FEWER PLACES TO HIDE? THE IMPACT OF DOMESTIC WAR CRIMES PROSECUTIONS[1] ON INTERNATIONAL IMPUNITY

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Ending impunity by perpetrators of crimes of concern to the international community is a necessary part of preventing the recurrence of atrocities.[3]

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[1] This paper is limited to criminal prosecutions, including processes leading up to prosecutions, such as extradition, although other remedies with respect to the commission of war crimes, crimes against humanity and genocide are also being employed in a number of countries. In the United States, the Center for Justice and Accountability (CJA) has sued 16 individuals from 10 countries in civil courts for damages under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA); for more information, see http://www.cja.org/cases/cases.shtml).
In addition, a number of asylum and immigrant receiving countries have used the 1951 Refugee Convention and it domestic immigration legislation to refuse refugee status or deported perpetrators of international crimes; see for instance results in this area in Canada in the Ninth Annual Report of its War Crimes Program at http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html#app3; some of these countries such as Australia, New Zealand, Canada, the United Kingdom and the Netherlands have established specialized war crimes units for this purpose. For the application of some of the substantive law in this regard see Rikhof, "Complicity in International Criminal Law and Canadian Refugee Law", 4 *Journal of International Criminal Justice (JICJ)* (2006), 702-722.
Lastly, some civil law suits have been filed either against foreign states for involvement in international crimes or against corporations, none of which have been successful to date (see the lawsuits in the United States against Caterpillar.http://ccrjustice.org/files/Ninth%20Circuit%20Opinion%2007.7.06.pdf,Talisman http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/06-03562.PDF, and Unocal - http://www.earthrights.org/legal/unocal/ , the latter of which resulted in a settlement; and the cases of Jones in the UK against Saudi Arabia, http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones-1.htm, and Bouzari in Canada against the Iranian government http://www.ontariocourts.on.ca/decisions/2004/june/bouzariC38295.htm; for the latter see Rikhof, Correspondents Report, 6 *Yearbook of International Humanitarian Law* (2003), 478).
For an overview of the various means of bringing war criminals to justice see: Beigbeder, *Judging War Criminals* (1999); Freeman and Er, *International Human Rights Law* (2004); and Beigbeder, *International Justice against Impunity,* (2005).
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[3] Chautauqua Declaration, signed by the prosecutors of the Nuremberg International Military Tribunal, the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Sierra Leone Special Court and the Extraordinary Chambers of the Courts of Cambodia, August 29, 2007; see http://www.asil.org/chaudec/index_files/frame.htm.

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Introduction

This article will examine the developments in the domestic arena to achieve a higher level of impunity for international crimes. After examining the historical and international context, it will look at a number of mechanisms, which have been utilized to accomplish this goal. The first level of examination is to determine how countries have adjusted their legislation to ensure that it is possible to prosecute international criminals especially in the wake of the high number of ratifications of the Rome Statute[4]. Then the focus will shift to the recent trend of war crimes prosecutions, including prosecutions based on territorial jurisdiction by the country where the crimes occurred, or active nationality jurisdiction where perpetrators were nationals of the prosecuting country or based on universal jurisdiction where there is no link between the location of the crime and the country bringing the prosecutions except for the fact that in most cases the perpetrator has fled to the country in question. The overview of the various mechanisms will conclude with an assessment of the application of international criminal law in the various countries by looking at developing trends in domestic prosecutions as well as discussing emerging legal issues pertaining to the notion of universal jurisdiction and the elements of the international crimes of genocide, war crimes and crimes against humanity.

Historical and International context

Both the development of the legal parameters of law dealing with international crimes and the application of this law by both international institutions has known historical ebbs and flows. A major impetus was received after the Second World War until about 1950 after which very little happened until the mid nineties even though conflicts in which international crimes occurred continued unabated during this time period.

Most of the law of war crimes and crimes against humanity was developed in the immediate aftermath of the Second World War and consisted of the instruments setting up the two international military tribunals in Nuremberg and Tokyo, the legislative authority enabling domestic courts to deal with war criminals in Europe and Asia, the caselaw developed by these tribunals and courts[5], the adoption of the 1948 Genocide

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[4] 106; see http://www.icc-cpi.int/about.html.

[5] The most important cases have been described in a variety of law reports; the proceedings and the verbatim judgments of the Military Tribunals in Nuremberg have been reported very extensively in the 15 volumes of the *Trials of War Criminals before the Nuernberg Military Tribunals*, the so-called Green Series (see also http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=nur_13tr) . There has also been the Law Reports of Trials of War Criminals for all proceedings including the Nuremberg Tribunals, which is a 15 volume compilation of summaries and case comments of important decisions selected and prepared by the United Nations War Crimes Commission (see also http://www.ess.uwe.ac.uk/genocide/war_criminals.htm). The judgment of the Nuremberg International Military Tribunal is reported in Volume XXII of the *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946* which was published at Nuremberg in 1949 and is also known as the Blue Series (see also http://www.yale.edu/lawweb/avalon/imt/imt.htm). There has also some reporting of war crimes trials in

Convention and the passing of the Geneva Conventions which regulated the conduct of war, including its violations[6]. Virtually all the important principles for this area of law can be traced back to this time period with some other important cases, such as the Menten case in the Netherlands[7], the Barbie, Papon and Touvier cases in France[8] and the Eichman trial in Israel[9] adding refinements to those principles. When international criminal law was examined by Canadian[10], Australian[11] and British criminal courts[12] in the eighties and nineties, a direct linkage was made between the post WWII law and the cases before them. This was not only done because the persons who had been investigated by the Canadian and Australian governments had committed their acts during the Second World War but also because there was no new law to speak of in the interim.

However, there has been an explosion of new developments internationally in the area of war crimes law in the last 15 years. There have been the International Criminal Tribunals for the Former Yugoslavia (ICTY)[13] and Rwanda (ICTR)[14], which were established in 1994 and 1995 respectively. These tribunals have their own Trial Chambers and a shared Appeal Chamber. The decisions of the Chambers of the two tribunals have greatly

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Annual Digest and Reports of Public International Law Cases, which changed its name in 1950 to *International Law Reports*.

[6] There are four Geneva Conventions, namely the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II); Geneva Convention relative to the Treatment of Prisoners of War (Geneva III); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva IV). The text of the four Conventions can be found in Schedules I to IV to the Geneva Conventions Act, R.S.C. 1985, Chapter G-3. The articles dealing with war crimes are articles 50 (Geneva I), 51 (Geneva II), 130 (Geneva III) and 147 (Geneva IV), which is the most encompassing. The war crimes provisions of the 1949 Geneva Conventions have been supplemented by the 1977 Additional Protocol I, articles 11 and 85. For a discussion of the post WWII caselaw see Rikhof, "War Crimes, Crimes against Humanity and Immigration Law", (1993) 19 Imm.L.R. (2nd) 18, at 30-46.

[7] 75 International Law Reports 331.

[8] See 78 International Law Reports 123 for the Barbie case; http://www.trial-ch.org/en/trial-watch/profile/db/facts/maurice_papon_188.html for the Papon case and http://www.trial-ch.org/en/trial-watch/profile/db/facts/paul_touvier_124.html for the Touvier case.

[9] 36 International Law Reports 1.

[10] The Finta case; for the Supreme Court of Canada decision see [1994] 1 S.C.R. 701.

[11] There have been three criminal prosecutions in Australia, namely the cases of Berezovsky, Wagner and Polyukhovich; the decision of the High Court of Australia in the last case can be found in 101 Australian Law Reports 545, (1991) 172 CLR 501 and 91 International Law Reports 1.

[12] There has been one prosecution in the United Kingdom, namely the Sawoniuk trial which has been the only successful prosecution of a WWII perpetrator based on universal jurisdiction; for an assessment, see 2 *Yearbook of International Humanitarian Law* (1999), Part III, "National Decisions".

[13] The official name is "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991" and was established on May 25, 1993 as the result of Security Council Resolution 837 (UNDOC S/RES/827 (1993).

[14] The official name of the tribunal is "The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations in the territory of neighbouring States, between 1 January 1994 and 31 December 1994" and was established by Security Council Resolution UNDOC S/RES/955 on November 8, 1994.

contributed to the development of the international law of war crimes, genocide and crimes against humanity. As of June 1, 2008, the ICTY has indicted 161 persons, the cases of 113 of those have been completed resulting in convictions and sentences of 55 persons in 46 separate trial processes[15] plus 9 acquittals while it also has transferred eight cases involving 14 persons referred to national jurisdictions, all to Bosnia and Herzegovina except two to Croatia and one to Serbia[16]. The ICTR has indicted 90 persons of whom 75 have been arrested and 30 convicted in 24 judgments[17] (plus another five have been acquitted) while transferring three persons to national jurisdictions, one to the Netherlands and two to France[18].

Apart from the work of the two ad hoc tribunals, there has been a lot of work done under the auspices of the United Nations to establish a permanent international criminal court. The Statute of the International Criminal Court, which was adopted on July 17, 1998[19], contains definitions of genocide, crimes against humanity and war crimes, which can be considered the most contemporary formulation of the international law pertaining to these crimes. The court started operating on July 1, 2002 and has indicted eleven persons, five leaders of the Lord Resistance Army for the Ugandan situation (two of which have died since the approval of the indictment), two Sudanese persons in respect to the Darfur situation, one for the situation involving the Central African Republic who is in custody and four from the Democratic Republic of the Congo (DRC) regarding war crimes committed in the Ituri region of that country; three of the indictees for the last situation are in custody[20] while the first trial before the ICC for one of them has started in June 2008.

The United Nations has also been instrumental in establishing three hybrid tribunals for dealing with international crimes[21], namely the Special Panel for Serious Crimes of the Dili District Court in East Timor (and its Court of Appeal), the Special Court for Sierra Leone (with Trial Chambers and an Appeal Chamber) and the Extraordinary Chambers of the Courts of Cambodia. These courts have a mixed membership of local and international judges[22].

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[15] See http://www.un.org/icty/glance-e/index.htm, "under "Key Figures"

[16] Namely Jankovic, decided by both the Trial and Appeal Chamber; Stankovic, both TC and AC; Todovic/Rasevic, both TC and AC; Mejakic/Gruban/Knezevic/Dusan Fustar, TC and AC; Ademi/Norac, TC; Ljubicic, TC and AC; Kovacevic, TC and AC, Lukic, TC, and Trbic, TC, all to BiH except two to Croatia [Ademi/Norac] and one to Serbia [Kovacevic]).

[17] See Report on the Completion Strategy of the International Criminal Tribunal for Rwanda**,** November 21, 2007, paragraph 60.

[18] Bagaragaza, TC and AC to the Netherlands (however, this transfer has been cancelled, see footnote 47 and page 22); Bucyibaruta, TC and Munyeshyaka, TC, to France.

[19] The Statute can be found in 37 I.L.M 999 and on the United Nations website at http://un.org/law/icc. The ICC's own website is http://www.icc-cpi.int/ .

[20] See International Justice Tribune (IJT), issue 76, October 22, 2007, page 1.

[21] The United Nations has also established a fourth tribunal based on an agreement with a national state with international aspects, namely the Special Tribunal for Lebanon but this tribunal does not have same jurisdiction as the other three tribunals (See article 1 of the Agreement which is attached as an Annex to Security Council Resolution 1757 (2007), May 30, 2007.

[22] Generally see http://www.pict-pcti.org/courts/hybrid.html.

The Special Court for *Sierra Leone* was established on January 16, 2002 as a result of an agreement between the United Nations and the government of Sierra Leone and has jurisdiction over the international crimes of crimes against humanity, violations of common article 3 of the Geneva Conventions and other serious violations of international humanitarian law, all defined in the same manner as in the ICC Statute. The Special Court has indicted twelve persons (two of which have died since the indictment against them had been approved while the whereabouts of one is uncertain[23]) resulting in four trials of which two involving five indictees have been completed at the Trial Chamber level, namely the so-called AFRC and CDF cases[24] while the Appeal Chamber issued a judgment in the AFRC case on February 22, 2008.

The Law on the Establishment of The Extraordinary Chambers of the Courts of *Cambodia* was the result of an agreement between the United Nations and the government of Cambodia and was as adopted in Cambodia on January 2, 2001, providing jurisdiction over genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions in the same manner as the ICTY/ICTR Statutes. It has started to operate in 2006 but trials have been commenced yet,[25] although five persons are in custody[26]. Like the Sierra Leone Special Court it can be seen as nationalized international tribunal in that it was established with involvement of the international community and has an international presence at all levels of the judicial process but is apart from that aspect an extension of the regular Cambodian court system[27].

The *East Timor* Special Panels came into being on June 6, 2000 as a result of the promulgation of its constituting instrument by the United Nations Transitional Administration in East Timor (UNTAET) rather than an agreement between the United Nations and a national government and has jurisdiction over the international offences (in addition to serious ordinary criminal matters) of genocide, war crimes and crimes against humanity, the contents of which are almost identical to the description of these crimes in the ICC Statute. The panels finished their mandate on May 20, 2005 after having convicted 84 defendants and acquitted three in 60 trials (arising out of 95 indictments covering 440 people); the Court of Appeal of East Timor heard seven cases with six other ones pending.[28] These panels are internationalized domestic courts in that the only international aspect is the fact that they had international personnel in the judiciary and

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[23] http://www.sc-sl.org/cases-other.html.
[24] The website is http://www.sc-sl.org/.
[25] The Law can be found at http://www.yale.edu/cgp/KR_Law_trans.06.09.2001.html; see also http://www.eccc.gov.kh/ and http://www.unakrt-online.org/.
[26] IJT, issue 78, November 19, 2007, page 1; for a general assessment of the progress at the ECCC, see the May 15, 2008 report by the NGO Open Society Justice Iniative at http://www.justiceinitiative.org/db/resource2?res_id=104086.
[27] For an appraisal see De Bertodano "Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers", 4 *JICJ* (2006), 285-293.
[28] The authorizing documents can be found at http://www.un.org/peace/etimor/UntaetN.htm, specifically http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf , while the decisions of the Dili District Court and the Court of Appeal are available at http://www.jsmp.minihub.org/trials.htm.

the office of the prosecution to ensure that the transition from a conflict situation to a peaceful process was as efficient as possible.[29]

There is another internationalized domestic court in *Bosnia and Herzegovina* (BiH) which is a joint initiative of the ICTY and the Office of the High Representative in Bosnia and Herzegovina (OHR) and which started on March 9, 2005. It has jurisdiction for war crimes and crimes against humanity. Since its inception Chamber I of this court, the war crimes chamber, has indicted 77 persons for involvement in war crimes, including 11 which had been transferred from the ICTY as part of its completion strategy and has convicted 27 persons including four which had been transferred from the ICTY while it has acquitted one person[30].

Kosovo has a similar court as BiH, which was established on June 10, 1999 by the United Nations Mission in Kosovo (UNMIK) with jurisdiction for war crimes and genocide and five such trials have been held[31].

Another, albeit more weakened in that it only allows for international advisors, type of domestic hybrid tribunal is the Iraqi Special Tribunal which was established in *Iraq* without United Nations involvement on December 10, 2003 and which has jurisdiction for genocide, crimes against humanity and war crimes, the definitions of which are similar to the ones in the ICC Statute;[32] This court has indicted 20 persons of which 12 have been sentenced for genocide, war crimes and crimes against humanity[33], including Saddam Hussein, the former president[34].

As of June 1, 2008, the truly international or internationalized tribunals, namely the ICTY, ICTR, ICC, the SLSC and the ECCC have convicted 90 persons (out of 279

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[29] For an academic examination of the hybrid tribunals (i.e. institutions with international and domestic aspects), see *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* edited by Romano, Nollkaemper and Kleffner, 2006.

[30] The English website can be found at http://www.sudbih.gov.ba/?opcija=sadrzaj&id=3&jezik=e.; see also International Justice Tribune (IJT), issue 80, December 17, 2007, pages 3-4. There have also been another 154 indictments since 2004 in other courts (at the district and cantonal level) of which 122 have resulted in convictions; see the website of the OSCE at http://www.oscebih.org/human_rights/warcrimes.asp?d=1 and the 2007 Annual Report of the Humanitarian Law Centre at http://www.hlc-rdc.org/uploads/editor/Godisnji_izvestaj_engleski.pdf, pages 40-44..

[31] For individual trials see the 2007 Annual Report of the Humanitarian Law Center at http://www.hlc-rdc.org/Izvestaji/942.en.html and http://www.hlc-rdc.org/uploads/editor/Godisnji_izvestaj_engleski.pdf, pages 48-58; for an assessment of the judicial system in Kosovo re war crimes prosecutions, see the Amnesty International report of January 30, 2008 at http://www.amnesty.org/en/news-and-updates/report/justice-failed-kosovo-20080130 and more in general the Human Rights Watch report of March 28, 2008 at http://hrw.org/reports/2008/kosovo0308/.

[32] The weblink is http://www.cpa-iraq.org/human_rights/Statute.htm.

[33] See http://www.trial-ch.org/en/trial-watch/search/judgement-place/13.html.

[34] See for commentaries on the institution and the trials: *Saddam on Trial: Understanding and Debating the Iraqi High Tribunal*, Michael P. Scharf and Gregory S. McNeal, 2006; Scharf, "The Iraqi High Tribunal: A Viable Experiment in International Justice?", 5 *JICJ* (2007) 258-263; Sissons and Bassin, "Was the *Dujail* Trial Fair?", 5 *JICJ* (2007) 272-286 and "Fatal Errors: The Trial and Appeal Judgments in the 'Dujail' Case", 6 *JICJ* (2008) 39-65.

indictments) over the last 10 years[35] for genocide, crimes against humanity and war crimes in conflicts with millions of victims and thousands of perpetrators. It is unlikely that there will be a dramatic increase in the number of people being indicted by the above institutions given the fact that all of them, apart from the ICC, have a short temporal jurisdiction, which will not last beyond the year 2010[36] and since all of them will only investigate persons who have the greatest responsibility[37].

While there is no sufficient empirical evidence as to a causal effect between sentencing by international tribunals and possible general deterrence in terms of preventing genocide, crimes against humanity and war crimes in the future[38], it stands to reason that if many more perpetrators could be captured, tried, convicted and sentenced to very serious penalties commensurate with the commission of these crimes, this causal link would be strengthened[39]. Any increase of remedies to deal with perpetrators of atrocities will have to come at the domestic rather than the international level. This is specifically recognized in the statute of the ICC, which is only entitled to take jurisdiction if a state party is unwilling or unable to take action itself against perpetrators[40] and as such can be seen as a default jurisdiction in relation to domestic actions in this regard.

Domestic war Crimes Legislation

While it had always been possible in the domestic context to initiate criminal prosecutions for genocide and war crimes as a result of ratifying the 1948 Genocide Convention[41] and the 1949 Geneva Conventions[42], the coming into force of the Rome Statute provided an important impetus for a large number of countries to not only examine their domestic legislation dealing with the regulation of war crimes, crimes against humanity and genocide but also to introduce changes to their laws to ensure that they were in compliance with international obligations and the tenets of the Rome Statute.

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[35] The first conviction was that of Dusko Tadic by the Trial Chamber of the ICTY on May 7, 1997, http://www.un.org/icty/tadic/trialc2/judgement/index.htm.

[36] As a result of the completion strategy for the ICTY (see http://www.un.org/icty/publications-e/index.htm) and the ICTR (see http://69.94.11.53/default.htm, "About the Tribunal", ICTR Completion Strategy") imposed by the Security Council of the United Nations or as a result of the terms of the agreement between the United Nations and Sierra Leone and Cambodia. The international component of the internationalized domestic courts are also of temporary nature in that the East Timor courts have already become fully national and the same is expected in the next few years for the courts in Bosnia-Herzegovina and Kosovo.

[37] Either as a matter of policy as for the ICTY and ICTR or as indicated in the establishing instruments, as is the case for the ICC, SLSC and the ECCC.

[38] See Drumble, *Atrocity, Punishment and International Law*, 169-173; see also Harmon and Gaynor, "Ordinary Sentences for Extraordinary Crimes", 5 *JICJ* (2007), 683-712 and Henham, "Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research", 5 *JICJ* (2007), 757-778.

[39] Drumble, *Atrocity, Punishment and International Law*, 207-208.

[40] Article 17 of the Statute.

[41] The Convention has 103 parties; see http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

[42] The Conventions have been acceded to by 194 parties; see http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions.

Four major trends can be identified in the manner in which individual countries have decided to prosecute persons suspected of the commission of atrocities[43]. Some countries, such as Denmark and Norway use a combination of broad extraterritorial jurisdiction, regular criminal law provisions for substantive offences, such as murder or torture, and a harsher sentencing regime to take into account the unique and international nature of the domestic offences. This approach has as an advantage that the crimes under consideration are well known to domestic prosecutors and judges while at the same time there is no need to adduce evidence or legal arguments regarding the international elements of war crimes, crimes against humanity or genocide. The disadvantage is that although a harsher sentencing regime can reflect to some extent the seriousness of the crimes under consideration, the stigma attached to a longer sentence for murder committed during an armed conflict or in a systematic or widespread manner (the hallmarks of war crimes and crimes against humanity) is not the same as a similar or even shorter sentence for an international crime in a similar circumstances. As well, unlike domestic offences, international offences are not subject to statutes of limitations[44].

This latter point was brought home by the ICTR in the Bararagaza case where Norway has requested to have this case transferred to its jurisdiction from the ICTR as part of the ICTR completion strategy. Norway, the defendant and the ICTR prosecutor made arguments in support for such a transfer but both the ICTR Trial[45] and Appeal Chamber[46] refused to do so since Norway did not have legislation criminalizing international offences and since a harsher sentencing regime was deemed not sufficient to overcome the lack of appropriate legislation. The case had been transferred to the Netherlands[47] and Norway is considering amending its legislation[48].

The other three trends involve different models for the implementation of international criminal into domestic law. One trend is what has been called static implementation[49] where the national law dealing with international crimes repeats the definitions of genocide, crimes against humanity and war crimes as set out in articles 6, 7 and 8 of the

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[43] For an overview of some of these regime see Hankin, "Overview of Ways to Import Core International Crimes into National Criminal Law" in *FICJC Publications No. 1 (2007), Importing Core International Crimes into National Criminal Law*, edited by Bergsmo, Hayashi and Harlem, 15-17 (http://new.prio.no/FICJC/FICJC-publication-series/)

[44] See the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, http://www.ohchr.org/english/law/warcrimes.htm, which is considered now part of customary international law.

[45] ICTR-2005-86-R11bis, May 19, 2006.

[46] ICTR-05-86-AR11bis, August 30, 2006.

[47] ICTR-2005-86-R11bis, April 13, 2007; because of adverse jurisprudence in 2007 in the Netherlands regarding the crime of genocide and universal jurisdiction (see below at page 22), the case was transferred back to the ICTR on March 17, 2008.

[48] See Harlem, Importing War Crimes into Norwegian Legislation, in *FICJC Publications No. 1 (2007), Importing Core International Crimes into National Criminal Law*, edited by Bergsmo, Hayashi and Harlem, 33-45(http://new.prio.no/FICJC/FICJC-publication-series/)

[49] See Hankin, "Overview of Ways to Import Core International Crimes into National Criminal Law" in *FICJC Publications No. 1 (2007), Importing Core International Crimes into National Criminal Law*, edited by Bergsmo, Hayashi and Harlem, 15-17 (http://new.prio.no/FICJC/FICJC-publication-series/)

Rome Statute. Within this trend one can distinguish three variations. The first one repeats the exact wording of these articles of the Rome Statute. This has for instance been done in the United Kingdom[50], Malta and in the draft legislation of Jordan[51]. Other countries using the static model do not reproduce the text of these three articles of the Rome Statute but only make reference to them; this can be seen for instance in the legislation of New Zealand, South Africa[52], Uganda and Kenya. The last variation on this model can be found in Australia where not only the text of the three articles of the Rome Statute are produced but also the full details set out in the ICC Elements of Crime document[53]. The advantage of this model in all three variations is that the domestic legislation provides by direct reference to the Rome Statute clear guidance to the essential elements of the international crimes both by using the text and the travaux preparatoires of the Statute as well as the jurisprudence of the ICTY and ICTR until July 17, 1998 when the Statute was agreed upon. The downside of this approach is that it cannot take into account new developments in international criminal law without amending the original legislation. Such new developments have already occurred to the extent that since the coming into force of the Rome Statute new war crimes have found their way into the spectrum of international criminal law, namely the war crimes of terrorism[54] and collective punishments[55].

The third model, the dynamic model, is the mechanism whereby the conduct criminalized in the Rome Statute is redrafted in the domestic legislation either to provide a better connection to existing criminal offences in the domestic legislation or clarify some of the Rome Statute concepts especially where the crimes in the Statute are vague or imprecise as a result of the incorporation of existing customary international law notions such as the crimes against humanity of inhumane acts or persecution or as a result of lack of agreement during the negotiations of the Statute as was the case with the crime against humanity of imprisonment which uses the qualifier "in violation of fundamental rules of international law".

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[50] See Cryer and Bekou, "International Crimes and ICC Cooperation in England and Wales", 5 *JICJ* (2007), 441-459.

[51] The source for the domestic legislations is the Coalition for the International Criminal Court (CICC), a global network of over 2,000 non-governmental organizations (NGOs) advocating for a fair, effective and independent International Criminal Court (ICC) and can be found on its website (http://www.iccnow.org/) under "Regional and Country Info"; see also the National Prosecution of International Crimes Project by the Max Planck Institute in Germany, http://www.mpicc.de/ww/en/pub/forschung/forschungsarbeit/strafrecht/nationale_strafverfolgung.htm ; other sources are separately mentioned where appropriate.

[52] See Du Plessis, "South Africa's Implementation of the ICC Statute", 5 *JICJ* (2007), 460-479.

[53] See http://www.un.org/law/icc/statute/romefra.htm.

[54] See most recently at the ICTY the Appeals Chamber decision in Galic, IT-98-29A, November 30, 2006, pages 31-54, followed by two Trial Chamber decisions of the Sierra Leone Special Court in the AFRC case (SLSC-04-16-T, June 30, 2007, pages 201-206) and the CDF case (SLSC-04-14-T, August 2, 2007, pages 50-53).

[55] Sierra Leone Special Court in the AFRC case (SLSC-04-16-T, June 30, 2007, pages 206-209) and the CDF case (SLSC-04-14-T, August 2, 2007, pages 53-55).

Examples of this model are the legislation of Germany[56]; the Netherlands; Uruguay (where the targeted groups of genocide include 'national, ethnic, racial, religious, political, union or a group with its identity based in reasons of gender, sexual orientation, culture, social, age, disability or health' while also adding the crime of instigating genocide); Argentina[57] (where the age in the war crime of forcible recruitment has been increased from 15 to18 years and where forced hunger as a grave violation of international law has been introduced); Ecuador (where the draft legislation adds to the groups of genocide the victims of gender, sexual orientation, age, health and conscience while ordering, planning or instigating genocide is also made an offence, even if genocide is not committed); the Republic of Congo (where the draft legislation adds to the definition of genocide, in addition the ones in the Rome Statute, any group that is defined by an arbitrary characteristic while under crimes against humanity "crimes de discrimination: tribale, ethnique ou religieuse" has replaced the crime of apartheid); and the Democratic Republic of the Congo (where the draft legislation increases the age in the war crime of forcible recruitment from 15 to 18 years).

The advantages and disadvantages of this model is similar to the previous one although since most legislation based on this model has been adopted more recently than when agreement regarding the Rome Statute text was reached, the disadvantage noted there is less obvious in this model.

The last model, the hybrid model, which has been used for instance in Canada[58], Costa Rica and Finland combines aspects of the both the static and dynamic models in that some crimes are specifically defined while others are made subject to a reference to international law. As with the other approaches variations have occurred both in terms of which crimes to define and in terms to which body of international law reference should be made. The Costa Rican legislation when employing the reference aspect of the legislation only mentions international treaty law (which means according to its legislation for war crimes international humanitarian law treaties and for crimes against humanity human rights conventions and the Rome Statute) while the Finnish statute refers to both treaty and customary international law but only for war crimes (prohibition of any acts which "otherwise violate the provisions of an international agreement on warfare binding upon Finland or the generally acknowledged and established rules and customs of war under public international law")[59]. The Canadian model goes the furthest in the reference portion by defining the three core international crimes by immediate reference to conventional international law, customary international law and general principles of law while at the same ensuring that the Rome Statute is considered a

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[56] See Kreß, "The German Model" in *FICJC Publications No. 1 (2007), Importing Core International Crimes into National Criminal Law*, edited by Bergsmo, Hayashi and Harlem, 23-25 (http://new.prio.no/FICJC/FICJC-publication-series/).
[57] Alvarez, "The Implementation of the ICC Statute in Argentina", 5 *JICJ* (2007), 480-492.
[58] Rikhof, "The Canadian Model", in *FICJC Publications No. 1 (2007), Importing Core International Crimes into National Criminal Law*, edited by Bergsmo, Hayashi and Harlem, 19-22 (http://new.prio.no/FICJC/FICJC-publication-series/).
[59] Hankin, "Overviews of Ways to Import Core International Crimes into National Criminal Law" in *FICJC Publications No. 1 (2007), Importing Core International Crimes into National Criminal Law*, edited by Bergsmo, Hayashi and Harlem, page 16(http://new.prio.no/FICJC/FICJC-publication-series/).

benchmark for customary international law as of July 17, 1998 but that further development in this area can continue independently[60].

These approaches have both advantages and disadvantages. Its advantage is that, by tying the regulation of core crimes very closely to international law, it will be assured that these countries will never be out of step with new developments in the international sphere. By virtue of this link, these new developments automatically become part of their domestic law without the need of legislative amendments. The disadvantage is that this linkage requires all actors in criminal prosecutions to be continually up to date with changes in the international jurisprudence.

War Crime Proceedings[61] based on Territorial/Nationality Jurisdiction[62]

There have been proceedings involving international crimes based on territorial or active nationality jurisdiction in 18 countries (including the three internationalized domestic courts in Bosnia-Herzegovina, Kosovo and East Timor), namely five in Europe, six in Latin America, three in Asia and four in Africa.

In **Europe**, apart from the national courts in Bosnia-Herzegovina and Kosovo, both of which were discussed above because of their international aspects[63], there have been a number of other war crimes prosecutions in the former Yugoslavia, namely in Serbia[64], Croatia and Macedonia.

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[60] Rikhof, "The Canadian Model", in *FICJC Publications No. 1 (2007), Importing Core International Crimes into National Criminal Law*, edited by Bergsmo, Hayashi and Harlem, 20-21 (http://new.prio.no/FICJC/FICJC-publication-series/).

[61] Only trials where charges were specifically laid for war crimes, crimes against humanity or genocide are discussed. There have been other trials based on domestic crimes related to situations, which bear similarities to international crimes; the unsuccessful Walter Basson trial in 1999 with 229 murder charges in South Africa is an example (see http://www.saflii.org/za/cases/ZACC/2005/10.html) as are the trials of Iouri Budanov in Russia in 2003 for crimes committed in Chechnya (http://www.trial-ch.org/en/trial-watch/profile/db/facts/iouri_budanov_314.html) and Pol Pot in Cambodia in 1997 for the murder of his former right-hand man, Son Sen (http://en.wikipedia.org/wiki/Pol_pot#Aftermath__.281979-1998.29) while the indictment in Uruguay in 2007 against former president Bordaberry for murder and disappearances in 1972 (IJT, issue 74, September 24, 2007, page 2) also falls into this category.

[62] The sources for information in this section are for the most part: the website Trial Watch, http://www.trial-ch.org/en/trial-watch/search.html; the Human Rights Brief (http://www.wcl.american.edu/hrbrief/issue.cfm) of the Center for Human Rights & Humanitarian Law of the American University Washington College of Law; the War Crimes Prosecution Watch which is prepared by is prepared by the International Justice Practice of the Public International Law & Policy Group and the Frederick K. Cox International Law Center of Case Western Reserve University School of Law (http://www.publicinternationallaw.org/warcrimeswatch/index.html); and the International Justice Tribune (IJT) (http://www.justicetribune.com/); more detailed of some of the cases can also be found in the Correspondents' Reports of the Yearbooks of International Humanitarian Law (YIHL).

[63] See page 7.

[64] For an assessment of the war crimes prosecutions in Serbia see the February 11, 2008 report by the International Center for Transitional Justice at http://www.ictj.org/images/content/7/8/780.pdf.

In *Serbia*[65] 57 persons have been charged in 12 separate indictments for international crimes since 2005, of which 22 have been convicted at first instance by the War Crimes Chamber of the Belgrade District Court (although 14 of these convictions were later overturned by the Serb Supreme Court), five persons have been acquitted and the remainder of the cases are ongoing.

Of the 22 convictions, five were the result of one trial involving members of the paramilitary group the Scorpions, which had been active in Bosnia during the 1992-95 war and in Kosovo in the late 1990s. Its members were believed to have taken part in the capture of Srebrenica and the killing of up to 8,000 Muslim men and boys in July 1995. Alexander Medic (5 years), Branislav Medic (20 years), Slobdan Medic (20 years) and Pero Petrasevic (13 years) were convicted on April 10, 2007 while Sasa Cvjetan (20 years) had already been convicted on December 20, 1995 by the Appeals Chamber of the Supreme Court of Serbia; one other person belonging to this group was acquitted, namely Aleksander Vukov. Four more persons belonging to this group were arrested on October 19, 2007 and indicted on April 21, 2008.

In addition, Anton Lekaj, a member of the military police forces within the Kosovo Liberation Army received a sentence of 13 years on September 18, 2006.

Sasa Radak was convicted to 20 years on September 6, 2006 for his participation of in the events at the Ovcara Farm, which took place on the night of 20 November 1991, close to Vukovar, and during which 192 Croatian prisoners of war were executed but this latter conviction was overturned by the Serb Supreme Court in April 2007. Milan Bulic was also convicted for crimes at the same location on March 2, 2007. The same event at Ovcara Farm also resulted in a trial in 2005 in which 16 persons had been charged for war crimes of which 14 were convicted for a total of 231 years imprisonment but that result has also been overturned by the Serb Supreme Court in December 2006; a new trial for all original 16 persons began on March 13, 2007. On April 10, Milorad Pejic, a British citizen, was arrested in Belgrade and added as a suspect in this case[66].

Two cases, which were begun recently are those of Sian Morina who was indicted on July 18, 2007 for crimes committed in Kosovo and of Vladimir Kovacevic who had been referred to Serbia by the ICTY in 2006[67] and who was indicted on July 30, 2007 for war crimes committed in Dubrovnik, Croatia; in the latter case charges were dropped in December 2007 because the accused was not mentally fit to stand trial while the former was acquitted on December 20, 2007.

Two trials involving personnel of the Serbian Ministry of Internal Affairs (MUP) started in late 2006 are still ongoing; the first one involves Sreten Popovic and Milos Stojanovic, in the so-called Bytyqi case, which started on November 13, 2006 while the second, the Suva Reka trial, involving eight accused, began five weeks earlier.

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[65] See for a general assessment a report by the NGO Open Society Justice Initiative of May 20, 2008 at http://www.justiceinitiative.org/db/resource2/fs/?file_id=19803.
[66] Trial Watch, http://www.trial-ch.org/en/trial-watch/profile/db/facts/milorad_pejic_758.html.
[67] Trial Watch, http://www.trial-ch.org/en/trial-watch/profile/db/facts/vladimir_kovacevic_184.html.

Other cases which have started but which have not been completed are the Zvornik case involving six accused which began in November 2005; the Orahovac case, involving Boban Petkovic for the murder of three Albanians which started in December 2007; the Slunj case against Zrdravko Pasic for crimes committed in Croatia which began in November 2007; and the Lovas case in which 14 persons were indicted for crimes committed in Croatia as well and which started in April 2008[68].

In *Croatia* 1428 persons had been accused of crimes involving violations of international humanitarian law of which 611 had been convicted between 1991 and 2006, a large number in absentia[69]. The ICTY has transferred two persons to Croatia, namely generals Ademi and Norac[70] whose trial has started in 2007 while Croatia has charged one person, Miroslav Radic in November 2007, who had been acquitted by the ICTY. Six more persons were charged in January 2008[71].

In *Macedonia* four investigations into crimes committed by ethnic Albanian guerrillas during the 2001 armed conflict in that country were reopened on March 4, 2008. The four cases were originally brought before the ICTY but were returned to the Macedonian judiciary in mid February after the ICTY prosecutor decided not to proceed with the cases[72].

In **Central and South America**, a number of countries have started prosecutions against persons involved in crimes against humanity and genocide carried out under previous regimes, namely Chile, Peru, Colombia, Argentina, Uruquay and Mexico.

In *Chile*, although Augusto Pinochet, the 91-year old former president, died on December 10, 2006, twenty some members of his military junta are now behind bars in Chile, and approximately 400 more are being prosecuted[73]. The most high profile case is that of Manual Contreras, a retired army general who led Chile's secret police, DINA, during the time of the Pinochet regime. He and eight other top DINA members were charged on May 15, 2003 for the 1974 kidnapping of a Spanish priest who was tortured and then disappeared. On April 18, 2008 Contreras was sentenced to 15 years imprisonment for this crime; he had already been sentenced a month earlier to 15 years in prison for the kidnapping and disappearance of a young left-wing activist in 1975 and on January 11, 2008 to 10 years for the kidnapping of seven other people[74] while he is also already

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[68] See the 2007 Annual Report of the Humanitarian Law Centre at http://www.hlc-rdc.org/uploads/editor/Godisnji_izvestaj_engleski.pdf, pages 26-35.
[69] See the website of the Centre for Peace, Nonviolence and Human Rights, Osijek, at http://original.centar-za-mir.hr/sudenjeeng.html, specifically its 2006 Report, page 6, which can be found at (http://original.centar-za-mir.hr/pdf/Summary%20Annual%20report%202006.pdf), as well as the International Justice Tribune (IJT), issue 76, October 22, pages 3-4 and the OCSE website at http://www.osce.org/zagreb/29857.html.
[70] http://www.un.org/icty/ademi/trialc/decision-e/050914.htm.
[71] See the 2007 Annual Report of the Humanitarian Law Centre at http://www.hlc-rdc.org/uploads/editor/Godisnji_izvestaj_engleski.pdf, pages 44-48..
[72] See http://www.balkaninsight.com/en/main/news/8343/ .
[73] IJT, issue 59, December 18, 2006, page 2.
[74] IJT, issue 81, January 21, 2008, page 3.

serving time for plotting the 1976 car-bomb murder in Washington of a Chilean diplomat[75].

Another high profile case is that of Miguel Krassnoff Marchenko, an army brigadier general, member of the DINA and chief of the Villa Grimaldi torture centre. In 2003 he was sentenced to 15 years for the commission of a number of forced disappearances while receiving additional sentences of 10 years in June 2006 and 4 years in December 2006 for similar crimes[76]; the latter sentence was also pronounced against six others including Marcelo Moren Brito, a colonel and head of one of the DINA brigades[77]. France had already asked for the extradition of Krassnoff and Brito in 1998. As well, on August 29, 2007 the Chilean Supreme Court upheld a sentence of life imprisonment against general Hugo Salas Wenzel, the head of the intelligence service under Pinochet for the murder of 12 opponents of the regime[78].

On April 18, 2008 retired admirals Sergio Barros, Guillermo Aldoney and Adolfo Walbaum and retired navy captains Sergio Barra and Ricardo Riesgo were indicted for the abduction, torture and killing a British-Chilean priest, Michael Woodward, and other dissidents in the days following Chile's 1973 military coup; also charged was Carlos Costa, a navy doctor. Om May 26, 2008 another indictment was issued involving Operation Colombo, a 1975 attempt by Chilean security services to blame the dissidents' deaths on infighting among radical leftists during the Pinochet regime[79].

In *Argentina*[80], Miguel Etchecolatz, the former deputy with the Buenos Aires police during the “dirty war”, was sentenced to life in prison on September 19, 2006. This has been considered a first since the court found the defendant guilty of crimes against humanity in direct application of international law, but especially since the crimes were committed “in the context of a genocide that took place in Argentina between 1976 and 1983”. This was the second major ruling to be handed down[81] since the amnesty laws for crimes against humanity were lifted in 2005[82].

But most public expectations surround two mega-cases that started in 2007: the case of the Army First Corps covering army activity in and around Buenos Aires, which started

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[75] Reuters June 16, 2003.
[76] http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/miguel_krassnoff-marchenko_603.html.
[77] http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/marcelo_moren-brito_602.html.
[78] http://news.bbc.co.uk/2/hi/americas/6967974.stm.
[79] International Herald Tribune, May 26, 2008.
[80] There had been a trial in Argentina before the time period under consideration in this article. On 22nd April 1985, a historical trial opened in Buenos Aires to judge the main actors of the dictatorship during the “dirty war”. General Jorge Videla and Admiral Emilio Massera were sentenced to life imprisonment for the crimes of assassination, illegal confinement and torture. Other leaders of the junta were sentenced to various years of imprisonment. President Carlos Menem pardoned them all five years later (see http://www.trial-ch.org/en/trial-watch/profile/db/facts/emilio-eduardo_massera_173.html).
[81] IJT, issue 53, September 25, 2006, page 4..
[82] See Jacobson, “A Break with the Past or Justice in Pieces: Divergent Paths on the Question of Amnesty in Argentina and Colombia”, 35 Ga.J. Int’l & Comp. L, 2006-2007, 175-204.

in early 2007 and the Navy Mechanics School[83] case dealing with crimes committed by the navy in its officer training school, from where thousands of dissidents disappeared, which began on October 18, 2007.[84]

On February 13, 2007 the Argentine government issued an extradition request to Spain for Isabel Perón[85], a former president while the former chief of staff to Perón and then president, Jorge Videla, has also been indicted[86]. On April 28, 2008 a court in Spain denied the request in the Perón case.

After the opening of the trial of former chaplain Christian von Wernich on July 5, 2007[87] who was convicted to life imprisonment on October 9, 2007, another trial of ten military officers started a week later on July 10, 2007 in Buenos Aires. Notable among the accused are General Cristino Nicolaides, a member of the last junta in power in the early 1980s, who escaped prosecution thanks to a secret agreement with the democratic government in 1983. Nicolaides was the head of intelligence battalion 601 in the late 1970s. On July 13, 2007 the Supreme Court also overturned the presidential pardon granted to General Omar Riveros, accused of human rights violations in the 1970s.[88]

On February 1, 2008, two retired military officers were arrested in connection with the massacre of 16 leftist guerrillas in 1972 on a military base in the Patagonian city of Trelew; they are Paccagnini Ruben, 81, who captained a ship and headed the military base Almirante Zar Trelew, and Emilio Del Real, 73, a frigate captain who allegedly was at the August 22, 1972, shooting of the guerrillas. On April 25, 2008 former police chief and mayor Luis Abelardo Patti was arrested for his involvement during the “dirty war”.

In *Colombia* the government brought 59 paramilitary leaders to court on December 14-15, 2006.[89] The trial of Salvatore Mancuso, the top paramilitary leader to stand trial before the Colombian courts, resumed on January 15, 2007 in Medellin. When the trial resumed, Mancuso admitted to at least 55 assassinations and 6 massacres.[90]

In *Peru* the former president Alberto Fujimori has been accused of human rights violations and corruption. He was arrested in Chile as a result of an extradition request and while this request was denied on July 12, 2007 by a lower court, Supreme Court agreed to his surrender on September 21, 2007; he was extradited a day later[91] and put on trial in Peru[92]. As well, on April 10, 2008 in a separate trial, a court in Lima sentenced 14 army officers for their participation in the Colina Group paramilitary death squad.

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[83] IJT, issue 88, May 5, 2008, pages 3-4.
[84] IJT, issue 67, May 7, 2007, page 2; see also IJT, issue 84, March 3, 2008, page 3.
[85] See Trial Watch, http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/isabel_per%F3n_601.html.
[86] http://www.trial-ch.org/en/trial-watch/profile/db/facts/jorge-rafael_videla_151.html.
[87] http://www.trial-ch.org/en/trial-watch/profile/db/facts/christian-federico_von-wernich_456.html.
[88] IJT, issue 72, July 23, 2007, page 2.
[89] IJT, issue 59, December 18, 2006, pages 1-2.
[90] IJT, issue 60, January 22, 2007, page 1.
[91] IJT, issue 72, July 23, 2007, page 3 and IJT, issue 74, September 24, 2007, page 2.
[92] ITJ, issue 87, April 21, 2008, page 2.

In *Uruguay* three persons have been arrested on December 17, 2007 for crimes against humanity during the "dirty war" between 1976 and 1983, including former military dictator Gregorio Alvarez[93].

Former *Mexican* president Luis Echeverria Alvarez was accused of having ordered the Mexican army to fire on a demonstration in Mexico City on October 2, 1968, while he was Minister of the Interior. A federal tribunal ruled on July 12, 2007 that the massacre, which left between 200 and 300 people dead, constitutes genocide, aimed at exterminating a national student group, but in the same ruling the charges against the president were dismissed since there was no evidence linking him to the massacres.[94]

In **Asia**, *Indonesia* established in 2000 the Ad Hoc Tribunal for East Timor to deal with the same events as the special courts in East Timor. Of the twelve indictments with charges of crimes against humanity involving 18 defendants, six military and police officers have been convicted while the remainder were acquitted[95].

There has been a conviction for war crimes in *Afghanistan*. Assadullah Sarwary, the former head of the Afghan intelligence services KhAD under the pro-Communist Najibullah regime that fell in 1992, had been in jail in Kabul for 14 years. On February 25, 2006 the national security court sentenced him to death. Sarwary is the first person to be tried for war crimes in an Afghan court.[96]

While there have been no prosecutions yet, there have been growing calls in *Bangladesh* for a war crimes tribunal to look into atrocities that occurred during the country's 1971 war of independence. Bangladesh, then known as East Pakistan, accuses Pakistan of unleashing a brutal crackdown during its independence struggle that left up to three million people dead in a span of nine months. The Bangladeshi War Crimes Facts Finding Committee (WCFFC), a research organisation, unveiled on April 3, 2008 a list of 1,597 war criminals responsible for the mass killings, rapes and other atrocities during the Liberation War. Of those on the list, 369 are members of Pakistan military, 1,150 are their local collaborators including members of Razakar and Al Badr (forces formed to aid the occupation army).[97]

In **Africa**, prosecutions involving war crimes, crimes against humanity and genocide have begun in the Republic of the Congo, the Democratic Republic of the Congo, Ethiopia and Rwanda, to be followed soon by Uganda.

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[93] See "Uruguay's ex-dictator charged with crimes against humanity", Associated Press, December 17, 2007.

[94] IJT, issue 72, July 23, 2007, page 2; see also http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/luis_echeverr%EDa-alvarez_326.html.

[95] See http://socrates.berkeley.edu/~warcrime/East_Timor_and_Indonesia/Adhoc_jakarta.html and http://www.jsmp.minihub.org/Indonesia/indonesia.htm.

[96] IJT, issue, 42, March 13, 2006, page 4.

[97] The Daily Star (Bangladesh), April 23, 2008.

On 17 August, 2005, after a three-week trial, a Brazzaville criminal court in the *Republic of the Congo* acquitted 15 officers in the so-called Beach case (related to the forced disappearance of 350 returning refugees at the Beach port in Brazzaville in 1999), finding them not guilty of the crimes of genocide, war crimes and crimes against humanity that were attributed to them.[98]

In the *Democratic Republic of the Congo (DRC*), the military court in Bunia, Ituri, in the beginning of 2006, sentenced a captain in the Rwandan army, Blaise Bongi, to life in prison for war crimes. On March 17, 2006, the military court in Bukavu sentenced Jean-Pierre Biyoyo, ex-commander of the armed group Mudundu 40 to five years in prison for the illegal detention of children. The military court in Mbandaka sentenced seven soldiers to life in prison on April 12, 2006 for crimes against humanity and for rapes committed in December 2003 in Songo Mboyo and Bongandanga.

On August 2, 2006 the former Minister of Defense under Thomas Luganga,Yves Kahwa Panga Mandro, who founded the Party for Unity and the Protection of Congo's Integrity (PUSIC) in October/November 2002 (a "movement that has been working to date to destabilize Ituri," according to the court ruling) was sentenced to 20 years in prison by the military tribunal in Bunia for crimes against humanity and war crimes, in particular for massacres committed in October 2002 in Zumbe village 25 kilometers from Bunia;[99]; however, an appeals court acquitted him on February 15, 2008.

On February 19, 2007, the same military tribunal of Bunia handed down life sentences to 4 militiamen while two others were sentenced to 10 and 20 years in prison, and a seventh was acquitted, all of whom belonged to the first integrated brigade of the Armed Forces of the Democratic Republic of Congo (FARDC), a unit composed of former militiamen that was trained with Belgian military cooperation in 2004. They were prosecuted for war crimes, following the discovery in November 2006 of a mass grave containing the bodies of 31 civilians in Bavi, a village 40 km south of Bunia.[100]

On June 28, 2007, the Military Court in Katanga acquitted all defendants, both military and civilian, in the Kilwa trial. In 2004, members of the FARDC regained control of the town of Kilwa from a rebel group, which had briefly occupied it. In investigating the events, human rights officers of the United Nations Mission in the DCR (MONUC) documented incidents of summary executions, torture, illegal detention and looting by the FARDC forces and concluded that little and sporadic fighting took place. Also charged for providing assistance to the armed forces had been three civilian employees of the mining company Anvil, namely one Canadian and two South Africans.[101] On December 21, 2007 the Military Court of Appeal in Lubumbashi refused to allow an appeal of the acquittals.

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[98] IJT, issue 32, September 26, 2005, page 3.
[99] IJT, issue 53, September 25, 2006, page 3.
[100] IJT, issue 64, March 19, 2007, page 3.
[101] Reuters, July 5, 2007.

In *Ethiopia*, former Ethiopian dictator Mengistu Haile Mariam, who is in exile in Zimbabwe, was convicted for genocide on December 12, 2006 by a court in Addis-Ababa and sentenced to life in prison on January 11, 2007;[102]; this was sentence was increased on May 26, 2008 to a death sentence.[103] Another 54 accused were convicted for genocide as well and of these 55 accused 35 were core members of the Derg, the ruling party in Ethiopia between 1977 and 1991 and a Marxist style revolutionary junta, while the remainder were ordinary members of the Derg and officials in urban dwellers associations (Kebeles).[104] Another 19 persons were convicted on April 5, 2008 including five who received the death penalty. Over 5000 persons have been tried for involvement in the Red Terror campaign by the Derg government of Mengistu as a result of investigations by the Office of the Special Prosecutor since 1994.[105]

In *Rwanda*, the 2,100 major perpetrators of the 1994 genocide will be tried in regular criminal court while the remainder will be the subject of specialized gacaca proceedings[106]. About 60,000 have been tried in those proceedings since 2005 while another 800,000 suspects are still awaiting a hearing. Rwanda will also receive 30 files involving major perpetrators from the ICTR in the context of its completion strategy.[107]

The numbers of suspected perpetrators in the genocide to be dealt with judicially in Rwanda are staggering: 818,564 people are suspected of genocide, of which 77,269 in the first category (punishable by life in prison), 432,557 in the second category (punishable by 1 to 30 years in prison and community service in the case of accepted confessions), and 308,738 in the "third category" or crimes against property (amicable settlement or sentenced to pay compensation).

The 1,545 gacaca district courts and 1,545 appeals courts are trying the crimes in the first and second categories while 9,008 gacaca cell courts are trying crimes against property. Approximately 60,000 decisions have been rendered by the gacaca courts of which around 50% of the sentences are for punishments of 15 to 30 years in prison, 3% for community service and 20-40% are acquittals depending on the regions. With respect to persons in detention, there were 120,000 prisoners at the end of 2002 which had been reduced to 92,000 in February 2007, including 30,000 from the gacaca courts while around 60,000 conditional releases took place between 2003 and 2007.[108]

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[102] ITJ, issue 60, January 22, 2007, page 3.
[103] BBC News, May 26, 2008.
[104] Tiba, "The Mengistu Trial in Ethiopia", 5 *JICJ* (2007), 513-528; see also http://www.trial-ch.org/en/trial-watch/profile/db/facts/mengistu_haile-mariam_262.html.
[105] Regarding the Office of the Special Prosecutor see *Emory International Law Review*, Fall Issue 1995.
[106] See official website of the Republic of Rwanda, http://www.gov.rw/ under "Genocide".
[107] See ICTR website, http://69.94.11.53/default.htm under "About the Tribunal", "ICTR Completion Strategy", "S2007/323", paragraph 7.
[108] Primary source: National Service of Gacaca Jurisdiction, December 2006, quoted in ITJ, issue 64, March 19, 2007, p. 1; see also Drumble, *Atrocity, Punishment and International Law*, 85-99 and ITJ, issue 87, April 21, 2008, page 1; see also Waldorf ,"Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice", (2006) 79 *Temp.L. Rev*. 1.

Uganda has set up a special war crimes court to deal with cases of human rights violations committed during the 20-year insurgency in the north**.** The court, a special division of the Uganda High Court, will be dealing with members of the Lord Resistance Army[109].

War Crimes Proceedings based on Universal Jurisdiction[110]

In **Europe**[111] 12 countries have initiated criminal investigations and prosecutions for international crimes[112] committed elsewhere between 1992 and June 1, 2008, resulting in just over 50 charges (of which over 80% since 2000 alone) with 21 convictions and 5 acquittals.

The Netherlands has become the main centre of international criminal justice, both internationally and domestically. Internationally, both the ICC and the ICTY are located

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[109] BBC News, May 26, 2008.

[110] Extradition proceedings are discussed in the country where they are taking place even though strictly speaking they are not based on universal jurisdiction. The sources for this section are in general: Human Rights Watch, "Universal Jurisdiction in Europe, the State of the Art", June 2006 at http://hrw.org/reports/2006/ij0606/; "EU Update, International Crimes", a semi-annual report (as of June 2006) by REDRESS at http://www.redress.org/journals_newsletters_1.htm; the Final Report by REDRESS and FIDH, "Fostering a European Approach to Accountability for Genocide, Crimes against Humanity, War Crimes and Torture: Extraterritorial Jurisdiction and the European Union", April 2007 at http://www.fidh.org/IMG/pdf/FINAL_FIDH-REDRESS_REPORT.pdf; and the website Trial Watch, http://www.trial-ch.org/en/trial-watch/search.html; See also in general Van Elst, "Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions", (2000) *LJIL* 815; Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives*, (2003); Macedo, *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, (2004); Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of national Jurisdiction for Prosecuting Serious Crimes under International Law*, (2006); and Kaleck, Ratner, Singelstein and Weiss, *International Prosecution of Human Rights Crimes,* (2007) while the publication "International Law in Domestic Courts" (http://ildc.oxfordlawreports.com/public/login) has international criminal law and international humanitarian law as categories.

[111] In addition to these investigative and prosecutorial efforts by individual countries, there have also been attempts at co-ordinating these activities by improving exchange of information pertaining to investigations and by establishing best practices. Interpol has convened three International Expert Meetings on Genocide, War Crimes, and Crimes Against Humanity since 2005; see http://www.interpol.int/Public/CrimesAgainstHumanity/default.asp, while three years earlier the European Union decided to establish an European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, which meets on a regular basis, see the *Official Journal of the European Communities* L167/1 of 26/6/2002 and L118/2 of 14/5/2003 (http://legislationline.org/legislation.php?tid=155&lid=5695&less=false). As well, the ICC has started to convene meetings with some of the specialized war crimes unit in order to develop an efficient co-operation model between national states and the ICC based on the complementarity principle enshrined in article 17 of its Statute.

[112] In most cases the international crimes considered in this section are war crimes and genocide although in some instances crimes against humanity were charged as well as torture, as defined by the 1984 Torture Convention.

in The Hague[113] while the SLSC will conduct its most high profile case, that of Charles Taylor, in that city as well[114]. As well, the Netherlands became the first country to have a case transferred from the ICTR as part of its completion strategy[115].

On the domestic side, the activities of the Dutch government have been equally impressive in that five persons have been convicted for international crimes since 2001, although this effort has stalled somewhat most recently as a result of two acquittals in 2007 and the overturning of one conviction in the same year.

Former Zairian army officer Sebastien Nzapali was convicted of torture in 2004 for his participation in leading death squads in the DRC in 1990 and 1995[116]. Heshamuddin Hesham and Habibullah Jalalzoy were convicted in 2005 for war crimes and torture due to their involvement in the KhAD in Kabul in Afghanistan between 1979 and 1989 and received a nine and twelve year prison sentence respectively[117], a sentence upheld by an appeals court on January 29, 2007[118].

Frans van Anraat, a Dutch national, was convicted at the trial level of complicity in war crimes on December 23, 2005 to 15 years imprisonment as a result of having provided chemicals used in attacks against Kurds within in Iraq in 1988 and against the Iranian army during the Iraq-Iran war in 1980-1988 by the Saddam Husein regime in Iraq. He was acquitted of complicity in genocide, as it was not established that he had actual knowledge of the genocidal intent of the Hussein government[119]. During the appeal of this case the court increased his sentence to 17 years imprisonment on May 9, 2007[120], even though the appeal court was of the view that there had been no evidence of genocide during the Anfal campaign[121]. On June 6, 2006 another Dutch national, Guus van Kouwenhoven, was convicted for violating a United Nations arms embargo in Liberia and sentenced to eight years imprisonment. There was insufficient evident of his knowledge or direct involvement to convict him of war crimes[122]. The verdict was overturned by an appeals court on March 10, 2008 and an acquittal substituted instead[123];

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[113] In addition, the Special Tribunal for Lebanon will also be established in the Netherlands, see http://www.un.org/apps/news/infocus/lebanon/tribunal/; see regarding this tribunal various contributors in 5 *JICJ* (2007) 1061-1174 and 21 *LJIL* (2008), Issue 2 .
[114] See http://www.sc-sl.org/Taylor.html.
[115] ICTR-2005-86-R11bis, April 13, 2007; however, this person will be transferred back to the ICTR as a result of the judgments in the Mpambara case (see below as well as the Report on the Completion Strategy of the International Criminal Tribunal for Rwanda**,** November 21, 2007, paragraph 16).
[116] See Kamminga, “Netherlands Judicial Decisions involving Questions of International Law: First Conviction under the Universal Jurisdiction Provisions of the UN Convention against Torture”, 51 *NILR* (2004) 439-449.
[117] See Guénaël Mettraux, “Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes”, 4 *JICJ* (2006) 362-371 (and further discussion as a result of this article in 4 *JICJ* (2006) 878-889.
[118] Case numbers LJN AZ7147 and LJN AZ9365, which can be found at http://zoeken.rechtspraak.nl/.
[119] Case number LJN AX6406 which can be found at http://zoeken.rechtspraak.nl/
[120] See Van der Wilt, “Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the *van Anraat* case*”,* 4 *JICJ* (2006) 239-257.
[121] Case number LJN BA6734, which can be found at http://zoeken.rechtspraak.nl/.
[122] Case Number LJN AY5160, which can be found at http://zoeken.rechtspraak.nl/.
[123] Case number LJN BC7373 which can be found at http://zoeken.rechtspraak.nl/.

later that month prosecutors announced their intention to seek an appeal to the Supreme Court of the Netherlands[124].

In another case, an officer of the Afghan Military Intelligence Service in Afghanistan during the Najibullah regime was acquitted for charges of war crimes and torture on June 25, 2007[125] while a Rwandan national, Joseph Mpambara, was arrested in August 2006 on charges of involvement in the genocide in Rwanda; in he latter case jurisdiction was denied on July 24, 2007 by the court of first instance on the basis that neither the perpetrator or a victim has Dutch nationality[126]; this judgment was confirmed on appeal on December 18, 2007[127]. All these cases have been investigated by a special police war crimes unit.

In *Belgium* there have been three cases since 2001, which have led to convictions for seven persons, all related to the Rwandan genocide. On January 8, 2001 the first universal jurisdiction case in Belgium resulted in the conviction of the "Butare Four" for war crimes and resulting in sentences of between 12 and 20 years for Julienne Mukabutera[128], Consolata Mukangango[129], Vincent Ntezimana[130] and Alphonse Higaniro[131].

On June 29, 2005, the half-brothers Etienne Nzabonimana[132] and Samuel Ndashykirwa[133] were sentenced to 12 and 10 years respectively for murders of Tutsis in Kirwa. The trial of Bernard Ntuyahaga[134] began in April 2007. He was found guilty of the murder of six Belgian peacekeepers in Rwanda and was sentenced to 20 years in prison on July 4, 2007 although he was acquitted of the murder of former prime minister of Rwanda, Agathe Uwilingiyimana, and of involvement in other massacres[135]; his appeal was rejected on December 12, 2007.

In addition to these convictions, Ephrem Nkezabera has been indicted for activities in the Rwandan genocide as well. He is said to have played a key role within the Interahamwe (an extremist Hutu militia which was heavily involved in the genocide), of which

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[124] See http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/guus_van-kouwenhoven_289.html
[125] Case Number LJN BA9575, which can be found at http://zoeken.rechtspraak.nl/.
[126] Case Number LJN BB0494, which can be found at http://zoeken.rechtspraak.nl/; see also IJT, issue 78, November 19, 2007, page 2; see alsoVan Sliedregt, "International Crimes before Dutch Courts: Recent Developments", 20 *LJIL* (2007), 895–908.
[127] Case number LJN BC1757, which can be found at http://zoeken.rechtspraak.nl/.
[128] http://www.trial-ch.org/en/trial-watch/profile/db/facts/julienne_mukabutera_186.html.
[129] http://www.trial-ch.org/en/trial-watch/profile/db/facts/consolata_mukangango_185.html.
[130] http://www.trial-ch.org/en/trial-watch/profile/db/facts/vincent_ntezimana_162.html.
[131] http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/alphonse_higaniro_163.html.
[132] http://www.trial-ch.org/en/trial-watch/profile/db/facts/etienne_nzabonimana_327.html.
[133] http://www.trial-ch.org/en/trial-watch/profile/db/facts/samuel_ndashyikirwa_328.html.
[134] http://www.trial-ch.org/en/trial-watch/profile/db/facts/bernard_ntuyahaga_477.html.
[135] IJT, issue 71, July 9, 2007, page 4.

National Committee he was a member. As a banker, he was said to have been in charge of financing the militia and furnishing arms to the militiamen[136].

On 25 June 2002 Hervé Madeo and Thierry Desmarest, French citizens, were charged with complicity in crimes against humanity, perpetrated in Myanmar by military battalions who were in charge of the security of the pipeline project of which the company they worked for, TotalFinalElf, was aware. This case against TotalFinalElf was reopened in 2007[137] but dismissed on March 5, 2008[138]. They have also been charged for the same crimes in France.

In *Germany* four individuals have been prosecuted and convicted, all for involvement in crimes committed in the former Yugoslavia[139]. Novislav Djajic, Maksim Sokolovic, Djuradj Kusljic and Nicala Jorgic were all found guilty in first instance between 1997 and 1999. Djajic, a former member of the Bosnian Serb forces, was convicted in May, 1997 to five years imprisonment for aiding and abetting manslaughter only although he had been charged with genocide[140]. Sokolovic was convicted to nine years imprisonment in November 1999 for aiding and abetting genocide and grave breaches of the Geneva Conventions (i.e. war crimes), which was upheld on appeal in February 2001[141]. Kusljic was convicted of genocide in December 1999 and received a life sentence, which was upheld on appeal in February 2001, but on the basis of grave breaches rather than genocide[142]. Jorgic was convicted of genocide and murder and received a life sentence in 1997, which was upheld by an appeal court in April 1999 and later by the European Court of Human Rights on July 12, 2007[143].

More recently, German authorities arrested Augustin Ngirabatware on September 17, 2007 pursuant to an international arrest warrant issued by the ICTR.

In *Denmark*, the Danish International Crime Investigation Section (SICO)[144] which is a specialized unit consisting of prosecutors and police investigators, has been instrumental in laying charges in two cases involving international crimes since 2003[145]. One was a former general in the Saddam Hussein government, Nizar al-Khazraji, who escaped prior to his arrest and is believe to have passed away. The second person is Rwandan national

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[136] http://www.trial-ch.org/en/trial-watch/profile/db/facts/ephrem_nkezabera_627.html and IJT, issue 84, March 3, 2008, page 3.
[137] http://www.trial-ch.org/en/trial-watch/profile/db/facts/thierry_desmarest_371.html.
[138] IJT, issue 95, March 17, 2008, page 4.
[139] See also Rissing-van Saan, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia", 3 *JICJ* (2005) 381-399 and Zappalà, "The German Federal Prosecutor's Decision not the Prosecute a Former Uzbek Minister, Missed Opportunity or Prosecutorial Wisdom?", 4 *JICJ* (2006) 602-622.
[140] http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/novislav_djajic_135.html.
[141] http://www.trial-ch.org/en/trial-watch/profile/db/facts/maksim_sokolovic_139.html.
[142] http://www.trial-ch.org/en/trial-watch/profile/db/facts/djuradj_kusljic_140.html.
[143] http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/nikola_jorgic_283.html.
[144] http://www.sico.ankl.dk/page34.aspx.
[145] There have also been two charges for other, domestic, crimes for which Denmark has extraterritorial jurisdictions. A Ugandan national was convicted in 2004 for armed robbery and abduction while another person is in custody for charges of murder in Pakistan; see http://www.sico.ankl.dk/page34.aspx.

Sylvaire Ahorugeze (the former Chairman of the Civil Aviation Authority) who has been was arrested on genocide charges in September 2006 but was released on August 10, 2007[146].

Before the establishment of SICO another person had been charged in Denmark; in 1994 Refik Saric was convicted for torturing detainees in 1993 at a prison in Bosnia and convicted to eight years imprisonment for grave breaches, which was upheld on appeal in 1995[147].

In *Spain*, there has been one conviction for international crimes and a number of indictments combined with arrest warrants for people who are not present in Spain although some of those were based on the passive nationality principle in that the victims were of Spanish nationality.

On April 19, 2005 Adolfo Scilingo was convicted and sentenced to 640 years imprisonment for attempted genocide and other crimes committed in Argentina's dirty war[148]. Scilingo had voluntarily appeared before the court. Another case involving the dirty war in Argentina pertained to ex-military officer Ricardo Miguel Cavallo who was extradited from Mexico to Spain and accused of 228 disappearances and 128 kidnappings. The Spanish Supreme Court decided on July 17, 2007 that he could be tried for genocide and terrorism[149] and on March 31, 2008 the Spanish government extradited him to Argentina.

In December 2006, Rodolfo Eduardo Almiron Sena, former police commissioner in Argentina, was arrested on charges of murder and belonging to criminal organization; he allegedly participated in a death squad in Argentina during the dirty war that was responsible for killing 600 people; on February 15, 2008, a Spanish court agreed to extradite him to Argentina[150] where he arrived on March 31, 2008.

Several Guatemalan military officials, including former president Efrain Rios Montt, were investigated for genocide as a result of a scorched earth policy and widespread suppression, characterized by massacres against the Indian population and the obliteration of 440 Indian villages between March 1982 and August 1983.[151] Although initially the lower courts declined to issue arrest warrants, the Constitutional Tribunal found that Spain had jurisdiction over the case[152]. Since then, Spain has charged several suspects with genocide, and requested their extradition. In November 2006, at least 2 of

[146] http://www.trial-ch.org/en/trial-watch/profile/db/facts/sylvere_ahorugeze_476.html.
[147] http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/refik_saric_517.html.
[148] See Tomuschat, "Issues of Universal Jurisdiction in the *Scilingo* Case", 3 *JICJ* (2005) 1074-1081; Gil Gil, "The Flaws of the *Scilingo* Judgment", 3 *JICJ* (2005) 1082-1091; Pinzauti, "An Instance of Reasonable Universality: The *Scilingo* Case", 3 *JICJ* (2005) 1092-1105.
[149] http://www.trial-ch.org/en/trial-watch/profile/db/facts/ricardo-miguel_cavallo_48.html.
[150] IJT, issue 86, April 7, 2008, page 1.
[151] http://www.trial-ch.org/en/trial-watch/profile/db/facts/efrain_rios-montt_260.html.
[152] See Roht-Arriaza, "Guatemala Genocide Case, Spanish Constitutional Tribunal decision on universal jurisdiction over genocide claims", 100 *AJIL* (2006) 207-213; Ascensio, "The Spanish Constitutional Tribunal's Decision in *Guatemalan Generals*: Unconditional Universality is Back, 4 *JICJ* (2006) 586-594.

the 8 defendants were arrested in Guatemala but on December 17, 2007 the constitutional court of Guatemala refused to acknowledge that a Spanish court has jurisdiction to put them on trial[153].

Five investigations have also been opened in the last couple of years, one involving actions by Chinese officials, namely the commission of genocide in Tibet[154] in 2006, another one against the Chinese government for actions against Falun Gong practitioners in 2007, one against three American soldiers for murder and crimes against the international community in Iraq in 2007[155],one for the possible commission of genocide in the West Sahara by Morocco, also in 2007 and lastly, in February 2008, against 40 Rwandan army officers on charges of mass murder and crimes against humanity in the aftermath of the 1994 Rwanda genocide[156].

In *France* two persons have been convicted of international crimes. In July 2006 Ely Ould Dah, a Mauritanian army captain was sentenced in absentia to 10 years imprisonment for torture in Mauritania in 1990 and 1991. Ould Dah had been in France when the investigation was opened, but managed to flee to Mauritania during a conditional release[157]. The second person convicted was Alfredo Astiz, an Argentine captain, convicted in absentia to life imprisonment of the torture and disappearance of two French nuns based on the passive personality principle (the nationality of the victims) rather than universal jurisdiction.[158]

There have a number of proceedings involving Rwandans who took part in the 1994 genocide. Laurent Bucyibaruta was indicted for involvement in the Rwandan genocide, arrested in June 2007[159] and was supposed to be transferred to the ICTR[160]. An investigation into Rwandan priest Wencelas Munyeshaka's involvement in genocide and crimes against humanity was opened in 1995 in France; after he was convicted in absentia by a Rwandan military court in November 2006, the ICTR made public an arrest warrant on June 21, 2007 as a result of which he was arrested in France on July 20, 2007 but released 10 days later because of problems with the warrants. Ultimately, the ICTR decided to transfer these two cases to the French courts on November 20, 2007[161] which was accepted by the French courts on February 20, 2008[162].

As well, Isaac Kamali was arrested on June 22, 2007 in the US as a result of an arrest warrant issued by Rwanda and then transferred to France, where he is a citizen, three

[153] "Guatemalan officials dodge genocide extraditions", Reuters, December 17, 2007.
[154] http://www.trial-ch.org/en/trial-watch/profile/db/facts/jiang_zemin_468.html; see also Bakker, "Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work", 4 *JICJ* (2006) 595-601.
[155] http://www.trial-ch.org/en/trial-watch/profile/db/facts/philip_decamp_411.html, http://www.trial-ch.org/en/trial-watch/profile/db/facts/shawn_gibson_409.html and http://www.trial-ch.org/en/trial-watch/profile/db/facts/philip_wolford_410.html.
[156] IJT, issue 83, February 18, 2008, page 4.
[157] http://www.trial-ch.org/en/trial-watch/profile/db/facts/ely_ould-dah_266.html.
[158] http://www.trial-ch.org/en/trial-watch/profile/db/facts/alfredo_astiz_311.html.
[159] IJT, issue 72, July 23, 2007, page 2.
[160] IJT, issue 84, March 3, 2008, page 3
[161] http://www.trial-ch.org/en/trial-watch/profile/db/facts/wenceslas_munyeshyaka_112.html.
[162] IJT, issue 84, March 3, 2008, page 3.

days later where he remains in detention while Dominique Ntawukuriryayo, a former deputy governor, was arrested in October, 2007 pursuant to an ICTR warrant, which was held valid on May 7, 2008; on May 19 of the same year the European Court of Human Rights rejected an urgent motion filed by Ntawukuriryayo. On January 8, 2008, Marcel Bivugabagabo, a member of the FAR during the genocide was arrested, also pursuant to a arrest warrant by Rwanda[163], as was Claver Kamana on February 29, 2008[164]; the latter was ordered extradited on April 2, 2008. French prosecutors have also commenced investigations in March 2008 against Agathe Habyarimana (the widow of President Juvenal Habyarimana), Callixte Mbarushimana and Eugène Rwamucyo.

Five persons from the Republic of Congo are under investigation in the so-called Brazzavile Beach Case.They were alleged to have been involved in the forced disappearance of 350 returning refugees at the Beach port in Brazzaville in 1999. On January 10, 2007, the Criminal Chamber of the French Supreme Court decided that France had jurisdiction to investigation the case[165]. The charges against one of them, General Jean-Francois Ndengue, were dropped later in 2007 because of his diplomatic immunity which confirmed by an appeal court on April 8, 2008.

Two Algerians have also been indicted for crimes against humanity, namely Abdelkader Mohamed and Hocine Mohamed, for the commission of crimes as members of a self-defense group in the Relizane province[166].

In the *United Kingdom* the first successful prosecution using universal jurisdiction was against Afghan militia leader Faryadi Zardad. In 2005, a jury convicted him of torture and hostage taking committed in Afghanistan in the 1990s and convicted him to 20 years imprisonment[167]. Zardad had been in charge of a checkpoint between Kabul and Pakistan where his subordinates committed torture, murder and other atrocities for which he was found to be responsible. In 1999 charges against Sudanese doctor Mohammed Ahmed Maghoub of torturing detainees were dropped as a result of lack of evidence. The United Kingdom has a special war crimes unit within the New Scotland Yard.

As well, extradition proceedings against four Rwandans (Célestin Ugirashebuja, Vincent Bajinya, Emmanuel Nteziryayo and Charles Munyaneza) for involvement in the 1994 genocide were commenced in 2006 on behalf of Rwanda[168].

Italy is requesting the extradition of more than 100 former South American leaders and their underlings over the disappearance, torture and death of Italians who were caught up

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[163] IJT, issue 81, January 21, 2008, page 3.
[164] IJT, issue 86, April 7, 2008, page 3.
[165] http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/pierre_oba_351.html, http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/blaise_adoua_352.html, http://www.trial-ch.org/en/trial-watch/profile/db/facts/denis_sassou-nguesso_350.html and http://www.trial-ch.org/en/trial-watch/profile/db/facts/jean-fran%E7ois_ndengue_349.html.
[166] http://www.trial-ch.org/en/trial-watch/profile/db/facts/abdelkader_mohamed_567.html and http://www.trial-ch.org/en/trial-watch/profile/db/facts/hocine_mohamed_568.html.
[167] http://www.trial-ch.org/en/trial-watch/profile/db/facts/faryadi-sarwar_zardad_329.html
[168] http://www.trial-ch.org/en/trial-watch/search/judgement-place/34.html

in a crackdown on dissent in the 1970s and '80s. Authorities have made the requests for 139 people involved in the military dictatorships of Chile, Uruguay, Argentina, Brazil, Bolivia and Paraguay and accused in the kidnapping and murder of 25 Italian dissidents. The suspects include Argentina's former junta leader Jorge Videla and Uruguay's former dictator Juan Bordaberry.[169]

In *Switzerland* two cases went to trial in the late nineties resulting in one conviction. Goran Grabez was charged with having committed war crimes against prisoners of the Omarska and Keratem camps between May and August 1992 but was acquitted on April 18, 1997 for lack of evidence[170]. In July 1998, Fulgence Niyonteze was charged with war crimes, crimes against humanity and genocide for his involvement in Rwandan genocide; he was convicted on April 30, 1999 of war crimes only since Swiss law had not included the other two crimes in its legislation at that time; he was sentenced to life imprisonment. On May 26, 2000 an appeals court reduced the sentence to 14 years[171].

In *Austria* Dusko Cvjetkovic, a Bosnian Serb, who had been charged with murder and genocide was acquitted by a jury of all charges in 1994.

In *Norway*, which, like Denmark also has a specialized war crimes unit with prosecutors and police investigators, two persons from Bosnia, Mirsad Repak and Sakib Dautovic were arrested in May 2007. Repak is linked to crimes committed against civilians detained in camp Dretelj near Capljina, which was controlled by the Croatian armed forces (HOS) during 1992 while Dautovic is suspected of having committed crimes in detention camps on the territory of Velika Kladusa[172]. As well, a Croat, Damir Sireta, was arrested on November 20, 2006 as a result of a Serbian arrest warrant for war crimes committed around Vukovar[173]; he was extradited to Serbia on May 16, 2008..

In *Finland* the National Bureau of Investigation (NBI) arrested a Rwandan citizen on April 14, 2007 and remanded him in custody on suspicion of genocide.

In *Sweden,* a special war crimes unit was created in the fall of 2007.

Africa

In *Senegal* a new law was proposed in February 2007, which would allow Senegal to try exiled former president of Chad, Hissène Habré, after Senegal was asked to do so in 2006 by the African Union as result of a 2005 extradition request by Belgium[174].

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[169] Associated Press, January 10, 2008.
[170] http://www.trial-ch.org/en/trial-watch/profile/db/facts/goran_grabez_134.html.
[171] http://www.trial-ch.org/en/trial-watch/profile/db/facts/fulgence_niyonteze_115.html.
[172] http://www.bim.ba/en/62/10/2845/.
[173] http://www.b92.net/eng/news/society-article.php?yyyy=2006&mm=11&dd=21&nav_category=113&nav_id=38115.
[174] For an assessment see May 16, 2008 report by Human Rights Watch at http://hrw.org/english/docs/2008/05/14/senega18826.htm

North America

In *Canada* Désiré Munyaneza was charged on October 19, 2005 with genocide, war crimes and crimes against humanity for his involvement in Butare during the Rwandan genocide. The trial began in May 2007 and is ongoing[175]. Canada has specialized war crimes units both with the federal police and the Department of Justice.

In the *United States*[176] Charles "Chuckie"Taylor, the son of Liberia's ex-president Charles Taylor was charged with torture on December 6, 2006; he was the leader of the elite Anti-Terrorist Unit (ATU) from approximately 1997 through at least 2002 when that unit committed torture[177], including various violent assaults, rape, beating people to death and burning civilians alive[178].

Australia

An Australian court ordered the extradition of Dragan Vasiljkovic to Croatia on April 12, 2007. He was born in Belgrade in 1954, but moved to Australia in 1969 and became an Australian citizen. In 1991, as the Serbian army sought to quench the Croatian bid for independence, he returned to Serbia to take part in the fighting. Dragan Vasiljkovic, or "Kapetan Dragan", as he was called, was in charge of a training camp for paramilitaries near Knin, and he also founded a paramilitary group called the "Kninjas" or the "Red Berets", which allegedly took part in war crimes. He is accused of having tortured and killed captured members of the Croatian army and police in the region of Knin and Benkovac in June and July 1991.[179]

As well, there is an investigation underway by the Australian Federal Police into the possible role of mining company Anvil Mining Limited in facilitating a military offensive in the town of Kilwa in the Democratic Republic of the Congo[180]

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[175] See Canada's Program on Crimes Against Humanity and War Crimes, Ninth Annual Report 2005-2006, http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html#cip, under "Criminal Investigation and Prosecution".

[176] The US has already arrested 26 Serbs, one person from Bosnia, one Argentine, one person from El Salvador and a Peruvian for involvement in atrocities in their homeland but these prosecutions are launched under its immigration legislation for immigration fraud, two of which have been deported; see testimony of Eli Rosenbaum, Director, Office of Special Investigations, Department of Justice, before the Subcommittee on Crime, Terrorism, and Homeland Security of the US House of Representatives Committee on the Judiciary, re Genocide and the Rule of Law, October 23, 2007 (http://judiciary.house.gov/committeestructure.aspx?committee=6) .

[177] He was charged with this crime because he was a US national although US law (http://www.gpoaccess.gov/USCODE/index.html) does provide universal jurisdiction for torture (US Code, Title 18, section 2340A(b)) as it does, as of December 21, 2007, for genocide (section 1091, as amended by Genocide Accountability Act of 2007) but not for war crimes (section 2441(b)); there is no provision for crimes against humanity.

[178] See http://hrw.org/english/docs/2006/12/06/usint14777.htm.

[179] (see http://www.trial-ch.org/en/trial-watch/profile/db/facts/dragan_vasiljkovic_478.html).

[180] See Kyriakakis, "Australian Prosecution of Corporations for International Crimes, the Potential of the Commonwealth Criminal Code", 5 *JICJ* (2007), 809-826.

Trends and Legal Issues

A number of important **trends** can be found in the application of international criminal justice in the last fifteen years.

The first one, which applies to both international and domestic practice is the fact that 13 erstwhile heads of state have been indicted or prosecuted and sentenced for international crimes[181]. On the international level the ICTR sentenced the prime minister of Rwanda during the 1994 genocide, Jean Kambanda, to life imprisonment in 1998[182]. President Slobodan Milosevic of the former Yugoslavia was indicted by the ICTY in 1999 and 2001 and put on trial in 2002, which would have been completed if he had not died while in custody during the proceedings in 2006[183]. The Sierra Leone Special Court indicted the former president of Liberia, Charles Taylor in 2006 and his trial has started in early 2008[184] in The Hague while another hybrid tribunal, the Special Court of Iraq, completed proceedings against Saddam Hussein in 2006 resulting in his execution the same year[185].

In addition, there have nine attempts at the domestic level to take action against former heads of state since 1992[186].

In South and Central America, Argentina has indicted two former presidents, namely Isabel Perón and Jorge Videla while Chile did the same with Augusto Pinochet, Peru with Alberto Fujimoro and Uruquay with Gregorio Alvarez. None of these five have gone to trial yet. On the other hand, in Mexico former president Luis Echeverria was tried for the commission of genocide, albeit while at the time in his capacity as Minister of the Interior but he was acquitted in 2007. As well, the former president of Guatemala, Efrain Rios Montt, has been indicted by Spain.

In Africa, Mengistu Haile Mariam of Ethiopia was sentenced to death in May 2008 but he remains at large in Zimbabwe. Senegal, after proceedings had already begun in Belgium, is putting legislation in place to indict the former president of Chad, Hissène Habré.

Of the action taken against the 13 former state leaders, six were put on trial of which four were convicted (of which one was sentenced in absentia and one executed), one died in custody and one was acquitted. In addition, there is some anecdotal evidence that other heads of state might be adjusting their behaviour albeit after the fact as was the case when president of Suharto of Indonesia decided not to travel to Switzerland for medical

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[181] While two others have been tried (Pol Pot in Cambodia) or indicted (Bordaberry in Uruguay) for regular crimes.
[182] ICTR 97-23-S, September 4, 1998, upheld by the Appeals Chamber on October 19, 2000, ICTR 97-23-A.
[183] See http://www.un.org/icty/cases-e/cis/smilosevic/cis-slobodanmilosevic.pdf.
[184] See http://www.sc-sl.org/taylor-timeline.pdf.
[185] See http://www.trial-ch.org/en/trial-watch/profile/db/facts/saddam_hussein-al-majid-al-tikriti_125.html.
[186] While international institutions can bring sitting heads of state to justice, national states can only do so against former heads of state according to the International Court of Justice in the Democratic Republic of the Congo versus Belgium case, decided February 14, 2003 (http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=36&case=121&code=cobe&p3=4).

treatment during the Pinochet extradition proceedings in the United Kingdom out of fear that he might be indicted as well while in Europe.

A second encouraging trend is the fact that there have been some proceedings against corporate players, albeit most have not been successful in the end. While the prosecution of corporate executives is not a new phenomenon as there had already been prosecutions of this kind after the Second World War against German corporate officials, including by the International Military Tribunal in Nuremberg[187], the international and hybrid tribunals have not ventured into this area so far.

On the domestic front there have been two convictions in the Netherlands for corporate executives for providing weapons to the Charles Taylor regime in Liberia (the van Kouwenhoven case) and for selling precursors for chemical weapons to the Saddam Hussein regime in Iraq (the van Anraat case). Both were convicted and received substantial prison sentences of 12 and 17 years respectively in 2005 and 2007, although the former was acquitted by an appeal court in 2008. In the DRC during the Kilwa trial both Congolese soldiers and three executives of the mining company Anvil were charged for war crimes but eventually acquitted in 2007[188]. As well, two executives of the French oil company TotalFinaElf, Hervé Madeo and Thierry Desmarest, have been indicted in both France and Belgium in 2002 for involvement for crimes against humanity in Burma in recent years; the proceedings in Belgium came to an end in 2008. .

Although it might be difficult for international institutions to hold corporations themselves responsible for breaches of international criminal law (it is for instance explicitly forbidden in the Rome Statute[189]), it is clear that the human actors representing such corporations are not immune from the reaches of this area of the law[190]. As well, the fact that criminal liability can be extended to these players is becoming part of the recent mantra that corporations are urged to ascribe to, namely the notion of corporate social responsibility or CSR. A number of international standards are being developed to

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[187] Gustav Krupp von Bohlen und Halbach was indicted but did not stand trial during the IMT proceedings due to mental illness. Other trials carried out against industrialists included the Krupp (Law Reports of Trials of War Criminals, Volume X, 69), Flick (Law Reports of Trials of War Criminals, Volume IX, 1), I.G. Farben (Law Reports of Trials of War Criminals, Volume X, 1), Zyklon B (Law Reports of Trials of War Criminals, Volume I, 93) and the Roechling (Law Reports of Trials of War Criminals, Volume X, 56-57) trials.

[188] The trial has been severely and widely criticized. Two of the more poignant commentaries are that of the United Nations High Commissioner of Human Rights of July 4, 2007 (http://www.unhchr.ch/huricane/huricane.nsf/0/9828B052BBC32B08C125730E004019C4?opendocument) and the detailed report by the NGO Global Witness of July 17, 2007 (http://www.globalwitness.org/media_library_detail.php/560/en/kilwa_trial_a_denial_of_justice).

[189] Article 25.1.

[190] See on this issue Reggio, "Aiding and betting In International Law" The Responsibility of Corporate Agents and Businessman for 'Trading With The Enemy of Mankind", 5 *International Criminal Law Review* (2005), 623-696; see also International Commission of Jurists (ICJ) Expert Panel on Corporate Complicity in International Crimes, http://www.icj.org/IMG/June_06_Update.pdf, as well as the website "Business and International Crimes" at http://www.fafo.no/liabilities/index.htm.

implement the general rules of corporate behaviour, especially in less developed areas of the world[191].

The combination of taking action against both the leadership up and including heads of state or leaders of non-governmental militia (as was done by the ICC in the cases of the LRA leadership in the Ugandan case[192] and the four indictments for the situation in the DRC[193]) and the purveyors of the means to carry out international crimes sends out the powerful message that the international community understands the complex forces involved in carrying out these crimes and it is willing to take action against both direct and indirect participants.

There are a number of **legal issues** arising out of the domestic efforts to bring perpetrators of serious human rights violations to justice, which require some further exploration.

The first one is the issue of *universal jurisdiction*. While this type of jurisdiction has been available for domestic criminal investigations for international crimes since the early fifties as a result of the Eichman case in Israel[194], most countries, even after implementing the Rome Statute, have opted for a limited type of jurisdiction whereby the presence of a perpetrator in the country carrying out the criminal investigation is required[195]. While presence is usually not defined in such statutes, some countries have declined to take action where such presence is of a short duration such as a temporary visit and insist on a more permanent type of presence; this decision is usually made based on general prosecutorial discretion rather than addressing the type of presence[196].

However, the notion of universal jurisdiction where no link at all is required between the state initiating investigations or prosecutions and the perpetrator of international crimes called universal jurisdiction in absentia has gained some currency in Europe in the last fifteen years.

In 1993 Belgium enacted a law to deal with the punishment of grave breaches of the Geneva Conventions where civil petitioners could bring cases where no territorial link existed between the crimes and Belgium. This law did result in prosecutions of some Rwandans involved in the genocide but also included complaints against Fidel Castro of Cuba, Ariel Sharon of Israel, Yasser Arafat of the PLO and Tommy Franks, Commander

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[191] See for instance http://www.cebcglobal.org/KnowledgeCenter/Standards.htm.
[192] See http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf.
[193] See http://www.icc-cpi.int/cases/RDC.html.
[194] 36 International Law Reports 1.
[195] A notable exception is New Zealand where the legislation does not contain this restriction; see article 8 of its International Crimes and International Criminal Court act 2000.
[196] For instance for Germany, see Rissing-van Saan, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia", 3 *JICJ* (2005) 381-399 and Zappalà, "The German Federal Prosecutor's Decision not the Prosecute a Former Uzbek Minister, Missed Opportunity or Prosecutorial Wisdom?", 4 *JICJ* (2006) 602-622 while for Canada, see the Kunlan Zhang case, http://decisions.fct-cf.gc.ca/en/2006/2006fc276/2006fc276.html, paragraph 6. In the Netherlands jurisdiction was even denied in a situation involving genocide where neither the victim nor the perpetrator had Dutch nationality, namely in the Mpambara case.

of Chief of the American-British Coalition forces of the war in Iraq in 2003. In 2003 the original law was amended to require a territorial link between Belgium and the perpetrator while also limiting the ability of private persons to initiate cases and providing the public prosecutor discretion over the handling of a case[197].

The choice of country for universal jurisdiction in absentia since the changes in Belgium in 2003 is now Spain. Traditionally, the courts in Spain had required one of the traditional links between Spain and the perpetrator of international crimes, which was found mostly in the passive nationality principle where the victims of the crimes had included Spanish nationals[198] but this changed in 2005. In that year the Spanish Constitutional Tribunal overturned lower courts decisions in the Guatemala case and allowed universal jurisdiction in absentia by interpreting Spanish jurisdiction broadly for legal provisions aimed at combating international impunity[199]. As a result, in addition to the indictments issued with respect to Guatemala, investigations have now been opened against Chinese officials in two instances, one dealing with Tibet in 2005, one regarding the treatment of Falun Gong adherents in 2006, against three US soldiers for activities in Iraq in 2007,one for the possible commission of genocide in the West Sahara by Morocco, also in 2007 and lastly, in February 2008, against 40 Rwandan army officers on charges of mass murder and crimes against humanity in the aftermath of the 1994 Rwanda genocide.

The second legal issue concerns the interpretation of the crime of *genocide*. The 1948 Genocide Convention limits the parameters of the victim groups to only four, namely belonging a national, ethnical, racial or religious group. This characterization did not change for any of the international institutions such as the ICTY, ICTR, SLSC or ECCC and although during the negotiations for the ICC there were calls to open this part of the definition, article 6 of the Rome Statute remains faithful to the original definition.

Domestic legislators or judicial authorities have had no such compunctions. On the legislative side the following affected groups in the domestic genocide definition have been added: "political, union or a group with its identity based in reasons of gender, sexual orientation, culture, social, age, disability or health" (Uruguay); "gender, sexual orientation, age, health and conscience" (Ecuador); "any group that is defined by an arbitrary characteristic" (Republic of the Congo); "political groups and population transfer or dispersion" (Ethiopia[200]) or even replaced the traditional definition of groups with "an identifiable group of persons", as was done in Canada[201].

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[197] See Vandermeersch, "Prosecuting International Crimes in Belgium", 3 *JICJ* (2005), 400-421 .

[198] See Tomuschat, "Issues of Universal Jurisdiction in the *Scilingo* Case", 3 *JICJ* (2005) 1074-1081; Gil Gil, "The Flaws of the *Scilingo* Judgment", 3 *JICJ* (2005) 1082-1091; Pinzauti, "An Instance of Reasonable Universality: The *Scilingo* Case", 3 *JICJ* (2005) 1092-1105.

[199] See Roht-Arriaza, "Guatemala Genocide Case, Spanish Constitutional Tribunal decision on universal jurisdiction over genocide claims", 100 *AJIL* (2006) 207-213; Ascensio, "The Spanish Constitutional Tribunal's Decision in *Guatemalan Generals*: Unconditional Universality is Back, 4 *JICJ* (2006) 586-594.

[200] See Tiba, "The Mengistu Trial in Ethiopia", 5 *JICJ* (2007), 513-528.

[201] Crimes against Humanity and War Crimes Act, sections 4 and 6, http://laws.justice.gc.ca/en/showtdm/cs/C-45.9.

Based on broad definitions of the term group, national courts have determined that the following situations amounted to genocide, in addition to the 1994 genocide in Rwanda and the Srebenica massacre in the former Yugoslavia in July 1995[202]: the dirty war in Argentina between 1976 and 1983 (by Argentine courts); a 1968 massacre in Mexico City which left between 200 and 300 students dead (by a Mexican court); the crimes committed by the Derg in Ethiopia between 1977 and 1991 (by Ethiopian courts); the Anfal campaign against Iraqi Kurds in 1988 (by the Iraqi Special Court and by a Dutch trial court but the latter overruled by an appeal court); the human rights violations against indigenous people in Guatemala in 1982-83 (by Spanish courts); the occupation of Tibet by China since 1951 (by a Spanish court); and other events in the former Yugoslavia outside Srebenica (by German courts although in two of the four cases this was overruled on appeal)[203].

It would appear that the crime of genocide was initially used in a number of instances as a result of the fact that the police and prosecutors felt very strongly that perpetrators of very serious crimes should be brought to justice but were limited by the restrictions of their national laws as they applied to crimes against humanity or war crimes. Since most situations under consideration involved at most a civil war but not an international armed conflict it was not possible to rely on the national implementation provisions related to the Geneva Conventions which do not provide for personal liability for war crimes committed in non-international armed conflicts. Similarly, crimes against humanity provisions could not be used since the national legislations did in most cases not regulate these crimes until the implementation of the Rome Statute in the new millennium[204]. However, now that national legislation and courts have expanded the number of groups which can be victims of genocide, it is possible to speak of an emerging rule of customary international law since the conclusion of the Rome Statute in 1998 which will have an effect not only how other countries intend to make use of this expansion but conceivably also an institution such as the ICC.

While there has been an expansion with respect to the group element of the crime of genocide, it appears that the high level mens rea of genocide, namely the specific intention to destroy these groups as developed by the ICTY, ICTR and now by the ICC indirectly when it indicted two persons related to the Darfur situation[205] will remain intact at the domestic level as well. While not entirely clear since the allegations dealt with complicity in genocide rather than direct involvement it would appear that the decision in

[202] These are the only genocide recognized by the international tribunals, namely the ICTR for Rwanda and the ICTY and the International Court of Justice in the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro) of February 26, 2007 (http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=ybh&case=122&k=8d) for Screbenica.
[203] See also IJT, Issue 77, November 5, 2007, pages 1-2.
[204] See for instance Tomuschat, "Issues of Universal Jurisdiction in the *Scilingo* Case", 3 *JICJ* (2005) 1074-1081; Gil Gil, "The Flaws of the *Scilingo* Judgment", 3 *JICJ* (2005) 1082-1091; Pinzauti, "An Instance of Reasonable Universality: The *Scilingo* Case", 3 *JICJ* (2005) 1092-1105.
[205] The two people were only charged with war crimes and crimes against humanity although the situation in Darfur has been characterized by the international community frequently as a genocide, see the decision to indict of April 27, 2007, http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1_English.pdf.

Mexico to acquit former president Echeverria and the decision not to find the Dutch businessman Van Anraat guilty of genocide charges were related to the mental requirement of genocide[206]. On the other hand, this element was present in the convictions for the Derg leadership in Ethiopia[207] and for Yugoslav soldiers convicted in Germany for this crime[208].

Very few domestic cases have dealt with *crimes against humanity*. The reason is that, especially in Europe, the notion of legality or retroactivity is a very important concept with as result that it has been impossible to charge this crime for situations that occurred before national legislations made provision for it, normally when implementing the Rome Statute between 2000 and 2008. While imaginative prosecutors have been trying to resolve this problem by laying charges based on genocide and war crimes, it is not clear how many more cases could have been investigated especially in an extra-territorial context if crimes against humanity had been available.

As well, there has been little or no debate with respect the possible use of crimes against humanity by applying of article 15 of the International Covenant on Civil and Political Rights[209], which states:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby;
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"

The travaux preparatoires of this Covenant indicate that the term "according to the general principles of law recognized by the community of nations" in article 15(2) has the same meaning as customary international law[210]. Given the fact that crimes against humanity have been known to international criminal law since the judgment of the International Military Tribunal in Nuremberg in 1948 and considering the fact that this Covenant has been ratified by 160 countries it is somewhat surprising that no argument has made along the lines that crimes against humanity are part of domestic law from the time that a country has ratified the Covenant[211].

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[206] Van der Wilt, "Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the *van Anraat* case*",* 4 *JICJ* (2006) 239-257; see also the decision of the appeal court of May 9, 2007, Case number LJN BA4676, which can be found at http://zoeken.rechtspraak.nl/.

[207] Tiba, "The Mengistu Trial in Ethiopia", 5 *JICJ* (2007), 513-528.

[208] Rissing-van Saan, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia", 3 *JICJ* (2005) 381-399.

[209] http://www.ohchr.org/english/law/ccpr.htm.

[210] See Bossuyt and Humphrey, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights* (1987), pages 330-333.

[211] The connection between crimes against humanity and customary international law was discussed by a Spanish court in the Scilingo case and was criticized for doing so by Tomuschat, "Issues of Universal Jurisdiction in the *Scilingo* Case", 3 *JICJ* (2005) 1074-1081 and Gil Gil, "The Flaws of the *Scilingo* Judgment", 3 *JICJ* (2005) 1082-1091 but supported by Pinzauti, "An Instance of Reasonable Universality:

Regarding *war crimes*, most prosecutions charging this international crime have based their indictments on the grave breaches regime in the Geneva Conventions with one interesting exception namely the decisions of the Dutch courts (at both the trial and appeal level) in two parallel cases involving the activities of two high officials of the KhAD in Afghanistan between 1979 and 1989[212].

Since neither genocide (since the fact situation did not allow for such a charge) nor crimes against humanity (because of legality concerns) charges were possible, the indictment was based on war crimes. The courts came to the conclusion that the armed conflict in Afghanistan at that time amounted to a non-international armed conflict, so that the grave breaches regime was not applicable but that common article 3 of the Geneva Conventions, which in a very abbreviated manner regulates the conduct during non-international armed conflicts, could be used to ascribe criminal liability for the two perpetrators.

This conclusion appears to be at odds with the development of the concept of individual criminal responsibility in non-international armed conflicts in other realms of international law[213]. The Geneva Conventions do not contain a provision similar to the grave breaches to enforce common article 3 on an individual level. As a matter of fact, Additional Protocol II, which regulated in 1977 in further detail the conduct during non-international armed conflicts, still did not contain such a provision. The ICTY Appeals Chamber came to the conclusion in 1995 in the Tadic case[214] that individual liability for such conflicts had become part of international criminal law for the time period of its jurisdiction, namely as of 1991 but it did not pronounce itself about situation between 1977 and 1991. In the domestic context, a study of the International Committee of the Red Cross in 2005 concluded that there was no evidence in customary international law for such a proposition before 1990[215].

The Dutch appeals court in its decision declines to examine international jurisprudence on this point (or for that matter on the issue whether the conflict in Afghanistan could be described as an international non-international armed conflict given the involvement of international players in that situation along the lines of ICTY reasoning in the same Tadic decision or that of the International Court of Justice in the Bosnia and Herzegovina

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The *Scilingo* Case", 3 *JICJ* (2005) 1092-1105. Norway intends in its new draft legislation to overcome this issue of legality by allowing the retroactivity of international crimes if the underlying crime was known in Norwegian law in the past.

[212] See Guénaël Mettraux, "Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes", 4 *JICJ* (2006) 362-371 (and further discussion as a result of this article in 4 *JICJ* (2006) 878-889 with respect to the trial decision; see decisions of the appeal court of January 29, 2007, Case numbers LJN AZ7147 and LJN AZ9365, which can be found at http://zoeken.rechtspraak.nl/).

[213] A similar problematic conclusion with respect to the specific war crime of collective punishments can be found in the decisions of the SLSC Trial Chamber in the AFRC case (SLSC-04-16-T, June 30, 2007, pages 206-209) and the CDF case (SLSC-04-14-T, August 2, 2007, pages 53-55).

[214] http://www.un.org/icty/tadic/appeal/decision-e/51002.htm.

[215] Henkaerts and Doswald-Becks (eds), *Customary International Humanitarian Law*, *Volume 1: Rules* (2005), pages 552-554.

versus Serbia and Montenegro case[216]) but limits its reasoning by observing that national law can go beyond the confines of international law which is not prescriptive but rather provides a minimum standard to be followed. As such, according to the court, the Dutch legislator was within its powers to extend its legal reach for individual liability beyond that of the grave breaches regime of the Geneva Conventions[217].

Conclusion

International criminal justice is only one aspect of transitional justice[218] and by itself cannot ensure that a society will be able to leave a traumatic past behind for a peaceful and just future. Similarly, international criminal justice by itself cannot prevent future conflicts from occurring, not even in the sense that there is convincing evidence that sentencing by international and domestic institutions has a retributive or deterrent impact[219]. However, a similar criticism can be made to some extent of domestic criminal and penal systems and these systems have had hundreds of years to flourish and mature so that as a minimum the international legal system should be given an equal opportunity to prove its worth.

In order for the international criminal justice system to make a robust contribution to transitional justice it would appear that a number of requirements should be met.

The first requirement is that as a legal system it needs to be internally consistent and predictable. When the main actors in this arena were either an international or hybrid tribunal it was not a difficult task to main such consistency since the ICTY and ICTR were the first in the field, had enormous political influence and were populated with the prosecutors and judges of the highest calibre. Other international institutions found it easy to follow suit. For instance, the judicial decisions by the East Timor Special Panels and the Special Court of Sierra Leone when discussing international criminal law have followed very closely the principles and parameters as set down by the ICTY and ICTR, especially by its shared Appeals Chamber.

The situation has changed. Now that a large number of domestic players have entered the international justice arena there is a risk of unbridled and uncontrolled diversity. In itself diversity at the local level is not problematic since international law can and should take into account local conditions and customs. In addition, given the fact that international

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[216] http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=ybh&case=122&k=8d.

[217] This was the same reasoning used by the Ethiopian court in the Mengistu case when extending the protected groups of genocide beyond the four mentioned in the Genocide Convention even though it could have convicted for crimes against humanity under Ethiopian law, see Tiba, “The Mengistu Trial in Ethiopia”, 5 *JICJ* (2007), 513-528.

[218] Generally re transitional justice see: *Post-Conflict Justice*, edited by Bassiouni (2002); Roht-Arriaza and Mariezcurrena, *Transitional Justice in the Twenty-first Century: Beyond Truth versus Justice* (2006); and *The Politics of Past Evil: Religion, Reconciliation, and the Dilemmas of Transitional Justice*, edited by Philpott (2006).

[219] See Drumble, *Atrocity, Punishment and International Law,* 149-173.

law still finds a great deal of its sources in domestic practice[220] eventually these state practices will have an effect on international law and therefore international institutions, especially in international criminal law where little state practice is required to create a new custom[221]. But this strong relationship between individual state practice and international custom in international criminal law creates an equal strong responsibility for states, now that they are engaging in this area of law, to ensure that they adhere to the basic principles of international criminal law as developed by the international institutions while still retaining the ability to infuse such principles with local content.

The fact that a number of states are of the view that the number of groups contained in the Genocide Convention and the Rome Statute do not accord anymore with modern realities and consequently have expanded on this number of groups is perfectly legitimate as long as other aspects of the crime of genocide, such as the requirement of specific intention or the destruction of a group, are not diluted and sacrificed on the altar of legal expedience. Some of the situations described by the various national courts as genocide appear to belong more to the category of crimes against humanity. From an international legal perspective it would be more astute to address the issue of retroactivity for crimes against humanity and customary international law than dispense with the essential elements of the crime of genocide.

Apart from issues regarding the possible problematic divergence of international criminal law the fact that thirty countries have become involved in the prosecutions of perpetrators of international crimes in the last fifteen years is very encouraging, especially the efforts of the eighteen countries where such crimes occurred in the past. Thousands of perpetrators have been brought to justice in such countries compared to 115 persons by the international institutions and countries relying on universal jurisdiction combined.

This reality suggests the second requirement of a maturing international legal system, namely a logical division of labour which is already taking place in an amorphous manner but which could benefit from higher levels of international policy decision-making and further co-operation between the various states and international institutions. Such a division of labour would be based on a dual complementarity approach. At the first level states with an ability to carry out meaningful prosecutions for war crimes, crimes against humanity and genocide should be responsible for doing so for crimes committed on their territory or by their nationals. Persons, who have fled such countries should be returned there either by employing the means of extradition or immigration remedies such as deportation. If a prosecution in such a country is not possible and a perpetrator is present in another country the latter should rely on either passive or universal jurisdiction to take action against that perpetrator. At the highest level, i.e.

[220] This can be (both in treaty law where a multi-lateral convention gains more strength if more countries ratify such treaties and in customary international law where states are still a very important direct source of law .

[221] See Rikhof, "Crimes against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda", 6 *National Journal of Constitutional Law* (1996), 233-268.

when the other two avenues are not possible the ICC (being most likely the only institution at the international level as of 2010) could step in[222].

Impunity is still often the norm for perpetrators involved in international crimes but given the slow pace and the incremental approach in international law generally, the advances made by international criminal law, both from a legal perspective and in terms of impact on perpetrators, in the last 15 years have been nothing short of amazing. And indeed, there are now fewer places to hide.

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[222] See for an example of possible co-operation between the ICC and domestic jurisdictions, Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", 49 *Harv. Int'l L.J.* (2008), 53, at 86-96 and 101-105.