 *Attorney General v. Cvetković*, 1.8.11 (hereinafter – ExC Cvetković).
 3. Cr.App. 6322/11 *Aleksandar Cvetković v. Attorney General*, 29.11.12 (hereinafter – Cr.App. Cvetković); the Supreme Court also rejected Cvetković's request for a further hearing on the case, see PFH 9240/12 *Aleksandar Cvetković v. The State of Israel*, 17.2.13 (hereinafter – PFH Cvetković).
 4. The Minister of Justice may order the extradition of a person who was declared "extraditable" in accordance with Section 18 of the Extradition Law.
 5. HCJ 2028/13 *Aleksandar Cvetković v. Justice Minister*, 21.7.13.
 6. Reuters, 'Israel Extradites Bosnian Serb for Trial over Srebrenica Massacre', 15.8.13, available at: <http://www.reuters.com/article/2013/08/15/us-israel-bosnia-extradition-idUSBRE97E0SG20130815> (last visited November 7, 2013).

Serbs. Under the control of Muslim forces, Srebrenica formed an enclave within Serb-held territory, and was declared a “safe area” by the UN Security Council in April 1993.¹⁰ During 1995, fighting around Srebrenica intensified, and on July 11, 1995 the town fell under the control of Bosnian-Serb forces, leading many Bosnian-Muslims to flee and seek refuge in a nearby UN compound. After deliberations with UN commanders, Bosnian-Serb forces took over the UN camp and separated Muslim men aged 17 to 65 from the women, children, and elderly. While the latter were transferred to Bosnian-Muslim-held territory, the men in the camp, and others who had either surrendered to Serbian forces, or were caught while fleeing the area, were concentrated and transferred to sites around Srebrenica. The evidence brought before the International Criminal Tribunal for the former Yugoslavia (ICTY) showed that between July 13 to 22, 1995, Bosnian-Serb forces acting upon orders of their high command, systematically executed between 7,000 and 8,000 people, mostly men. These executions took place in a number of sites around Srebrenica, including the Branjevo farm.

The BiH extradition request for Cvetković elaborated on his alleged actions in the course of these horrific events. As a soldier in the 10th Sabotage Detachment of the Bosnian-Serb Army, Cvetković - together with 7 other soldiers - was alleged to have participated in the execution of 1,000 to 1,200 Bosnian-Muslim men in the Branjevo farm on July 16, 1995. The victims, who were brought to the farm by buses, some of them cuffed and blindfolded, were positioned in front of the soldiers and shot with firearms. Afterwards, the soldiers searched for survivors and killed them. According to two of his peers, Cvetković was dissatisfied with the pace of the executions at a certain point during the incident, and suggested the use of an M-84 machine gun.

Extradition Proceedings before the Israeli Courts

Cvetković’s legal defense raised a number of legal arguments before the Israeli courts to challenge the extradition request from BiH. For reasons of space, this article will focus on only two of the issues that were considered by the courts: first, Cvetković’s argument that his extradition to BiH would violate Israel’s public order and second, whether the evidence presented to the court proved the required *mens rea* for the crime of genocide.

A. Conditions for extradition and the public order restriction

To enable extradition from Israel, the State authorities must satisfy each of the general conditions for extradition, as enumerated in Section 2 of the Extradition Law: (i) that an extradition agreement between the two countries exists;¹¹ (ii) that the crime for which extradition is requested is a criminal offence in both countries (the

principle of “double criminality”);¹² and (iii) that there is reciprocity in the extradition relations between the two countries.¹³ Beyond those conditions, Section 2B of the Extradition Law provides various restrictions which may hinder extradition.¹⁴ Among these restrictions, Section 2B(a)(8) provides that a requested person shall not be extradited if this would violate Israel’s “public order”. This particular restriction is regularly cited by the defense in extradition cases as a residual clause to cover a wide variety of legal arguments.¹⁵

Citing the “public order” restriction, Cvetković argued that the conditions in Bosnian prisons were such that his safety could not be guaranteed. The Israeli courts took note of the concerns, but were not persuaded in view of the well-established jurisprudence according to which the public order restriction had to be interpreted narrowly (requiring concrete concerns of unlawful violations against the defendant as opposed to general allegations),¹⁶ and because it was possible to mitigate those concerns by means of receiving assurances for Cvetković’s safety and well-being from the Bosnian authorities.¹⁷

7. Israel signed the Genocide Convention on 17.8.49 and ratified it on 9.3.50; The Israeli law on the Prevention and Punishment of the Crime of Genocide – 1950, entered into force on 7.4.50.
8. William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26 *Leiden Journal of International Law* 667.
9. U.N. GAOR Report of the Secretary-General pursuant to General Assembly resolution 53/35: The Fall of Srebrenica, A/54/549, 15.11.99.
10. U.N. SCOR Res. 819, S/RES/819, 16.4.93.
11. Section 2A(a)(1), Extradition Law.
12. Section 2A(a)(2), Extradition Law; acts of genocide are criminalized in both countries under Section 1 of the Law on the Prevention and Punishment of the Crime of Genocide – 1950 (Israel); and Section 171 in conjunction with Section 180 of the Criminal Code (BiH).
13. Section 2A(b), Extradition Law.
14. Section 2B, Extradition Law.
15. Common arguments against extradition include, *inter alia*, concerns for the safety of the extradited person in the requesting state; claims that extradition would violate due process rights of the extradited person due to differences in substantive and procedural laws, heavier penalties in the requesting state than the custodial state, and undue delay.
16. ExC Cvetković, *supra* note 2, para. 20; Cr.App. Cvetković, *supra* note 3, para. 30.
17. ExC Cvetković, *supra* note 2, para. 22; Cr.App. Cvetković, *supra* note 3, para. 35.

The Israeli courts also rejected Cvetković's argument that the Bosnian justice system failed to conduct fair trials or to comply with due process standards. In reaching this conclusion, the courts relied on information presented by the State, including statements by ICTY officials and the fact that the United States, Netherlands, Croatia, Serbia and Spain had all extradited fugitives to BiH, among them two soldiers who had also been involved in the massacre in Branjevo farm.¹⁸ The courts also dismissed claims relating to differences between the Israeli and Bosnian justice systems.¹⁹

The District Court additionally noted the universal moral values and humanitarian principles violated by the alleged crimes, and the dire consequences for Israel which could follow a decision not to extradite, including: damage to Israel's foreign relations; the risk of Israel becoming a refuge for offenders; impairing the right of a State to prosecute persons who allegedly committed criminal offences in its territory; and thwarting the purposes of extradition. The court also accepted the State's argument that in a case involving a crime of such gravity for which ensuring accountability was recognized as a fundamental national interest, declining an extradition request would in fact *harm* the public interest.²⁰

The courts concluded that the public order restriction did not prevent the extradition of Cvetković to BiH in this case, but set two terms for Cvetković's extradition: (i) incarceration under supervision and in premises that were isolated from the general prison population; and (ii) frequent consular visits by Israeli representatives.²¹

At the defense's request, the District Court also made the extradition conditional, upon a guarantee that the Bosnian court would comply with a future decision of the European Court of Human Rights (ECtHR) on whether the BiH's sentencing policy violated its obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights.²² However, the Supreme Court removed this condition, accepting the State's argument that a court hearing an extradition case could not fetter the discretion of a foreign court, and that setting such a condition was unnecessary, since BiH was obligated to follow the instructions of the ECtHR.²³

B. Evidentiary threshold and the mens rea for genocide

In support of the extradition request, the BiH authorities attached voluminous materials consisting of general materials regarding the Srebrenica massacre, as well as specific evidence relating to the events which had taken place in the Branjevo farm, including testimonies and statements of soldiers from the 10th Sabotage Detachment and victims who had survived the massacre. The courts found that the evidence satisfied the standard of proof

required in order to declare a person extraditable with respect to both the objective and subjective elements of the crime of genocide.²⁴

i. Standard of proof in extradition cases

The standard of proof required to declare a person extraditable under Section 9 of the Extradition Law, requires evidence that would have been sufficient to try the person in Israel; namely, that there is a "basis for the indictment".²⁵ The Supreme Court jurisprudence on extradition has established that extradition proceedings are not a criminal trial, where the weight and credibility of evidence and witnesses are considered in order to determine guilt or innocence.²⁶ Thus, the standard of proof in extradition proceedings is lower than the standard of proof of "beyond reasonable doubt" that is required for a criminal conviction. Interestingly, the Supreme Court in this case observed that the depth and detail of the deliberations on the evidence far exceeded what was required in the context of extradition proceedings.²⁷

ii. The crime of genocide

Genocide is regarded as "a denial of the right of existence of entire human groups", that "shocks the

18. ExC Cvetković, *supra* note 2, para. 28; Cr.App. Cvetković, *supra* note 3, para. 34.

19. ExC Cvetković, *supra* note 2, para. 30; Cr.App. Cvetković, *supra* note 3, para. 33.

20. As noted by the Court in Cvetković, "bringing a person who is charged with genocide to justice ... is a fundamental interest and moral imperative of the State of Israel"; see ExC Cvetković, *supra* note 2, para. 23.

21. ExC Cvetković, *supra* note 2, para. 25; Cr.App. Cvetković, *supra* note 3, para. 35; Following the decision of the District Court and in the course of the appeal proceedings before the Supreme Court, the Ministry of Justice of BiH transmitted several letters in which it undertook to implement necessary measures to safeguard Cvetković's rights and well-being and to allow him to receive frequent consular visits.

22. ExC Cvetković, *supra* note 2, para. 91; Art. 7(1), European Convention on Human Rights (1950); Art. 15, International Covenant on Civil and Political Rights (1966).

23. Cr.App. Cvetković, *supra* note 3, judgment of Justice 24.

24. ExC Cvetković, *supra* note 2, para. 61; Cr.App. Cvetković, *supra* note 3, judgment of Justice Joubran, para. 29.

25. Section 9(a), Extradition Law.

26. e.g. Cr.App 8010/07 *Haziza v. The State of Israel*, 13.5.09, para. 17; Cr.App. 318/79 *Angel v. The State of Israel*, 25.2.80, para. 5; in comparison to many countries, the evidentiary threshold required in extradition proceedings in Israel is particularly high.

27. Cr.App. Cvetković, *supra* note 3, para. 12.

conscience of mankind”. Genocide was first identified as an international crime in response to the Holocaust.²⁸ The crime of genocide is committed through acts that are listed in Article 2 of the Genocide Convention, that focus on the physical destruction of a protected group (including, *inter alia*, killing and causing serious bodily or mental harm). However, only such acts that are committed with specific intent to destroy, in whole or in part, a protected group may lead to criminal culpability.²⁹ This specific intent distinguishes the crime of genocide from other international crimes and underlies the particular seriousness of genocide, often referred to as “the crime of crimes”. Due to its exceptional severity, the prevention of and punishment for this crime is considered a peremptory norm of international law from which no derogation is allowed, and which creates *erga omnes* obligations on all states.³⁰

The courts dismissed Cvetković’s factual claim that the massacre in the Branjevo farm was an isolated incident of execution of war prisoners, which did not amount to genocide.³¹ Among other things, the courts referred to judgments of the ICTY and the WCC, which established that acts of the Serbian forces after the fall of Srebrenica, including the Branjevo farm massacre, were acts of genocide.³²

With respect to Cvetković’s part in these events, he admitted that he had been present at the Branjevo farm on the day of the massacre, but claimed that he had merely served as a driver and had not participated in the killings or witnessed them. However, the courts found that there was more than enough evidence to establish Cvetković’s active participation in the massacre.³³ In this context, the courts noted that since the purpose of the extradition proceedings was to examine whether the evidence justified further inquiry by a competent court, arguments concerning contradictions between witnesses, the weight of the evidence and so forth had to be heard during the criminal trial and not in the course of the extradition proceeding.³⁴

iii. *Mens Rea*

The mental elements of the crime of genocide are comprised of **awareness** of the genocidal objective and **intent** to commit the underlying prohibited act. The requisite *mens rea* also involves a specific intent “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”³⁵

Assessing the mental element of an accused is a difficult task that should be conducted by an adjudicator of fact, who hears the criminal trial against the accused. This is particularly true with regard to the specific intent to commit genocide, which is frequently the most complex issue in a case of alleged genocide. By its nature, genocide

is a crime that can be, and indeed has been, perpetrated through the collective violent acts of hundreds, thousands, or tens of thousands of direct perpetrators, which together materialize into the crime of genocide. The crime will usually be planned by high ranking political and military leaders who are not the direct perpetrators of the crimes. This creates challenges with holding the lower level perpetrators accountable for a crime of this scale and complexity, given that they may not be aware of the details of the overall plan, or the genocidal scheme.³⁶ Indeed, the issue of proving genocidal intent was at the crux of the dispute between the State and the defense.

The District Court accepted the State’s argument that it was not required to prove that Cvetković knew each detail of the genocidal plan, and found that there was

28. G.A. Res. 96(1), ‘The Crime of Genocide’, U.N. GAOR (11.12.1946).

29. The standard definition of the crime is found in the 1951 Genocide Convention and is incorporated into the Statutes of the ad-hoc International Criminal Tribunals and the International Criminal Court, as well as into the domestic legislation of many states, including Israel and BiH. See: Art. 2, Convention on the Prevention and Punishment of the Crime of Genocide (1948); Art. 4(2), Statute of the International Criminal Tribunal for the Former Yugoslavia; Art. 2, Statute of the International Tribunal of Rwanda; Art. 6, Rome Statute of the International Criminal Court.

30. Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* 2nd edition (2010), p. 204.

31. ExC Cvetković, *supra* note 2, paras. 63-64; Cr.App. Cvetković, *supra* note 3, paras. 15-19.

32. ExC Cvetković, *supra* note 2, para. 63, referring to: *Prosecutor v. Krstić*, Judgment, Trial Chamber, IT-98-33-T, 2.8.01; *Prosecutor v. Popović et al.*, Judgment, Trial Chamber, IT-05-88-T, 10.6.10; *Prosecutor’s Office of BiH v. Stupar et al.*, First Instance Verdict, X-KR-05/24, 29.7.08; *Prosecutor’s Office of BiH v. Trbić*, First Instance Verdict, X-KR-07/386, 16.10.09.

33. ExC Cvetković, *supra* note 2, para. 65; Cr.App. Cvetković, *supra* note 3, para. 14.

34. ExC Cvetković, *supra* note 2, para. 68; Cr.App. Cvetković, *supra* note 3, para. 24.

35. For a general overview, see Antonio Cassese et al., *International Criminal Law: Cases and Commentary* (2011), p. 209 *et seq.*; Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2010), p. 220 *et seq.*; Alexander Greenwalt, ‘Rethinking Genocidal Intent: The Case for a knowledge-Based Interpretation’ (1999), 99 *Colum. L. Rev.* 2259, pp. 2279-2282.

36. *Id.*

sufficient evidence to prove that Cvetković had been aware that the Branjevo farm massacre was not an isolated incident, but rather part of the genocide of the Muslim group at Srebrenica, and that his acts would realize the genocidal plan. In this regard, the court noted that it was possible to utilize the presumption that a person is aware of the results of his actions, namely that Cvetković had known that killing the able-bodied men would impact the survival of the group as a whole.³⁷

The court noted the general difficulties associated with proving specific intent, which was “a matter of the heart” and held that it could therefore be assisted by external circumstantial evidence. The court found that there was sufficient evidence to establish specific intent to commit genocide: shooting hundreds of Muslim men, most of them cuffed and wearing civilian clothes, over a period of ten hours, in a systematic and organized fashion, indicated the desire or intent to cause the prohibited result: the destruction of the Muslim “group” at Srebrenica. The court also noted the evidence which showed that Cvetković had suggested using machine guns in order to speed up the executions.³⁸ Additionally, the court utilized the “presumption of intent”, that a person intended the natural results of his conduct.³⁹

The Supreme Court affirmed that Cvetković had the requisite awareness, again noting that it was not necessary to show that he had known every detail of the genocidal scheme or had taken part in its design, but only that he had been aware of the principles of that plan. The Court added that demanding otherwise would be too high an obstacle for the extradition of those who were not in the high-command, given that those who followed orders in the field were usually not aware of all of the details of the operation.⁴⁰ In a similar vein, the Court noted the relative difficulty of proving the element of specific intent to commit genocide, and all the more so when the accused was a soldier who followed orders, as opposed to political or military leaders who publicly expressed their intentions.⁴¹ Nevertheless, the Supreme Court utilized the presumption of intent, concluding that the circumstantial evidence in the case was sufficient to establish that Cvetković had the required intent. The Court emphasized that it based its conclusion, first and foremost, on the number of victims of the massacre in the farm – between 600 and 1,200 persons; on the fact that the evidence did not show that Cvetković had objected, at any stage, to the operation or to participating in it; and that he had even tried to speed up the execution.⁴² The defense argued that the presumption of intent should not be invoked given that the Muslim group in Srebrenica had not been destroyed. In other words, it could not be said that Cvetković had “intended the natural results of

his conduct” since the “result” did not occur. The Court expressed its discomfort with this argument and stressed that the failure to complete the genocidal scheme did not prevent the Court from finding that the required mental element existed.⁴³ The Supreme Court emphasized that its conclusions regarding the existence of a mental element had no bearing beyond the contours of the extradition process, whereas definitive findings could only be reached after an in-depth analysis of the evidence in the course of the criminal trial in the requesting state.⁴⁴

Following the decision of the Supreme Court, the defense filed a petition for a further hearing, arguing that the Supreme Court's judgment altered the Court's settled jurisprudence on the mental element of the crime of genocide, which justified further consideration by an expanded panel of judges. President of the Supreme Court, Asher Grunis, dismissed the petition, concluding that no further deliberations were required.⁴⁵

iv. The implications of the WCC's judgment against Cvetković's peers

The Supreme Court also considered whether a recently rendered judgment of the WCC supported the defense's arguments concerning the insufficiency of evidence of genocidal intent. In its arguments before the District Court, the defense noted that two of Cvetković's peers, Dražen Erdemović and Marko Boškić, had been convicted of crimes against humanity (in the ICTY and WCC, respectively) and not genocide, and argued that this indicated that the soldiers had not had the requisite mental element.⁴⁶ However, the State pointed out that Erdemović – the only member of the 10th Sabotage Detachment Unit to be tried by the ICTY – had signed a plea agreement and subsequently had become a prosecution witness,⁴⁷ and that Boškić had entered into a plea agreement with the prosecution authorities of BiH.⁴⁸ The defense also

37. ExC *Cvetković*, *supra* note 2, para. 87.

38. *Id.*, para. 88.

39. *Id.*, para. 89.

40. Cr.App. *Cvetković*, *supra* note 3, para. 24.

41. *Id.*, para. 25.

42. *Id.*, para. 26.

43. *Id.*, para. 27.

44. *Id.*, paras. 22, 26.

45. PFH *Cvetković*, *supra* note 3.

46. ExC *Cvetković*, *supra* note 2, para. 77.

47. *Prosecutor v. Erdemović*, Indictment, IT-96-22, 22.5.96.

48. Court of Bosnia & Herzegovina, 'Marko Boškić sentenced to 10 years imprisonment', 19.7.10, available at: <http://www.sudbih.gov.ba/?id=1726&jezik=e> (last visited November 7, 2013).

argued that since BiH had requested extradition *only for genocide*, extradition would not be possible without proving the mental element to a sufficient degree.⁴⁹ At the time the District Court judgment was rendered, the WCC was conducting proceedings against four other soldiers who had participated in the massacre (Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja). On June 18, 2012, the Trial Court of the WCC acquitted them of genocide charges, holding that it was not proven that they had had specific intent to commit genocide, and convicting them of persecution by murder, as a crime against humanity.⁵⁰ The defense notified the Israeli Supreme Court of this development. However, the Supreme Court found that WCC's judgment did not affect its decision, given that the evidentiary threshold required for extradition was lower than the one required for conviction.⁵¹

Conclusion

Eighteen years after the Srebrenica Genocide, Aleksandar Cvetković is finally in the custody of the Bosnian authorities and will stand trial for his involvement in these horrific events.⁵² Cvetković joins other soldiers in his unit, who were held accountable for their crimes. This result, which would not have been possible without excellent international cooperation, sends a clear and resounding message that there is no impunity for genocide. Israel can be proud of its contribution to this cause, which signals its unshakeable commitment to fight against impunity for the most serious crimes of concern to the international community. ■

Tal Werner-Kling is a senior attorney in the Office of the State Attorney in Israel. She was the head of the extradition team in the Department of International Affairs at the Office of the State Attorney, and was one of the attorneys who represented the State in the extradition case against Aleksandar Cvetković. The author wishes to thank Mr. Tomer Haramaty for his assistance in writing this article.

49. ExC Cvetković, *supra* note 2, para. 78.

50. Court of Bosnia & Herzegovina, "Trial Verdict pronounced in the case v. Franc Kos et al.", 18.6.12, available at: <http://www.sudbih.gov.ba/?id=2507&jezik=e> (last visited November 7, 2013); the decision was upheld on appeal, *see* Court of Bosnia & Herzegovina, 'K.F. ET AL. CASE INFORMATION', available at: <http://www.sudbih.gov.ba/?opcija=predmeti&id=316&jezik=e> (last visited November 7, 2013).

51. Cr.App Cvetković, *supra* note 3, para. 38; in this context, Justice Joubran noted that the judgment in *Kos et al.* indicated that "the WCC carefully examined the evidence before it, and it does not strike me as a procedure that is unfair, as the appellant asked us to determine."

52. On September 12, 2013, the WCC confirmed the indictment against Cvetković, charging him with genocide. *See* Court of Bosnia & Herzegovina, 'Indictment Confirmed in the Case v. Aleksandar Cvetković', 13.9.13, available at: <http://www.sudbih.gov.ba/?id=2899&jezik=e> (last visited November 7, 2013).



הארגון הבינלאומי של עורכי-דין ומשפטים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

NGO: IAJLJ - The International Association of Jewish Lawyers and Jurists
Representative delivering the statement: Adv. Tom Gal

Human Rights Council 24th Session Item 3 – General Debate

Thank you Mr. President,

The report of the Secretary-General regarding the administration of justice and protection of those deprived of their liberty has been presented. The International Association of Jewish Lawyers and Jurists wishes to address the failure to protect and administer justice. We wish to address the Egyptian Ambassador attending this Council and highlight Egypt's violation of these fundamental concepts. We wish to address States members of this Council and request them to act swiftly on the matter of Mr. Ouda Seliman Tarabin.

In its 63rd session, a year and a half ago, 12 long years after Mr. Tarabin's incarceration, the Working Group on Arbitrary Detention issued a decision declaring that Mr. Tarabin's detention was arbitrary and calling for his immediate release from Egyptian custody. In disregard of this, and despite several communications to the Egyptian representatives, Mr. Tarabin remains in an Egyptian prison. Recently, we delivered an urgent appeal to the Working Group, seeking the reaffirmation of its decision on Mr. Tarabin, a declaration that Egypt is in non-compliance with the above decision and is violating international law. We have not yet received a response.

Mr. Tarabin has been arbitrarily detained by Egyptian authorities since the year 2000. He is accused of having illegally crossed the border, despite using his Israeli passport, and espionage. He was sentenced in absentia to 15 years imprisonment by a military court, although he is not and was not military personnel. Mr. Tarabin had no access to a lawyer during his interrogation, nor during the course of his trial. He was not allowed to appeal his sentence or request a retrial. The diplomatic representative of his national country, Israel, was formally informed of his arrest and imprisonment only 4 years after his detention, in 2004. Mr. Tarabin's rights have been gravely violated, he was not offered a fair trial or legal counsel, he was not aware of the charges brought against him or the ensuing sentence. Egypt has clearly violated its obligations under international law, particularly Articles 9 and 14 of the ICCPR.

We urge this Council, the Working Group and other bodies responsible for the protection of those deprived of their liberty to ensure that Egypt fulfills its obligation. We ask you to ensure that justice is administered adequately and call on Egypt to release Mr. Tarabin at once.

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הארגון הבינלאומי של עורכי-דין ומשפטים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

NGO: IAJLJ - The International Association of Jewish Lawyers and Jurists
Representative delivering the statement: Adv. Tom Gal

Human Rights Council 24th Session Item 7 – General Debate

Thank you Mr. President,

The International Association of Jewish Lawyers and Jurists wishes to take advantage of the discussions under Item 7 to address UNRWA's operations in the so-called OPT. It is our view that it's work poses an obstacle to the on-going peace talks between the Israeli government and the Palestinian Authority. By preserving the refugee status of millions of Palestinians, UNWRA undermines its mandate and diminishes the human rights situation of the Palestinians.

UNRWA has been operating in the Middle East since 1950. It was established for the sole purpose of protecting Palestinian refugees fleeing from the Arab-Israeli conflict of 1948. At the time of its establishment, UNRWA's mandate applied to approximately 750,000 Palestinians. At present, UNRWA recognizes more than 5.5 million Palestinians as refugees. This is an unrealistic number that by itself poses an obstacle to the present peace-talks. Many of these Palestinian refugees live in the Gaza strip or in the West Bank under the Palestinian Authority's jurisdiction. UNRWA's work in these areas preserves the refugee status of many Palestinians, condemning them to a life of dependency and poverty. Moreover, UNRWA's resources, founded on generous donations of States, are dedicated to such preservation and as result, in fact, are relieving the Palestinian Authority from its responsibilities to protect the human rights of those Palestinians.

Therefore, we believe a transparent review of UNRWA's work should be conducted. Its mandate, agenda, allocation of resources and the parameters it applies to define who is a refugee eligible for protection should be evaluated. The review should also cover the assistance it lends to the Palestinian Authority and the de-facto Hamas government in the Gaza Strip in respect to refugees under their jurisdiction. Such scrutiny would strengthen UNRWA's reliability. It would ensure transparency of funding and allocation of resources guaranteeing that these are used to support the Palestinian Authority and not relieve them of their duties. It would encourage adopting an up-to-date approach toward the Palestinian refugees issue so as to support the on-going peace process. Finally, as UNWRA's mandate resembles the UNHCR mandate, a thorough review would help set priorities for dealing with the continuing influx of millions of refugees originating from other Middle East conflicts, like that in Syria, who are in dire need of humanitarian aid.

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הארגון הבינלאומי של עורכי-דין ומשפטים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

NGO: IAJLJ - The International Association of Jewish Lawyers and Jurists
Representative delivering the statement: Adv. Tom Gal

Human Rights Council 24th Session Item 9 – General Debate

Thank you Mr. President,

Agenda Item 9 of this Council has been created for the prevention of all forms of racism and xenophobia. The International Association of Jewish Lawyers and Jurists would like to take the opportunity to discuss incidents of hate speeches, incitement to genocide and racism. These incidents have been reported. We have addressed them many times: in this Council and by written appeals. Nonetheless, these incidents have not been properly discussed.

In the 23rd session of this Council the issue of neo-Nazism was considered by the Special Rapporteur, however the report on the matter did not specify countries or incidents that should be tackled. No addendum to the report was published and so we are left with the mere hope that States will address incidents of neo-Nazism, racism and xenophobia as a matter of good faith, though no effective monitoring is provided. Sadly, in the months that have passed since the 23rd session, incidents of neo-Nazism, racism and xenophobia have continued to occur on a daily basis. Hate speech is published and threats are made based solely on nationality, ethnicity, religion or race. Therefore, we ask the Special Rapporteur to revise his latest report on neo-Nazism so as to include relevant practices that should be monitored closely.

As a final note, we were particularly amazed and concerned about recent statements made by Iran and Syria against the background of the conflict in Syria and the possibility of a military intervention. Surprisingly, both states chose to threaten a military attack against Israel, in the event of such military intervention. These threats were not based on Israel's support for such military intervention; they were made solely because of the nationality and religion of those living in Israel. These threats are yet another link in the long chain of pronouncements made by these states, inciting to eliminate the State of Israel and its Jewish inhabitants. However, what surprised us most was the indifference with which this incitement was treated; no state found it important to condemn these threats and the behavior of Syria and Iran. Therefore, we again call upon the Special Rapporteur and this Council to ensure that these and other recent threats are properly addressed by conducting country visits and publishing a report on that matter.

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THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

November 22, 2013

Your Excellency
Secretary-General of the United Nations
Honorable Ban Ki Moon,

Your Excellency,

Racist and Genocidal Remarks by Iran's Head of State

I write to you on behalf of the International Association of Jewish Lawyers and Jurists, a Category II NGO at the UN, whose members are lawyers, judges, judicial officers and academic jurists in over 50 countries.

I wish to communicate our members' deepest anxiety and outrage at remarks made by the Iranian Supreme Leader Ayatollah Khamenei during a Nov. 20th speech broadcast live on Iran's Press TV, as well as content published subsequently on the Ayatollah's Twitter feed.

During the speech, the Ayatollah described Israel (which he refers to as "the Zionist Regime") as a "rabid dog" and said that "Zionist officials cannot be called humans, they are like animals...". He also said "the Israeli regime is doomed to failure and annihilation".

On November 21st, the Ayatollah's Twitter feed displayed an image of what purports to be a dog employed by the Israeli military pulling at the arm of an Arab woman, with the caption in English: "Israel is the sinister, unclean rabid dog of the region".

The Ayatollah's depiction of Israeli Jews as sub-human, evil and dirty is a typical manifestation of anti-Semitism and racism in its vilest form and is reminiscent of the worst examples of such phenomena from the last century.

In addition, by directly and publicly inciting for the destruction, in whole or in part, of a national, ethnic, racial or religious group, the Iranian Head of State is guilty of incitement to the crime of Genocide under the *Convention on the Prevention and Punishment of the Crime of Genocide as well as under the Rome Statute of the International Criminal Court*.

As an organization which was created, *inter alia*, to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" (Preamble – UN Charter), it is incumbent upon the UN to respond forcefully and unequivocally in rejecting such rhetoric by the leader of one of its member states.

In the words of the Irish Statesman, Edmund Burke:

"The only thing necessary for the triumph of evil is for good men to do nothing."

Thus, we call upon Your Excellency to condemn the abovementioned statements of Ayatollah Khamenei in the strongest terms and to publish the condemnation as widely as possible. We also urge Your Excellency to raise the matter before the Security Council with a view to imposing possible sanctions and referring the charge of Incitement to Genocide to the International Criminal Court.

Yours sincerely,

Irit Kohn, Adv.
President



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IAJJ Hague Conference, 2013 - Resolutions

The International Association of Jewish Lawyers and Jurists (IAJLJ) Conference on "Three Aspects of International Justice at The Hague: ICJ, ICC and ICTY" was held at the Peace Palace in The Hague on October 9-13, 2013. The venue of the Conference was symbolically chosen, due to the critical issues on the agenda of the IAJLJ, which transpire at The Hague. The Conference organizers and participants, lawyers, jurists, academicians and practitioners representing Governments, NGOs and independent experts, hailing from many different states, as well as local observers, are grateful to the Director of the Peace Palace Library, Mr. Jeroen Vervliet, for hosting, under welcoming auspices, this unique international event.

The IAJLJ, **committed** to protecting Jewish rights and universal compliance with Human Rights principles; Exposed to the complexity of the issues, limitations, conflicting interests, and political climate affecting the functions of the ICJ, ICC and ICTY; **aware** of the impact of the ICC – high hopes, expectations and disappointments on various continents;

Following two days of scholarly judicial presentations, the IAJLJ:

1. Urges the end to impunity for serious humanitarian crimes and welcomes the establishment of international institutions to prosecute war crimes, genocide and crimes against humanity. Noting that international criminal jurisprudence is in its early stages and that international criminal courts and tribunals are a recent form of intergovernmental institution, and

Noting that politicisation of prosecutions would undermine the legitimacy of international criminal courts and tribunals:

2. Encourages the further development of procedures and constitutional processes to ensure integrity and even-handedness in judicial decisionmaking. Such judicial procedures and processes should set out the usual guarantees of judicial conduct, including: codes of conduct, conditions for recusal, performance reviews, and public reporting.

3. Encourages the development of procedures for judicial oversight of the initiation of prosecutions.

Noting that national jurisprudence on international crimes is enriched by international tribunal decisions and vice versa,

4. Urges reciprocal communication of jurisprudence emerging in international criminal law across jurisdictions and its implementation across jurisdictions in all regions and across all levels. The IAJLJ observes that repeated questions of proper jurisdiction of the International Court of Justice arise in both its advisory and dispute resolution capacities. The Court's jurisprudence on these questions is particularly unsettled in relation to matters of armed conflict. Therefore, the IAJLJ

5. Encourages the adoption of jurisdictional doctrines, including the "political question" doctrine, that would entail judicial restraint in cases of ongoing conflict where the consent of states directly concerned is absent, and demurral in matters of international peace and security of which the Security Council is actively seized.

6. Urges the International Tribunals to cooperate, on the basis of positive shared complementarity, with the relevant national domestic prosecutorial and judicial authorities. The Conference raised urgent immediate questions, including "What, if anything, is being done regarding the slaughter of 120,000 civilians in Syria by a dictator ignoring international criminal law?" The Conference noted that Israel respects international institutions and believes in the ideals these institutions stand for. However, these institutions must respect facts, law and justice.

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צדק

ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory. [**ARAMAIC:** צדק (he was righteous), **SYRIAC:** זדק (it is right), **UGARITIC:** *šdq* (= reliability, virtue), **ARABIC:** *šadaqa* (= he spoke the truth), **ETHIOPIC:** *šadaqa* (= he was just, righteous)] Derivatives: צדקה **POST-BIBLICAL HEBREW:** alms, charity. Cp. **ARAMAIC** צדקתה (= justice). **PALMYRENE** צדקתה (= it is right). צדק 1. just, righteous. 2. pious.

After Ernest Klein, A Comprehensive Etymological Dictionary of the Hebrew Language for Readers of English. 1987: Carta/University of Haifa

Justice is one of the goals of the International Association of Jewish Lawyers and Jurists. Thus, the Association works to advance human rights everywhere, addressing in particular issues of concern to the Jewish people through its commitment to combat racism, xenophobia, antisemitism, Holocaust denial and negation of the State of Israel.

We invite you to join a membership of lawyers, judges, judicial officers and academic jurists in more than fifty countries who are active locally and internationally in promoting our aims.

As a new or renewing member, you will receive a subscription to *Justice* and a free, one-month trial subscription to The Jerusalem Post. You will be invited to all international conferences of the Association and may vote and be elected to its governing bodies. You may also have your name and other information appear in our online directory linked to our main website.

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