

From Nuremberg to The Hague:

Teaching from the Past - Challenges for the Future

Background: Making War More “Civilized”

Efforts to mitigate the impact of military conflicts extend well back into the 19th century. One turning point came with Henry Dunant’s experiences in Italy in 1859, when more than 30,000 dead and wounded were left untended or unburied after the battle of Solferino. Dunant did what he could to help the wounded and care for the dead on the battlefield, but his options were very limited. He then went on to advocate founding a neutral entity to care for the wounded – a desire that met with widespread support. The new organization, founded in 1863, would name itself the “International Committee of the Red Cross” (ICRC) in 1876. By August 1864, twelve countries had already adopted the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (the “First Geneva Convention”). But the Red Cross and Geneva Convention focused “only” on such casualties as wounded soldiers and prisoners of war, not the way in which war itself was waged (*ius in bello*) or the right to wage war (*ius ad bellum*).

Ten years later, at the Brussels Conference of August 1874, a group of countries entered into negotiations on the “Laws and Customs of War.” While the Brussels declaration failed to take effect for lack of adequate ratification, 25 years later the treaties based on it – the Hague Conventions of 1899 and 1907 – brought a breakthrough. The Hague Conventions on Land Warfare prohibited certain means and methods of waging war, and can be viewed as an attempt to civilize the very process of waging war itself. But though they established prohibitions, these international treaties still included no threat of penalties.

It was evident, not least of all from the crimes committed during World War I and their handling by the courts, that this approach still lacked the necessary enforceability. Apart from the fact that despite the terms of the Treaty of Versailles, Kaiser Wilhelm II was never called to account for the war crimes committed under his supreme command, more than a thousand other persons suspected of war crimes were never prosecuted. Of the 17 “Leipzig Trials” held from 1921 to 1927 and intended to punish war criminals at the instance of the Allies, seven ended in acquittals at the supreme court level after questionable proceedings.¹ Thus the law’s attempt to deal with the crimes of World War I failed. In the aftermath of World War II, it was in part because prosecution at the national level – in this case, in Germany –

¹ Cf. Hankel, Gerd: Leipziger Prozesse. Hamburg 2003. p. 97 ff. et passim. Cf. Safferling, Christoph: Lernen von Nürnberg. In: Rechtsgeschichte (RG). Vol. 14 (2009). pp. 150 f.

had proved unsuitable and inadequate that the Allies took over the task of prosecuting German war crimes themselves.²

World War II

The International Military Tribunal: The Nuremberg Trials

The Allies began considering prosecuting the war crimes and crimes against humanity committed by Germany and Japan no later than October 1941.³ In preparation for such proceedings, the United Nations War Crimes Commission (UNWCC) was founded in London on October 20, 1943.⁴ Ten days later, on October 30, the Allies issued the Moscow Declaration, announcing that one of the aims of the war was to prosecute war crimes. Under the declaration, war criminals were to be sent back to the countries where they had committed the crimes. Nevertheless, the Allies reserved the right to punish German crimes with no particular geographical localization by a joint decision of the Allies' governments.⁵ The specific prosecution of the principal war criminals was discussed at the London Conference that began on June 26, 1945.⁶ The Charter of the International Military Tribunal (IMT) that it adopted on August 8 of that year represented a breakthrough in the prosecution of principal German war criminals, as well as the founding of the IMT and a historical document of far-reaching significance. Under the Charter, the IMT was to be formed "for the just and prompt trial and punishment of the major war criminals of the European Axis."⁷ It was to prosecute crimes against peace, war crimes, and crimes against humanity.⁸

The International Military Tribunal was prompted by the idea that by prosecuting these crimes in proceedings under the rule of law, it would be possible to help safeguard human rights and peace. Criminal prosecution of wars of aggression was intended to strengthen the prohibition on war as a continuation of policy by other means.

Proceedings against the major war criminals were instituted in Berlin on October 18, 1945, with the Tribunal's receipt of the indictments.⁹ The defendants were 24 high-ranking

² U.S. Chief of Counsel Justice Robert H. Jackson expressly cited this failure in his Opening Statement at the Nuremberg Trials as a reason for establishing the International Military Tribunal.

³ Cf. inter alia Safferling, Christoph: Lernen von Nürnberg. In: Rechtsgeschichte (RG). Vol. 14 (2009). p. 151.

⁴ Cf. United Nations War Crimes Commission: History of the United Nations War Crimes Commission and the Development of the Laws of War. London 1947. pp. 112 ff., esp. 119. However, because of disagreement on the participation of individual Soviet Republics, the Soviet Union did not join the UNWCC. Cf. *ibid.*, pp. 158 f.

⁵ Moscow Conference, Joint Four-Nation Declaration of October 30, 1943, Statement on Atrocities. With express reference to the Moscow Declaration, U.N. Resolution 3/I of February 13, 1945, called for similar extraditions. Although the prosecution of war crimes was brought up at both the Tehran Conference (December 1943) and the Yalta Conference (February 1945), objectively nothing constructive was decided.

⁶ Cf. Jackson, Robert H.: International Conference on Military Trials. London 1945.

⁷ Art. 1 IMT Charter.

⁸ Art. 6 IMT Charter.

⁹ Cf. International Military Tribunal: Trial of the Major War Criminals before the International Military Tribunal. Official Collection. Vol. 1, Nuremberg 1947. (below: IMT Vol. 1). pp. 26 ff.

representatives of the Nazi regime, along with seven organizations.¹⁰ The trials were held in Nuremberg. The Opening Statement in Nuremberg on November 21, 1945, by Robert H. Jackson, U.S. Chief of Counsel at the IMT, still remains a significant declaration on the prosecution of war criminals. As has already been mentioned above, at the very beginning of his remarks, Jackson pointed out that the trials were necessary in order to avert any recurrence of the Nazi regime's atrocities:

“This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war. The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched..”¹¹

For Jackson, ending impunity, as an imperative of reason and as a compelling normative basis for any order of international law looking to the future, took on key importance even above and beyond the current proceedings against the major German war criminals:

“...While this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors.”¹²

Because hardly anyone was left neutral by World War II, said Jackson, it was the victors' task to prosecute the crimes of the Nazi regime – unless they wanted to leave the defeated to judge themselves as had been done after World War I.¹³ It was clear to Jackson that the

¹⁰ Cf. IMT Vol. 1. pp. 30 ff., 45 f., 46 ff. and 70 ff. The defendants were Hermann Göring, Rudolf Hess, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Franz von Papen, Arthur Seyss-Inquart, Albert Speer, Konstantin von Neurath and Hans Fritzsche. Also accused were Robert Ley (committed suicide on October 25, 1945, i.e. before the proceedings began), Martin Bormann (tried in absentia) and Gustav Krupp von Bohlen und Halbach (too ill to stand trial). The accused organizations and institutions were the Reich Cabinet, the Corps of Political Leaders of the Nazi Party, the SS, the SD, the SA, the Gestapo and the Armed Forces High Command (including the General Staff). Cf. IMT Vol. 1. p. 29.

¹¹ Cf. IMT Vol. 2. p. 115.

¹² Cf. IMT Vol. 2. p. 182.

¹³ Cf. IMT Vol. 2. p. 118.

Nuremberg Trials would be followed in the future by other trials for crimes against international law, which would align with the standards set in Nuremberg:

“We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”¹⁴

If the matter were to be left merely at the trials of the major criminals in Nuremberg, Jackson implies, this would not only undermine the credibility of the community of nations, but delegitimize the IMT itself.¹⁵

Not just Jackson, but probably most of those involved with the proceedings were aware of the significance of the Nuremberg Trials. Yet it was Jackson in his Opening Statement who worded it the most clearly. Also referring to preparatory documents and resolutions like the Moscow Declaration and the IMT Charter, Jackson saw the historical significance of the Nuremberg Trials in terms of several aspects:

The Nuremberg Trials were the first time that individuals were prosecuted for serious crimes under international law (crimes against peace, war crimes and crimes against humanity).¹⁶

They were also the first time that high-ranking representatives of a state which had been responsible for crimes against international law were prosecuted. This made it impossible to pass responsibility along to the “state”; immunity in one’s capacity as an officer of the state was no longer a reason for exemption from punishment.¹⁷

The Trials, he noted, were the first proceedings in which aspects of different legal systems were applied, especially with regard to criminal procedure.¹⁸

The Trials served to implement the principle of international policy by which war itself might ultimately become criminal.¹⁹

In contrast to a conceivable retaliatory lynch justice that had in part also been discussed previously, the criminals would be prosecuted according to proceedings under the rule of law, which must also be viewed as a contribution toward safeguarding human rights, not least of all those of the accused.²⁰

¹⁴ Cf. IMT Vol. 2. p. 118.

¹⁵ Cf. IMT Vol. 2. p. 183 et passim.

¹⁶ Cf. IMT Vol. 2. p. 115.

¹⁷ Cf. IMT Vol. 2. p. 177.

¹⁸ Cf. IMT Vol. 2. p. 180.

¹⁹ Cf. IMT Vol. 2. p. 183.

²⁰ Cf. IMT Vol. 2. p. 119. See also the remarks of U.S. Secretary of War Henry L. Stimson concerning a possible summary punishment of Nazi perpetrators. Cf. Weinke, Annette: Die Nürnberger Prozesse. Munich 2006. p. 58.

Consequently, the ultimate aim was this: Prosecuting criminal cases under international law through an international criminal court would expand international law into an effective, reliable legal system functioning on the basis of proceedings under the rule of law.

The judgments of October 1, 1946, acquitted three defendants,²¹ sentenced seven to imprisonment for between ten years and life, and condemned twelve of the 22 defendants to death by hanging.²²

Despite every effort to conduct proceedings under the rule of law, despite the scope of the crimes being prosecuted, and despite the lack of alternatives, the Nuremberg Trials of the major war criminals were not free from controversy. During the proceedings themselves, the defense in particular criticized them as “victors’ justice.” In this connection, for example, criticism was directed against the panels and prosecutors, who were composed primarily of Allied representatives. There were also numerous complaints of alleged violations of the principle of *nullum crimen sine lege*, because until then it had been unclear whether international law recognized criminal responsibility for the acts falling under the IMT’s jurisdiction.²³ There was also criticism of how grounds for justification and exculpation were governed in the IMT Charter. Article 8 of the Charter provided that while acting under orders did not preclude prosecution, it could be a mitigating factor. This was said to bar defendants from appealing to “superior orders” as an expression of their hopeless dilemma. A further point of criticism concerned the handling of organizational crimes, since the possibility of condemnation on the basis of membership in a criminal organization was said to be incompatible with the principle of individual responsibility governed by Art. 6 of the Charter, if mere membership in itself constituted an irrefutable presumption of participation in the organization’s criminal acts. The critics saw further deficiencies in regard to the defense of the accused. For example, not only was the defense said to be offered less time for preparation, but it was given access to only a portion of the records available to the prosecution.²⁴ This situation was said to compromise the “equal fighting chances” of the parties.²⁵ But there was also dissent in the larger context, and criticism of the Nuremberg Trials was inflamed not least of all by the exclusion of questions of filing charges against the Allies, for example for the carpet bombing of German cities by British and U.S. bomber

On Nazi victims’ plans to take revenge on Nazi perpetrators, cf. Tobias, Jim G. / Zinke, Peter: Nakam. Berlin 2003.

²¹ Cf. IMT Vol. 1. pp. 350, 370 and 383.

²² Cf. IMT Vol. 1. pp. 412 f.

²³ Cf. Eser, Albin: Das Internationale Militärtribunal von Nürnberg aus deutscher Perspektive. In: Reginbogin, Herbert R. / Safferling, Christoph J.M. (eds.): Die Nürnberger Prozesse. Munich 2006. pp. 55 f.

²⁴ Cf. Mangold, Christoph: Die völkerstrafrechtliche Verfolgung von Individuen durch internationale Strafgerichtshöfe. Frankfurt/M. 2007. p. 22.

²⁵ Cf. Safferling, Christoph / Graebke, Philipp: Strafverteidigung im Nürnberger Hauptkriegsverbrecherprozess. In: Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW), Vol. 123 (2011). pp. 73 ff.

squads, the Red Army's murder of Polish officers at Katyn, or the massacre by the French military in Sétif, Algeria, in May 1945.²⁶

Precisely the latter points of criticism highlight a fundamental problem of the Nuremberg Trials: Even though the legal principles and standards that guided the Trials were based on universalist and humane grounds, they subsequently failed to become generally binding internationally.²⁷

The International Military Tribunal for the Far East: The Tokyo Trials

Proceedings comparable to the Nuremberg IMT were held for the Pacific Theater of World War II in Tokyo between May 3, 1946, and November 12, 1948: the International Military Tribunal for the Far East (IMTFE). However, there were significant differences between the IMT and the IMTFE. The Supreme Commander of Allied troops in the Pacific, U.S. General Douglas MacArthur, maintained a strong influence over the court and the proceedings. He imposed by fiat both the charter developed by the prosecuting authorities and the court itself, and held the power to confirm the judgments and order their execution.²⁸ The choice of the twelve judges posed problems in that other than the judge from India, none were experienced in international law, and neither the French nor the Soviet judge understood the court's languages, Japanese and English. Further, there were doubts about the neutrality of the Philippine judge, who himself had survived a Japanese massacre, and of the Australian President of the tribunal, who had previously prepared a report for his government on Japanese war crimes.²⁹ Still more, the court was more restrictive in ruling on offers of proof from the defense than those from the prosecution,³⁰ so that one must question whether the proceedings in Tokyo were fair and acceptable.

The premise of prosecuting every perpetrator, even heads of state, for serious crimes against international law was likewise compromised by the decision not to prosecute Emperor Hirohito, revered in Japan as an incarnate divinity until 1945. Although it may have been desirable in the short term to make Hirohito the flag bearer for the democracy to be established in Japan, in the long term this failure to prosecute has damaged both that country's acceptance of the IMTFE and the credibility there of the claim that those responsible were called to account.³¹ Similar considerations also apply to the secondary

²⁶ Cf. inter alia, Echterkamp, Jörg: Nach dem Krieg. Zürich 2003. p. 170 and Weinke, Annette: Die Nürnberger Prozesse. Munich 2006. pp. 56 f.

²⁷ Cf. Weinke, Annette: Die Nürnberger Prozesse. Munich 2006. p. 57.

²⁸ Cf. Osten, Philipp: Tokioter Kriegsverbrecherprozess und die japanische Rechtswissenschaft. Berlin 2003. pp. 52, 70 et passim. These powers are reminiscent of the role of the Confirming Officers who were common in the military justice of Western armies. To that extent, the IMTFE was far closer to a common military court than was the IMT.

²⁹ Cf. Boister, Neil / Cryer, Robert: The Tokyo International Military Tribunal. Oxford 2008. pp. 83 f.

³⁰ Cf. Boister, Neil / Cryer, Robert: The Tokyo International Military Tribunal. Oxford 2008. pp. 104 f.

³¹ Cf. Osten, Philipp: Tokioter Kriegsverbrecherprozess und die japanische Rechtswissenschaft. Berlin 2003. pp. 105ff.

trials, which have also proved problematic to some degree from this viewpoint of a fair hearing,³² and to the Japanese government's release policy after the Peace Treaty of 1952, which led to all war criminals being freed by the end of 1958. Indeed, Mamuro Shigemitsu, who had been sentenced to seven years' imprisonment by the IMTFE, was a convicted war criminal who even became a government minister.³³ "Given this background," Philipp Osten summarizes, "in the mid-1950s the Tokyo Trials increasingly came to be viewed as short-term victors' justice, and the victim mentality among the Japanese population grew."³⁴

Despite their significant position in the history of international criminal law, both the Nuremberg IMT and the IMTFE operated amid the conflict between the priorities of political and legal legitimation and the Allies' moral responsibility to legally adjudicate the Axis Powers' crimes. The Nuremberg and Tokyo tribunals were important steps in the development of international criminal law, and in the endeavor not to let macro-crimes go unpunished. The problems and shortcomings of those proceedings do not change that fact.

Control Council Law No. 10 – The National Aspect of Criminal Prosecution

The roughly 15,000 proceedings conducted before national courts around the world for war crimes committed during World War II were founded, particularly in Germany but also in a few other European countries, on Control Council Law No. 10. This law was the equivalent of the IMT Charter for national prosecutions of corresponding crimes under international law. Issued on December 20, 1945, under its Article 2(1)(d) the law expressly continued the work of the IMT in that it criminalized membership in an organization that had been declared criminal by the IMT. It also incorporated from Article 7 of the IMT Charter the prohibition on making heads of state immune from prosecution.³⁵

One of the most significant instances of the application of this law was the "subsequent" Nuremberg trials. The Doctors' Trial (1946-47) was of particularly lasting importance. In this proceeding, a total of 24 physicians and other involved individuals were charged with human experiments at concentration camps, euthanasia murders, and other crimes. Seven doctors were sentenced on August 20, 1947, to death by hanging, and were executed on June 2, 1948. The court's judgment formulated principles of medical ethics for the conduct of medical and psychological experiments that are still applicable today, particularly with regard to the consent to participate and the obligation to do the least possible harm to the participants.³⁶

³² Cf. Osten, Philipp: Tokioter Kriegsverbrecherprozess und die japanische Rechtswissenschaft. Berlin 2003. p. 25.

³³ Cf. Boister, Neil / Cryer, Robert: The Tokyo International Military Tribunal. Oxford 2008. pp. 252 and 317.

³⁴ Osten, Philipp: Tokioter Kriegsverbrecherprozess und die japanische Rechtswissenschaft. Berlin 2003. p. 124.

³⁵ Cf. Art. 2(4) Control Council Law 10. Cf. also Werle, Gerhard: Bestrafung von NS-Unrecht in Westdeutschland. In: Marxen, Klaus / Koichi, Miyazawa / Werle, Gerhard (eds.): Der Umgang mit Kriegs- und Besatzungsunrecht in Japan und Deutschland. Berlin 2001. p. 139.

³⁶ Cf. Transcript of the Nuremberg Doctors' Trial, p. 11587. Published in Dörner, Klaus / Ebbingshaus, Angelika / Linne Karsten (eds.): Der Nürnberger Ärzteprozeß 1946/47. (Microfiche Edition) Munich 1999. Fiche 122.

These guidelines, which became known as the “Nuremberg Code,” are one of the most enduring legacies of the subsequent Nuremberg trials.³⁷ Control Council Law No. 10 was also applied in the “Dachau Trials” (in the U.S. Zone), some trials in Rastatt and Baden-Baden (French Zone), the “Curiohaus” trials in Hamburg (British Zone) and by the Supreme Court for the British Zone.³⁸ Later, the accused in the U.S. Zone were usually judged in the denazification courts under the Act for Liberation from National Socialism and Militarism of March 5, 1946. Although the great majority of war criminals prosecuted in the Soviet Zone of Occupation and the GDR were prosecuted under the laws of the Soviet Military Administration in Germany, more than 120 war criminals there were also convicted under Control Council Law No. 10.³⁹

It must be borne in mind that although the two-pronged nature of international and national criminal prosecution of serious crimes against international law was implemented in occupied Germany, Control Council Law No. 10, which was intended for the national level, was applied consistently only in the British Zone of Occupation.⁴⁰

No further major trials for Nazi crimes were held after 1950. Once the IMT ended, international criminal jurisdiction was no longer in the hands of the international community of nations. The Allied proceedings, including for denazification, had been largely completed, and German criminal courts concerned themselves as a general rule with individual or secondary crimes, but not with large interconnected sets of crimes. It was only the Ulm Einsatzkommando Trial, which ended with the judgment announced on August 29, 1958, that made it clear to the public that the criminal justice system had as yet failed to focus on many sets of crimes that called for systematic, expert investigation. Amid that situation, the Federal Republic founded the Central Office of the State Justice Administrations for the Investigation of National Socialist Crimes, in Ludwigsburg.⁴¹ The subsequent trials that were important in this context, such as the Frankfurt Auschwitz Trial (1963-65) and the Düsseldorf Majdanek Trial (1975-81), were likewise held before German regional courts (*Landgerichte*), and therefore under national jurisdiction.

³⁷ Cf. Eckart, Wolfgang U.: Fall 1: Der Nürnberger Ärzteprozess. In: Ueberschär, Gerd R. (ed.): Der Nationalsozialismus vor Gericht. 2nd ed. Frankfurt/M. 2000. pp. 73 ff., esp. pp. 75 and 83, and Ebbinghaus, Angelika: Einleitung. In: Dörner, Klaus / Ebbinghaus, Angelika / Linne Karsten (eds.): Der Nürnberger Ärzteprozess 1946/47. Munich 2000. pp. 68 f.

³⁸ Cf., inter alia, Ostendorf, Heribert: Die Bedeutung der Nürnberger Prozesse für die Strafverfolgung von Kriegsverbrechen durch die UN. In: Ueberschär, Gerd R. (ed.): Der Nationalsozialismus vor Gericht. 2nd ed. Frankfurt/M. 2000. pp. 264 ff.

³⁹ Cf. Wentker, Hermann: Justiz in der SBZ / DDR 1945-1953. Munich 2001. p. 400, and Marxen, Klaus: Bestrafung von NS-Unrecht in Ostdeutschland. In: Idem / Koichi, Miyazawa / Werle, Gerhard (eds.): Der Umgang mit Kriegs- und Besatzungsunrecht in Japan und Deutschland. Berlin 2001. p. 162.

⁴⁰ More than 27,000 trials were held by the denazification courts there. Cf. Römer, Sebastian: Mitglieder verbrecherischer Organisationen. Frankfurt/M. 2005. p. 25.

⁴¹ Cf. Weinke, Annette: Eine Gesellschaft ermittelt gegen sich selbst. Darmstadt 2008. pp. 10 ff.

The Definition of Global Standards by the Nuremberg Principles

Internationally, the IMT Charter of 1945 initially attained great importance. The London Agreement among the four victorious Allies was supported by a total of 19 other countries from every continent at the beginning of proceedings in Nuremberg.⁴² That alone makes clear that far more countries than just the four victorious Allies significantly shared the desire made evident in the Nuremberg Trials to take action against crimes under international law. Twenty-three of the 51 founding countries of the United Nations supported the IMT. In its Resolution 95/I of December 11, 1946, the U.N. General Assembly reinforced the principles of international criminal law that had been established by the IMT Charter, and in Resolution 177 of November 21, 1947, it ordered the newly established International Law Commission (ILC) of the United Nations to formulate wording for the Nuremberg concepts. These principles, ultimately submitted by the ILC to the General Assembly in 1950, are known as the “Nuremberg Principles”:

“Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

⁴² Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay. Cf. the note to Article 5 of the London Agreement in: IMT Vol. 1. p. 8 and Safferling, Christoph: Lernen von Nürnberg. In: Rechtsgeschichte (RG). Vol. 14 (2009). p. 149, note 9. Jackson also discusses this point in his Opening Statement: Cf. IMT Vol. 2. p. 115.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.⁴³

⁴³ Yearbook of the International Law Commission 1950. Vol. II. New York 1957. pp. 374 ff.

These were intended to lay down the most important foundations of the IMT Charter and IMT case law in generalized, binding form for international jurisprudence.⁴⁴ However, because of the intensifying conflict between East and West, the principles submitted in 1950 were never formally adopted by the General Assembly; it only offered Member States an opportunity to state their opinions on them.⁴⁵

International Criminal Law Efforts Blocked during the Cold War

In Germany and Japan, numerous pardons and releases of convicted war criminals bore witness to the significant decline in the intensity of criminal prosecution. Moreover, the accusation of “victors’ justice” became louder in both countries. That the Nuremberg Principles had been called into question became clear with the German ratification of the European Convention on Human Rights (ECHR) on December 5, 1952. At the time, the Federal Republic declared a reservation as to the Convention’s Article 7(2), under which an act is punishable even if it was not expressly forbidden by national law at the time when it was committed, but “was criminal according to the general principles of law recognized by civilized nations.” The reservation was intended to make clear that in the 1950s policy climate of coming to terms with the past, the Federal Republic of Germany had no intention of justifying the Nuremberg Trials with this so-called “Nuremberg Clause.”⁴⁶

The hardening dividing lines in the Cold War also increasingly paralyzed implementation of the Nuremberg Principles elsewhere. As soon as power-political and geostrategic considerations and interests came into play, neither the West nor the East showed itself really willing to promote the implementation of international criminal law and the Nuremberg Principles. The will to give up certain rights of sovereignty to new institutions of international criminal law had largely slackened.⁴⁷ One example is the system for enforcing the Geneva Conventions of 1949. As a consequence of the appalling effects of World War II on the civilian population, the most important expansion of these conventions at the time was the Geneva Convention relating to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention). However, the drafters omitted to establish an international criminal jurisdiction for the crimes defined as “grave breaches” in the Conventions. Instead, prosecution – to which the signatories to the Convention had committed – was left in the hands of the national courts.⁴⁸

⁴⁴ Cf. Cassese: Affirmation of the Principles of International Law, Part 1 (Introduction). In: http://untreaty.un.org/cod/avl/ha/ga_95-l/ga_95-l.html (March 29, 2011).

⁴⁵ Cf. Cassese: Affirmation of the Principles of International Law, Part 2 (The Formulation). In: http://untreaty.un.org/cod/avl/ha/ga_95-l/ga_95-l.html (March 29, 2011).

⁴⁶ Cf. Safferling, Christoph: Lernen von Nürnberg: In: *Rechtsgeschichte (RG)*. Vol. 14 (2009). p. 152. This reservation was not lifted until 2001, long after the Cold War ended.

⁴⁷ Cf. Ferencz, Benjamin B.: *Von Nürnberg nach Rom*. Bonn 1998. p. 4.

⁴⁸ Cf. Art. 146 of the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War.

In the military conflicts during the decolonialization process of the 1950s and early 1960s, such as those in Indochina and Algeria, the international community of nations moved farther away from enforcing the Nuremberg Principles. Extremely serious violations of human rights were seldom prosecuted even by the national courts. Instead, they were exploited as accusations against the other side of the conflict when that seemed useful for propaganda purposes. The Soviet Union, for example, attempted in this way to attract into its own political camp the Western Powers' colonies seeking independence.⁴⁹ Nor did the International War Crimes Tribunal of 1966/67, better known as the "Russell Tribunal,"⁵⁰ function as an international criminal court. However, it did serve to revive public debate about serious crimes under international law, at least insofar as concerned the tribunal's being composed of intellectuals. For example, the United States' military intervention on the side of South Vietnam was categorized as a crime against peace, and the use of cluster bombs was considered a war crime. Thus it was possible to attract political attention in the midst of the Cold War, but the Russell Tribunal (as well as its three successor tribunals) remained largely without consequences at the governmental level, whether nationally or internationally, in terms of prosecuting serious crimes against international law.⁵¹

Nevertheless, the publication of photos of the massacres during the Vietnam War heightened the awareness that modern war had especially severe effects on the civilian population. Protests against this way of waging war in Vietnam, 1.2 million dead in the Biafra War in Nigeria from 1967 to 1970, and other similar war excesses also brought about cautious corrections in international policy.⁵² Resolution 2444, "Respect for Human Rights in Armed Conflicts," adopted by the U.N. General Assembly on December 19, 1968, can be seen as a first tentative step toward change. It reinforced the principles of humanitarian international law adopted back in 1965 at the 20th International Conference of the Red Cross in Vienna, under which the permissible means and methods of waging war are limited such that the civilian population must be protected against aggression and combatants must be distinguished from civilians. Resolution 2444 urged the U.N. Secretary General to work with the Red Cross in taking further steps toward standardizing humanitarian international law. This formed the starting point for an international conference from 1974 to 1977, which concluded with the adoption of the first and second amending protocols to the Geneva Conventions of 1949. The First Protocol clarified the terms of the Geneva Conventions, and incorporated the requirements of Resolution 2444 into the Geneva Convention as legally binding guarantees. In addition, in cases of doubt, "established custom," the "principles of

⁴⁹ Cf. Klose, Fabian: Menschenrechte im Schatten kolonialer Gewalt. Munich 2009. p. 53.

⁵⁰ Named after its founder, the mathematician, philosopher and peace activist Bertrand Russell.

⁵¹ Cf. Limquaco, Peter / Weiss, Peter (eds.): Prevent the Crime of Silence. London 1971. pp. 10 f., 59 f., p. 66 and pp. 369-372.

⁵² Cf. Best, Geoffrey: Humanity in Warfare. New York 1980. p. 316.

humanity” and the “dictates of public conscience”⁵³ were to apply as the guiding principles in armed conflicts. The Second Protocol laid down the rules of humanitarian international law to apply in non-international armed conflicts; but it has met with little application in practice.⁵⁴

Because of their serious violations of human rights, the Latin American dictatorships, which gradually gave way to democratic political systems toward the end of the 1980s, also came under the scrutiny of international criminal law.⁵⁵ The transition process in countries like Argentina, however, not infrequently included amnesties for the acts perpetrated under the dictatorship,⁵⁶ often on the grounds that criminal proceedings against perpetrators under the “old” regime might have jeopardized the process of transition from dictatorship to democracy. To at least break the silence about the crimes that had been committed, “truth commissions” were appointed.⁵⁷ The findings of these commissions were accessible to the public, and later, when the amnesties were lifted,⁵⁸ were also able to serve as evidence in criminal proceedings (as for example in Argentina).⁵⁹ A development of similar importance is the culture of remembrance associated with “transitional justice” trials. Transitional justice stands for attempts to deal with massive violations of human rights and acts of violence in order to permit the transition to a sustainably peaceful, generally democratic social order. With its memorials, this culture of remembrance approaches coping with the past at least through a policy of remembrance, and points up the continuing need to come to terms with the past.⁶⁰

There is still some question whether such transitional justice proceedings, including truth commissions, are capable of resolving the problems inherent in transitioning to peaceful, democratic societies. Doubts are prompted by the experiences of the Truth and Reconciliation Commission (TRC) in South Africa after the end of apartheid. Findings there

⁵³ Art. 1(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of June 8, 1977.

⁵⁴ Cf. Menz, Simon: *Verantwortlichkeit der Mitarbeiter privater Militär- und Sicherheitsunternehmen*. Berlin 2011. pp. 89 ff. The reference to this Second Protocol in the Statute of the ICTR (Art. 4 ICTR Statute) remains an exception.

⁵⁵ Along with long-standing dictatorships in countries like Paraguay (1954 to 1989/92) and Brazil (1964 to 1985), it was especially the dictatorship under Augusto Pinochet in Chile (1973 to 1990) and the Argentine military dictatorship from 1976 to 1983, with their brutal measures of persecution, that aroused attention and repugnance in other countries as well.

⁵⁶ Cf. Müller-Plantenberg, Urs: *Abgang am Tag der Menschenrechte*. In: *Lateinamerikanachrichten*. Issue 391, January 2007. (<http://www.lateinamerikanachrichten.de/index.php?artikel/1013.html>, May 18, 2011).

⁵⁷ For example, it was only through a truth commission that the scope of the crimes in Guatemala became known (200,000 dead and 626 massacres), causing shock among the population. Cf. Buckley-Zistel, Susanne: *Handreichung Transitional Justice*. Berlin 2007. pp. 4 f.

⁵⁸ For example, in Brazil (Cf. Russau, Christian: *Der Schatten der Operation Condor erreicht Brasilien*. In: *Lateinamerikanachrichten* No. 405, March 2008 (<http://www.lateinamerikanachrichten.de/index.php?artikel/2715.html>, May 18, 2011), Argentina (Amnestie für Junta-Mitglieder gekippt. In: *Süddeutsche Zeitung*, July 14, 2007 (<http://www.sueddeutsche.de/politik/argentinien-amnestie-fuer-junta-mitglieder-gekippt-1.843858>, May 18, 2011) and Chile (Chile kippt Diktatur-Amnestie. In: *Die Tageszeitung (taz)*, December 16, 2006. (<http://www.taz.de/1/archiv/archiv/?dig=2006/12/16/a0118>, May 18, 2011).

⁵⁹ Cf. Buckley-Zistel, Susanne: *Transitional Justice als Weg zu Frieden und Sicherheit*. Berlin 2008. pp. 6 f.

⁶⁰ Cf. on developments in Latin America, Aguilar, Paloma: *The Timing and the Scope of Reparation, Truth and Justice Measures*. In: Ambos, Kai / Large, Judith / Wierda, Marieke (eds.): *Building a Future on Peace and Justice*. Berlin 2009. pp. 511 f., and p. 524. Examples would include the Parque de la Memoria on the Rio de la Plata in Argentina and the Museo de la Solidaridad Salvador Allende in Santiago, Chile.

were closely linked with granting amnesty, so that even very severe crimes went unpunished if guilt was confessed publicly.⁶¹ Even though the TRC made the immense scope of apartheid crimes comprehensible for the first time, recent studies indicate that two-thirds of the population felt afterwards that it had sharpened the lines of conflict.⁶² Impunity combined with the publication of the scope of the crimes furthermore perpetuated the social division among ethnicities in South Africa. Even today, the division of society, which was not part of the brief of the transitional justice concept, had a delegitimizing effect that represents a threat to the young South African democracy.⁶³

After the End of the Cold War

The disintegration of the Eastern Bloc concluded with the end of the Cold War in 1989-90 and the birth of numerous new states. This development went hand in hand with ever more assertive calls for the criminal penalization of serious crimes under international law.

The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda

This was because the dissolution of imposed systems did not always lead to a peaceful future. In October 1991, the Yugoslavian conflict, with its serious violations of human rights and war crimes, launched a process at the U.N. level that ultimately led to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY). In July 1992 the Security Council took a specific position confirming that perpetrators bore individual criminal responsibility.⁶⁴ This was followed by the establishment of a Commission of Experts headed by Frits Kalshoven to investigate possible violations of human rights and of humanitarian international law.⁶⁵ The commission confirmed the suspicion of serious crimes, and recommended establishing an ad hoc tribunal to adjudicate those crimes. Based on that report, on February 22, 1993, the Security Council made a finding of a breach of the peace and of international security, and resolved to establish an international tribunal to prosecute the committed crimes, under the preparatory sponsorship of the Secretary General.⁶⁶ Once the Secretariat had submitted a draft statute for a tribunal, the Security Council unanimously adopted Resolution 827 on May 25, 1993, establishing the tribunal under the terms of

⁶¹ Cf. Abrahamsen, Therese / van der Merwe, Hugo: Reconciliation through Amnesty? N.p. (Johannesburg / Cape Town) 2005, and Valji, Nahla: Truth and Reconciliation. In:

http://www.csvr.org.za/index.php?option=com_content&view=article&id=2305:truth-and-reconciliation--lessons-from-the-south-african-context&catid=139:media-articles&Itemid=37 (May 18, 2011).

⁶² Cf. Buckley-Zistel, Susanne: Handreichung Transitional Justice. Berlin 2007. p. 5.

⁶³ Cf. inter alia, Hamber, Brandon / Maepa, Traggy / Mofokeng, Tlhoki / van der Merwe, Hugo / Centre for the Study of Violence and Reconciliation: Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report. In: www.csvr.org.za/wits/papers/papkhul.htm (Sept. 14, 2011), Madlingozi, Tshepo: Good Victims, Bad Victims. In: le Roux, Wessel / van Marle, Karin (eds.): Law, memory and the legacy of apartheid. Pretoria (Pretoria University Law Press) 2007. pp. 107-127, and Valji, Nahla: Gerichtsverfahren und Wahrheitskommissionen. In: Utz, Britta (ed.): Handbuch der Menschenrechtsarbeit. Edition 2010 / 2011. CD-ROM. Berlin 2010.

⁶⁴ Cf. Security Council Resolution No. 764.

⁶⁵ Cf. Security Council Resolution No. 780.

⁶⁶ Cf. Security Council Resolution No. 808.

Chapter VII of the U.N. Charter, and adopting the Secretariat's draft statute unamended. This was associated with a revival of the Nuremberg Principles. For example, the recitals of the Statute expressly referred to the IMT.⁶⁷ From the time it began operations on November 15, 1993, until June 2011, the Tribunal had brought charges against a total of 161 persons and concluded proceedings in 126 cases.⁶⁸ The last fugitive was apprehended with the arrest of Goran Hadžić on July 22, 2011.

Another important step in the development of international criminal jurisdiction took place in response to the civil war in Rwanda, the speed and brutality of which attracted international attention to this East African country. In 1994, some 800,000 people fell victim within three months to the Rwanda genocide.⁶⁹ After mostly taking no action during the conflict, in July 1994 the U.N. Security Council responded by establishing a Commission of Experts to investigate the events in Rwanda. As in the case of Yugoslavia, the underlying Resolution 935 emphasized the perpetrators' individual responsibility for the violations of humanitarian international law. Like its forerunner, the Karshove Commission in Yugoslavia, the commission in Rwanda particularly had the duty of gathering evidence of violations of humanitarian international law and acts of genocide. It found both crimes against humanity and crimes against international law, and urged the Security Council to lay the groundwork for criminal prosecution. The commission argued in favor of a tribunal, and suggested taking the Statute of the ICTY as a basis, with minor modifications. The legal basis for establishing the International Criminal Tribunal for Rwanda (ICTR) was adopted by the Security Council in Resolution 995 of November 8, 1994, again referring to Chapter VII of the U.N. Charter. Contrary to the commission's recommendations, the Security Council decided on an autonomous tribunal, which would sit in Arusha, Tanzania, for reasons of security and infrastructure. To allow for the synergies that the commission sought, the Statute provided that some branches of the ICTY and ICTR, especially the court of appeals, would be combined at The Hague. The ICTR began work on June 27, 1995, with the nomination of candidates for the judges. To date it has conducted 78 proceedings, two of which are still in the preliminary stage and 16 still in trial. Of the completed proceedings, 51 ended with convictions, eight with acquittals, and two with the death of the defendants.⁷⁰

Despite their indisputable contribution to the evolution of international criminal law, the specific legacy of the two ad hoc tribunals has been mixed. Even in the voting process for the establishment of the ICTY, one of the core problems of international criminal courts'

⁶⁷ Cf. Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993) of May 3, 1993. Paras. 42 and 47.

⁶⁸ Cf. <http://www.icty.org/sections/TheCases/KeyFigures>, status: August 2011.

⁶⁹ Cf. Jones, Bruce D.: Peacemaking in Rwanda. Boulder 2001. pp. 17 f., and Organization of African Unity: The Report of the Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events. Addis Ababa 2000. Section 16.15.

⁷⁰ Cf. www.unict.org, status June 2011.

adjudication of macro-crimes already became evident: the political dimension of the undertaking. Developing countries in particular raised the criticism that the Security Council had exceeded its authority by establishing the Yugoslavia Tribunal.⁷¹ Moreover, in its early years the ICTR had to contend with bureaucratic obstacles, chronic underfinancing by the United Nations, a shortage of qualified personnel, and serious mismanagement.⁷² Cooperating with the countries concerned also proved a problem for both bodies. Even though the war in Yugoslavia officially ended with the Dayton Treaty in 1995, it remained difficult or even impossible for the ICTY to cooperate with the successor states of Yugoslavia, apart from Bosnia-Herzegovina.⁷³ Likewise, the ICTR has a highly problematical relationship with the Rwandan government, which repeatedly takes advantage of the Tribunal's need for its cooperation as a way of applying pressure to block investigations and possible convictions from among its own ranks.⁷⁴ These practical constraints have left the Tribunals vulnerable to charges from their opponents of "victors' justice" or of ethnic and/or political partisanship.⁷⁵ Furthermore, the ICTY's work has been hampered by the inconsistent strategy of the peacekeeping troops in Yugoslavia – which de facto was still not at peace even after 1995 – since for years the troops did not consider it their task to support the Tribunal, with the consequence that numerous manhunts yielded results only after the ICTY had already been in operation for years.⁷⁶

The Tribunals' methods of operation also gave rise to extensive criticism. For example, despite all efforts, proceedings before both Tribunals have often been so protracted as to raise questions about the defendant's right to a speedy trial.⁷⁷ Another point of criticism was the way in which both the ICTY and the ICTR dealt with the victims. Here, not infrequently, there was inobservance of fundamental standards and a violation of victims' rights.⁷⁸ The ICTR also found it difficult to deal with those acquitted, because they often cannot return to Rwanda for fear of reprisals, yet the Tribunal also cannot oblige third countries to accept them. As a consequence these persons must live shut away in the Tribunal's protected accommodations.⁷⁹ While the ICTR's performance in the legal grounding of its judgments and decisions varies, the ICTY must accept the criticism that in the overall view, its practices

⁷¹ Cf. Ratner, Steven R. / Abrams, Jason S. / Bischoff, James L.: *Accountability for Human Rights Atrocities in International Law*. 3rd ed., Oxford 2009. (below: Ratner et al.: *Accountability for Human Rights Atrocities*). p. 214.

⁷² Cf. Report of the Secretary General on the Activities of the Office of Internal Oversight Services of February 6, 1997 (UN GA Res. A/51/789).

⁷³ Cf. Stroh, Dagmar Patricia: *Die nationale Zusammenarbeit mit den Internationalen Straftribunalen für das ehemalige Jugoslawien und Ruanda*. Berlin 2002. p. 364.

⁷⁴ Cf. Ratner et al.: *Accountability for Human Rights Atrocities*. p. 228.

⁷⁵ Cf. Ratner et al.: *Accountability for Human Rights Atrocities*. pp. 222 and 229.

⁷⁶ Cf. Safferling, Christoph / Melčić, Dunja: *Das Kriegsverbrechertribunal in Den Haag. Rechtsgrundlage und Entwicklung*. In: Melčić, Dunja (ed.): *Der Jugoslawien-Krieg*. 2nd ed., Wiesbaden 2007. p. 511.

⁷⁷ Cf. Ratner et al.: *Accountability for Human Rights Atrocities*. p. 252.

⁷⁸ Cf. Cryer, Robert / Friman, Hakan / Robinson, Darryl / Wilmshurst, Elizabeth: *An Introduction to International Criminal Law and Procedure*. Cambridge 2007. p. 141.

⁷⁹ Cf. Heller, Kevin Jon: *What happens to the Acquitted?* In: *Leiden Journal of international Law (LJIL)*. Vol. 21 (2008). p. 664.

in imposing penalties are not always legally comprehensible.⁸⁰ In the course of the “Completion Strategy” specified by the United Nations, in recent years both international Tribunals have increasingly allocated proceedings to national courts. In both cases this has significantly eased the burden on the Tribunals, but in the case of the ICTY particularly, the national courts of the successor states have often not protected the procedural rights of the accused.⁸¹ Finally, one must also critically inquire as to the Tribunals’ influence on the populations and societies concerned. For example, the Tribunals’ geographical distance from the scene (The Hague, Netherlands and Arusha, Tanzania) has also meant that the societies concerned have not identified with the international penal efforts. Consequently the Tribunals’ work could contribute only to a modest degree toward the reconciliation of those societies and the improvement of their national systems of justice. There are also only very limited indications of a deterrent effect on potential perpetrators. The principle of bringing charges against only a small percentage of perpetrators is certainly one of the causes here. Finally, even the attempts to defuse the charge of partisanship or “victors’ justice” must be deemed a failure, because the outreach programs that were initiated to involve the population have been unable to achieve much tangible effect.⁸²

In summary, one can note most of all that any new edition of the ad hoc tribunals is unlikely, because after nearly 20 years of activity by these courts, a certain fatigue has set in. This relates to both the political will to set up a bureaucracy under a U.N. mandate with the scope of the ICTY and ICTR, and also the associated financial obligations. It must be doubted that the Member States of the United Nations are willing to continue financing such expensive and laborious tasks with their mandatory contributions.

Hybrid and Internationalized Courts: The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia

After a decade in which tens of thousands of people lost their lives, in 2000 one of the bloodiest and most brutal civil wars of the recent past came to an end. Although the principal theater was in Sierra Leone, a number of other countries were also involved, including Liberia, Côte d’Ivoire, and Guinea. This conflict was especially characterized by the extensive use of child soldiers, the exceptionally brutal treatment of the civilian population in the form of mass amputations as punishment, and the application of other means of terrorization.⁸³ After a cooling-off phase and the reestablishment of a fragile peace by a British action force and United Nations troops from 2000 to 2002, the United Nations and the government of Sierra Leone entered on January 16, 2002, into a treaty under international

⁸⁰ Cf. Drumbl, Mark A.: *Atrocity, Punishment and International Law*. Cambridge 2007. pp. 59 ff.

⁸¹ Cf. Ratner et al.: *Accountability for Human Rights Atrocities*. p. 221.

⁸² Cf. Ratner et al.: *Accountability for Human Rights Atrocities*. p. 223.

⁸³ Cf. Akin, Wanda M.: *Nuremberg, Justice and the Beast of Impunity*. In: Reginbogin, Herbert R. / Safferling Christoph J.M. (eds.): *Die Nürnberger Prozesse*. Munich 2006. p. 257.

law for the establishment of a hybrid international and national court.⁸⁴ This court's task was to pass judgment on those principally responsible for the crimes committed during the civil war. Under its Statute, the resulting Special Court for Sierra Leone (SCSL), sitting in Freetown, Sierra Leone, has concurrent jurisdiction, but the SCSL has primacy over the national courts in prosecuting the acts listed in the Statute.⁸⁵ Moreover, the SCSL is specifically not constituted as part of the Sierra Leone justice system, as is also reflected in the international staffing of the prosecutorial authority and the panels of judges. After the necessary national implementing acts, the SCSL began work as early as July 2002. To date, charges have been brought against 13 persons, of whom eight have been convicted, three died during the proceedings, and one is still considered a fugitive.⁸⁶

A preliminary assessment of the SCSL's work reveals a number of problems, even though in this case, among a diverse mélange of political and practical or legal factors, the main burden lies more with practical deficits. As was already the case with the ICTY and the ICTR, the SCSL also confronts significant difficulties with implementing efficient cooperation with the state.⁸⁷ Because the SCSL, as a hybrid court, was not created under a resolution of the Security Council pursuant to Chapter VII of the U.N. Charter, and there are also no equivalent provisions in the Statute of the SCSL,⁸⁸ other states are under no legal obligation to cooperate with the SCSL.⁸⁹ Another problem is that while the SCSL has primacy over the national courts of Sierra Leone, that does not apply to the national courts of neighboring states. Yet it was precisely Sierra Leone's neighboring states that were directly and indirectly also involved in the conflict, and both the political and de facto geographical boundaries are fluid. Consequently flight to a neighboring country was an obvious option for perpetrators.⁹⁰ Furthermore, in a country with weak structures like Sierra Leone, numerous practical problems arise for the work of both the court and the defense. The mere absence of rudimentary and, especially, ongoing administrative structures like maintaining a birth register has serious consequences. Article 7 of the SCSL Statute provides that only those who were age 15 or above at the time of the offense can be prosecuted, and those between the ages of 15 and 18 are to be assigned punishments under a rehabilitative approach. Consequently it is an advantage to the perpetrator if he falls within one of these two age groups. Because individuals frequently look significantly younger than their age, and because many themselves know their ages only approximately or not at all, there is no

⁸⁴ Cf. Bohlander, Michael / Winter, Renate: Internationalisierte Strafgerichte auf nationaler Ebene. In: Kirsch, Stefan (ed.): Internationale Strafgerichtshöfe. Baden-Baden 2005. p. 271.

⁸⁵ Art. 8 SCSL Statute.

⁸⁶ Cf. www.sc-sl.org, status June 2011.

⁸⁷ Cf. Cryer, Robert / Friman, Hakan / Robinson, Darryl / Wilmschurst, Elizabeth: An Introduction to International Criminal Law and Procedure. Cambridge 2007. p. 198.

⁸⁸ There is neither a positively worded obligation nor a provision on the consequences of failure to cooperate.

⁸⁹ No such obligation has arisen so far from customary international law either. Cf. Seibert-Fohr, Anja: Prosecuting Serious Human Rights Violations. Oxford 2009. pp. 257 ff.

⁹⁰ Cf. Staggs, Michael: Second Interim Report on the Special Court for Sierra Leone. Berkeley 2006. p. 23.

protection against abuse of the provisions on age. But this also impedes the defense,⁹¹ with a consequent adverse effect on ensuring the rights of the accused. A difficulty in the defendants' position results from the lack of provisions for assistance with legal costs that could ensure a fair defense for these people, who often have few financial resources.⁹²

The court's jurisdiction is also proving to be increasingly problematic. It is limited to prosecuting the principal persons responsible for the civil war, while the middle and low levels of command are subject to national criminal prosecution. The numbers of perpetrators in the middle and low levels range into the thousands.⁹³ Nevertheless, there are substantial impediments to prosecution at the national level. First of all, the Lomé Peace Accord of 1999 provides a general amnesty for all parties to the conflict, which is binding on the national courts, though not on the SCSL.⁹⁴ Moreover, although important reforms have been initiated, the Sierra Leone justice system has substantial deficits in the rule of law even in fundamental aspects.⁹⁵ Finally, Sierra Leone's criminal law is still inconsistent with international guarantees of human rights.⁹⁶

The initial situation in Cambodia was different. In contrast to Sierra Leone, it took this South Asian country nearly three decades until the need to adjudicate the acts of the Khmer Rouge perpetrated between 1975 and 1979 had achieved such urgency that the state decided to take action. The rule of the Khmer Rouge under Pol Pot cost the lives of 1.7 million Cambodians, through murder, torture, forced labor and hunger. But not until 1997 did the country approach the United Nations with a request for support in addressing these crimes through the courts. In the spring of 1998, the Secretary General sent a Group of Experts to Cambodia to review the possibility of implementing the project. After nearly a year of work, the commission concluded that a national solution was not viable, because the inadequate conditions of the Cambodian system of justice could not guarantee a fair trial. A hybrid solution was just as unsuitable, because the resulting dependence on Cambodia's willingness to cooperate would jeopardize the entire undertaking. Instead, the commission advised establishing a new ad hoc tribunal under the aegis of the United Nations.⁹⁷ The Cambodian government, however, insisted on a national solution, so that the negotiations

⁹¹ As examples: Akin, Wanda M.: Nuremberg, Justice and the Beast of Impunity. In: Reginbogin, Herbert R. / Safferling Christoph J.M. (ed.): Die Nürnberger Prozesse. Munich 2006. pp. 262 f.

⁹² Cf. Cassese, Antonio: Role of Internationalized Courts and Tribunals in the Fights Against Criminality. In: Romano, Cesare P.R. / Nollkaemper, André / Kleffner, Jann K. (eds.): Internationalized Criminal Courts and Tribunals. Oxford 2004. p. 10.

⁹³ Cf. Statistical Appendix to the Report of the Truth and Reconciliation Commission of Sierra Leone. A Report by the Benetech Human Rights Data Analysis Group to the Truth and Reconciliation Commission. Appendix 1 to the Report of the Truth and Reconciliation Commission of Sierra Leone. Palo Alto 2004. p. 15.

⁹⁴ Art. IX Lomé Peace Accord.

⁹⁵ Cf. Human Rights Commission of Sierra Leone: The State of Human Rights in Sierra Leone 2009. N.p., n.d. (Freetown 2010) and US Department of State: 2010 Human Rights Report Sierra Leone. N.p. (Washington), n.d., p. 8.

⁹⁶ Cf. Human Rights Watch: Bringing Justice: the Special Court for Sierra Leone. New York 2004. p. 38

⁹⁷ Cf. Ratner et al.: Accountability for Human Rights Atrocities. pp. 350 f.

with the United Nations broke off for a time in 2002. Nevertheless, that same year the General Assembly urged the Secretary General to resume negotiations under the assumption of a national solution. These negotiations finally concluded with the General Assembly's acceptance of a treaty between the United Nations and Cambodia on May 13, 2003, and the ratification of the treaty by the Cambodian Parliament in October 2004. The Extraordinary Chambers in the Courts of Cambodia (ECCC) established under this treaty are a part of the national justice system, as reflected not only in the applicability of national law, but the predominance of Cambodian judges and counsel for the defense. The ECCC began their work in July 2007 by initiating the first proceedings against former leaders of the Khmer Rouge. To date, five persons have been charged and one person has been convicted at the first instance.⁹⁸

Although practical and legal factors are in part responsible for the shortcomings of the ECCC, here the political dimension unequivocally takes the foreground as a source of adverse impetus. Even fundamental decisions like the structure and organization of the court's panels and the persons to whom prosecution could extend (only the Khmer Rouge leaders with primary responsibility) bear witness to the scope of party political influence on the ECCC's work. Both the trial and the appellate panels, the former with three Cambodian and two international judges each and the latter with four Cambodian judges and three international judges,⁹⁹ are dominated by the national contingent. If the necessary qualified majority of four or five votes, respectively, cannot be achieved for a decision, there is a danger of procedural gridlock. Because of the strongly national nature of Cambodian criminal law, investigations are conducted jointly by two investigating magistrates – one Cambodian and one international. In the event that the investigating magistrates do not agree, the question must be submitted to a pretrial panel in which the majority of the judges are likewise Cambodian.¹⁰⁰ The same mechanism applies to the office of the prosecutor, for which one Cambodian and one counsel from another country are appointed as co-prosecutors.¹⁰¹

The power to appoint judges and prosecutors also gives cause for concern. All judges and prosecutors are appointed by the Cambodian Supreme Council of Magistracy, the international judges and prosecutors being drawn from a list provided by the U.N. Secretariat.¹⁰² Both the organizational structure and the appointment mechanism are vulnerable to political influence, whether with regard to initiating investigations or filling the positions for Cambodian judges and prosecutors. Both factors raise questions about not only the court's efficacy but the judges' independence and impartiality.

⁹⁸ Cf. www.eccc.goc.kh. Stand June 2011.

⁹⁹ Cf. Art. 4 UN-Cambodia Agreement.

¹⁰⁰ Cf. Art. 5 UN-Cambodia Agreement.

¹⁰¹ Cf. Art. 6 UN-Cambodia Agreement.

¹⁰² Cf. Art. 3(5), Art. 5(5) and Art. 6(5) UN-Cambodia Agreement.

The limitation of prosecution to the highest leadership levels of the Khmer Rouge must also be viewed as political. The official party line of the governing party in Cambodia is based to more than an insignificant degree on the contention that current officials were not involved in the Khmer Rouge's crimes.¹⁰³ Given that assumption, the Cambodian government's interest in a comprehensive, objective handling of Khmer Rouge crimes is questionable at the very least.

Moreover, the ECCC again pose difficulties in establishing effective cooperation with other countries. Cambodia has no extradition agreements with many countries, and also cannot rely on voluntary cooperation, because its neighboring countries either supported the Khmer Rouge in the 1970s or are still dependent on the Khmer Rouge, which remain strong in some border territories even today.¹⁰⁴ Under the above conditions, one may well ask whether the special chambers in Cambodia can live up to the expectation of an effective, fair prosecution of macro-crimes.

Both courts – the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia – moreover share a serious structural problem. Because of chronic underfinancing and their dependence on voluntary donations by donor countries, both verge on an inability to function in their work. Even if this scenario has been averted for both cases, this remains a fundamental problem that affects all international and internationalized courts. In this regard it must be noted that the financial problem increases significantly as the courts become increasingly integrated into national justice systems and “distanced” from the United Nations.

The Special Panels for Serious Crimes in East Timor / Iraqi High Tribunal

In August 1999, after a referendum in which 80 percent of the population had voted for independence, the tense political situation in East Timor escalated. At that point pro-Indonesian militias, with support from the Indonesian military, established a dictatorship. Although it was obvious that the violations of human rights that had been committed needed to be addressed by the law and a United Nations Investigative Commission expressly recommended establishing a further ad hoc tribunal, the proposal failed to achieve a majority in the Security Council.¹⁰⁵ Instead, the U.N. Transitional Authority in East Timor (UNTAET) established Special Panels for Serious Crimes in 2002, within the Timorese judicial

¹⁰³ Cf. Ratner et al.: *Accountability for Human Rights Atrocities*. pp. 342 f. and 360.

¹⁰⁴ Cf. Ratner et al.: *Accountability for Human Rights Atrocities*. pp. 359 f.

¹⁰⁵ Cf. Ratner et al.: *Accountability for Human Rights Atrocities*. pp. 248 f.

system.¹⁰⁶ By the time its activity concluded on May 20, 2005, 391 persons had been charged and 84 convicted.

In Iraq, Saddam Hussein's decades-long dictatorship had been characterized by oppression of the population, mass violations of human rights, and wars against Iran and Kuwait. On December 10, 2003, as part of his removal from power by Western Coalition troops, the Iraqi Interim Governing Council established the Iraqi Special Tribunal (IST). This was to act as a special court for genocide, crimes against humanity, and war crimes. The Iraqi transitional government was not empowered to do so by either the United Nations or an international treaty. Instead its authorization came from the executive body of the occupying powers, the Coalition Provisional Authority (CPA), which had also appointed the transitional government. The statute establishing the IST had come about with extensive international support. Criticism of the court's legitimacy began to arise only after the Iraqi Transitional National Assembly subsequently integrated it into the national judicial system in 2005, as the Iraqi High Tribunal (IHT).¹⁰⁷ The IHT has primacy of jurisdiction before the national criminal courts for the above crimes committed by Iraqi nationals between July 16, 1968, and May 1, 2003. It began its work with the trial of Saddam Hussein in 2005. To date it has conducted some 90 proceedings, 59 of which ended with convictions and 20 with acquittals.¹⁰⁸

The Special Panels for Serious Crimes in East Timor are a classic example of the convergence of political and legal shortcomings. Support, particularly of the financial kind, from both the United Nations and the Timorese government, was markedly scant. Moreover, the panels, all of which were composed of two international judges and one Timorese judge, did not have sufficient training in this specialized field. The result was a large number of legally dubious judgments that could not be appealed until 2003, because of the lack of an appellate court. Even after the appellate court began work in 2003, quality did not improve significantly. At the appellate level as well, many judgments contained gross legal errors,¹⁰⁹ a consequence of the conflict between national law and the recognized standards of international criminal law, which were to be applied to the crimes at issue.¹¹⁰ The role of Indonesia¹¹¹ in cooperating with the Special Panels must also be viewed as a problem. Out

¹⁰⁶ United Nations Transitional Administration in East Timor, the Special Representative of the Secretary-General: Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (UNTAET/REG/2000/15) of June 6, 2000.

¹⁰⁷ Cf. Cryer, Robert / Friman, Hakan / Robinson, Darryl / Wilmschurst, Elizabeth: *An Introduction to International Criminal Law and Procedure*. Cambridge 2007. p. 194.

¹⁰⁸ Cf. US Department of State: *Human Rights Report 2009: Iraq*. N.p. (Washington) 2009, and US Department of State: *Human Rights Report 2010: Iraq*. N.p. (Washington) 2010. pp. 17 and 18.

¹⁰⁹ For example, people were indicted for acts that were not defined by law as offenses.

¹¹⁰ Cf. Cassese, Antonio: *Role of Internationalized Courts and Tribunals in the Fights Against Criminality*. In: Romano, Cesare P.R. / Nollkaemper, André / Kleffner, Jann K. (eds.): *Internationalized Criminal Courts and Tribunals*. Oxford 2004. p. 8.

¹¹¹ Cf. Cassese, Antonio: *Role of Internationalized Courts and Tribunals in the Fights Against Criminality*. In: Romano, Cesare P.R. / Nollkaemper, André / Kleffner, Jann K. (eds.): *Internationalized Criminal Courts and Tribunals*. Oxford 2004. p. 9.

of the 391 defendants, more than 300 were and are still on Indonesian territory and need have no fear of extradition. Consequently up to the time when the panels ceased their work, only 84 cases, most from the lower ranks of the militias, were heard; all 84 of the accused were convicted.¹¹²

The case of the Iraqi High Tribunal once again shows the difficulties of prosecuting crimes in unstable political situations and where conflict has not ended. Because of the uncertain situation, given a court composed solely of national judges and the lack of structures for the rule of law, the Tribunal could not guarantee either its own independence or a fair trial.¹¹³ Moreover, the inclusion of the death penalty in the list of punishments resulted in a withdrawal or refusal of cooperation by international human rights groups and experts outside the USA.¹¹⁴ The consequent lack of inflow of international expertise and the court's lack of experience with the highly complex questions of international criminal law and humanitarian international law only exacerbated the situation further.¹¹⁵

Paradigm Change at the Turn of the Century: The International Criminal Court and Future Challenges for the International Community

The International Criminal Court

The desire for an international criminal court can be traced back to the nineteenth century.¹¹⁶ But it would take until the late 1930s before a first serious attempt was made to establish such an institution on the basis of an international treaty. Yet even in 1937, after the Convention for the Creation of an International Criminal Court had been concluded at the initiative of the League of Nations, it was ratified by only one country, and therefore never took effect.¹¹⁷ These efforts revived only after the end of World War II and the Nuremberg and Tokyo Tribunals. At the initiative of the United Nations, the Genocide Convention adopted in 1948 was intended to establish an international court. The Secretariat in fact presented two drafts as early as 1947 that raised the future prospect of forming an international criminal court. Moreover, the General Assembly requested the International Law Commission (ILC) to review possibilities of establishing an international criminal court whose subject matter jurisdiction would include genocide. While the ILC's work got as far as a draft statute for such a court in 1950, the political divisions of the Cold War began to harden, and a unified approach by the international community was no longer possible. The result was a

¹¹² Cf. Ratner, Abrams, Bischoff, *Accountability for Human Rights Atrocities in International Law*, p. 249.

¹¹³ Cf. Kelly, *The Ghosts of Halabja*, pp. 61 ff., 105 ff.; Malekian, *Emasculating the Philosophy of International Criminal Justice in The Iraqi Special Tribunal*, 38 *Cornell International Law Journal* (2005), pp. 720 f.

¹¹⁴ Cf. Parker, Tom: *Prosecuting Saddam*. In: *Cornell International Law Journal*. Vol. 38 (2005). p. 908.

¹¹⁵ Cf. Cryer, Robert / Friman, Hakan / Robinson, Darryl / Wilmshurst, Elizabeth: *An Introduction to International Criminal Law and Procedure*. Cambridge 2007. p. 194.

¹¹⁶ Cf. Moreno-Ocampo, Luis: *The Tenth Anniversary of the ICC and Challenges of the Future: Implementing the Law*. Address of October 8, 2008 in London. p. 3, available online at <http://www.iccnw.org/documents/20081007LuisMorenoOcampo.pdf> (June 27, 2011).

¹¹⁷ Cf. Ratner et al.: *Accountability for Human Rights Atrocities*. p. 230.

standstill in developments that lasted nearly 40 years; not until 1989 did Trinidad and Tobago revive the discussion of an international criminal court. Although that island nation's intent was directed primarily toward combating the international drug trade, the initiative was a starting point for getting the United Nations to focus once again on the question of a permanent international criminal court. Although the topic was approached rather gingerly at first, the escalating conflict in the former Yugoslavia beginning in 1991 sparked the necessary concern, and at the same time drew focus to the crimes being committed there. As early as 1994 the ILC presented a first draft statute for an international criminal court that would have broad-reaching subject matter jurisdiction.¹¹⁸ Although these developments arose in a period of great attention to strengthening protections for human rights and euphoria about the end of the Cold War, the ILC's draft still encountered such skepticism that the General Assembly felt compelled to review and revise the text further. In a task force established for this purpose, ultimately a group of countries coalesced who shared the joint goal of establishing an international criminal court, and who also had the necessary political muscle to put that desire into action. So in 1998, this group agreed to meet in Rome, where they would create an international criminal court on the basis of the ILC's preliminary work. The five weeks of negotiations in Rome were characterized by a large number of very diverse political and legal problems, but also by the presence of many actors from civil society and several surviving former Nuremberg prosecutors. Ultimately the parties were able to complete a draft text of a statute. This was accepted at the final meeting, and would take effect after ratification and accession by 60 countries. That goal was met with surprising speed, so that the Statute took effect on July 1, 2002, and the International Criminal Court (ICC), seated in The Hague, began its work on March 11, 2003.

The Rome Statute for the International Criminal Court was an attempt to codify existing substantive international criminal law with regard to core crimes (Articles 5-8 ICCSt) and the general principles governing criminal responsibility (Articles 22-33 ICCSt), and to establish a new kind of procedural order that was not too heavily oriented to national legal systems. The ICC is based on the principle of complementarity; i.e., it supplements the national judicial systems, which normally have primacy, only if a Party State is unwilling or unable to exercise its jurisdiction for the prosecution of international criminal offenses (Art. 17 ICCSt). The ICC Prosecutor may take action on instructions by countries or the Security Council of the United Nations, but also on his or her own initiative, thus demonstrating that the prosecutorial authority of the ICC is largely independent (Art. 13 ICCSt). However, the Prosecutor is also subject to strict oversight by a Pre-Trial Chamber. The Prosecutor must obtain that chamber's authorization before beginning investigations on his or her own initiative (Art. 15 ICCSt). Before the matter goes to trial, the Pre-Trial Chamber must confirm the charges

¹¹⁸ For example in the areas of terrorism and drug criminality as well.

(Art. 61 ICCSt). The ICC has no executory bodies of its own; in other words, it must rely on the Party States to enforce prosecutory measures (Part IX ICCSt).

The ICC's jurisdiction is not universal; it is limited to international crimes, genocide, crimes against humanity, and war crimes (Art. 5 ICCSt) committed in territories of the Party States or by nationals of the Party States (Articles 12, 13 ICCSt). An unusual feature of the procedural law under the Rome Statute is the extensive rights of participation for victims (Art. 68 (3) ICCSt). At every stage of the proceedings, victims may present their views and file motions. They are entitled to legal representatives and may thus have more than an inconsequential influence on the proceedings. The Statute likewise provides for compensating recognized victims by way of the Trust Fund for Victims (Art. 75 ICCSt).

To date, the ICC has brought proceedings against 26 persons; 20 cases are in the pre-trial phase (in which 11 indictees remain at large so far). Four cases have gone to trial, one person died, and one proceeding was halted for lack of sufficient suspicion that the person had committed the offense.¹¹⁹

As important and necessary as the International Criminal Court is, it also suffers in equal measure from its limited options to act. It too must rely on countries' cooperation. This problem arises especially in cases when a country refers a situation "of its own" to the ICC.¹²⁰ One example is Uganda. This East African country referred prosecution in connection with the civil war in Uganda to the ICC, but wanted to limit its investigations primarily to acts committed by the so-called Lord's Resistance Army, without allowing the acts of government troops to become a matter of investigation.¹²¹

From the legal standpoint, there are also significant problems with the victims' participation and the disclosure of evidence.¹²² For example, the victims' status as parties to the proceedings is unique to date, and the interface between the procedural rights of the victims and the defendants, as well as with the powers of the Prosecutor, is rife with conflict.¹²³ Moreover, the ICC has no executive power; in other words, it is not itself able to enforce its orders and judgments, because it has no police or similar means of compulsion of its own. This necessarily requires effective, prompt cooperation from the 118 Party States,¹²⁴ or voluntary cooperation from the other states.¹²⁵ To date, more than one third of the

¹¹⁹ Cf. www.icc-cpi.int, status October 2011.

¹²⁰ Art. 14(1) ICC Statute.

¹²¹ Cf. Freeland, Steven: The International Criminal Court. In: ALTA Law Research Series. Vol. 24 of 2009. p. 7.

¹²² Cf. Safferling, Christoph: Frieden durch Völkerrecht? In: Jahn, Matthias / Kudlich, Hans / Streng, Franz (eds.): Strafrechtspraxis und Reform. Berlin 2010. pp. 534 ff.

¹²³ Cf. Freeland, Steven: The International Criminal Court. In: ALTA Law Research Series. Vol. 24 of 2009. p. 8.

¹²⁴ Cf. Cf. <http://www.icc-cpi.int/Menu/ASP/>, status September 22, 2011.

¹²⁵ Cf. Kaul, Hans-Peter: The International Criminal Court: Current Challenges and Perspectives. In: Washington University Global Studies Law Review. Vol. 6 (2007). p. 575.

international community has still not acceded to the Rome Statute, including the USA, Russia and China.¹²⁶ Because of their veto powers, these countries play a particularly important role in the transfer of cases from the U.N. Security Council to the ICC. That raises the risk of politicizing the decision to refer a situation to the court. As an example we may mention the Security Council's varying assessment of events in Libya and Syria in 2011.¹²⁷ Undoubtedly, the suspicion of a policy of prosecution guided by national power interests, and subject to a corresponding arbitrariness, represents an enormous risk to the legitimacy and acceptance of the ICC.¹²⁸

The ICC is also plagued with practical problems. For example, Prosecutors' investigations in territories that are not yet pacified are not only time-consuming, expensive and dangerous, but still face the challenge of having to satisfy the criteria for gathering evidence under the rule of law.¹²⁹ This situation is further exacerbated by the ICC's tense financial situation; it suffers from underfinancing and from its dependence on donor countries and other donations.¹³⁰ It remains to be seen whether its scarce resources will affect the court's "clock speed" because the funds available determine the scope of its activities.¹³¹

Current Challenges

Despite the many solutions that the international community has found so far for dealing with serious violations of human rights and war crimes, substantial problems remain. Although the establishment of the ICC was undoubtedly a major step toward institutionalizing international criminal prosecution, in some regards it has aroused expectations that the court cannot fulfill by itself. For example, it is particularly the victims or their advocates, in the form of NGOs, whose disappointment with national measures for prosecution or for dealing with macro-criminality leads them to turn to the ICC so as to ensure that those responsible receive just punishment for serious crimes. When these expectations are disappointed, whether because the ICC does not have jurisdiction or because it is impeded in its investigative work, "victims' frustration" can scarcely be avoided. However, international criminal prosecution also stands in a relationship of tension with the various forms that processes for peacemaking and reconciliation may take.¹³² The example of Uganda shows that this is not merely an academic problem. After the ICC's Chief Prosecutor issued arrest warrants for the leaders of

¹²⁶ But Israel and India have also declined so far to join.

¹²⁷ Cf. Security Council Resolutions Nos. 1970 and 1973 (Libya), which authorized all Member States to take every necessary measure to protect the civilian population and to maintain the no-fly zone over Libyan territory.

¹²⁸ Cf. Safferling, Christoph: Frieden durch Völkerrecht? In: Jahn, Matthias / Kudlich, Hans / Streng, Franz (eds.): *Strafrechtspraxis und Reform*. Berlin 2010. p. 537.

¹²⁹ Cf. Freeland, Steven: The International Criminal Court. In: ALTA Law Research Series. Vol. 24 of 2009. p. 9.

¹³⁰ Cf. Kaul, Hans-Peter: The International Criminal Court Current Challenges and Perspectives. In: Washington University Global Studies Law Review. Vol. 6 (2007). p. 578.

¹³¹ Cf. Freeland, Steven: The International Criminal Court. In: ALTA Law Research Series. Vol. 24 of 2009. p.10, according to which the Party States appear to prefer this solution.

¹³² Cf. Seibert-Fohr, Anja: *Prosecuting Serious Human Rights Violations*. Oxford 2009. p. 5 and Cryer, Robert / Friman, Hakan / Robinson, Darryl / Wilmshurst, Elizabeth: *An Introduction to International Criminal Law and Procedure*. Cambridge 2007. p. 583.

the Lord's Resistance Army, the peace negotiations between the LRA and Ugandan government collapsed when the LRA demanded a retraction of the warrants.¹³³

All in all, experience to date demonstrates the need for a two-stage system that allocates nation states the primary responsibility for prosecuting macro-crimes. International criminal prosecution, and particularly the ICC, cannot be expected to assume the entire responsibility; they can only be complementary, as a supplement to national criminal jurisdictions. National criminal jurisdiction takes on central significance, irrespective of whether the countries concerned have ratified the Rome Statute for the ICC. Even the Statute itself provides that the International Criminal court is supposed to have a complementary function.¹³⁴ Consequently, national criminal prosecution should be in the interest of every country that adheres to international law and advocates its enforcement. It is therefore important to reinforce the associated capacity at the national level in such a way that criminal prosecution can be conducted there in compliance with human rights. Moreover, apart from financial reasons, a strong role of national criminal prosecution in the country where the crime was committed is also and especially supported by the greater ease of accessing evidentiary material, as well as the need to include the population primarily affected by or involved in the crimes, as a way of coming to terms with the past and taking a step toward the future.

Although many countries have decided, in the course of implementing the Rome Statute, to incorporate crimes under international law into their national law, this has led to the initiation of national criminal proceedings only in a few cases so far. And even when this comes about, numerous problems arise. For example, on December 8, 2010, Frankfurt Higher Regional Court (*Oberlandesgericht*) brought the Rwandan Onesphore Rwabukombe to trial for genocide, murder, incitement to genocide and incitement to murder, and on March 1, 2011, Stuttgart Higher Regional Court brought Rwandans Ignace Murwashyaka and Straton Musoni to trial for crimes against humanity, war crimes, and being a member or ringleader of a foreign terrorist association.¹³⁵ The "difficulties of adapting" German law (in this case) to the special characteristics and challenges of combating international crime are especially evident in the Frankfurt proceedings. Despite in-depth preparation in this specialty, not only different legal traditions, but different concepts of memory and one's own experience come into conflict, especially in the questioning of witnesses. While German procedure aims for the greatest possible objectivity and fidelity to the facts, differently disposed cultural contexts and mentalities become evident in the recapitulation of past events, when Rwandan witnesses

¹³³ Cf. Freeland, Steven: The International Criminal Court. In: ALTA Law Research Series. Band 24 von 2009. p. 7.

¹³⁴ Preamble, Art. 1 und Art. 17 ICC Statute.

¹³⁵ Press release from Frankfurt Higher Regional Court of December 9, 2010, available (in German) at www.olg-frankfurt.justiz.hessen.de, and press release from Stuttgart Higher Regional Court of March 4, 2011, (in German) at www.olg-stuttgart.de.

have a completely different concept of objectivity and truth content, and, for example, give hearsay information the appearance of personal experience.¹³⁶ Such “soft” factors stand in quite a tense interaction with the rules of German criminal procedure.

This example shows that even where the political will is present, even countries with highly refined legal systems have a shortage of the knowledge, capabilities and structures that permit a systematic application of the terms of international criminal law. Nor has German legal training responded to these needs so far. Teaching knowledge and techniques for handling criminal norms outside national law, and the requirements of the administration of criminal justice outside one’s own cultural sphere, is urgently needed for those persons working in these areas of criminal law. But apart from substantive legal knowledge of the individual crimes, the institutional and procedural conditions must also be created or improved so as to encourage national systems’ ability to prosecute crimes under international law.

¹³⁶ Cf. Kraft, Andreas: Die Wahrheit hinter dem Grauen. In: Frankfurter Rundschau of June 21, 2011 (<http://www.fr-online.de/panorama/deutsche-justiz-verhandelt-voelkermord-in-ruanda-die-wahrheit-hinter-dem-grauen,1472782,8579394.html>, June 22, 2011). Cf. also internal reports of the ICWC Monitoring Project.

