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# *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*

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## **Abstract**

*This article focuses on the problems of, and prospects for, the enforcement of international humanitarian law through the prosecution and punishment of individuals accused of violations of international humanitarian law by international or national tribunals. The author first examines the factors that historically prevented the development of international tribunals and then looks at recent events, namely the end of the Cold War and the subsequent unleashing of unparalleled forces of nationalism and fundamentalism in different parts of the world, which have created an increased willingness on the part of states to institute mechanisms, both at the international and domestic levels, for international criminal justice. With the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia and for Rwanda, the enforcement of international humanitarian law has moved into a new and more effective phase. Yet, the clear merits of individual criminal prosecution by international tribunals cannot simply override the very real problems and obstacles they face. The author examines these problems, arguing that state sovereignty is a major obstacle to the effective enforcement of international criminal justice. Nevertheless, the author concludes that justice can be done at the international level and that international criminal tribunals are vital in the struggle to uphold the rule of law.*

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## 1 Introduction: International Criminal Prosecution as a Means of Enforcing International Humanitarian Law

As is well known, various means are available for enforcing international humanitarian law. First, there is the traditional, but controversial, method of reprisals, whereby a belligerent employs illegal means of warfare in response to violations of the laws of war by its adversary. Reprisals are resorted to in order either to induce the adversary to terminate its unlawful conduct or to 'punish' the adversary for the purpose of deterring any further breach. This method of enforcement has been criticized on the ground that it more often than not leads to an escalation of conflict and, it is argued, it often proves to be ineffective.<sup>1</sup> Further, the 1949 Geneva Conventions and Additional Protocol I<sup>2</sup> severely limit the scope of this enforcement method. In addition, reprisals can under no circumstances take the form of violations of human rights, genocide or 'crimes against humanity'.<sup>3</sup>

Second, respect for international humanitarian law can be sought through specific mechanisms agreed upon by the parties to a conflict, such as the designation of a Protecting Power to secure the supervision and implementation by the belligerents of their international obligations.<sup>4</sup> Granted, the Protecting Power aims to protect the interests of the parties, but it is a mechanism that may be activated in order to contribute to the enforcement of international humanitarian law. This method,

<sup>1</sup> See, e.g., F. Kalshoven, *Belligerent Reprisals* (1971).

<sup>2</sup> See Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 ('First Geneva Convention'), Article 46; Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 ('Second Geneva Convention'), Article 47; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ('Third Geneva Convention'), Article 13(3); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ('Fourth Geneva Convention'), Article 33(3) and 46; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ('Protocol I'), Article 5 (the four Geneva Conventions will hereinafter collectively be referred to as '1949 Geneva Conventions'). These bans on reprisals against protected persons/objects can be said to have become part of customary international law.

<sup>3</sup> On the illegality of reprisals pursuant to a developing 'principle of humanity' and non-derogable human rights norms, see Provost, 'Reciprocity in Human Rights and Humanitarian Law', *BYbIL* (1994) 383, at 413.

<sup>4</sup> This mechanism is provided for in Article 8 of the First, Second and Third Geneva Conventions, and Article 9 of the Fourth Geneva Convention, and also in Article 5 of Protocol I.

however, has proved to be a relative failure, as it has only been resorted to in three cases since the entry into force of the 1949 Geneva Conventions.<sup>5</sup>

A further means of promoting compliance with international humanitarian law is the utilization of fact-finding mechanisms, such as the 'Fact Finding Commission' provided for in Additional Protocol I. One of the advantages of fact-finding is that it enables the creation of a public 'record' of violations of international humanitarian law, which can assist in war crimes trials, thereby contributing to enforcement.<sup>6</sup> The Commission of Experts set up by the Secretary-General of the UN at the request of the Security Council pursuant to Resolution 780 (1992) to investigate and report on evidence of grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law in the former Yugoslavia falls within this category. With the establishment of the Commission of Experts, the Security Council was seeking to deter the parties from violating their obligations under international humanitarian law.<sup>7</sup> It was subsequent to the findings of this Commission of Experts that the Security Council decided to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY).

This brings us to the next level of enforcement of international humanitarian law, through criminal jurisdiction: that is, through the prosecution and punishment by national or international tribunals of individuals accused of being responsible for violations of international humanitarian law. This article will focus on the problems of, and prospects for, this method of enforcement. This method distinguishes itself from the others described above in that it is concerned with individual criminal responsibility as opposed to state responsibility. Its aim is to enforce the obligations of *individuals* under international humanitarian law, whereas the preceding methods concentrate on the enforcement of the obligations of *states*. However, as I shall demonstrate later in this paper, the principal problem with the enforcement of international humanitarian law through the prosecution and punishment of individuals is that the implementation of this method ultimately hinges on, and depends upon, the goodwill of *states*.

<sup>5</sup> Protecting Powers were resorted to in three cases: in 1956 in the Suez conflict (only, however, between Egypt on the one hand and France and the UK on the other); in the short conflict between India and Portugal over Goa in 1961; and in the Indo-Pakistani war in 1971, although India soon withheld its consent. In relation to war crimes prosecution, one author posits that '[i]f the task of the Protecting Powers, and of the substitute humanitarian organisation such as the ICRC, includes that of scrutiny, might it not also include that of gathering evidence of violations of the Conventions for use in subsequent prosecutions? Any such overt action by a Protecting Power might well lead one of the belligerents to declare it non grata and terminate its functions. The consequences for the Protecting Power are not far-reaching. But for the ICRC the assumption of a scrutiny role involving the collection of evidence poses great dangers.' See Shearer, 'Recent Developments in International Criminal Law Affecting Enforcement of International Humanitarian Law', in Australian Defence Studies Centre, *Selection of Papers Delivered to the Second Regional Conference on International Humanitarian Law*, 12-14 December 1994, at 72-73.

<sup>6</sup> *Ibid.*, at 75 *et seq.*

<sup>7</sup> See SC Res. 780 (1992).

## 2 The Failure of Prosecution through National Jurisdiction

The obligation of states to prosecute and punish persons accused of serious violations of international humanitarian law through their respective *national* jurisdictions arises out of their treaty obligations,<sup>8</sup> most notably those under the 1949 Geneva Conventions.<sup>9</sup>

As is commonly known, the jurisdiction provided by the 1949 Geneva Conventions is universal in that those suspected of being responsible for grave breaches come under the criminal jurisdiction of all states parties, regardless of their nationality or the *locus commissi delicti*. In addition, Article 88 of Protocol I requires that states parties provide mutual assistance with regard to criminal proceedings brought in respect of grave breaches to the 1949 Geneva Conventions or to Protocol I, including cooperation in the matter of extradition.

However, these provisions on *national* jurisdiction over grave breaches have been, at least until recent years, a dead letter. In situations of armed conflict abroad, a state is generally reluctant to prosecute its own personnel, especially when it is on the 'winning side'. In such cases, a state may also be disinclined to prosecute enemy personnel because such legal actions carry the risk of exposing war crimes committed by the state's own personnel. As for crimes committed in an armed conflict in which a state has not participated, both political and diplomatic considerations and the frequent difficulty of collecting evidence normally induce state authorities to refrain from prosecuting foreigners.

<sup>8</sup> While it is doubtful, in the absence of clear state practice and *opinio juris*, that states have a *duty* under customary international law to enforce international humanitarian law through criminal jurisdiction, states have jurisdiction to prosecute in the absence of a treaty pursuant to principles such as the universality principle and the passive personality principle. The principles on suppression of war crimes in the 1949 Geneva Conventions are said to be 'declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces': United States, *The Law of Land Warfare, Department of the Army Field Manual*, July 1956, at 181, para. 506(b). The obligation to prosecute is also said to arise by corollary with the right to an effective remedy; the obligation on the state to provide effective remedies to persons within its jurisdiction is complemented by the obligation to prosecute persons responsible for such violations, whether occurring in conflict or otherwise.

<sup>9</sup> See also the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Genocide Convention) at Articles V and VI and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) (Apartheid Convention) at Articles IV and V. Both conventions contain clear obligations on states parties to introduce and take the necessary measures to prosecute and punish perpetrators. With respect to 'grave breaches' of their provisions, the 1949 Geneva Conventions and Protocol I require states:

- (i) to enact legislation necessary to provide effective penal sanctions for persons committing or ordering the commission of grave breaches; and
- (ii) to search for the persons alleged to have committed or ordered the commission of grave breaches and to try such persons before their own courts, or alternatively to hand them over to another contracting state that has made out a *prima facie* case.

Both in the context of international conflicts and civil wars, political motivations may often lead states to prefer amnesty to prosecution.<sup>10</sup> As Bishop Desmond Tutu, Head of the Truth and Reconciliation Commission of South Africa, put it, referring to gross violations of human rights, political leaders choose 'reconciliation' over 'justice and ashes'.<sup>11</sup> Leaving aside the question of the political advisability of this choice, granting amnesty to persons responsible for grave breaches of international humanitarian law and mass violations of human rights raises serious moral and legal objections. Moral because, as Justice Robert Jackson commented in relation to the trial at Nuremberg, letting major war criminals live undisturbed to write their 'memoirs' in peace 'would mock the dead and make cynics of the living'.<sup>12</sup> And legal because the validity of such amnesty is doubtful. Arguably, the prohibition of such crimes and the consequent obligation of states to prosecute and punish their authors should be considered a peremptory norm of international law (*jus cogens*): hence, states should not be allowed to enter into international agreements or pass national legislation foregoing punishment of those crimes. Furthermore, the Human Rights Committee has held that:

Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy including compensation and such full rehabilitation as may be possible.<sup>13</sup>

Until very recently, the few trials that had been held within national criminal jurisdictions in respect of violations of norms of international humanitarian law related to crimes committed during the Second World War. The trials in France of Barbie, Touvier and Papon for crimes against humanity are prominent examples. However, following the establishment of the International Criminal Tribunal for the Former Yugoslavia, and plausibly as a result of the incentive created by that initiative, national courts in Denmark, Germany, Austria and Switzerland, among others, have begun to try and prosecute persons accused of committing atrocities in the former Yugoslavia. In 1994, for example, Danish courts exercised universal jurisdiction to

<sup>10</sup> As occurred in several South American countries for gross violations of human rights. For discussion on the validity of amnesty/impunity for gross violations of human rights in international law, see N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1995) and Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale LJ* (1991) 2537.

<sup>11</sup> See Woollacott, 'Reconciliation, or Justice and Ashes?', *The Guardian*, 1–2 February 1997, quoting Bishop Desmond Tutu in relation to the choice faced by law-makers in South Africa after Apartheid. In this regard, for many countries facing such a 'choice', an international criminal court may be the only feasible means of ensuring that justice is done, to the extent that amnesty under national criminal jurisdiction has no effect on individual criminal responsibility in the eyes of international humanitarian law.

<sup>12</sup> R. H. Jackson, *The Nürnberg Case, as Presented by Robert H. Jackson* (1947), at 8.

<sup>13</sup> United Nations Human Rights Committee General Comment No. 20 in relation to Article 7 of the International Covenant on Civil and Political Rights.

try and convict Refik Sarić, a Bosnian refugee in Denmark, for atrocities committed in Dretelj camp, Bosnia-Herzegovina.<sup>14</sup>

### 3 The Failure of Prosecution through International Jurisdiction Prior to 1993

While the 1949 Geneva Conventions do not expressly provide for the prosecution of offenders before an international tribunal, neither do they exclude 'handing over the accused to an international criminal court whose competence has been recognised by the Contracting Parties'.<sup>15</sup> This mechanism is expressly provided for in Article VI of the Genocide Convention and Article V of the Apartheid Convention.<sup>16</sup>

Nevertheless, the Cold War in international relations from the 1960s until the beginning of the 1990s made it impossible for international humanitarian law to be enforced through such international judicial institutions. This paralysis, characterized by the mutual suspicion and distrust of the Western and Eastern blocs, also triggered an obsession with non-interference in domestic affairs. In this climate, the likelihood of establishing an international criminal court was very remote.

### 4 The Turning Point: The New World Order

With the end of the Cold War, the animosity that had dominated international relations for almost half a century dissipated. In its wake, a new spirit of relative optimism emerged, stimulated by the following factors:

- (i) there has been a clear reduction in the distrust and mutual suspicion that frustrated friendly relations and cooperation between the Western and Eastern blocs;
- (ii) the successor states to the USSR — Russia and the other states participating in Confederation of Independent States — are coming to accept and respect some basic principles of international law;
- (iii) there is unprecedented agreement in the Security Council and increasing convergence in the views of its five permanent members, with the consequence that this institution is able to fulfil its functions more effectively.

<sup>14</sup> *Tribunal*, January/February 1996, no. 2, at 7.

<sup>15</sup> J. Pictet, *The Geneva Conventions of 12 August 1949: Commentary on Article 129*, vol. III, at 624. This interpretation is supported by Röling, 'Aspects of the Criminal Responsibility for Violations of the Laws of War', in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, vol. 1 (1979), at 200–201; Draper disagrees: 'The modern system of penal repression of "grave breaches" has reduced the competent jurisdiction exclusively to the Courts of the Detaining Power'. See Draper, 'The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1978 [sic]', 164 *RdC* (1979-III) 38, at 41–42.

<sup>16</sup> Article VI of the Genocide Convention, which provides that 'Persons charged with genocide . . . shall be tried . . . by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.

It is common knowledge that, despite the obvious problems of the Cold War era, the two power blocs did guarantee a modicum of international order to the extent that each of the superpowers acted as policeman and guarantor of order in its respective bloc. The collapse of this structure of international relations ushered in a wave of negative consequences. It has entailed a fragmentation of international society and intense disorder which, coupled with rising nationalism and fundamentalism, has resulted in a spiralling of (mostly) internal armed conflict, with much bloodshed and cruelty. The ensuing implosion of previously multi-ethnic societies, such as the former Yugoslavia and Rwanda, has led to gross violations of international humanitarian law on a scale comparable to those committed during the Second World War, which have shocked the conscience of the world. To be sure, the Cold War era witnessed many such excesses,<sup>17</sup> but it is only now with the new 'harmony' among the Big Five, together with intense media coverage of such events, that unprecedented opportunities have been created for the prosecution and punishment of those responsible for serious violations of international humanitarian law.

In this context, it should not come as a surprise that the end of the Cold War brought with it a revival of proposals for the establishment of a permanent international criminal court, an idea first mooted in the aftermath of the First World War and, as discussed above, envisaged in the Genocide and Apartheid Conventions. To quote the Final Report of the Commission of Experts set up under the terms of Resolution 780 (1992) of the Security Council, 'since the nations are expecting a new world order based on international public order, there is a need to establish permanent and effective bodies to dispense international justice'.<sup>18</sup> In other words, a new world order based on the rule of international law.

## **5 The Post-Cold-War Twin-Track: The Establishment of Ad Hoc International Tribunals and Work on the Establishment of a Permanent International Criminal Court**

In response to major violations of international humanitarian law since the end of the Cold War, the Security Council has set up ad hoc Tribunals pursuant to its power to decide on measures necessary to maintain or restore international peace and security: in 1993 the International Criminal Tribunal for the Former Yugoslavia, and in 1994 the International Criminal Tribunal for Rwanda (ICTR). Moves towards the establishment of an international tribunal to prosecute and punish war crimes

<sup>17</sup> For example, the Vietnam War, Cambodia under Pol Pot, civil wars in Guatemala, El Salvador, Afghanistan, Angola and Mozambique.

<sup>18</sup> UN Doc. S/1994/674.

committed by Iraqi forces in Kuwait, an idea first mooted in the autumn of 1990,<sup>19</sup> seem once more to be gaining momentum.<sup>20</sup>

The *major merits* of criminal prosecution and punishment by an international criminal court can be stated as follows.

- (i) The purpose of an impartial tribunal is to determine the *individual* criminal responsibility of individual offenders. Instead of focusing on *collective* guilt, it aims to identify individual responsibility. Thus, it rejects the tendency in times of conflict to blame an entire people for the crimes committed by certain individuals fighting in its name. This individual focus may also have a cathartic or healing effect and may contribute to the creation of peace.
- (ii) One of the most important merits of an international tribunal lies in its ability to hold accountable those who violate international humanitarian law and, in so doing, to uphold the rule of international law. As stated by the eminent Dutch international jurist B.V.A. Röling,

the foremost, essential function of criminal prosecutions [is] to restore confidence in the rule of law. The legal order is the positive inner relation of the people to the recognised values of the community, which relation is disturbed by the commission of crimes. If crimes are not punished, the confidence in the validity of the values of the community is undermined and shaken.<sup>21</sup>

In calling the offenders to account, an international criminal tribunal may serve to fill the vacuum left by national legislation on amnesty, to the extent that a grant of amnesty by a national authority may turn out to have no effect on individual criminal responsibility in international law. An international criminal tribunal may thus do justice where national jurisdictions are unable to do so and where victims would otherwise have no remedy.

- (iii) The 'judicial reckoning' of perpetrators of serious violations of international humanitarian law before an independent tribunal, composed of judges of various nations not parties to the conflict and applying 'impartial justice', can serve to blunt the hatred of the victims and their desire for revenge.
- (iv) This easing of tensions through the meting out of impartial justice can, in turn, create the conditions for a return to peaceful relations on the ground.
- (v) The proceedings of an international criminal tribunal build an impartial and objective *record of events*. This record differs fundamentally from that established by a fact-finding commission (see section 1 above), in that it has passed the rigorous test of judicial scrutiny, that is, the application of a tribunal's strict rules of admissibility of evidence. In this regard, investigations conducted with a view

<sup>19</sup> For a review of efforts made with regard to the creation of an international court to try Iraqi leaders for crimes committed during the Iraqi invasion of Kuwait and the ensuing Gulf War, see *The Path to The Hague — Selected Documents on the Origins of the ICTY* (1996).

<sup>20</sup> Recent efforts include the International 'Campaign to Indict Iraqi War Criminals', see 'All-party Call to Try Saddam', *The Guardian*, 16 January 1997.

<sup>21</sup> Röling, 'Criminal Responsibility for Violations of the Laws of War', 12 *Revue Belge de Droit International* (1976) 8, at 22.



to prosecution before an international criminal tribunal are much more far-reaching and thorough than those undertaken by a fact-finding commission. Thus, the record of an international tribunal is also of crucial value as a historical account of events.

- (vi) The holding of trials is a clear statement of the will of the international community to *break with the past* (*rompre avec le passé*) by punishing those who have deviated from acceptable standards of human behaviour. In delivering punishment, the international community's purpose is not so much retribution as stigmatization of the deviant behaviour.

## 6 The Problems of International Criminal Courts as a Means of Enforcing International Humanitarian Law

The problems faced by the ICTY demonstrate the difficulties in enforcing international humanitarian law through an international mechanism. Among the complaints regularly aired before the General Assembly of the United Nations in the annual speech of the President of the ICTY and in the Annual Report<sup>22</sup> are that:

- (i) The ICTY Statute places excessive reliance on state cooperation as the primary means of achieving the mandated objectives of prosecuting persons for violations of international humanitarian law. ICTY, having no police force of its own, must rely on international cooperation in order to effect arrests. It has proved extremely difficult to achieve significant state cooperation in complying with the Tribunal's orders to arrest and deliver indicted persons to The Hague and to provide assistance in evidentiary matters. Impunity is a genuine risk when states and international authorities refuse to arrest indicted individuals.
- (ii) There is a crucial need for more arrests of military or political leaders. States, if arresting at all, demonstrate greater willingness to arrest lesser figures, whilst allowing the leaders to remain at large. The process of restoring peace and security to the affected region is thus made all the more difficult.
- (iii) There are tremendous financial and logistical obstacles in the way of an effective international criminal tribunal. To establish an effective and fully functioning institution from scratch requires enormous funding. ICTY has had to build a courtroom and offices and supply them with all the necessary equipment, hire staff from all around the world, build a detention unit, fund programmes for the protection of victims and witnesses, send teams of investigators into the field, and so on. Yet there remains much to be done. For example, ICTY's Prosecutor, like the rest of the Tribunal's organs, has been severely hampered by lack of funds, and there is a genuine need for more investigators to undertake the many complex and time-consuming inquiries necessary to fulfil the institution's

<sup>22</sup> See for example, the Address by the President of the ICTY to the General Assembly on 4 November 1997 and the Fourth Annual Report of the ICTY, 7 August 1997, UN Doc. A/52/375, S/1997/729.

mandate. Witnesses have to be found amongst the Balkan diaspora. They must be interviewed and brought to The Hague to testify and, if necessary, be placed in a witness protection programme. This applies not only to prosecution witnesses, but to defence witnesses as well.

- (iv) Finally, the legal regime is not straightforward. Unlike national jurisdictions, which may rely on dozens of codes and hundreds of precedents for guidance, the ICTY has to apply, in addition to its Statute, customary international law, which can only be ascertained by consulting widely-dispersed international law sources. This became particularly clear in the case of *Erdemović*,<sup>23</sup> when the judges of the Appeals Chamber had to determine whether international law recognized the defence of duress, a question on which the Statute remains silent. Furthermore, the work of international tribunals is made all the more problematic by the absence of an international code of criminal procedure, although the Rules of Procedure and Evidence which have been laboriously drafted by the ICTY would provide a blueprint for a future permanent institution.

## 7 International Criminal Justice v. State Sovereignty

Whilst states continue to shy away from resorting to national penal enforcement (see section 2 above), they are also very reluctant to ‘internationalize’ the repression of serious violations of international humanitarian law. This proposition remains true, despite the recent moves towards the establishment of a permanent international criminal court, moves which seem to be very close to reaching their goal. The reluctance of states regarding international penal enforcement is hardly surprising, given that international criminal tribunals intrude on one of the most sacred areas of state sovereignty: criminal jurisdiction.

One of the essential features of an international criminal tribunal — whether established ad hoc by the Security Council pursuant to Chapter VII of the UN Charter or whether made permanent through a multilateral treaty — is that it purports to exercise international criminal jurisdiction directly over individuals living in states and subject to the exclusive authority of such states. It thus casts aside the ‘shield’ of state sovereignty. There is no doubt that the establishment of such tribunals constitutes a major inroad into the traditional omnipotence of sovereign states. However, as I shall now demonstrate by drawing from the experience of the ICTY and from the current proposals for an international criminal court, state sovereignty *resurfaces* when it comes to the day-to-day operations of the Tribunal and its ability to fulfil its mandate. This proves once again the validity of a remark made by a renowned German lawyer, Niemeyer, earlier this century: he pointed out that international law is an edifice built on a *volcano* — state sovereignty.<sup>24</sup> By this he meant that whenever

<sup>23</sup> *Prosecutor v. Drazen Erdemović*, IT-96-23A, AC, Judgment, 7 October 1997.

<sup>24</sup> H. G. Niemeyer, *Einseitige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen* (1932), at 3.

state sovereignty explodes onto the international scene, it may demolish the very bricks and mortar from which the Law of Nations is built. It is for this reason that international law aims to build devices to withstand the seismic activity of states: to prevent or diminish their pernicious effect. This metaphor is particularly apt in relation to an international tribunal. The tribunal must always contend with the violent eruptions of state sovereignty: the effect of states' lack of cooperation is like lava burning away the foundations of the institution.

In order to better understand the effect of state sovereignty on the operation of international criminal tribunals, one must first grasp their constitution and functions. Unlike national courts, which are concerned exclusively with judicial functions and leave investigation and prosecution up to other bodies, the current model for an international criminal court, in fact, provides for two organs: (i) a body entrusted with the administration of justice (the Chambers); and (ii) a body responsible for the investigation and prosecution of crimes falling under the Tribunal's jurisdiction. In the ICTY and ICTR, the latter organ is called the 'Office of the Prosecutor'. Under the Draft Statute for a permanent international criminal court, it is designated as 'the Procuracy'.<sup>25</sup> As I shall illustrate, the effectiveness of both the judicial arm and the investigation arm of an international criminal tribunal depends heavily on state cooperation and is ultimately impeded by lack of state cooperation under the guise of state sovereignty.

Unlike national courts, an international criminal tribunal has no law enforcement agency akin to a *police judiciaire*. It thus relies primarily on the cooperation of national authorities for the effective investigation and prosecution of persons accused of violations of international humanitarian law. Accordingly, all requests for assistance or orders of the ICTY, for instance, are addressed to and processed by the national system of the relevant state as the first resort. Cooperation is necessary in relation to requests for assistance or orders of the ICTY for the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of the accused to the ICTY. States are obliged to cooperate with the ICTY for these purposes pursuant to Article 29 of the ICTY Statute.

However, Rule 59 *bis*<sup>26</sup> of the Rules of Procedure and Evidence of the ICTY provides an alternative procedure to that contemplated by Article 29 (and also Rule 55) concerning arrests by states. A Trial Chamber of the ICTY<sup>27</sup> has held that 'once an arrest warrant has been transmitted to an international authority, an international

<sup>25</sup> Article 12 of the Draft Statute defines the Procuracy as an 'independent organ of the Court responsible for the investigation of complaints'.

<sup>26</sup> 'Transmission of Arrest Warrants

(A) Notwithstanding Rules 55 to 59, on the order of a Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused on such terms as the Judge may determine, together with an order that he be taken into custody by that authority or international body or the Prosecutor. . . .

<sup>27</sup> *Prosecutor v. Slavko Dokmanovic*, IT-95-13a-PT, TC II, Decision on the Motion for Release by the Accused Slavko Dokmanovic, 22 October 1997.

body, or the Office of the Prosecutor, the accused person named therein may be taken into custody without the involvement of the State in which he or she was located'.<sup>28</sup> Four successful arrests have been made by international authorities in the former Yugoslavia since the adoption of Rule 59 *bis*.<sup>29</sup>

Notwithstanding this development, the ICTY remains very much like a giant without arms and legs — it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfil its functions. It has no means at its disposal to force states to cooperate with it. This is to be contrasted with the International Military Tribunals at Nuremberg and Tokyo, which investigated and prosecuted war crimes committed in states held under military occupation by the Allied forces.

The obligation of states to cooperate with an international tribunal, whether pursuant to a binding Security Council resolution in the case of ad hoc tribunals or pursuant to their treaty obligations in the case of a permanent international criminal court, requires each state to enact implementing legislation or to amend its existing legislation for this purpose. A particular problem which arises with respect to most implementing legislation enacted by states to date with regard to the ICTY<sup>30</sup> is the tendency to subsume cooperation with the ICTY under the traditional model of *inter-state* judicial cooperation. For example, many states, in their implementing legislation, apply extradition procedures to requests by the ICTY for the surrender of accused persons, some even referring expressly to 'extradition' of accused persons.<sup>31</sup> The application of the law of extradition to cooperation with the ICTY is inappropriate. Extradition to a state and surrender to an international jurisdiction are two totally different and separate mechanisms. The former concerns relations between two sovereign states and is therefore a reflection of the principle of equality of states; it gives rise to a *horizontal* relationship. The latter, instead, concerns the relation between a state and an international judicial body endowed with binding authority; it is therefore the expression of a *vertical* relationship. The Appeals Chamber of the ICTY

<sup>28</sup> *Ibid.* at 18.

<sup>29</sup> Arrests of Milan Kovacevic, Anto Furundžija and Goran Jelišić by SFOR and Slavko Dokmanovic, by UNTAES respectively. Simo Drljaca was killed in the course of an attempt to arrest him by SFOR.

<sup>30</sup> As at 10 November 1997, the following 20 states have enacted legislation regarding the International Criminal Tribunal for the Former Yugoslavia: Italy, Finland, Netherlands, Germany, Iceland, Spain, Norway, Sweden, Denmark, France, Republic of Bosnia and Herzegovina, Australia, Switzerland, New Zealand, United States, United Kingdom, Belgium, Republic of Croatia, Austria and Hungary. Four countries have indicated that they do not need implementing legislation (Korea, Russia, Singapore and Venezuela).

<sup>31</sup> See, e.g., 'extradition': Article 2 of Denmark's Act on Criminal Proceedings before the International Tribunal for the Prosecution of Persons Responsible for War Crimes Committed in the Territory of Former Yugoslavia; Article 2 of Norway's Act Relating to the Incorporation into Norwegian Law of the United Nations Security Council Resolution on the Establishment of an International Tribunal for Crimes Committed in the Former Yugoslavia; the implicit procedure in Bosnia and Herzegovina's Decree with Force of Law on Deferral upon Request by the International Tribunal; and Article 11 of Italy's Decree Law No. 544 of 28 December 1993.

has recently noted that the relation between national courts of different states is 'horizontal' in nature.<sup>32</sup>

The ICTY is endowed with jurisdiction over individuals living within sovereign states, be they states of the former Yugoslavia or third states, and, in addition, has been conferred with primacy over national courts in its Statute. By the same token, the Statute granted ICTY the power to address to states binding orders concerning a broad variety of judicial matters (including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of indictees to ICTY). Clearly, a 'vertical' relationship has been established, at least as far as the judicial and injunctory powers of the ICTY are concerned (whereas in the area of enforcement, the ICTY is still dependent upon states and the Security Council). This is borne out by the fact that requests for extradition under the inter-state scheme are subject to the discretionary consent of the state from which extradition is sought or are envisaged in bilateral treaties on extradition; by contrast, the ICTY's requests for surrender are always binding upon states pursuant to ICTY's Statute, to UN Resolution 827 (1993) establishing the ICTY, and to Chapter VII of the UN Charter. Such requests override national legislation. It is worth noting here that Rule 58 of the ICTY's Rules of Procedure and Evidence provides that the duty of cooperation and judicial assistance laid down in Article 29 of the Statute 'shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the ICTY which may exist under the national law or extradition treaties of the State concerned'. This Rule effectively codifies the principle of customary international law pursuant to which a state cannot adduce its constitution or its laws as a defence for failure to carry out its international obligations.<sup>33</sup>

The importance of state sovereignty as a factor influencing the work of an international tribunal is made glaringly apparent by a recent problem faced by the ICTY with respect to the Office of the Prosecutor's efforts to obtain documents relevant to the case of *Prosecutor v. Tihomir Blaškić*. The problem in that particular instance arose out of two *subpoenae duces tecum* (orders to appear in court for the purpose of handing over documents) issued on 15 January 1997 by a Judge of the Trial Chamber, at the request of the Office of the Prosecutor. These *subpoenae* enjoined (i) Bosnia and Herzegovina and 'the Custodian of the Records of the Central Archive of what was formerly the Ministry of Defence of the Croatian Community of Herzeg-Bosna' and (ii) the Republic of Croatia and the Minister of Defence of the Republic of Croatia, to provide the documents listed therein. These *subpoenae* were not complied with within the allotted time by the Republic of Croatia and were only partially complied with by Bosnia and Herzegovina. In response to the subpoena, the Republic of Croatia argued that the ICTY does not have the competence to issue *subpoenae* to a sovereign state or

<sup>32</sup> *Prosecutor v. Tihomir Blaškić*, IT-95-13-AR108 bis, AC, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.

<sup>33</sup> See *Restatement of the Law — Third, The Foreign Relations Law of the United States*, vol. I, (1987), para. 115b, at 64; and *Polish Nationals in Danzig*, 1931 PCIJ, Series A/B, No. 44, at 24.

to its officials; it added that if the Security Council had intended to depart so drastically from international law (probably intending to refer to those international rules which provide for state immunity as well as the immunity of state agents), it would have stated so plainly in the Statute of the ICTY. It agreed to give its 'full co-operation' to the Office of the Prosecutor with respect to the requested documents, not on the basis of the *subpoena* which it considered unfounded, but rather on the basis of its legislation on cooperation with the ICTY<sup>34</sup> and 'under the terms applicable to all States'. It added, however, that '[l]ike any sovereign State, the Republic of Croatia reserves the right to observe the interests of its national security when assisting the ICTY'.<sup>35</sup> In contrast, Bosnia and Herzegovina stated that it recognized the competence of the ICTY to issue orders against states, such as the *subpoena* in question, and that the Statute allows for the issuance of such orders. It proceeded to argue before the ICTY that it had taken all necessary steps to ensure compliance with the ICTY's order.

The Appeals Chamber<sup>36</sup> ruled that while *subpoenae duces tecum* could not be addressed to states, binding orders could be so addressed; states cannot, by claiming national security interests, withhold documents and other evidentiary material requested by the ICTY. However, it recommended that practical arrangements be adopted by the relevant Trial Chamber to make allowance for legitimate and bona fide concerns of states. The Appeals Chamber also noted that ICTY does not possess any power to take enforcement measures against sovereign states; such powers cannot be regarded as inherent to the functions of an international judicial body. Following the reporting of a judicial finding concerning a state's failure to observe the provisions of the Statute or the Rules, it is for ICTY's parent body, the Security Council, to impose sanctions, if any, against a recalcitrant state, under the conditions provided for in Chapter VII of the United Nations Charter. In addition, subject to certain conditions, each Member State of the United Nations may act upon the communal legal interest in the observance of this international obligation laid down in Article 29. A collective response through other intergovernmental organisations may also be envisaged, again 'subject to certain conditions'.

The reluctance of states to give way to international criminal jurisdiction with respect to matters which would otherwise be subject to their exclusive sovereignty becomes even more apparent in light of the way in which the International Law Commission's draft statute on a permanent international criminal court deals with the allocation of jurisdiction between the court and national authorities. In this regard, it is significant that the Preparatory Committee set up by the General Assembly to review the draft found that 'the jurisdictional aspects of the Statute were

<sup>34</sup> The Constitutional Act on the Co-operation between the Republic of Croatia and the International Criminal Tribunal, 19 April 1996.

<sup>35</sup> Reply of the Government of the Republic of Croatia to Subpoena Duces Tecum, *Prosecutor v. Thomir Blaskic*, IT-95-13-T, 10 February 1997, para. 12.

<sup>36</sup> *Supra* note 32.

the object of the most intense and arduous discussions'.<sup>37</sup> The statute of the international criminal court as currently drafted is more restrictive with respect to jurisdiction than that of the existing ad hoc Tribunals. For example:

- (i) Like the ICTY and the ICTR, the proposed international criminal court is to have 'complementary' jurisdiction with that of national jurisdiction but, unlike these two ad hoc Tribunals, the proposed court gives *primacy* to national jurisdictions.
- (ii) The jurisdiction of the proposed international criminal court is triggered by states, and not on the initiative of the Procuracy. The latter does not have the power to investigate *ex officio*, but only on the basis of the complaint made by a state (although it has sole authority to decide on the issuance of indictments following state complaints).<sup>38</sup>
- (iii) In addition, under a proposal currently being discussed, in order for the jurisdiction of the court to 'kick in' in a given case, the complaining state, the state which has custody of the suspect *and* the state on whose territory the crime is alleged to have taken place, must not only have ratified the statute, but must also have 'opted in' with regard to the specific crimes complained of.<sup>39</sup>

It is hoped that these restrictions on the permanent international criminal court's jurisdiction will be tempered so that the court may function effectively.

To sum up, the truth of the matter is that the major concessions that have been made by states over their sovereignty with respect to the establishment of fully functioning international criminal tribunals are nevertheless being negated by an excessive clinging to state sovereignty in the face of requests for cooperation. Having opened the door of state sovereignty, it is all too quickly shut again.

## 8 Concluding Remarks

The trend towards 'criminalization of international law', through criminal prosecution and punishment of breaches of international humanitarian law by international criminal tribunals, should not blind us to the basic dilemma facing international tribunals: prosecution and punishment or continued respect for state sovereignty? The supremacy of state sovereignty in the form of excessive restrictions on the jurisdiction of international criminal courts can only result in the creation of ineffective institutions.<sup>40</sup>

In addition, the trend towards the institutionalization of international criminal law must not detract from the underlying political realities. Judicial reckoning, while

<sup>37</sup> Politi, 'The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects after the First Session of the Preparatory Committee', 13 *Nouvelles Etudes Pénales* (1997) 115, at 118.

<sup>38</sup> See ILC Draft Statute, Articles 25 and 26.

<sup>39</sup> An exception is made for the crime of genocide, over which the court has 'inherent jurisdiction' to the extent that ratification of the statute automatically implies acceptance of the court's jurisdiction. See generally Articles 20 through 25 of the ILC Draft Statute for an international criminal court.

<sup>40</sup> Report of the International Law Commission, 46th Session, 1994, at 36.

necessary in order to uphold and enforce the international rule of law, should run parallel to steps taken on the political level. The prosecution and punishment of war criminals by an international criminal tribunal (whether ad hoc or permanent) cannot be a substitute for robust action by the United Nations where required to restore international peace and security. As long as the ideological, political and military leaders behind the serious violations of international humanitarian law still remain firmly in power, flaunting with impunity their rendezvous with justice, this can only result in a discrediting of the work of international criminal tribunals. So long as states retain some essential aspects of their sovereignty and fail to set up an effective mechanism to enforce arrest warrants and to execute judgments, international criminal tribunals may have little more than normative impact. Thus, we are once again reminded of the limits posed by international politics on international law.<sup>41</sup>

In spite of these problems, the most effective means of enforcing international humanitarian law remains the prosecution and punishment of offenders within national or international criminal jurisdictions. I will go further and say that the rule of international humanitarian law depends on its enforcement through the prosecution and punishment of its offenders. As Cesare Beccaria stated as long ago as 1764, 'the conviction of finding nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence',<sup>42</sup> and thus of ensuring respect for the rule of law.

<sup>41</sup> 'International Law is still limited by international politics, and we must not pretend that either can live and grow without the other.' Stimson, 'The Nuremberg Trial: Landmark in Law', 25 *Foreign Affairs* (1947) 189.

<sup>42</sup> Beccaria, 'Dei delitti e delle pene', translated in J. Farrar, *Crimes & Punishment* (1880), at 193-194.