The five pieces collected here reflect the remarkable maturation of international criminal law. Only a decade ago, when the enforcement of international criminal law was a pipe dream, the events discussed herein would have been deemed implausible. Now, with international crimes being prosecuted by a growing spectrum of national and international courts, and with the participation of prosecutors, defense lawyers, investigators and non-governmental organizations, international criminal law has finally emerged as a distinct body of law with real mechanisms for enforcement.

Nothing signifies the triumph of international criminal law more than the International Criminal Court (ICC). As most countries embrace the ICC as a long-needed answer to a serious gap in enforcement, the United States has wrestled with its ambivalence. Jennifer Schense and John Washburn discuss in section I the approach of the United States toward the Court, and the PrepCom negotiations that are paving the way for the ICC to begin operation upon the sixtieth ratification.

The ICC was a consequence of the international criminal tribunals for the former Yugoslavia and Rwanda, and Maury D. Schenk, Brian J. Newquist, Lesley Stone, and Daryl A. Mundis discuss the recent activities of these tribunals in section II. Further ad hoc tribunals have been created in Sierra Leone, Cambodia and East Timor, and these are discussed in section III by Daryl A. Mundis. Mavis Gyamfi describes another landmark in section IV—the U.N. Convention Against Transnational Organized Crime, which is the first multilateral treaty on organized crime. Finally, in section V Brian Concannon discusses the Raboteau trial in Haiti where, following a six-week jury trial hailed by national and international observers as fair, the impoverished justice of Haiti—against all odds—convicted sixteen army officer and paramilitaries of human rights offenses arising from a 1994 massacre.
I. The United States and the International Criminal Court

Jennifer Schense and John L. Washburn*

This article describes the evolution of the U.S. government's policy regarding the International Criminal Court (ICC). In particular, we examine the activities of the U.S. government since the conclusion of the Rome Diplomatic Conference, in the course of six sessions of the U.N. Preparatory Commission for the ICC (PrepCom), and in its bilateral and multilateral relations with other States. This article also examines the recent U.S. signature and sets forth some considerations that may affect the approach of the Bush administration to future negotiations relating to the ICC.

A. Summary and Introduction

The United States identified seven flaws in the Statute for the ICC shortly after the July 1998 Rome Diplomatic Conference.1 At the end of 1999, the United States could be reasonably confident that most of these objections would be met in the coming year. Continuing negotiations in the PrepCom on Rules of Procedure and Evidence and on Elements of Crimes for the Court were making good progress toward finding solutions or compromises for three of them. Of the others, the United States has simply dropped three. These had to do with the crimes of terrorism and drug trafficking, the Statute's ban on reservations, and the self-initiating prosecutor.

The remaining objection was that the jurisdiction of the ICC must not extend to military service members and civilian officials of the United States as long as it has not ratified the Rome Statute. During the 1999 and 2000 PrepCom sessions, this demand continued to overshadow the numerous and often centrally important contributions the U.S delegation made at the PrepCom to strengthening the operations and jurisprudence of the Court.

By the end of the Rome diplomatic conference, this position had emerged as the remainder of earlier and unsuccessful American efforts at broad control of the Court. These had included, for example, an attempt to make the U.N. Security Council the sole source of cases for the ICC. On its last day, the conference definitively rejected a U.S. proposal to deny jurisdiction to the Court over "acts . . . committed by officials or agents of a State not party in the course of official duties and acknowledged by the State as such"2 unless that State had consented.

The delegation also carried over from Rome, and into the 1999 and 2000 sessions, two distinct styles in the conduct of their diplomacy. The first was conventional—and often very skillful—multilateral diplomacy, employing the usual techniques of initiating and exchanging texts, searching for compromises that avoided papering over real disagreements in favor of results the Court could use, and emphasizing cooperation with others for a

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common purpose. This was often backed up by formidable expertise and thorough preparation. The admiration and respect it created considerably offset the resentment and impatience aroused by the second approach.

The second approach combined a hard and continuous push for an exemption with a search for concessions that might allow Washington to reconsider the need for it. This was an obviously contradictory combination. The possibility of an American signature was raised more and more openly as another inducement for concessions in the last two PrepCom sessions in this period. By the beginning of 1999, most delegations had come to believe that neither an exemption nor any reconsideration in Washington would ever happen. Moreover, they were increasingly irritated by U.S. demands for concessions to which it was now clear there would never be any return.


At the fourth PrepCom session, delegates began to focus in earnest on the completion of the draft Rules of Procedure and Evidence and the Elements of Crimes with the June 30, 2000 deadline established by the Final Act of the Rome Conference drawing nearer. The U.S. delegation continued to remain actively engaged in the negotiations, especially in drafting the Elements of Crimes. The United States had successfully insisted at the Rome Conference that the PrepCom should be charged with drafting the elements.

Delegations were also further encouraged by the provisional resolution of some of the issues raised by U.S. Ambassador David Scheffer as being of “fundamental concern to the United States.” Among those issues resolved were the elements for the war crime of the direct or indirect transfer of civilian populations into occupied territories. Both the U.S. and Israeli delegations were concerned about what they viewed as an undue extension of international law beyond that contained in the Geneva Conventions. After months of intense negotiations, delegations on all sides were able to reach agreement on a set of elements that mirror exactly the definition of the crime in the Rome Statute, while allowing sufficient flexibility to adapt to possible changes either in international law or in the political situation concerned. Resolution was also achieved on a provision of Article 12, which required clarification. Article 12(3), as worded, allows a non-State party to temporarily accept the Court’s jurisdiction for purposes of “the crime in question.” The PrepCom accepted a Bosnian proposal that clarified that such acceptance would apply to “all crimes of relevance to the situation,” thus meeting a widely shared concern that the use of the word crime alone might allow some States to use the Court to prosecute political enemies while denying the Court’s jurisdiction over their own crimes.

The primary issue for the U.S. delegation, however, remained unresolved, and delegates could not begin to determine how to approach it. On the strength of pressure from the Department of Defense to maintain the U.S. position and without any clear signal from The White House, the U.S. delegation continued to seek a total exemption for U.S. nationals. It was widely anticipated that the U.S. delegation would at least informally introduce a proposal to achieve this exemption at the March session of the PrepCom. However, the U.S. delegation did not circulate any language. Instead, Ambassador Scheffer met informally but systematically with heads of delegations to sound out support for two mechanisms, which he hoped Washington would accept as constituting an exemption: a rule procedure based on Article 98 and the addition of text to the relationship agreement between the U.N. and the ICC. The purpose of the rule was to allow the Court to enter into agreements with States to limit surrender of individuals to the Court. The relationship agreement, as an
agreement between the Court and the United Nations, would then include language to
create an exemption from surrender to the Court of officials and military personnel of the
United States and of other non-State parties to the Court. At the end of the March session,
the U.S. delegation demonstrated its intention to pursue both the rule and the text for the
relationship agreement through a footnote attached to the rolling text at the last minute. 1

Most delegates could not support the idea of a complete exemption for American na-
tionals. Many agreed that both the proposed rule and text for the relationship agreement
were not legally justified and would be harmful to the Statute and to the Court. Many also
resented the insistence of the United States in obtaining the exemption without regard to
the serious damage it would do to the credibility and effectiveness of the Court. Nonethe-
less, it was difficult for them to resist the political pressure exerted on countries in their
capitals to concede to the United States, and the tactical maneuvering of the U.S. delegation
in the PrepCom.

The results of the fourth PrepCom session touched off intense but largely inconclusive
discussions within the Clinton administration. These reached sub-cabinet working groups
and apparently involved the Secretaries of Defense and State as well. Regional bureaus
within the State Department became extensively engaged in the ICC issue for the first time,
giving the State Department’s participation in inter-agency debates unprecedented depth
and vigor. The State Department was finally authorized to pursue the Article 98 approach,
but was not allowed to offer even signature as an inducement. This outcome was publicly
expressed in a letter to other governments by Madeleine Albright. 4

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1. The footnote simply read, “One delegation may propose an addition to the rule related to article 98.”


4. The letter from U.S. Secretary of State Madeleine Albright to foreign ministers around the world, calling
for support of the U.S. position, dated April 17, 2000, is part of the archives of the Coalition for the Inter-
national Criminal Court. The text of the letter reads as follows:

17 April 2000

Dear Mr. Minister:

I am writing to you at this time to emphasize the critical importance we attach to our proposal for the
proposed International Criminal Court (ICC). We are seeking a provision in the UN/ICC relationship
agreement and a Rule to Article 98 of the Rome Statute to address our fundamental objective to prevent,
unless certain conditions are met, the surrender or acceptance by the ICC for trial of nationals of non-
party States who are acting under governmental direction and whose actions are acknowledged as such
by the non-party State.

We must achieve, before it is too late, the proper balance between the noble aims of the ICC treaty,
namely, to bring to justice perpetrators of genocide, crimes against humanity, and serious war crimes,
and the continuing need for responsible nations to maintain or restore international peace and security
and to undertake humanitarian missions. We believe our proposal advances both goals with non-
parties and with parties to the ICC Treaty. Yet, it would still make it extremely difficult for individuals
from rogue states to act with impunity. Our proposal is consistent with Article 98 and is not an
amendment or modification of the Rome Statute. If our proposal is adopted by the U.N. Preparatory
Commission on the ICC this year, it would address the fundamental concern that leads U.S. to oppose
the treaty and would enable U.S. to assist the ICC as appropriate. The end result would be a stronger
ICC that would benefit from a relationship with the United States. It also would give U.S. time to
evaluate the treaty regime and the Court’s operation before making a final decision about our partic-
ipation in the Court.

There is too much at stake for international justice and international peace to go down a path that
would drive a wedge between the United States and the ICC. I strongly urge you to support our
The letter backfired with its most important recipients because it seemed to push a position on Article 98 that had already been rejected at the end of the fourth session. Moreover, the letter used the language of the proposal that had been so soundly defeated in Rome. Many read it as a threat of continued American opposition to the Rome Statute. Nonetheless, the letter became the basis for instructions for strenuous demarches on this position by individual envoys in capitals worldwide and by U.S. delegations at multilateral meetings. Many of the latter were regional, such as conferences between the United States and the European Union.

C. FIFTH SESSION OF THE PREPARATORY COMMISSION (JUNE 12–30, 2000)

As a result of these discussions with other countries, the U.S. delegation approached the fifth session of the PrepCom with the realization that their full proposal was generating strong opposition among the Like-Minded Group of States (LMG)\(^4\) and, in particular, the European Union (EU). This was accompanied by the realization that time was quickly running out if any exemption was to be achieved through the Rules and Elements.

The U.S. approach changed tactically but not substantively in June. The United States set aside the exemption language for the relationship agreement and began to press for only the rule, arguing that alone it was harmless. The United States formally introduced a new text of the rule at the start of the fifth session.\(^6\) These activities caused some confusion as the June session of the preparatory commission approaches, and to instruct your delegation accordingly. In any event, we would appreciate your consulting U.S. prior to making any final decision on this important matter.

Sincerely,
Madeleine K. Albright
Secretary of State

5. The LMG developed as an informal government grouping in 1995, during the Ad Hoc Committee of the General Assembly created to address the ICC. What started out as a group of approximately six or seven States at the start of the Ad Hoc Committee grew to include close to twenty like-minded States by the end of 1995, including Argentina, Australia, Austria, Canada, Denmark, Egypt, Finland, Germany, Greece, Italy, Lesotho, the Netherlands, New Zealand, Norway, Portugal, Samoa, Singapore, South Africa, Sweden, Switzerland, and Trinidad and Tobago. The LMG coalesced around a very specific initial goal: to advance the negotiations in the face of P-5 and other efforts to sidetrack the process by obtaining a recommendation of the Ad Hoc Committee that the General Assembly create a preparatory committee, with a view towards establishing a date as soon as possible for a diplomatic conference. The core membership of what came to be called the Like-Minded Group of States (LMG) emerged as early debates revealed similarities among delegations on key issues, including the court’s jurisdiction and how that jurisdiction would be triggered, and what should constitute the Statute’s core crimes. Eventually, the impact of the LMG’s coordination, together with that of the Coalition for an International Criminal Court, has a decisive, constructive impact on the outcome of the Rome Conference. For a more detailed description of the evolution of the LMG, see the chapter on the role of NGOs in the development of the Rome Statute by Jennifer Schense and William Pace, part of a commentary edited by Antonio Cassese, due for publication in 2001.

because it was clear from the April and May demarches that the United States required both the rule and the relationship agreement text to achieve an exemption. Nonetheless, the United States put forth only the rule in June and asked that it be considered "on its own merits."

Efforts to prevent the U.S. rule from being accepted were unfortunately made more difficult by the all-or-nothing environment building at the PrepCom. The PrepCom bureau flatly opposed a vote on the Rules and Elements because of the belief that while a rule to Article 98 would alone be harmless, the possibility of adoption of the Rules and Elements by anything less than consensus would reflect disagreement about their universal acceptability and slow the momentum of ratifications. The LMG followed suit. This encouraged the United States not to concede on the rule or to let up the political pressure. A few delegates held out for a vote, but in the end succumbed to the pressure to accept the rule and to adopt both the Rules and Elements by consensus. This consensus, however, could only be achieved if the rule was accompanied by a warning in the summary of the session’s proceedings that the rule was indeed stand-alone and could not be linked to the relationship agreement or any similar agreement in the future. The chair of the PrepCom (in his capacity as head of the Canadian delegation), Portugal (on behalf of the EU), and many members of the LMG spoke after the adoption of the text to emphasize that there would be no re-opening of the Rome Statute. It was clear, however, from public and private statements of members of the U.S. delegation as of October 2000 that the strenuous campaign for a U.S. exemption would continue.

Preparations in Washington before the sixth session of the PrepCom had a feverish and desperate quality. Supporters of the ICC within the administration, especially in the State Department, saw the opportunity to sign the Statute slipping away. A full confrontation with the Defense Department was avoided with the latter’s grudging agreement to let the delegation try to put together a combination of measures that would collectively provide for full exemption. Since this agreement came very late and the multiple proposals in the U.S. position made it difficult to advocate forcefully, American international activity in support of it, including bilateral demarches, was comparatively slight.

of only one of the two categories of States. This proposal has been interpreted as reflecting U.S. delegation concerns about eventual inclusion of the crime of aggression. As mentioned in the section of this report addressing aggression, further discussion of the U.S. proposal has been postponed until a more appropriate time, most specifically when the Rules of Procedure of the Assembly of States Parties are negotiated.

7. The rule reads, "The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court." *Finalized Draft Text of the Rules of Procedure and Evidence,* U.N. Doc. PCNICC/2000/1/Add.1, at 89 (Rule 195) (2000). The proviso in the session summary reads, "It was generally understood that rule 9.19 [renumbered as rule 195] should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State." *Proceedings of the Preparatory Commission at Its Fifth Session,* U.N. Doc. PCNICC/2000/L.3/Rev.1, at 3 (2000), available at http://www.un.org/law/icc/prepcomm/jun2000/pdf/docs.htm.

8. To name a few press sources in which the U.S. delegation’s intentions are made clear, see *U.S. Gains a Compromise on War Crimes Tribunal,* N.Y. TIMES, June 30, 2000; *100 Countries Approve War Tribunal,* AP ONLINE, June 30, 2000, at http://www.ap.org; *U.S. Opponents Claim Win on International Court,* UNITED PRESS INT’L, June 30, 2000; *War Crimes Court Ratified by Canada; U.S. Battles to Keep Citizens Exempts from Prosecution,* THE OTTAWA CITIZEN, July 1, 2000; *U.S. Wins Time to Protect Forces from War-Crimes Panel,* WASH. TIMES, July 1, 2000; *Official Outlines U.S. Strategy on War-Crimes Court,* UNITED PRESS INT’L, Aug. 2, 2000.
D. Sixth Session of the Preparatory Commission (November 27–December 8, 2000)

The working environment at the sixth session of the PrepCom was overshadowed by the approaching December 31, 2000, deadline for signature of the Rome Statute. By the start of the sixth session, twenty-three countries had ratified the Rome Statute, a fact underscored by the announcement on the first day of the session that South Africa had ratified; that number would rise to twenty-seven by the end of the year. In addition, two States—the Syrian Arab Republic and the United Arab Emirates—announced on the first day that they had signed and Peru announced that its signature was imminent. An additional twenty-two States would sign the Statute before the deadline, bringing the final number of signatories up to 139.

Speculation among delegates was rife that the United States might sign the Statute before the deadline. This was not the first time the possibility was openly addressed: Ambassador Scheffer had encouraged delegates to believe that he might be able to persuade President Clinton to sign, if the U.S. delegation received concessions in the texts of the Rules and the Elements, amounting to an exemption. However, this possibility never had its desired effect on other delegates at the PrepCom because they recognized that they could not concede what the U.S. delegation would require to successfully make its case for signature in Washington.

The U.S. delegation continued to seek a full exemption from the PrepCom, focusing primarily on the relationship agreement text. To achieve this, the first proposal addressed Article 10 of the draft relationship agreement, apparently seeking to interpose the United Nations between non-State parties and the Court as the conduit for documentation about admissibility of specific cases. Seventeen other delegations spoke strongly against this proposal because of the likelihood that transmittal of information through the Security Council could effectively delay admissibility determinations and hamper the work of the Court. The rolling text of the draft agreement omits this proposal; however, the United States did succeed in having a footnote attached calling for future consideration of how to address transmission of information relating to the surrender of U.N. peacekeepers.

On the last day of the working group on the relationship agreement, the United States introduced a second proposal, DP.17, calling for the addition of a new article to the draft agreement. This article reflects most closely the original U.S. proposal for the relationship agreement.

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9. It should be here noted that 120 States voted to adopt the Rome Statute at the close of the Rome Diplomatic Conference, a figure that was a goalpost for NGOs, governments, and others promoting signature of the Statute.


11. Footnote 12 states, “Some delegations suggested that it would be useful to include somewhere in the present Agreement a provision dealing with the transmission of information to the United Nations by the Court regarding a request for surrender of any member of United Nations peacekeepers when the Court deems it appropriate.” See Discussion Paper Proposed by the Coordinator, U.N. Doc. PCNICC/2000/WGICC-UN/RT.1 (Dec. 7, 2000). Due to a lack of active U.S. participation in the February/March 2001 PrepCom to support this element, this footnote was subsequently dropped from the draft agreement, U.N. Doc. PCNICC/2001/L.1/Rev.1/Add.1. Both documents are available from the U.N. and are on file with the NGO Coalition for the International Criminal Court.


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agreement, which the LMG and the EU so soundly rejected leading into the fifth session of the PrepCom.13 However, because it was introduced on the last day, there was no time to discuss it. This proposal and others were added to the rolling text of the relationship agreement as an annex, with the note that: "Owing to the lack of time, the Working Group deferred consideration of the following proposals to the next session." The Coordinator further stressed during the final plenary that there was no priority given to the proposals contained in the Annex, but that they were included simply because they were introduced during the last session and had not been discussed by the Working Group.

Also on the last day, the United States submitted a third proposal to the plenary that was neither formally introduced nor discussed. This proposal requested an extension of the PrepCom's mandate in order to consider the development of factors for the Court that may be relevant for the investigation, prosecution, and surrender of suspects, including the context within which an alleged crime has occurred and a State's contribution to international peace and security. The United States intended for these two eleventh-hour proposals to effectively result in a near-total exemption for American nationals. It would, of course, also similarly benefit the nationals of other countries, which could meet the criteria required by the proposals.14 The Working Group on the Relationship Agreement will address DR 17; the second proposal will be dealt with by Zsolt Hetesy of Hungary, the PrepCom Bureau's contact point for the headquarters agreement. The Bureau encouraged delegations to share any comments or suggestions regarding the U.S. proposal with the contact point; therefore, responses from delegations to this proposal will likely shape the Bureau's decision as to the framework in which this proposal will ultimately be addressed.

Finally, a number of delegations discussed the possibility of an extension of Article 124 of the Rome Statute to States having signed the Rome Statute but not having ratified. The effect of such an extension would be to exempt the governments, but not the nationals, of non-State parties from the Court's jurisdiction over war crimes for the first seven years after entry into force. However, there was limited support for this proposal; moreover, the U.S. delegation did not consider it a full exemption, so the idea was eventually dropped.

E. Clinton Signs the Rome Statute

The Rome Statute closed for signature at midnight on December 31, 2000. The United States, along with Israel and Iran, signed a few hours before this deadline. Ambassador Scheffer signed the Statute on behalf of the U.S. government. President Clinton's decision

13. The text of the proposal reads as follows:

In order to encourage contributions by States to promote international peace and security, and unless there has been a referral to the Court pursuant to article 13(b) of the Statute, the United Nations and the Court agree that the Court shall determine on its own motion pursuant to article 19(1) the admissibility of a case in accordance with article 17 when there is a request for the surrender of a suspect who is charged in such case with a crime that occurred outside the territory of the suspect's State of nationality.

Proposal Submitted by the United States of America, supra note 6.

14. The effect of the two proposals together would likely be to require the Court only to evaluate a State's ability to exercise complementarity, and not a State's willingness to do so, as required by Article 17 of the Rome Statute. However, it should be noted that as long as this decision rests in the hands of the judges, even this drastic step would not result in the 100 percent exemption, which the U.S. Department of Defense demands.
to sign, unlike some of his other last-minute moves, did not preempt any action that his successor might take and had been long and thoroughly debated within his administration.

This debate began immediately after the end of the sixth session of the PrepCom. Opponents, especially in the Department of Defense, declared that nothing should undercut the demand for exemption and future efforts to achieve it. Proponents argued that the Clinton administration had supported the principle of an international criminal court consistently since 1995 and that signature would be a closing confirmation of this support.\footnote{Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 32, U.N. Doc. A/CONF.39/27 (1969).}

By early November, the Clinton administration was receiving appeals for signature from many sources. Non-governmental organizations and individuals approached every office and individual concerned with the ICC in the administration and some organizations with nationwide memberships mounted effective letter-writing campaigns. These campaigns culminated in the delivery of a selection of these letters in person to the president. Letters to the president also came in from Congress, religious organizations and leaders, distinguished human rights activists, and persons prominent in other fields. Heads of state and government from other countries, American notables, and personal friends called or visited him to urge signature.

Finally, newspapers across the country editorialized in favor of signature. Their general approach was that the United States should not turn its back on the Court and should use signature to retain American influence over the final stages of shaping and establishing the ICC.

In the end, this approach is also reflected in the official statement accompanying the U.S. signature. However, this document bears the marks of the contention that dominated debate within the U.S. government until the very end. The statement repeats the concern that the ICC must not have jurisdiction over nationals of states not party to the Statute so that the United States can observe the Court in its formative years before choosing to become subject to its jurisdiction. In this way, the statement fails to dispel the longstanding confusion within the U.S. government about the Court's jurisdiction over individuals, not over states. It also refers to other unspecified flaws in the Statute, but leaves it to the incoming administration to meet these concerns and advises that until that is done, the Rome Statute should not be submitted to the Senate for ratification.

F. Conclusion

As this article was written, the Bush administration was considering its long-term policy toward the ICC. At the seventh session of the PrepCom, from February 26 to March of 2001, the United States absented itself except for the working group on aggression. The style and substance of American participation in the work before the PrepCom in September 2001 will establish the boundaries of American policy and limit the options of those who make it. Will the new government feel bound to signal its disapproval of the Clinton signature as strongly in this international forum as it has domestically? Will it wish to participate in shaping the Court through its positions on such issues as the Rules of Procedure of the Assembly of States Parties, the Court's financial regulations and rules, and its relations with the U.N.? Finally, the new Secretary of State has made clear that his
administration even more sternly insists on exemption than its predecessor. His delegation is likely to discover at the eighth session of the PrepCom, if not before, that the nations traditionally allied to the United States are precisely those that will continue to put exemption out of reach.

II. International Criminal Tribunals for the Former Yugoslavia and for Rwanda

Maury D. Shenk, Brian J. Newquist, Lesley Stone, and Daryl A. Mundis*

This section summarizes the significant developments that occurred during 2000 relating to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).16

A. Structural Changes to the ICTY and ICTR

The Statutes of the ICTY17 and the ICTR18 were amended in 2000 with the goal of substantially reducing the lengths of trials conducted before the Tribunals. These amendments were the culmination of a process begun in 1998,19 when the U.N. General Assembly requested the Secretary-General to establish an expert group to review the effective operation and functioning of the ad hoc Tribunals.20

On November 22, 1999, the Secretary-General transmitted to the General Assembly the expert group’s report,21 containing forty-six recommendations for improving the efficiency of the Tribunals. Following the release of the expert group report, the General Assembly

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16. For information regarding earlier developments at the ICTY and ICTR, see Douglas Stringer, International Criminal Tribunal for the Former Yugoslavia, 31 Int’l L. 611 (1997); Monroe Leigh & Maury Shenk, International Criminal Tribunal for the Former Yugoslavia, 32 Int’l L. 509 (1998); Maury Shenk et al., International Criminal Tribunal for the Former Yugoslavia and for Rwanda, 33 Int’l L. 549 (1999); Maury Shenk et al., International Criminal Tribunal for the Former Yugoslavia and for Rwanda, 34 Int’l L. 683 (2000). The recent, extremely significant surrender of Slobodan Milosevic to the ICTY by the Serbian government will be discussed in a similar article next year.


requested comments from the Tribunals on the recommendations proposed by the expert group.\textsuperscript{22}

Shortly after these comments were submitted, ICTY President Jorda presented a report to the General Assembly and Security Council on behalf of the ICTY Chambers.\textsuperscript{23} The plan set forth in his report contained three primary elements and was designed to greatly reduce the length of pre-trial detention faced by the accused at the ICTY. First, the Security Council should consider amending the ICTY Statute to include \textit{ad litem} (or ad hoc) judges. Second, in order to expedite appeals, the ICTY Statute should be amended to increase the number of appellate judges. Third, the ICTY Rules of Procedure and Evidence (RPE) should be amended to permit the Trial Chambers to delegate more authority to the chambers' senior legal officers for the management of the pre-trial phase of the pending cases.

On November 30, 2000, in response to this ICTY proposal, the Security Council adopted Resolution 1329,\textsuperscript{24} amending the statutes of both the ICTY and ICTR, and generally following the plan submitted by President Jorda, with the exception of the amendments to the ICTY RPE.\textsuperscript{25}

Resolution 1329 amended the ICTY Statute, creating twenty-seven new \textit{ad litem} judges and expanding the Appeals Chamber to seven judges, thereby increasing the composition of the chambers from fourteen to sixteen permanent judges.\textsuperscript{26} The \textit{ad litem} judges will be assigned exclusively to the Trial Chambers in accordance with strict statutory guidelines. Only nine \textit{ad litem} judges may serve at any one time and no more than six may be assigned to any one Trial Chamber.\textsuperscript{27} Once \textit{ad litem} judges are assigned, each Trial Chamber would be split into either two or three sections,\textsuperscript{28} each of which will contain three judges.\textsuperscript{29} Each section must be composed of both permanent and \textit{ad litem} judges, in order to ensure that each section benefits from the experience of the permanent judges.\textsuperscript{30} It is anticipated that once the \textit{ad litem} judges are appointed, the ICTY will be able to conduct six trials simultaneously. This will expedite the trials for those accused currently in pre-trial detention awaiting trial.
The ad litem judges, like the permanent judges, are elected for a term of four years, and enjoy the same terms and conditions of service and privileges and immunities as the permanent judges. Although ad litem judges are not eligible for re-election (unlike the permanent judges), they may serve on multiple trials for a cumulative period not to exceed three years. Furthermore, ad litem judges may not vote for or serve as president of the ICTY or as Presiding Judge of a Trial Chamber, participate in the adoption of the RPE, review an indictment, consult with the president regarding the assignment of judges or in relation to a pardon or commutation of a sentence, or adjudicate in pre-trial proceedings.

The Security Council also amended the ICTY and ICTR Statutes to increase the Appeals Chamber from five to seven judges. However, for each appeal the Appeals Chamber will continue to be composed of five members. The two new additional Appeals Chamber judges are to be drawn from the ICTR.

B. The International Criminal Tribunal for the Former Yugoslavia

1. Status of Proceedings

By the end of 2000, the ICTY had publicly indicted ninety-seven individuals. Thirty-five of the accused were in custody in the ICTY detention unit, four had been provisionally released, and twenty-seven arrest warrants remained outstanding. Proceedings against five accused had been completed. Eleven accused were before the Appeals Chamber; twelve were before the Trial Chambers; and sixteen were in pre-trial stages.

Two trials were concluded in 2000. In Prosecutor v. Kupreskic and Others, five members of the Croatian Defence Council (HVO) were found guilty of crimes against humanity and violations of the laws or customs of war in connection with their role in the attack on the...
village of Ahmici in Central Bosnia. A sixth defendant, Dragan Papic, was acquitted on the grounds that the evidence was insufficient to establish guilt beyond a reasonable doubt.

In Prosecutor v. Blaskic, Tihomir Blaskic, a general in the HVO, was found guilty by virtue of individual and superior responsibility on three counts of crimes against humanity, six counts of grave breaches of the Geneva Conventions, and ten counts of violations of the laws of war. Blaskic received the longest term of imprisonment to date—forty-five years.

Also in the year 2000, on December 11, Hans Holthuis (The Netherlands) was appointed Registrar. Holthuis took office on January 1, 2001. Holthuis was Chief Public Prosecutor and Head of the National Office of the Public Prosecutor’s Service of The Netherlands before taking his position at the ICTY.

2. Legal Developments

a. Power to Subpoena SFOR

On October 18, 2000, the Trial Chamber issued a decision on a motion for judicial assistance by defendant Todorovic compelling the Stabilization Force (SFOR) and SFOR’s thirty-three participating States to produce evidence pertaining to Todorovic’s arrest. To- dorovic claimed that he was illegally detained, and he filed a motion seeking discovery of a variety of evidence from SFOR to support this claim.

The prosecution argued that even if the arrest were irregular, it would not justify the defendant’s release. The prosecution also argued that laws compelling disclosure of materials were not binding on SFOR because they were designed to regulate conduct between states.

In its decision on Todorovic’s motion, the Trial Chamber discussed Article 29 of the ICTY Statute, which requires States to cooperate with the Tribunal by producing evidence, and reasoned that on its face, Article 29 “applied to all States, whether acting individually or collectively. In principle, there is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organisations and, in particular, their competent organs such as SFOR in the present case.”

The Trial Chamber concluded that it had the authority to issue a binding order to the thirty-three States participating in SFOR under Article 29, and through SFOR’s responsible

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46. See id. at 7.

47. See Fact Sheet on ICTY Proceedings, supra note 42, at 4.


50. See id.


53. See Decision on Motion for Judicial Assistance, supra note 51, at ¶ 9.

54. See id. ¶¶ 14-15.

55. See id. ¶ 37, quoting Article 29 of the Statute of the International Tribunal (as amended May 13, 1998).

56. See Decision on Motion for Judicial Assistance, supra note 51, at ¶ 46.
authority (the North Atlantic Council), to SFOR itself. The Trial Chamber rejected SFOR's blanket claim that disclosure was precluded by the need for operational security. The Trial Chamber further decided that it was competent to subpoena SFOR personnel, including U.S. General Eric Shinseki, since, for the sake of the decision, he was not representing his state and should be treated "qua individual in respect of any event that he has personally witnessed, even if observed while performing his official functions." The prosecutor filed an appeal, and eight states and NATO filed requests for review. However, before the appeal was heard, Todorovic pled guilty to one count of the indictment.

b. Stare Decisis

In Prosecutor v. Aleksovski, the Appeals Chamber formally recognized the principle of stare decisis. At the trial level, the accused had been acquitted on two counts of grave breaches of the Geneva Conventions because the Trial Chamber had found that Article 2 of the Statute, which requires that the conflict be international and that the crimes affect protected persons, did not apply. The prosecutor appealed, arguing that the Trial Chamber did not use the "overall control" test set out in the Tadic case for establishing the international character of the armed conflict.

The Appeals Chamber noted that the need for consistency, stability, and predictability was especially strong in the context of criminal law, where individual liberty is at stake. Noting that there was no provision in the ICTY Statute that dealt with stare decisis, the Tribunal examined the practice in common and civil law jurisdictions and found that both generally apply the principle. The Appeals Chamber determined that "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."

The Appeals Chamber further determined that its decisions are binding on Trial Chambers, but the decisions of a Trial Chamber have no binding force on other Trial Chambers although a Trial Chamber is free to follow another's decision if it finds it persuasive. Following these principles, the Appeals Chamber determined that the Trial Chamber had misapplied the Tadic "overall control" test, but declined to reverse the verdict of acquittal because doing so would not have affected the defendant's sentence.

c. The Tu Quoque Defense

The tu quoque defense is an argument that obligations under international law are reciprocal, and a party is entitled to violate its obligations if violations are being committed by the enemy. In Prosecutor v. Kupreskic and Others, the Trial Chamber rejected the tu quoque

57. See id. ¶ 58.
58. Id. ¶ 62.
60. The plea was accepted on January 19, 2001. See id.
62. The "overall control" test is discussed in Prosecutor v. Tadic, Case No. IT-95-1-A, Judgement (July 15, 1999) at ¶ 156.
63. See Aleksovski, supra note 61, at ¶ 97.
64. Id. ¶ 107.
65. See id. ¶ 112.
66. See Judicial Supplement 11, supra note 45, at 2.
defense and concluded that the defendants' attacks against the Muslim population were not justified by similar attacks of Muslim forces against the Croatian population. The Tribunal held that the body of law it applies is not based on a system of bilateral obligations and reciprocity, but rather on obligations that are absolute and unconditional.  

d. Persecution

Also in the Kupreskic case, the Trial Chamber discussed the crime of persecution, which it defined as a “gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.” The actus reus of persecution generally consists of a series of acts or omissions. The mens rea of persecution is distinguishable from that of genocide in that genocide requires the intent to destroy, in whole or in part, the victims' group. The Trial Chamber noted that, “from the viewpoint of mens rea, genocide is an extreme and most inhuman form of persecution.”

e. Provisional Release Granted to Two Defendants

For the first time in the ICTY’s history, two defendants were released pending trial. The defendants, Simo Zaric and Miroslav Tadic, had voluntarily surrendered to the Tribunal. They are each charged with two counts of crimes against humanity and one count of grave breaches of the Geneva Convention. The Rule of Procedure and Evidence regarding release pending trial had been amended in November of 1999, so that exceptional circumstances were no longer among the criteria required for release.

C. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The ICTR made significant progress on numerous fronts in 2000. In addition to securing new convictions and concluding several appeals, the Tribunal significantly improved its relationship with the Rwandan government. The Tribunal began the year under a cloud of severely strained relations with the Rwandan government in the aftermath of the Appeals Chamber's 1999 decision to dismiss charges against Jean-Bosco Barayagwiza. However, in March 2000, the Appeals Chamber quashed the earlier ruling and reinstated charges against Barayagwiza, which the Rwandan government saluted as a “victory for victims.” Subsequently, the ICTR successfully took numerous steps to repair and improve its relationships with the Rwandan government and citizens. In 2000, ICTR judges for the first

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68. Id. ¶ 621.
69. Id. ¶ 636.
70. Prior to this, defendants had been released only due to illness or to mourn family members. See Law of War: Tribunal Will Grant Bail to Two Defendants, INT’L ENFORCEMENT L. REP., June 2000, at C5.
74. For a summary of this November 3, 1999 decision and reactions to it, see Maury Shenk et al., International Criminal Tribunal for the Former Yugoslavia and for Rwanda, 34 INT’L LAW. 683 (2000).
time agreed to requests by the Rwandan government to personally visit crime scenes. More significantly, the ICTR’s chief prosecutor, Carla Del Ponte, announced that she will ask the Trial Chambers to hold future hearings in Rwanda, and that in the future “it might even be possible to . . . [move] the entire Tribunal to Kigali.” Furthermore, in September 2000 the ICTR opened an information and outreach center in Kigali, which will house a public information area, documents repository and legal library, and will manage the Victims Assistance Programme.

The improved relations between the ICTR and the Rwandan government may facilitate what many believe is necessary to the ICTR’s legitimacy—investigation and, if appropriate, indictment and prosecution of persons from the largely Tutsi Rwandan Patriotic Front (RPF). The RPF is the rebel movement that seized power after the massacres in Rwanda, and remains in power as Rwanda’s current government. The failure of the ICTR to indict RPF members until now has exposed the Tribunal to criticisms of being a “victor’s tribunal.” The ICTR chief prosecutor not only intends to investigate RPF members, but also has now publicly secured the cooperation of the Rwandan government in this endeavour.

1. Status of Proceedings

By the end of 2000, the ICTR had forty-four individuals in custody at the ICTR detention facility in Arusha, Tanzania. The ICTR continued to receive international cooperation in apprehending and extraditing indicted high-level political and military leaders. In 2000, assisting countries were the United Kingdom, Belgium, and other countries.

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76. See Coalition for International Justice, ICTR Judges to Visit Crime Scenes (Aug. 16, 2000), at http://www.cij.org/content.html (visited Feb. 24, 2001). In response, Martin Ngoga, Rwanda’s representative to the ICTR, stated that the decision by the ICTR indicated that “many things have been put right as far as the workings of the Tribunal and its relationship with Rwanda . . .” Id.

77. See Prosecutor Seeks to Move ICTR Hearings on Genocide to Rwanda, XINHUA, Nov. 21, 2000. Currently, all trial proceedings are held at the seat of the court in Arusha, Tanzania. Ms. Del Ponte further stated that such a move was now possible because “relations with the government has [sic] now reached a stage where proper guarantees can be given and relied upon for the holding of ICTR trials in Rwanda itself,” and that such a move was necessary because the ICTR “must make [its] work more relevant to the people of Rwanda.” Id.

78. See ICTR Press Release, ICTR Information Centre Opens in Kigali (Sept. 25, 2000), at http://www.ictr.org/ENGLISH/PRESSREL/2000/241.htm. The Victims Assistance Programme will provide “counseling for victims who are witnesses or potential witnesses before the tribunal.” Id.


80. See Christina M. Carroll, An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994, 18 B.U. Int’l L.J. 163 (2000). Reasons cited in defense of the past policy to limit indictments to Hutus include the desirability of “indicting and prosecuting the most serious violators first,” and the desire to “maintain good relations with the current Tutsi government in order to facilitate its investigation of international humanitarian law violations in Rwanda.” However, it has also been established that there is “overwhelming evidence to prove that Tutsis [have] committed . . . serious violations of international humanitarian law” during the 1994 massacres. Id.


83. ICTR Press Release, Former Rwandan Army Officer Arrested in London (Feb. 7, 2000), available at http://www.ictr.org/ENGLISH/PRESSREL/2000/220.htm. Tharcisse Muvunyi, a former Rwandan senior army officer, was arrested in the U.K. on February 5, 2000 and transferred to the ICTR on October 30, 2000. Mr. Muvunyi is charged with five counts including genocide and crimes against humanity (rape and other inhumane
The trial of Georges Ruggiu, a former journalist and broadcaster, ended after the accused changed his plea to guilty on May 15, 2000. Ruggiu was sentenced on June 1, 2000, to twelve years in prison after being found guilty on charges of direct and public incitement to commit genocide and crimes against humanity. The charges stemmed from media broadcasts made by the accused during the 1994 massacres, which "encouraged setting up of road blocks and congratulated perpetrators of massacres of the Tutsi at these road blocks." Ruggiu, a native of Belgium, is the eighth person to be convicted by the ICTR and the first non-Rwandese to be charged by the ICTR.

The ICTR also concluded two landmark appeals during 2000. On February 14, 2000, the Appeals Chamber dismissed the appeal of Omar Serushago, confirming the Trial Chamber's sentence of fifteen years' imprisonment on charges of genocide and crimes against humanity. Serushago thus became "the first person to be definitively convicted and sentenced by the ICTR." The Appeals Chamber also unanimously upheld the conviction of Jean Kambanda, the former prime minister of Rwanda, on October 19, 2000, for charges which stem from acts that took place in the geographical area under Mr. Muvunyi's command during the 1994 massacres. Id. See id. Augustin Ndindillyimana, the former Chief of Staff of the Gendarmerie Nationale, was arrested in Belgium on January 29, 2000, and transferred to the ICTR on April 22, 2000. See ICTR Press Release, France Transfers Former Minister to Arusha (Mar. 8, 2000), available at http://www.ictr.org/ENGLISH/PRESSREL/2000/223.htm. Jean de Dieu Kamuhanda, the former Minister for Culture and Higher Education in the interim Government of Rwanda during the 1994 massacres, is charged with, inter alia, genocide, conspiracy to commit genocide, incitement to genocide, and crimes against humanity. He was arrested in France on November 26, 1999, and transferred to the ICTR on March 7, 2000. See ICTR Press Release, 1. See ICTR Press Release, Captain Sagahutu Pleads Not Guilty (Nov. 28, 2000), available at http://www.ictr.org/ENGLISH/PRESSREL/2000/252.htm. Captain Innocent Sagahutu was arrested in Ringkobing, Denmark, on February 15, 2000, and transferred to the ICTR detention facility on November 24, 2000. He is charged with twelve counts including genocide, crimes against humanity, including rape, and violations of the Geneva Conventions in his role as military commander of the Rwandan Armed Forces during the 1994 massacres of the Tutsi population and moderate Hutus. He has also been charged in connection with the killing of former Rwandan Prime Minister Uwilingiyimana and ten Belgian soldiers who were guarding her at the time. Id. See ICTR Press Release, Pastor Ntakirutimana Transferred to the Tribunal's Custody (Mar. 25, 2000), available at http://www.ictr.org/ENGLISH/PRESSREL/2000/225.htm. Elizaphan Ntakirutimana, former pastor of a Seventh Day Adventist Church, is the first suspect to be arrested and extradited by the United States. Mr. Ntakirutimana is charged under two separate indictments with, inter alia, genocide, crimes against humanity, and breaches of the Geneva Conventions arising from attacks against civilians, including men, women, and children who had sought refuge in Ntakirutimana's church complex during the massacres. Ntakirutimana was first arrested in the United States on September 29, 1996, and subsequently released. He was re-arrested on February 26, 1998, and transferred to the ICTR detention facility on March 24, 2000. See ICTR Press Release, Swaziland Agrees to Enforce ICTR Sentences (Aug. 31, 2000), available at http://www.ictr.org/ENGLISH/PRESSREL/2000/240.htm. The other two countries that have agreed to receive convicted individuals for imprisonment are Mali and the Republic of Benin. See ICTR Press Release, Former Journalist Ruggiu Sentenced to Twelve Years in Prison (June 1, 2000), available at http://www.ictr.org/ENGLISH/PRESSREL/2000/235.htm. 

90. Id.
91. Id.

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of genocide." Kambanda thus became "the first head of government to be convicted and punished for genocide" by an international criminal tribunal.95

2. Legal Developments

The most significant legal development at the ICTR during 2000, as in 1999, arose through the ongoing ICTR processes against Jean-Bosco Barayagwiza, "a former government official . . . [and] founder of both an extremist Hutu political party and a Rwandan radio station that incited violence against Tutsis."96 After lengthy pre-trial proceedings, the Appeals Chamber in November 1999 dismissed the indictment against Barayagwiza and ordered his release on the grounds that his fundamental rights had been violated by the delays in the proceeding.97 However, the Appeals Chamber stayed its order to release Barayagwiza pending a motion for reconsideration by the ICTR prosecutor under Article 25 of the ICTR Statute, which provides for review of a final decision based upon new facts "which could have been a decisive factor in reaching the decision."98

On March 31, 2000, the Appeals Chamber quashed its earlier ruling, having found several "new facts." Specifically, the Appeals Chamber found that: (a) Barayagwiza was aware of the nature of the ICTR charges against him throughout most of the relevant time period; (b) the delay in his transfer to the ICTR was caused by government and judicial officials in Cameroon, and not by ICTR prosecutorial negligence; and (c) Barayagwiza's attorney had in fact agreed to a timetable which caused most of the delay between his detention in Arusha and his initial appearance before the ICTR. Therefore, the Appeals Chamber concluded:

The new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision . . . that remedy must be modified.99

The Chamber reinstated the charges against Barayagwiza, but decided that if found not guilty, "he shall receive financial compensation" or, if found guilty, the "sentence shall be reduced to take account of the violation of his rights."100

While this decision has been saluted by many parties as the correct result, the ICTR's legal reasoning has been criticized because it departs from Rule 120 of the Tribunal's own Rules of Evidence and Procedure.101 As one commentator observed, "[n]one of the 'new

95. Id.
96. See Shenk, supra note 74, at 688.
98. Id.
100. Id. at para. 75. This same remedy has been subsequently used on similar facts in Laurent Semanza v. The Prosecutor, where Semanza also motioned for release on the grounds of illegal pre-trial detention in Cameroon. See Press Briefing By the Spokesman for the ICTR (June 12, 2000), at http://www.ictr.org/ENGLISH/pressbrief/0brief12600.htm.
101. Rule 120 of the ICTR's Rules of Procedure and Evidence qualifies the standard for review based on new facts set out in Article 25 of the ICTR Statute, by requiring that the new facts be "not known to the moving party at the time . . . and not have been discovered through the exercise of due diligence."
Public International Law

III. The Creation of New Ad Hoc International Criminal Tribunals and Other International Efforts to Prosecute Violations of International Humanitarian Law

Daryl A. Mundis*

Significant steps were taken in 2000 to establish ad hoc international criminal tribunals to prosecute serious violations of international humanitarian law in Sierra Leone and Cambodia. Until the International Criminal Court (ICC) is established, such efforts will continue to be necessary, since the ICC will have only prospective jurisdiction to try alleged offenders. This section describes the international efforts to create new ad hoc tribunals in Sierra Leone and Cambodia and international efforts to prosecute alleged offenders of international humanitarian law in East Timor and Kosovo.

A. Sierra Leone

On August 14, 2000, the U.N. Security Council adopted Resolution 1315, in which the Secretary-General was requested: (1) to negotiate with the Government of Sierra Leone to create an independent Special Court, and (2) to report on these negotiations and make specific recommendations concerning the establishment of such a Special Court. Negotiations were conducted in September 2000 at U.N. Headquarters and in Freetown. On October 4, 2000, the Secretary-General forwarded his report, including the agreement with the Government of Sierra Leone and a draft Statute for the Special Court.

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102. Schabas, supra note 97, at 568.
103. March Decision, supra note 99, at para. 65 (emphasis added).
105. Pursuant to Article 126(1) of the ICC Statute (Treaty of Rome), reprinted in 37 I.L.M. 999 (1998), the ICC will come into existence on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification with the Secretary-General. As of December 31, 2000, twenty-seven States had ratified the Treaty of Rome.
106. ICC Statute Article 24(1) states: "No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute."

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The Special Court will have competence to prosecute persons "who bear the most responsibility" for serious violations of international humanitarian law and Sierra Leonean law committed on the territory of Sierra Leone since November 30, 1996. Thus, unlike the ICTY and ICTR, the Sierra Leone Special Court is a "treaty-based sui generis court of mixed jurisdiction and composition." Like the ICTY and ICTR, the Special Court will have concurrent jurisdiction with and primacy over the domestic courts of Sierra Leone.

The Special Court will have subject matter jurisdiction over crimes against humanity, violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law, and certain enumerated offenses under Sierra Leonean law. These provisions relating to crimes against humanity, Common Article 3, and other serious violations are generally consistent with similar statutory provisions for the ICTY, ICTR, and ICC.

Article 6 of the Sierra Leone Statute sets forth the provisions governing individual criminal responsibility, and is consistent with similar provisions governing the ad hoc Tribunals.

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109. The Secretary-General had proposed prosecuting those "most responsible" for the crimes committed in Sierra Leone. The term "most responsible" was employed to denote "both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime." Secretary-General's Sierra Leone Report, supra note 108, at para. 30. As such, the term was designed not for jurisdictional purposes, but rather as guidance for the prosecutor in designing a prosecutorial strategy. See id. However, in late December 2000, the U.N. Security Council amended the proposed Sierra Leone Statute to raise the legal standard to those "who bear the greatest responsibility" for the offenses committed. As a result, it is expected that the Sierra Leone Special Court will prosecute between 20 and 25 individuals. See U.N. Council Curtails Youth Trials in Sierra Leone, N.Y. TIMES (Dec. 27, 2000).

110. Sierra Leone Statute, supra note 108, art. 1. After noting that the civil war in Sierra Leone commenced on March 23, 1991, the Secretary-General acknowledged that "imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court." Secretary-General's Sierra Leone Report, supra note 108, at para. 26. Several dates were considered before finally opting for November 30, 1996, the date on which the Abidjan Peace Agreement was concluded. See id. at paras. 21-28.

111. Id. at para. 9.

112. See Sierra Leone Statute, supra note 108, art. 8.

113. See id. art. 2.

114. See id. art. 3.

115. See id. art. 4. Three offenses are set forth as being punishable under this article:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

116. See id. art. 5. Pursuant to this provision, the Special Court has jurisdiction over the following offenses:

(a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

(i) Setting fire to dwelling-houses, any person being therein to section 2;

(ii) Setting fire to public buildings, contrary to sections 5 and 6;

(iii) Setting fire to other buildings, contrary to section 6.
and ICC, with one important exception, Article 6(5). This provision provides that the individual criminal responsibility provisions of Sierra Leone law govern those crimes set forth in Article 5 of the Sierra Leone Statute. Article 10 of the Sierra Leone Statute provides that a grant of amnesty is *not* a bar to prosecution by the Special Court.117

As drafted by the Secretary-General, Article 7, which governs jurisdiction over persons as young as fifteen years of age at the time of the alleged crime, is perhaps the most controversial aspect of the Sierra Leone Statute.118 The Secretary-General had proposed extending jurisdiction over such relatively young offenders through the creation of a special "Juvenile Chamber."119 This proposal drew criticism from several non-governmental organizations and human rights groups120 and in late December 2000, the U.N. Security Council amended the proposed Sierra Leone Statute setting legal standards that make the prosecution of child soldiers extremely unlikely.121

The Special Court will be composed of three organs: the trial and appellate chambers, prosecutor, and registry.122 The chambers consist of two three-judge Trial Chambers and one five-judge Appeals Chamber.123 The Government of Sierra Leone will appoint one judge for each Trial Chamber and two judges for the Appeals Chamber. The United Nations will appoint the remaining judges.124 The accused appearing before the Special Court is afforded all rights recognized by international human rights law.125

117. This point is of particular significance in light of the sweeping grants of amnesty provided for in the Lomé Peace Agreement of 7 July 1999 and the United Nations position that such amnesties may not be granted in respect of international crimes, such as genocide, crimes against humanity and other serious violations of international humanitarian law. See Secretary-General's Sierra Leone Report, supra note 108, at paras. 21-24.

118. See discussion in Secretary-General's Sierra Leone Report, supra note 108, at paras. 32-38.

119. Sierra Leone Statute, supra note 108, art. 7(3)(b). This Juvenile Chamber as envisaged would possess wide discretion to dispose of cases, excluding imprisonment. Sierra Leone Statute Article 7(3)(f) provides: "In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies." Article 19(1) provides, in part: "The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years."

120. For example, Human Rights Watch opposes trying offenders who were younger than 18 at the time the offense was committed. See HRW Press Release, Sierra Leone: Justice and the Special Court, Nov. 1, 2000, available at http://www/hrw.org/press/2000/11/sl-pr-1101.htm. Moreover, both Human Rights Watch and Amnesty International have urged that the Sierra Leone Statute be amended to make the recruitment of child soldiers younger than 15 years of age a crime. See id.; see also Amnesty International website, http://www.amnesty.org/ai.nsf/Index/AFR510812000?OpenDocument&of=COUNTRIES\SIERRA+LEONE.

121. U.N. Council Curtails Youth Trials in Sierra Leone, N.Y. TIMES, Dec. 27, 2000. The Security Council determined that the Special Court should have jurisdiction over adults and children who "bear the greatest responsibility" for committing crimes. The Secretary-General had proposed trying those adults and children who were "most responsible" for committing offenses. The U.N. Security Council recommended the establishment of a Truth and Reconciliation Commission that would "have a major role to play in the case of juvenile offenders" and seek suitable institutions and rehabilitation for them. Id.

122. See Sierra Leone Statute, supra note 108, art. 11.

123. See id. art. 12(1). Sierra Leone Special Court Agreement Article 2(3) provides that the Government of Sierra Leone and the Secretary General shall consult on the appointment of the judges.

124. See id. art. 12(1). See also Sierra Leone Special Court Agreement, supra note 108, art. 2(a) and (b), which provide that the Secretary-General shall appoint the judges "upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary General."

125. See id. art. 17. For example, the accused is entitled to a fair and public hearing (subject to measures ordered for the protection of victims and witnesses, as is the case for the *ad hoc* Tribunals), to the presumption

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Regarding the Rules of Evidence and Procedure (RPE), the Sierra Leone Statute dictates that the ICTR's RPE in force at the time of the establishment of the Special Court will apply. In the event that the ICTR's RPE do not adequately address a specific situation arising in the context of the Special Court, the judges are empowered to amend the RPE, in which event they are to rely on the 1965 Sierra Leonean Criminal Procedure Act for guidance.

Upon conviction, the Special Court may impose imprisonment and the "forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct." In determining an appropriate sentence, the Special Court is to have recourse to the sentencing practices of the ICTR and the Sierra Leonean domestic courts.

The seat of the Special Court will be in Sierra Leone and the official language will be English. The U.N. Security Council has proposed that the Special Court be financed through voluntary contributions and not through an assessment on all U.N. members, as proposed by the Secretary-General. The Special Court will come into operation on the day after both the United Nations and Sierra Leone have notified each other that the legal instruments for entry into force have been complied with. Neither party had adopted the Sierra Leone Special Court Agreement by December 31, 2000.

B. Cambodia

In 1999, a bill was introduced in the Cambodian National Assembly to establish a Cambodian tribunal, with the participation of international judges and prosecutors, to prosecute senior leaders of the Khmer Rouge for their alleged criminal activities during the reign of terror that consumed Cambodia during the period from April 17, 1975 to January 6, 1979.

Discussions between the Secretary-General and the Cambodian Prime Minister resolved the outstanding substantive issues concerning the Khmer Rouge Tribunal, although the proposed statute for this tribunal has not been made public yet. Negotiations between the Cambodian and United Nations officials on the Memorandum of Understanding (MOU) that will govern technical issues regarding the establishment of the Khmer Rouge Tribunal of innocence, to assert the right against self-incrimination; to have counsel; and to be present throughout the proceedings.

126. See id. art. 14(1).
127. See id. art. 14(2).
128. See id. art. 19(1).
129. Id. art. 19(3). This article provides that forfeited property, proceeds or assets are to be returned to their rightful owner or the Sierra Leone Government.
130. See id. art. 19(1).
132. Sierra Leone Special Court Agreement, supra note 108, art. 20.
134. International efforts to establish a Khmer Rouge Tribunal intensified following the release of the report of the expert group appointed by the Secretary-General to examine the Cambodian Government request for international assistance in bringing the senior leaders of the Khmer Rouge to justice. See U.N. Doc. A/53/850-S/1999/231 (Mar. 16, 1999); Steven R. Ratner, The United Nations Group of Experts for Cambodia, 93 AM. J. INT'L L. 948, 948-953 (1999).
were completed on July 6, 2000. The MOU is to be signed once the Cambodian National Assembly enacts the necessary legislation to establish the Khmer Rouge Tribunal. The debate on this legislation was scheduled to begin during the last week in December 2000.

The draft statute and MOU were leaked to the press in October 2000, and although not necessarily the final versions of these documents, they do provide a rough outline of the proposed tribunal. For example, unlike the ICTY, ICTR, and ICC, the Khmer Rouge Tribunal will be comprised of a three-tiered structure, consisting of one trial court, an appeals court, and a supreme court. The Draft statute also provides for Co-Investigating Judges to conduct the investigations and Co-Prosecutors to prepare indictments against suspects.

The Khmer Rouge Tribunal will have subject matter jurisdiction over six categories of offenses: (1) crimes set forth in the 1956 Penal Code of Cambodia; (2) genocide; (3) crimes against humanity; (4) grave breaches of the four 1949 Geneva Conventions; (5) destruction of cultural property in violation of the 1954 Hague Convention for the Protection of Property in the Event of Armed Conflict; and (6) offenses committed against internationally protected persons as set forth in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.

Article 29 of the Draft Khmer Rouge Statute sets forth the provisions concerning individual criminal responsibility, and is consistent with international criminal law norms. Article 35 sets forth the rights of the accused, which are consistent with international human rights standards.

136. See id.
137. These leaked documents were published in the Phnom Penh Post, Volume 9, Issue 22, Oct. 27-Nov. 9, 2000. The following citations to the Draft Khmer Rouge Statute and Draft MOU are taken from the version as published in this newspaper.
138. Draft Khmer Rouge Statute, supra note 137, art. 2.
139. Consisting of three Cambodian judges and two international judges. Draft MOU, supra note 137, art. 2; Draft Khmer Rouge Statute, supra note 137, art. 9.
140. Consisting of four Cambodian judges and three international judges. Id.
141. Consisting of five Cambodian judges and four international judges. Id.
142. There will be one Cambodian Investigating Judge and one international Investigating Judge. Draft Khmer Rouge Statute, supra note 137, art. 23; Draft MOU, supra note 137, art. 4. One prosecutor will be Cambodian, the other a foreign national. Draft Khmer Rouge Statute art. 16 and Draft MOU art. 5. In the event of disagreements between either the Co-Investigating Judges or the Co-Prosecutors, a detailed scheme for resolving such differences is envisioned. See Draft Khmer Rouge Statute arts. 20 and 23, and Draft MOU art. 6.
143. Draft Khmer Rouge Statute, supra note 137, art. 3.
144. See id. art. 4.
145. See id. art. 5.
146. See id. art. 6.
147. See id. art. 7.
148. See id. art. 8.
149. Concerning the right to counsel there have been reports that the Cambodian Legislative Commission, which is responsible for directing the bill through the parliamentary process, has added a provision barring foreign attorneys from appearing before the Khmer Rouge Tribunal. Under this amendment, foreign counsel would be permitted to advise Cambodian defense counsel, but would be prohibited from addressing the court. See http://listserv.acsu.buffalo.edu/cgi-bin/wa?A2 = ind0012&L = justwatch-1&D = 1&O = D&F = &S = &P = 43228 (last visited July 24, 2001).
The Khmer Rouge Tribunal is to be located in Phnom Penh and the official working language shall be Khmer, with translations into English and French. Salaries and expenses of the Tribunal shall be borne by both Cambodia and the United Nations in accord with a schedule set forth in Article 44 of the Draft Khmer Rouge Statute and Articles 14 and 15 of the Draft MOU.

As noted by the negotiators of the MOU upon completion of their discussions in July 2000, the responsibility for establishing the Khmer Rouge Tribunal now rests with the Cambodian Government and its legislative process.

C. East Timor

On October 25, 1999, the United Nations assumed responsibility for the administration of East Timor following the collapse of the rule of law during late summer 1999. As part of this administration, the United Nations Transitional Administration in East Timor (UNTAET) was empowered to exercise all legislative and executive authority, including the administration of justice. Thus, the United Nations is effectively running the court system in the former Indonesian territory.

On December 11, 2000, United Nations prosecutors issued the first indictments against eleven individuals, including one Indonesian Army officer, for crimes against humanity, including forced deportations of thousands of civilians and the murder of three priests and two nuns. Prosecutors expect to issue additional indictments in early 2001.

D. Kosovo

Although the ICTY has jurisdiction over violations committed in Kosovo during the armed conflict that occurred in that province in 1999, the U.N. Administrator for Kosovo proposed on June 22, 2000 a quasi-international court to prosecute alleged offenders for war crimes committed in Kosovo. In the Secretary-General's Report on the financing of the United Nations Interim Administration Mission in Kosovo (UNMIK) for the period from July 1, 2000 through June 30, 2001, 121 specific positions were requested to launch the Special Programme of International Judicial Support in Kosovo. As part of this initiative, the Secretary-General has requested budgetary authority for eleven international judges, three international prosecutors, and additional legal, linguistic, secretarial and other support. At the close of 2000, eight international judges and three international prosecutors were working in the local courts.

150. See Draft Khmer Rouge Statute, supra note 137, art. 43.
151. See id. art. 45.
IV. Crime Control Treaties

Mavis M. Gyamfi*

A. International Crime Convention

After two years of meetings of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, the United Nations General Assembly adopted the U.N. Convention against Transnational Organized Crime (Crime Convention) at its Millennium Assembly on November 15, 2000. Although the Ad Hoc Committee began its work two years ago, the Crime Convention originated six years earlier, when the U.N. adopted the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime. The Naples Declaration requested that the Commission on Crime Prevention and Criminal Justice initiate the process of obtaining States' positions on a convention against organized transnational crime. The adoption and signing of the Crime Convention was a major forward step in the fight against organized crime.

There are two protocols to the Crime Convention: the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. These were adopted by the General Assembly together with the Crime Convention. A third protocol, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, is still under negotiation. The Ad Hoc Committee included in the draft resolution two paragraphs in which the General Assembly would note that the Ad Hoc Committee had not completed its work on the draft protocol on firearms and would request it to finalize such work as soon as possible. Several governments emphasized the importance of the finalization of the draft protocol prior to the Conference on Small Arms and Light Weapons, which will be held in New York July 9-20, 2001.

The Crime Convention is the first multilateral treaty in the field of organized crime. Its stated purpose is "to promote cooperation to prevent and combat transnational organized crime more effectively." Under the Crime Convention, State Parties that have not already done so must establish the following four criminal offenses in their domestic law:

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157. The General Assembly established the Ad Hoc Committee on December 9, 1998 in Resolution 53/111. The Ad Hoc Committee was composed of over 120 U.N. Member States.


160. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children was based on a draft submitted to the Ad Hoc Committee by the delegations of the United States and Argentina.


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1. Participation in an organized criminal group;
2. Money laundering;
3. Corruption; and
4. Obstruction of justice.\textsuperscript{163}

Parties to the treaty must also provide technical assistance to developing countries to help them take the necessary measures to implement and enforce the Crime Convention and otherwise fight organized crime.\textsuperscript{164}

Extradition is important to the effectiveness of the Crime Convention. The crimes covered by the Crime Convention are to be made extraditable by State Parties.\textsuperscript{165} A party that makes extradition conditional on the existence of a treaty may use the Crime Convention as the legal basis for extradition if it receives an extradition request based on an offense covered by the Crime Convention from a country with whom it does not have an existing treaty.\textsuperscript{166}

The Crime Convention and its two protocols were opened for signature at The High-Level Political Signing Conference held from December 12-15, 2000, in Palermo, Italy—a country whose struggle with organized crime is well known. The conference was hosted by the Italian government and the United Nations Office for Drug Control and Crime Prevention. At the signing conference, 124 of the 189 Member States of the United Nations, including the United States, signed the Crime Convention. The Crime Convention will enter into force after forty countries ratify it.

U.N. Secretary-General Kofi Annan and Italian President Carlo Azeglio Ciampani were among persons speaking at the signing. Several praised the Crime Convention as a positive step in battling organized crime. Others were less certain of its effectiveness. Spain's Minister of the Interior, Jaime Mayor Oreja, stated: "Yet loopholes for escaping the law are amazing and include recourse to political explanation and protection."\textsuperscript{167} Turkey's representative expressed concern that the Crime Convention does not explicitly mention terrorist groups as organized criminal groups, stating that "It must be ensured that anyone committing a criminal act covered by the Convention and its protocols would not be immune from justice by claiming political motives."\textsuperscript{168} Despite these concerns, both Spain and Turkey signed the Crime Conventions and the two protocols thereto.

Frank Loy, the U.S. Under Secretary of State for Global Affairs, proclaimed that the United States has been at the forefront of the fight against international organized crime.\textsuperscript{169} He further emphasized that the United States has established International Law Enforcement Academies in Budapest and Bangkok where local law enforcement personnel learn about organized crime and that the United States will open two more in Africa and Latin America in the near future.\textsuperscript{170} The United States signed the Crime Convention and both of its protocols.

\textsuperscript{163} Id. arts. 5, 6, 8, 23.
\textsuperscript{164} See id. art. 30.
\textsuperscript{165} See id. art. 16.
\textsuperscript{166} See id. at § 4.
\textsuperscript{168} Id.
\textsuperscript{170} See id.
State Parties to the Crime Convention committed not only to establish corruption as a criminal offense in their domestic legislation, but also to "adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials."\(^{171}\) In April 2000, the U.N. Crime Commission decided to recommend to the General Assembly that a comprehensive global anti-corruption convention be developed following the completion of the Crime Convention.

B. OECD Convention


U.S. Department of State Deputy Spokesman, Philip T. Reeker, stated that the OECD Convention "represents a key element in the [Clinton] Administration's wider anti-corruption strategy...."\(^{174}\) The United States presented its first report to the OECD on its implementation of the OECD Convention this past year. The OECD's Working Group commended the United States for its substantial contribution to the fight against corruption, but also noted problems with U.S. anti-corruption law, such as the discrepancy between the fifteen-year maximum sentence for bribery of domestic public officials and the five-year sentence for bribery of foreign public officials.\(^{175}\) The report was one of many opportunities the United States took to highlight the fight against corruption during the year.\(^{176}\) The United States also released "Battling International Bribery 2000" in June of 2000, the second of six annual reports to Congress reviewing the implementation and enforcement of the OECD Convention, and discussing other countries' implementation of the OECD Convention.

C. Implementation of Multilateral Treaties

This section summarizes domestic measures to advance crime control treaty obligations and goals.

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171. Crime Convention, supra note 162, art. 9, ¶ 1.

172. The countries are: Brazil, Czech Republic, Denmark, France, Italy, Poland, Portugal, Spain, Switzerland, and Turkey. Brazil, Poland and Turkey have not yet adopted implementing legislation. OECD Online, STEPS TAKEN AND PLANNED FUTURE ACTIONS BY EACH PARTICIPATING COUNTRY TO RATIFY AND IMPLEMENT THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2001) [hereinafter STEPS TAKEN].

173. Id. Though 26 countries have ratified the Bribery Convention, 34 countries have signed it.


176. Id. Former Secretary of State Madeleine Albright urged signatory governments to enact strong implementing legislation that fully meets the requirements of the OECD Convention at the 2000 World Economic Forum in Davos, Switzerland. In February 2000, Former Under Secretary of State Alan Larson marked the first anniversary of the OECD Convention's entry into force by holding a press conference at which he reviewed progress on implementing the anti-bribery agreement and pushed for all signatories to bring it into effect. Former Under Secretary Larson also raised the OECD Convention during preparations for the G-8 Summit in Japan. See U.S. Dept. of State, Battling International Bribery 2000, at http://www.state.gov/www/issues/economic/bribery_2000_rpt.pdf (June 29, 2000) [hereinafter Battling International Bribery].
Bulgaria. The Bulgarian Parliament adopted amendments to its domestic law relating to the criminalization of "offering" and "promising" of a bribe as well as the abolition of the concept of provocation as a defense on June 8, 2000. In May 2000, a draft supplementing the Law on Administrative Offenses and Sanctions was submitted to Parliament for its approval. The draft would allow the imposition of monetary sanctions and forfeiture on legal persons that are convicted of bribery.177

Czech Republic. In addition to ratifying the OECD Convention last year, the Czech Republic also ratified the Council of Europe Criminal Law Convention on Corruption on September 8, 2000.178

Iceland. The Icelandic Parliament amended its General Penal Code to remove limits on the level of fines for legal persons, and to increase the statute of limitations on bribery to five years.179

Japan. In April 2000, Japan adopted a new policy excluding companies involved in bribery from official development assistance contracts.180


South Korea. In February 2000, President Kim Dae Jung launched an anti-corruption website, named "Shinnungo," on which Korean citizens could report complaints about unfair treatment and public corruption.182

Sweden. In February 2000, Sweden’s Minister for Trade, Leif Pagrotzsky, co-hosted and addressed a colloquium on corruption in the arms trade. Minister Pagrotzsky called for a sustained and purposeful effort to address the problem.183

United States. The United States ratified other international anti-corruption conventions in the year 2000: (1) the Inter-American Convention on Corruption on September 29, 2000, and (2) the Council of Europe Criminal Law Convention on Corruption (COE Convention) on October 11, 2000. The United States also plans to join the Group of States Against Corruption (GRECO). The GRECO is a mechanism for monitoring the implementation of the COE Convention and other COE anti-corruption obligations. Twenty-four countries have joined thus far, and the GRECO has begun operating.

D. Conclusion

The year 2000 saw significant progress in the areas of transnational organized crime and corruption. It is a positive sign that the Crime Convention and its protocols were met with such overwhelming support by the U.N. Member States. It is important, however, to moni-

177. See STEPS TAKEN, supra note 172.
178. See id.
179. See id.
180. See id.
182. See Battling International Bribery, supra note 176, at 53.
183. See id. at 54.

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tor how countries that ratified the various conventions described above will implement and enforce them domestically.

V. Justice for Haiti: The Raboteau Trial

BRIAN CONCANNON, JR.*

Haiti's Raboteau Massacre trial was a major, though under-reported, development in international law in 2000. The case is a milestone in the international fight against impunity for large-scale human rights violations. It can also serve as a model for other countries attempting to address the crimes of a dictatorship through national prosecutions after a democratic transition.

The trial concluded on November 9, 2000 when, after six weeks of trial and five years of pre-trial proceedings, a jury in the Haitian city of Gonaïves convicted sixteen former soldiers and paramilitaries for participating in the April 1994 Raboteau Massacre. A week later, the judge convicted thirty-seven more defendants in absentia, including the entire military high command and the heads of the paramilitary FRAPH (Front Révolutionnaire pour l'Avancement et le Progrès Haïtiens).

The Raboteau case marked a sharp break with a long tradition of impunity in Haiti. The case was the most complex in the country's history, and was the first broad prosecution of commanders for human rights violations. Most important, the proceedings were fair to victims and defendants alike, as attested by national and international monitors. Raboteau's success was due in large part to the persistence of individuals, especially the victims, but also reflected significant systemic improvements in Haiti's judiciary since its democratic transition began in 1994.

A. Background

Haiti's justice system, never a model of fairness, was ravaged by the thirty-year dictatorship of François and Jean-Claude Duvalier (1957-1986), and again during the brutal de facto regime. The de facto murdered and tortured with impunity for three years,¹⁸⁴ and attacked judicial authorities that tried to curb their abuses.¹⁸⁵ When the constitutional authorities returned in October 1994, they inherited a justice system with no capacity for, tradition of, or interest in, handling either complex cases or prosecutions of those who had wielded power.¹⁸⁶

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¹⁸⁵. A former prosecutor testified in the Raboteau trial, and was asked why he did not initiate any prosecution after the massacre. He acknowledged that he had a legal obligation to do so, but invoked the Creole proverb: "Konstitisyon se pape, bayonet se fe" (the Constitution is paper, bayonets are steel).

¹⁸⁶. For a more in-depth treatment of the obstacles to justice in Haiti's democratic transition, see Brian Concannon, Jr., Beyond Complementarity: The International Criminal Court and National Prosecutions, a View from Haiti, 32 COLUM. HUM. RTS. L. REV. 201 (2000). See also WILLIAM G. O'NEILL & ELLIOT SCHRAEGE, PAPER LAWS, STEEL BAYONETS: BREAKDOWN OF THE RULE OF LAW IN HAITI 1 (1990) ("There is no system of justice in Haiti. Even to speak of a 'Haitian Justice System' dignifies the brutal use of force by officers and soldiers, the chaos of Haitian courtrooms and prisons, and the corruption of judges and prosecutors"); Stotzky, supra note 184, at 81 (Haiti's judicial structure is "less developed than that of virtually any nation that has attempted" a democratic transition).
Raboteau is a poor neighborhood of fishermen, salt rakers, and small merchants. When the neighborhood sparked the nationwide protests in 1985 that led to the departure of Jean-Claude "Baby-Doc" Duvalier, it acquired a reputation for resisting tyranny. When the army ousted Jean-Bertrand Aristide, Haiti's first democratically elected president, on September 30, 1991, the people of Raboteau immediately took to the streets, joining tens of thousands of democrats around the country. In Raboteau, as elsewhere, the soldiers shot into the crowds, killing unarmed demonstrators.

Over the next two and a half years, the people of Raboteau continued their nonviolent resistance. They held clandestine meetings, hid refugees, circulated literature, and organized demonstrations. The dictatorship responded by sending military and paramilitary patrols into the area; beating, threatening, arresting, and torturing those involved in the resistance, as well as anyone believed to be connected with them. Houses were sacked, money stolen, and businesses destroyed.

B. THE MASSACRE

The repression in Raboteau culminated in the events of April 18-22, 1994. Throughout 1994, the international community had increased the pressure on the dictatorship, and the regime had responded by increasing its pressure on the Haitian people. On April 18, the army and paramilitaries conducted what has been called “the rehearsal” in Raboteau. Charging into Raboteau in pickup trucks, they shot at and chased the young men who formed the backbone of the resistance.

They watched as the activists fled to the harbor, Raboteau's "embassy," where those fleeing the army could find safety under the water or in a local fishing boat. The attackers also sacked the house of a prominent local leader, and savagely beat an elderly blind man, who died the next day. Over the next few days, the army planned and organized. Reinforcements arrived, and the barracks were placed on "Condition D," full alert.

The main attack started before dawn on April 22. Army troops and paramilitaries approached Raboteau from several angles, and started shooting. They charged into houses, breaking down doors, stealing and destroying possessions. They terrorized the occupants. Young and old, men, women, and children were threatened, beaten, forced to lie in open sewers, and arrested. The onslaught forced many to take the familiar route to the harbor, but this time an armed ambush awaited them. Many were killed; some were wounded, on the beach, in the water and in boats. Some were arrested, imprisoned, and tortured. One girl shot in the leg had to flee the hospital the next day, and another hospital a few days later when soldiers came looking for her.

The death toll will never be known, because the attackers prevented relatives from claiming the bodies. Several were buried by paramilitaries in shallow graves and disinterred by animals and eaten. Others floated out to sea. The prosecution felt that eight murders were sufficiently documented to present to the jury. Dozens were assaulted, arrested, imprisoned, and/or tortured. Thousands fled their homes, as the bustling neighborhood cleared out.

187. The information in this section came mostly from trial testimony and the author's interviews with victims (1995-2000). See also TRUTH AND JUSTICE COMMISSION REPORT, supra note 184, at 66 (report devoted a special section to Raboteau).
C. THE FIGHT FOR JUSTICE

For the victims, trial preparation started the day after the massacre. The local justice of the peace lived in Raboteau, and he toured the neighborhood, documenting the damage to houses and taking witness statements as people returned. A French priest with the Catholic Church's Justice and Peace Commission helped preserve medical records and more statements. When the elected government returned to power five months later, the victims began the long fight to force their case through the justice system. Although the case enjoyed broad popular and deep governmental support, the prosecution often seemed bogged down, and in the end took five years to reach trial.

The victims collaborated enthusiastically with government initiatives, especially the Truth and Justice Commission, which devoted a chapter of its report to the massacre.188 The victims also aggressively lobbied local, national, and international media and human rights groups, and pressured government officials. They employed an array of tactics: demonstrations, press conferences, and faxes, forging links with other groups, even creating their own songs. Eventually the Raboteau massacre became the leading symbol for the dictatorship's repression, and its prosecution a key indicator of Haiti's progress in reforming its justice system.

The Bureau des Avocats Internationaux (BAI), a group of lawyers funded by the Haitian government, started working on the Raboteau case in 1996. The BAI prepared complaints for the victims, represented them in court proceedings, and helped them advocate outside of the courtroom. The cornerstone of the BAI's strategy was the "partie-civile" process, which, under the French system adopted by Haiti, allows the victims' claims for money damages against the defendants to piggyback on the criminal prosecution. Partie-civile lawyers can participate in almost all phases of the criminal case, especially the trial. In addition to the victims, the BAI worked closely with prosecutors, the investigating magistrates, police, and national officials.

The Haitian government also established a special coordination office that handled logistics and coordinated the activities of the various actors. The office organized seminars for the victims and arranged for medical, psychological, and economic assistance. A special unit of the newly formed Haitian police pursued and arrested many of the suspects. After one defendant escaped in 1996, Gonaives' prison officials were replaced, and the building was reinforced.

In addition to efforts specific to the case, the preparation for the Raboteau massacre trial reflected broader improvements in Haiti's justice system since 1994. The area where improvement was most needed, and most made, was in the individual capacity of judicial personnel. Both the trial judge and the chief prosecutor were justices of the peace at the time of the transition, but had moved quickly up the ranks due to training and continuing education programs. The judge graduated at the top of the first class of Haiti's new Ecole de la Magistrature, a training academy for judges and prosecutors. An assistant prosecutor had recently returned from a year at France's Ecole de la Magistrature. He was the academic director of Haiti's Ecole at the time of trial, and after his performance in the Raboteau case he was named chief prosecutor in Port-au-Prince.

188. TRUTH AND JUSTICE COMMISSION REPORT, supra note 184, at 66. The government also sponsored a "Complaint Bureau (Bureau de Doléances)" to collect testimony for prosecutors. Although the prosecutors lacked the capacity to pursue the cases, the Bureau's preservation of evidence helped identify and evaluate witnesses.

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The Haitian justice system was also able to respect all of the relevant procedures by the time of trial. In 1996, the constitutional requirement that warrants be written in French and Haitian Creole was rarely observed, because the forms were only in French. Defendants did not obtain counsel until just before trial, which prevented adequate trial preparation and appeal of pre-trial rulings. The jury was chosen from a small pool of the local elite. In the Raboteau case, defendants were all held pursuant to valid, bilingual warrants. They were represented from the beginning by some of Haiti's best criminal lawyers, who aggressively fought pre-trial rulings all the way to the Supreme Court. The jury was chosen from a wide geographic, economic, and social spectrum.

Material improvements were made as well. The Canadian government replaced all of Haiti's provincial trial court buildings (the old Gonaives courthouse had no electricity, telephone, or toilet. During slow trials one could observe the appeals court through the floorboards). In 1997, several hearings were delayed because prison authorities did not have a vehicle to transport a prisoner to court. By 2000, the prison system was able transport all twenty-two defendants in custody at once, with no hitches.

The Raboteau prosecution was spared two common obstacles to transitional justice, an army and an amnesty law. The army was disbanded in 1995, and the amnesty law, enacted under international pressure, was intentionally toothless. In addition, there was broad popular support for the trial, and little open resistance. As a result, most of the struggle to get the case to trial was against the justice system itself.

D. The Trial

The Raboteau massacre trial was the largest and most complicated in Haiti's history. The entire six weeks were broadcast live on national radio, much of it on TV, and were the main topic of conversation everywhere. It was the first time the military leadership had been tried for human rights violations. The prosecution used an unprecedented number of witnesses and documents, and pioneered the use of expert testimony in criminal cases.

Each day of the trial was observed by several Haitian human rights organizations, as well as by members of MICAH, the United Nations Support Mission to Haiti. The prosecution team's four lawyers worked closely with two lawyers from the BAI, who represented the civil interests of the victims. A total of ten lawyers represented the twenty-two defendants in custody.

The core of the prosecution's case was eyewitness testimony. Thirty-four witnesses testified for the prosecution, including victims, their neighbors, and local officials. The eye-

190. The amnesty only applied to the act of staging the coup d'état, not the consequent brutality. It has never been invoked by a defendant in a coup-era human rights trial. Concannon, supra note 186, at n.54.
191. Trials in Haiti, once started, usually go until they end, with brief recesses for food and rest, but not for sleep. This often means they stretch into the morning of the next day. The first recent trial to abandon this practice was the Carrefour Feuilles Massacre trial, held in August 2000. That trial, of several policemen, some high ranking, for the killing of eleven civilians in 1999, was considered Haiti's best ever before Raboteau. Like the Carrefour Feuilles trial, the Raboteau trial started each morning, and recessed each afternoon or early evening.
192. BAI lawyers, as parties civiles, presented evidence, questioned witnesses, made legal arguments and gave a closing statement.
193. In absentia defendants are not allowed legal representation, as they have not accepted the jurisdiction of the court. They are allowed to send a friend or relative to explain their absence to the court.
witness accounts were highly consistent and were corroborated by expert testimony. With a few minor exceptions, the witnesses' stories withstood rigorous scrutiny.\textsuperscript{194}

An international team of forensic anthropologists had exhumed and studied the remains of three presumed victims in 1995, and interviewed survivors. A team member testified to how its observations: injured bones, clothing, ropes around the skeletons' necks, even a key to the house where the victim had reportedly stayed, confirmed the witness' accounts. A geneticist established that DNA from two of the bodies matched that of the reported victims' relatives.

The case against the military and paramilitary leadership, who were tried \textit{in absentia}, was based on command responsibility and accomplice theories. The former head of MICIVIH, the U.N./O.A.S. human rights mission to Haiti explained how the repression was organized systematically and on a national scale, and included military and paramilitary elements. He noted that Gonaïves, and particularly Raboteau, had been targeted throughout the coup years, and that the leadership was well aware of this repression. He concluded that the attack had been planned and covered up by national military and civilian leaders.

Two Argentine military experts had investigated the Raboteau massacre at the court's request in 1999. Their report\textsuperscript{195} concluded that the military leaders were responsible for the massacre under both Haitian and international law. At trial, they explained the legal responsibility of the soldiers, both superiors and subordinates. The experts opined that the high command was at least aware of the massacre beforehand, and did nothing to stop it. They also described the army as "a criminal enterprise" that was organized for repressing civilians, rather than for any legitimate military purpose.

The documentary evidence included information from the army archives, and reports from human rights organizations. The army documents were particularly useful in describing how the military units were organized, and supplied by the high command. Individual soldiers' personnel files disproved their defenses that they were at another barracks at the time of the massacre. The prosecution even obtained the high command's report on the incident, which demonstrated its knowledge of the massacre and failure to punish those involved.

Many documents did not make it into the courtroom. Approximately 160,000 pages were removed from Haitian military and paramilitary offices by U.S. troops in 1994. Despite repeated calls for their return by the Haitian government, members of the U.S. Congress, the United Nations, human rights groups like Human Rights Watch and Amnesty International, and a host of organizations and individuals in more than thirty countries, the documents had not been returned.

The defendants erected a common front. All but one claimed that they were not present at the massacre, and most claimed to have little knowledge of it until their arrests. With slight exceptions, none inculpated a co-defendant. The official military version of the in-

\textsuperscript{194} In the Haitian system, the judge starts each witness by asking a broad, open-ended question about the event. The judge asks follow-up questions then defers to the prosecutor (for either defense or prosecution witnesses). When the prosecutor is finished, the jury members are invited to ask questions. After that, the lawyers for the victims and for the defendants each take their turn, but are not allowed to address the witness directly. They must propose a question to the judge, who may pose it as is, modify it or reject it altogether.

\textsuperscript{195} Horacio Pantaleon Ballester & Jose Luis Garcia, \textit{Responsabilités hiérarchiques des Forces Armées d'Haiti dans le déroulement des opérations survenues du 18 au 22 avril 1994 à Raboteau (Gonaïves)}, (1999) (report to court on file with author).
incident, expressed in press releases and by the highest-ranking defendant at trial (a captain), was that there was no massacre; that the army had responded to an attack on a military post by chasing some of the “terrorists” away, without significant casualties on either side.196

The jury deliberated for four hours, and found sixteen of the twenty-two defendants in custody guilty, all of serious crimes. Twelve of these were convicted for premeditated murder and received the mandatory sentence of life imprisonment. The other four received sentences from four to nine years. The in absentia defendants all received the mandatory life imprisonment, but they are entitled to a new trial if they return to Haiti. In the civil portion of the case, the victims were awarded a total of U.S.$140 million in damages.

National and international observers agreed that the trial was fair to victims and accused alike. Adama Dieng, the U.N. Human Rights Commission Independent Expert on Haiti, called the trial “a huge step forward” for the Haitian justice system.197 The U.N.'s MICAH added that the Raboteau massacre case, along with the August 2000 Carrefour Feuilles massacre trial, “prove that the Haitian Justice system is capable of effectively prosecuting” human rights cases, “while respecting the guarantees of the 1987 Constitution and International Treaties to which Haiti is a party.”198 Lovinsky Pierre-Antoine of Fondation 30 Septembre, Haiti's largest victims' group, called the trial “fair and balanced for victims and accused alike” and hoped it would be a model for future cases.

E. FOLLOW-UP

Despite this success, the Raboteau massacre case is not finished. Adama Dieng emphasized that the “Haitian justice system must continue to pursue those convicted in absentia,” and called on “[c]ountries where the fugitives may be found” to cooperate with Haitian authorities to arrest and extradite them.199 Raoul Cedras, the army Commander-in-Chief, and Philippe Biamby, head of the High Command, are in Panama, while Michel Francois, the third leader of the coup, is in Honduras. The rest of the High Command, as well as Emmanuel Constant, the leader of the paramilitary FRAPH organization, are reported to be in the United States.200

196. The U.S. Embassy military attaché visited the area of the alleged attack a few days later, as did a team from MICIVIH. Both found no sign of an attack on the post. There were no reports of any military or paramilitary injuries.
199. Raboteau Verdict, supra note 197.
200. Concannon, supra note 186, at n.11, 12 and accompanying text. Constant was ordered deported from the United States to Haiti in September 1995, on the grounds that his presence in the United States was inimical to U.S. policy, as it gave the impression that the government condoned his death squad activities. In re Emmanuel Constant, No. A 74 002 009 (Immigration Ct. 1995). Shortly thereafter, Constant stated in a “60 Minutes” interview that he had coordinated his activities with the CIA, who paid and encouraged him. The deportation order was never executed. See also David Grann, Giving “The Devil” His Due, The Atlantic Monthly, June 2001, at 54 (extensive article on Constant, his activities during the dictatorship, and his relationship with U.S. intelligence services). Colonel Carl Dorelien, a high command member convicted in the Raboteau trial was arrested by the INS and ordered deported by an immigration judge on June 21 2001. See Jody Benjamin, Haitian Enforcer Bids to Stay Put, South Florida Sun-Sentinel, June 22, 2001.
The BAI, along with clinical programs at DePaul University's International Human Rights Law Institute and Yale's Orville H. Schell, Jr. Center for International Human Rights, is preparing extradition requests for defendants living in the United States. The BAI is also pursuing the civil damages.

The Raboteau massacre case has changed the way that Haitians perceive their justice system. For the first time, the system has been used by those traditionally without power to vindicate their rights against the traditionally powerful. For the first time, human rights victims, judges, and prosecutors throughout the country believe that the justice system really can and should provide justice. This has created a constituency for the system in general, and human rights cases in particular, both within and without the system. Victims who had previously been wary of formal justice now articulate exactly how they want their trial to be, with the Raboteau trial as the standard. Judges and prosecutors who had been wary of prominent cases now see them as realistic opportunities to do good and establish their reputation. For this reason, the Raboteau massacre case will not be the end of the fight against impunity, but the beginning. The trial also gave a boost to overall justice reform. Its success serves as a positive reinforcement of the improvements to date, and the obstacles met along the way point to concrete objectives for further reform.

The Raboteau trial should also serve as a model, and an inspiration, for efforts to combat impunity around the world. The dedication of the victims, and the Haitian government's persistence and innovation in trying new approaches, are transferable to many situations. The success of the prosecution, especially its quality and its reach to the top military and paramilitary echelons, is a clear example that even poor countries can achieve justice through their national systems.

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