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**Selected Issues in International Criminal Law**

**Working Group on International Criminal Law**

**Collected Reports 2003-2004**

Edited by

**CHRISTINE BAKKER – ELSA GOPALA KRISHNAN – LUISA VIERUCCI  
and PIERRE-MARIE DUPUY**

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**Introduction**

The Working Group on International Criminal Law was established upon the initiative of Professor Pierre-Marie Dupuy in the fall of 2002. Following a recent influx of researchers and fellows whose topics centered on a wide range of issues under the banner of international criminal law, it seized on the opportunity for providing a forum for discussion, debate, exchange of ideas and materials alike, as well as inviting both the participants and outside collaborators to present topical themes in the field.

A wealth of participants, ranging from researchers to fellows, to professors both from the EUI and Italian universities, a number of whom have direct professional experience with the field of international criminal justice greatly enriched the Working Group's dynamics, by providing insight and first-hand experience of the field, particularly with the ICTY thanks to the presence of Professor Cassese, former President of the Tribunal. This, combined with a regular schedule of meetings and working sessions, has encouraged a fruitful collaboration among the members and contributed to in-depth and highly stimulating discussion. An informal setting, with an emphasis on both current affairs and substantial issues serves to meet the participants' general and particular interests by selecting proposed themes, while devoting a part of each session to the latest news, and even entire sessions to recent and important cases to stay abreast of developments. The working Group has also proved to be a highly useful and interactive forum for researchers to present their topics and their progress, as well as exchange ideas and

address issues, and benefit from the input of the other participants, all of which is encouraged by the use of three working languages, Italian, English and French, for its activities.

A broad spectrum of themes has been addressed over the two years of the Working Group's existence. These include both substantive and procedural issues, as well as other areas of international law which are closely related to international criminal law. The group has focused on both the statutes and case law of international courts and tribunals, hybrid tribunals, and relevant case law from national courts. Generally, sessions are structured around presentations given by participants, followed by a discussion aimed at hashing out the more difficult and contentious issues. Most sessions have a designated rapporteur, who then establishes a report in English or French, accounting for the main topics and questions, the views of the different participants and any conclusions which might have been reached during the course of debate. The following Working Paper is a compilation of those reports, reflecting the content of some 10 meetings in total.

The reports tie the threads of a number of crucial and recurring themes together, both of the practical or rather more theoretical underpinnings of the field. For example, the complex issue of immunities has often been raised and discussed, in relation to recent watershed cases, such as the International Court of Justice's 2002 ruling in the Congo-Belgium case. This question often tied in with debates over the principle of universal jurisdiction, its interpretation and its implementation in various national and international legal instruments, as well as case law. Another salient theme is the relation between States and the International Criminal Court: a few sessions were devoted to the principle of complementarity under Article 17 of the Rome Statute, as well as the mechanisms of State cooperation and the practice of bilateral immunity agreements. In terms of substantive law, related areas such as the destruction of cultural property have been explored, in addition to fundamental legal issues such as command responsibility. In addition to addressing the procedural aspects of jurisdiction and substantive areas, certain sessions also analyzed specific key issues, such as the practice of plea-bargaining and guilty pleas. Beyond the two ad hoc tribunals and the International Criminal Court, the

Working Group sought to broaden its scope by discussing the various other courts and tribunals involved in the field of international criminal justice, namely national courts and 'hybrid' tribunals, including those in Sierra Leone and East Timor, and the upcoming ones in Cambodia and Iraq.

By presenting these reports as an EUI Working Paper, the members of the Working Group hope to encourage further discussion as to their findings, and strive to make this part of an ongoing effort to promote its activities. Each academic year brings its new share of researchers and professors, which guarantees renewed input and brings new issues and methods to the forefront. As part of this effort, the academic year 2004-2005 saw the group off to an active start, with three meetings in the first semester. In the immediate present, a few members of the Working Group are debating and drafting an analysis of Article 21 § 3 of the Rome Statute establishing the International Criminal Court concerning the applicability of international human rights law. This is in fact in response to a solicitation for an expert opinion sent by the Chief Prosecutor for the ICC, Luis Moreno Ocampo, to Professor Pierre-Marie Dupuy, as part of the Prosecutor's policy to request expert consultations on complex legal issues facing the Court.

Among the main projects discussed for this year, a workshop will be organized by Professor Pierre-Marie Dupuy and certain members of the group on the issue of universal jurisdiction, which aims at establishing an up-to-the-minute analysis of the key issues involving the role of universal jurisdiction in relation to the International Criminal Court.

*Pierre-Marie Dupuy wants to thank Christine Bakker, Elsa Gopala Krishnan (EUI Researchers) and Luisa Vierucci (J.M.F. 2003-2004) for the work accomplished in the preparation of this working paper and for their longstanding activity within the working group.*

## **List of participants**

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### **Meeting of 13 March 2003**

L'Arrêt de la Cour de Cassation de Belgique du 12 février 2003 : Affaire Ariel Sharon et Amos Yaron

### **Meeting of 7 April 2003**

ICTY Judgment of 29 November 2002, Trial Chamber II: Prosecutor v. Mitar Vasiljevic

### **Meeting of 12 May 2003**

The principle of command responsibility in light of the recent ICTY judgments, and the establishment of a war crimes tribunal for Iraq

### **Meeting of 21 November 2003**

The Relationship Between State Aggravated Responsibility and Individual Criminal Responsibility

### **Meeting of 9 December 2003**

The conformity of the Immunity agreements concluded by the US and ICC States Parties with article 98 of the Rome Statute establishing the ICC and The adoption of plea bargaining by the ICTY: the Nikolic case

### **Meeting of 29 January 2004**

The Complementarity Principle in the ICC Statute

**Meeting of 4 March 2004**

The protection of cultural property in time of armed conflict

**Meeting of 25 March 2004**

The European Arrest Warrant and the prosecution of crimes falling within the ICC Statute

**Meeting of 28 April 2004**

The Extraordinary criminal Chambers in the Courts of Cambodia for the prosecution of crimes committed under the regime of the Khmer Rouge between 1975 and 1979

**Meeting of 5 November 2004**

Recent Developments Surrounding the Iraqi Special Tribunal, Abu Graib and Guantánamo Bay

*Groupe de travail sur le droit international pénal*

*Séance du 13 Mars 2003*

**L'Arrêt de la Cour de Cassation de Belgique du 12 février 2003**

***Affaire Ariel Sharon et Amos Yaron***

**Introduction**

**La législation belge**

La Loi belge du 16 juin 1993, modifiée en 1999, relative à la répression des violations graves du droit international humanitaire, et présentée par Paola Lombardi et Axelle Reiter, donne compétence aux juridictions belges pour poursuivre les auteurs présumés de génocide, de crimes contre l'humanité et de crimes de guerre, indépendamment de la nationalité des auteurs et des victimes, et indépendamment du lieu de commission des crimes.

**Faits et procédure**

Sur cette base juridique, le 18 juin 2001, une plainte avec constitution de parties civiles (23 victimes palestiniennes et libanaises) a été déposée à Bruxelles à l'encontre d'Ariel Sharon, actuel Premier Ministre d'Etat d'Israël, et Amos Yaron, actuel directeur général au sein du Ministère de la Défense nationale, pour génocide, crimes contre l'humanité et crimes portant atteinte aux personnes et aux biens protégés par les Conventions de Genève, pour les actes perpétrés dans les camps de réfugiés palestiniens de Sabra et Chatila à Beyrouth, du 16 au 18 septembre 1982. À l'époque, Ariel Sharon était Ministre de la Défense et Amos Yaron était commandant de division aux portes des villages de Sabra et Chatila.

Le 26 juin 2002, la Chambre des mises en accusation de la Cour d'Appel de Bruxelles a déclaré la plainte irrecevable. Tout en affirmant la compétence universelle du juge belge, telle qu'assignée par la Loi de 1993, la Chambre a considéré que les personnes visées par la plainte devaient se trouver sur le territoire de la Belgique.

Le 12 février 2003, la Cour de Cassation a, en partie, cassé l'arrêt de la Cour d'Appel de Bruxelles. La Cour a décidé que la compétence universelle du juge belge était *absolue* et



que des procédures pouvaient être engagées même dans les cas où les accusés ne se trouvaient pas sur le territoire belge. Une procédure contre Amos Yaron pouvait donc être engagée. Toutefois, la Chambre a confirmé qu'Ariel Sharon en tant que Premier Ministre en exercice d'un État étranger jouissait de l'immunité et ne pouvait pas être poursuivi tant qu'il occupait cette fonction.

Lors des débats du groupe de travail, deux points essentiels ont été discutés : le principe de compétence universelle absolue telle qu'elle a été affirmée par la Cour de Cassation (I), et l'attribution de l'immunité à Ariel Sharon en tant que Premier Ministre d'un État étranger en exercice (II).

### **I. La Reconnaissance par la Cour du Principe de Compétence Universelle Absolue ou de 'Compétence Universelle Par Défaut'**

La Cour de Cassation a décidé que la Loi belge de 1993, modifiée en 1999, donne une *compétence universelle absolue* aux juridictions belges, c'est-à-dire que les juridictions belges peuvent poursuivre les personnes accusés de crimes de guerre, de crimes contre l'humanité ou de génocide même dans les cas où ces personnes ne se trouvent pas sur le territoire de la Belgique. Si on considère cette conclusion à la lumière de l'arrêt rendu par la CIJ dans l'affaire *Congo c. Belgique*, le 14 février 2002, on peut considérer qu'elle constitue certainement un « pas en avant » dans la poursuite des auteurs de crimes internationaux. Dans l'affaire *Congo c. Belgique* la Cour ne s'est pas prononcée au sujet de la compétence universelle absolue. Certains juges, dans leurs opinions individuelles, ont admis une compétence universelle absolue seulement sous certaines conditions précises, et le Président Guillaume a même conclu que le droit international n'admettait point une compétence universelle 'in absentia' (par défaut).

Au cours de nos débats, la question a été posée d'éventuelles conséquences d'une compétence universelle absolue reconnue dans plusieurs États. Dans les cas où des juridictions dans plusieurs États se reconnaissaient compétentes en l'absence de critères de rattachement avec les pays respectifs, on serait confronté à une multiplication de procédures. Dans tels cas, il se poserait la question de déterminer la juridiction la plus

appropriée. On pourrait envisager la création d'un tribunal de conflits qui déciderait des conflits de compétence positifs, ou bien l'attribution d'une telle compétence à une section de la CPI. Il semble cependant qu'à l'heure actuelle il ne s'agit que d'une question théorique, car c'est justement le conflit négatif de compétence, et donc l'impunité, qui est la règle, et l'action des Etats, le conflit positif, qui reste l'exception. En effet jusqu'à très récemment, la Belgique était l'un des rares pays (avec l'Espagne notamment) à avoir engagé des poursuites sans qu'un critère de rattachement avec le pays ait été retenu.

## **II. L'attribution de l'Immunité à Sharon en tant que Premier Ministre Etranger *En Exercice***

Quant à l'attribution de l'immunité à Sharon, il a été constaté qu'on pouvait bien souscrire aux conclusions de la Cour, à savoir que Sharon jouissait d'une immunité en tant que Premier Ministre d'un État étranger *en exercice*, mais que des poursuites pouvaient être engagées dès qu'il ait quitté cette fonction. En revanche le raisonnement de la Chambre ne semble pas toujours être exacte. Lors de nos débats, ont été discutés en particulier trois arguments invoqués par la Cour de Cassation afin de justifier l'attribution de l'immunité à Sharon :

1. La Cour a constaté que la coutume internationale s'opposait 'à ce que les chefs d'État et de gouvernement *en exercice* puissent, en l'absence de dispositions internationales contraires s'imposant aux États concernés, faire l'objet de poursuites devant les juridictions pénales d'un État étranger.'

On peut parfaitement souscrire à cette conclusion de la Chambre : en effet il est généralement reconnu que la coutume internationale accorde une immunité *personnelle* aux chefs d'États *en exercice*. La Chambre a confirmé, à juste titre, que Sharon ne pouvait pas être poursuivi tant qu'il était Premier Ministre sans qu'elle se soit cependant exprimée de manière explicite sur le caractère de cette immunité (*personnelle*).

2. La Cour a ensuite conclu de l'articulation des articles IV et VI de la *Convention pour la prévention et la répression du crime de génocide* que ce texte excluait toute immunité

en cas de poursuite devant les tribunaux compétents de l'état sur le territoire duquel l'acte a été commis, mais, en revanche, n'excluait pas une immunité lorsque la personne accusée était traduite devant les tribunaux d'un Etat tiers s'attribuant une compétence que le droit international conventionnel ne prévoit pas. Référence a donc été faite à la Convention afin de justifier l'attribution d'une immunité à Sharon.

On peut douter du bien-fondé de ce raisonnement et la lecture limitée que la Cour fait de la Convention sur le génocide a été critiquée lors des débats. Le fait que la Convention n'envisage pas explicitement la compétence de tribunaux d'États tiers n'implique pas qu'un État tiers n'a pas la compétence judiciaire de reconnaître de l'affaire. Les articles IV et VI ne constituent pas un obstacle à ce qu'un État tiers exerce sa compétence. Dans ce contexte, a été mentionnée l'affaire du *Lotus* et le principe selon lequel l'attribution de compétence dépend des États. S'il n'y a pas de règle qui s'oppose à l'exercice de la compétence par des États tiers, cela signifie que rien n'exclut l'exercice de leur compétence. La référence aux articles IV et VI de la Convention sur le génocide ne permet pas de soutenir l'existence d'une immunité pour le cas d'espèce.

3. La Cour a finalement observé que selon l'article 27 §2 du Statut de Rome de la Cour pénale internationale 'les immunités qui peuvent s'attacher à la qualité officielle d'une personne, en vertu du droit international, n'empêchent pas ladite Cour d'exercer sa compétence à l'égard de cette personne', mais que ce principe ne s'appliquait pas aux cas où les juridictions nationales poursuivaient des personnes sur la base d'une compétence universelle par défaut. Il semble que le raisonnement de la Cour est incomplet dans la mesure où elle ne se réfère qu'à l'article 27 du Statut et ne prend pas en compte l'article 98 § 1 du Statut. Celui-ci dispose que '[I]a Cour ne peut présenter une demande d'assistance qui contraindrait l'Etat requis à agir de façon incompatible avec les obligations qui lui incombent en droit international en matière d'immunité des Etats ou d'immunité diplomatique d'une personne ou de biens d'un Etat tiers, à moins d'obtenir au préalable la coopération de cet Etat tiers en vue de la levée de l'immunité.' Le raisonnement de la Cour de Cassation, qui omet de faire référence à l'article 98 § 1 du Statut, lequel respecte l'immunité accordée aux représentants des États tiers, semble par

conséquent être erroné. Toutefois, de nouveau, la Cour aboutit à la ‘bonne’ conclusion, à savoir, que Sharon jouit de l’immunité.

La question de l’applicabilité du principe posé par l’article 27 du Statut devant les juridictions nationales a été discutée brièvement. De façon générale, la position de Paola Gaeta, qui soutient que cette disposition ne s’applique pas aux juridictions nationales, a été approuvée.

Il a été soulevé que les immunités perdaient de plus en plus de terrain et allaient vers l’extinction, face aux valeurs (des droits de l’homme) considérées de plus en plus importantes. Le Professeur Condorelli a soutenu qu’on pouvait envisager une procédure engagée à l’encontre une personne qui occupait une position officielle. Selon lui, rien n’empêchait qu’une telle procédure soit engagée, car le chef d’État bénéficiait seulement de l’immunité à l’exécution. Cette opinion n’est cependant pas restée incontestée. Il a été invoqué que cela mettrait en crise tout l’État, qu’il fallait respecter l’imperium et que si une personne publique faisait l’objet d’une procédure, cela créerait un écho dans la communauté internationale, et une atteinte grave au prestige de l’État même. La souveraineté et l’image de l’État risqueraient d’être affectés par la poursuite d’un chef de l’Etat qui représente celui-ci.

## **Conclusion**

On peut généralement conclure que l’arrêt rendu par la Cour de Cassation dans l’affaire Sharon et Yaron constitue un pas en avant dans la mesure où la Chambre applique une notion large de compétence en admettant la compétence universelle absolue (compétence universelle par défaut). Si on ne peut pas souscrire au raisonnement de la Cour de Cassation relatif à l’immunité d’Ariel Sharon, on peut cependant constater que la Cour a néanmoins abouti à un résultat qui correspond à l’état actuel du droit international en matière des immunités.

*Working Group on International Criminal Law*  
*Meeting of 12 May 2003*

**The Principle of Command Responsibility In Light of the Recent ICTY Judgments;  
and the Establishment of a War Crimes Tribunal for Iraq**

**I. Command Responsibility**

As stressed by Prof. Condorelli, who introduced the topic, Article 7(3) of the ICTY Statute ('The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof') restates the definition of command responsibility under customary international law at the time of its adoption.

In the *Musema* (27 January 2000) and *Delalic et al.* (Appeals Chamber, 20 February 2003) judgments, the distinction between *de jure* and *de facto* command was addressed. It was concluded that although the existence of a formal *de jure* superior responsibility is an important aspect of the exercise of command authority, this is not sufficient to establish criminal responsibility for crimes committed by subordinates. Command responsibility within the meaning of Article 7(3) only arises when the superior has *effective control* over the persons committing violations of international humanitarian law, i.e. has the material ability to prevent and punish the commission of the offence. Such authority can either be based on formal appointment (*de jure* superior responsibility), or on a factual situation (*de facto* superior responsibility). Therefore, if the existence of such effective control can be established, the absence of formal appointment does not exclude criminal responsibility under Article 7(3).

This reasoning applies to both civil and military command. However, the doctrine of superior responsibility extends to civilian superiors only to the extent they exercise a

degree of control over their subordinates which is similar to that of a military commander (*Delalic et al.*, Appeals Chamber, Judgment of 20 February 2003, paras. 193-197).

In the case of *Hadzihasanovic et al.*, the Trial Chamber considered the doctrine of command responsibility in the light of the principle *nullum crimen sine lege praevia*. The defense contended that, in 1992, command responsibility had not been defined under international law, and its application would therefore violate the principle of legality. However, the Trial Chamber found that this notion had already been established under customary international law, and supported the conclusion by referring, in addition to the Hague Conventions of 1907, to the Nuremberg and Tokyo Tribunals, the First Additional Protocol to the 1949 Geneva Conventions, to national judicial decisions, as well as to several Security Council resolutions concerning the conflict in former Yugoslavia. The Trial Chamber extensively analyzed the Security Council resolution establishing the ICTY, the UN Secretary General's report on the Draft Statute for the ICTY, and the drafting history of the ICTY Statute.

There was some discussion in the Working Group as to whether Security Council resolutions can be considered to be horizontally applicable. Several participants, including Prof. Condorelli, argued that, in principle, these resolutions are only binding on States and that consequently they do not, in and of themselves, give rise to the horizontal applicability of the provisions contained therein. However, Prof. Dupuy recalled that in some cases, the Security Council has explicitly addressed itself to non-State actors, such as the UNITA, of which it also recognized its effective control in Angola at the time.

It was concluded that a distinction must be drawn between, on the one hand, the general issue of the horizontal applicability of Security Council resolutions and, on the other, the specific resolutions establishing the ICTY and the ICTR. The latter resolutions are of a particular nature, since they establish what was regarded as a crime under customary international law.

Prof. Condorelli stressed that the decision of the Trial Chamber in the *Hadzihasanovic* case contained some other important elements relating to the application of the principle

of legality under international law. He concluded by underlining that the case law of the ICTY and the ICTR has contributed significantly to the development of the law governing internal armed conflicts, in particular through the ICTY decision in the *Tadic* case (Appeals Chamber).

## **II. The Establishment of a War Crimes Tribunal in Iraq**

The second point of discussion, the establishment of war crimes tribunals in Iraq, was introduced by Elsa Gopala Krishnan. She informed the Working Group of the ongoing discussion within the US administration on the subject, and presented the two existing proposals, one elaborated by the Pentagon, and the other by the State Department.

The State Department proposed to create an Iraqi based tribunal, which would become part of the national judicial system and be manned by Iraqi judges. This tribunal would be competent to hear cases concerning both crimes committed by the former government led by Saddam Hussein since 1979 during the invasion of Kuwait, during the war with Iran, and against the Kurdish population, as well as the crimes committed by Iraqis during the recent war against US military personnel and Iraqi civilians. The acts to be prosecuted would be war crimes and crimes against humanity, including torture.

On the other hand, the Pentagon has proposed to establish a tribunal similar to the Nuremberg tribunal with American judges, which would apply the American rules for military tribunals. This tribunal would be competent to hear and try cases concerning the same crimes and periods as proposed by the State Department. It would, initially, fall under the responsibility of the interim government.

The question was raised on which legal basis such a tribunal could be established. Prof. Condorelli recalled that Security Council resolution 1472 established the status of 'Occupying Powers' for the US and the UK. Under the *jus in bello*, in particular the Geneva Conventions of 1949, the Occupying Powers in an armed conflict are under the obligation to take judicial measures with respect to violations of international

humanitarian law. There seemed to be a consensus within the Working Group that the Pentagon proposal did not seem to take account of the principles of, *inter alia*, the Geneva Conventions in this respect, since the application of the American rules for military tribunals do not seem to comply with the international standards for a fair trial.



*Working Group on International Criminal Law*

*Meeting of 21 November 2003*

**The Relationship Between State Aggravated Responsibility and  
Individual Criminal Responsibility**

The main differences between the ‘State model’ and the ‘individual model’ of responsibility, as adopted by commentators in the field, were presented by Beatrice Bonafe. These are two major approaches to the relationship between State and individual responsibility. While breaches amounting to international crimes both committed by States and individual are violations of obligations owed to the international community as a whole, the nature and content of the relationship between State and individual responsibility differs according to the two theoretical models in question. The former conceives individual responsibility for international crimes as a form of State responsibility. The latter, on the other hand, conceives State and individual responsibility as two independent regimes of international responsibility. This may lead, for instance, to reparations under the State model as opposed to individual criminal responsibility under the latter model.

The different types of enforcement models were presented. Under the modern individual model, individual criminal responsibility has nothing to do with State responsibility; individual and State responsibility for the same crime are established in different and separate ways. Under the classical ‘State model’, the reaction of a State affected by a wrongful act usually is to apply countermeasures, which may also be used by a third State if the act was particularly widespread and grave. The other possible reaction at a State level was propounded by some Italian legal doctrine, according to which agents of the ‘accused’ State were brought before national courts in order to “punish” the responsible State. This brings individual responsibility back into the framework of State responsibility as it is conceived as a “sanction” towards the author State. A number of those present, including Prof. Dupuy, contested that this last reaction was generally accepted, since the cases against Germany after WWII involved a very specific situation.

A presentation was then given of the ILC Articles on State Responsibility, including how the ILC had introduced the element of 'seriousness' in Art 40(2)).

It was proposed that the criteria for attributing an act to a State should be redefined, adding the elements of how the State apparatus is used for committing the crime/wrongful act (i.e. based on an analysis of how widespread the actions/decisions were throughout the governing structure) and taking account of the status of the organ involved in the act (e.g. was it directed by the head of the State concerned or did it originate only at a lower level).

There was much discussion of this proposal and the desirability/necessity for such a redefinition and possible problems were raised. Prof. Dupuy stressed how this proposal may make it harder to attribute an act to the accused State since classical international law based its analysis of attribution on establishing the link between the act and the State, without assessing the nature of the state organs involved in such a way.

A further distinction was made between three types of crimes: international individual crimes (e.g. torture), 'mixed crimes' (e.g. genocide and crimes against humanity), and pure State crimes (e.g. aggression) and it was suggested that a redefined concept of attribution would be particularly useful in dealing with 'pure' State crimes.

*Working Group on International Criminal Law*  
*Meeting of 9 December 2003*

**The Conformity of the Immunity Agreements Concluded by the US and ICC States Parties with Article 98 of the Rome Statute Establishing the ICC and the Adoption of Plea Bargaining by the ICTY: The *Nikolic* Case**

**I. The Conformity of the Immunity Agreements Concluded by the US and ICC States Parties with Article 98 ICC**

Presentation by Salvatore Zappalà on the basis of his article: The Reaction of the US to the entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements, *Journal of International Criminal Justice* 1 (2003), 114-134.

The ‘Immunity agreements’, also termed ‘Article 98 Agreements’, are proposed by the US in order to obtain exemption from the jurisdiction of the ICC for all US citizens. Under these agreements, an ICC State Party would be bound to obtain US consent in order to transfer a US national to the Court. Although the agreements rely, under their own terms, on article 98(2) and article 16 of the ICC Statute, the fact that they do respect this provision is controversial. Article 98(2) states:

‘The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligation under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender’.

The main question at stake is the following: does Article 98(2) only intend to cover agreements made *prior* to the entry into force of the ICC Statute (restrictive interpretation) or also agreements concluded *after* this date (extensive interpretation)?

The legal consequences of this question are significant. The United States, which refused to become a party to the ICC Statute (half of the ICC States Parties had already ratified such an agreement) cannot be held responsible for a breach of the Statute. But the issue for the ICC State Parties lies in determining to which extent they can subscribe to this agreement without breaching their obligations under the Statute.

Two main attitudes have emerged among the ICC States Parties. Certain countries accept the possibility to conclude such immunity agreements, with or without specific conditions. Other States have rejected this possibility, claiming that the integrity of the Statute cannot be affected. Trying to reconcile the two positions, the EU did not reject the eventuality that ICC States Parties enter into Article 98 Agreements with the US, but nevertheless formulated a set of conditions to be respected if such was the case.

Within the Working Group, different arguments were raised concerning the possible interpretations of article 98. Two elements support an extensive interpretation: 1) the preparatory works, which show that some States wanted to be free to conclude treaties limiting some provisions of the Statute, and, 2) the wording of article 98, which does not specify to which agreements it applies and thus allows the broadest interpretation.

Professor Dupuy summarized the three main arguments in favour of a restrictive interpretation:

1) The Vienna Convention on the Law of Treaties (1969) states that a treaty has to be interpreted according to its object and the purpose. Article 98 agreements would be 'suicidal' for the Rome Statute as they would allow behaviour conflicting with its very objective, namely to end impunity. Moreover, those agreements would violate the Vienna Convention's obligation to perform a treaty in good faith because the States party to the Statute have an obligation to cooperate with the ICC. As for the states that have signed but not ratified the Statute, it was recalled that they are obliged not to impede or contradict the realisation of the treaty's aim. This latter general principle is part of customary international law.

2) Only the *prior* agreements were mentioned in the *travaux préparatoires*.

3) The ICC Statute belongs to those treaties whose degree of flexibility is very low: it explicitly rejects reservations and it sets up an international organisation. Therefore the Rome Statute is not a classical reciprocal agreement but can rather be regarded as a ‘constitution’.

Two further observations were raised. First, that the inclusion of article 98 in the Statute had probably necessary to try and overcome US opposition to the ICC as a whole. The core issue is not the signature of such immunity agreements, but their implementation. For the time being, the discussion is purely theoretical, only time will tell what problems might arise in practice.

Second, the Court itself could interpret article 98(2), therefore providing for an ‘interprétation authentique’ of it, by virtue of the powers it has under article 119 and the general principle recognizing an inherent power of interpretation to for courts and tribunals.

## **II. The Adoption of Plea Bargains by the ICTY: the *Nikolic* Case**

Elsa Gopala Krishnan presented the *Nikolic* case, who was the first of a wave of defendants this year to negotiate his plea before the ICTY. Only one precedent exists: the *Erdemovic* case. In the latter case, the plea was rejected, because the consequences of the plea had not been adequately explained to the accused. In the *Nikolic* case, although the defendant had entered a plea of guilty, the judges imposed a prison sentence of 27 years instead of 15 or 20 years as requested by the prosecutor. Regarding this case, the question raised by was the following: are plea bargains appropriate for international crimes before international courts? In her opinion, the transposition of a ‘tool’ used at the national level may not be adequate at the international level. In fact, plea bargaining is not a general principle but a measure of administration of justice justified by a particular context at the national level. Although the ICTY uses the term ‘plea agreement’ and not ‘bargaining’, the difference is merely formal. The Working Group focused mainly on two points.

It was noted that the debate is the same both at the international and the internal level: on one hand, the efficient administration of justice, which requires to save time and money, and on the other, the principle of equal treatment in judgment. However, the circumstances justifying the practice of plea bargaining at the national level are not necessarily to be found at the international level:

- It seems that the ECJ recognises that plea bargaining is a general principle among European States only in case of minor offences (in Italy it covers only crimes not subject to a prison sentence), whereas the ICTY deals with the most serious crimes.
- At the national level, the right to a fair trial is usually protected by the fact the agreement must be accepted by the court (i.e.: France, United States). This is also the case before the ICTY. However, the guilty plea leads to a shorter trial where the rights of the defence may be unduly restricted, and utmost scrutiny should be exercised by judges regarding the validity of the plea. In addition, given the specific mission of the ad hoc Tribunals concerning the maintenance of international peace and security and the return to a democratic through reconciliation, such expedited trials may not be satisfactory from the victims' point of view.

Once the plea bargain is entered into, another problem arises. As it was highlighted by Judge Cassese in the *Erdemovic* case, the plea bargain involves elements of opportunity (shorter trial) but does not necessarily entail a mitigation of sentence (this remains at the discretion of the judge). In the case of the ICTY, the judges face a moral dilemma especially in the case of a guilty plea for genocide. The degree of discretion that the judges have in reducing the sentence or not following a plea agreement is not compatible with the principle of equal treatment.

Prof. Dupuy concluded that inequality in sentencing negatively affects the perception of legitimacy of the ICTY, which is accountable to public opinion. He noted that the ICTY suffers from growing negative public opinion. In the newspaper *Le Monde*, it was underlined that the Nikolic sentence would raise doubts about the way the Tribunal

issues a sentence. Nowadays, civil society pays so much attention to international justice (legitimacy/efficiency) that justice has to be done and also to be seen to be done. Prof. Dupuy expressed the opinion that in international law the everyday newspaper is the tribunal.

*Working Group on international criminal law*

*29 January 2004*

**The Complementarity Principle in the ICC Statute**

The discussion was introduced with two presentations. The first introduction, by Christine Bakker, focused on the question to what extent the concept of complementarity is an innovation compared to prior norms of international law. In the second presentation, Elsa Gopala Krishnan discussed the procedural aspects of complementarity, highlighting a number of unresolved issues relating to the admissibility of cases before the ICC.

**I. Complementarity: A Revolution in International Criminal Law?**

**1. Prior International Obligations of States to Prosecute and Try the Perpetrators of Core Crimes**

The creation of the ICC itself is undoubtedly a revolution in the prosecution of perpetrators of international crimes. But the idea according to which the Court only intervenes if the ‘core crimes’ are not duly being investigated or prosecuted at the national level, confirms the primary role of the national judicial authorities, as is also laid out in the prior international conventions concerning these crimes.

These are the Genocide Convention of 1948, the Geneva Conventions of 1949 and its Additional Protocols of 1977 concerning war crimes. Although to date, no comprehensive international convention concerning crimes against humanity has been adopted, some of the crimes mentioned as such in Article 7 of the Rome Statute, have been the subject of specific conventions, in particular the Torture Convention of 1984. Even though the exact obligations vary from one convention to the other, they generally contain an obligation for the State Parties to establish jurisdiction over the perpetrators of the relevant crimes and when found on their territory, to prosecute and try them, or extradite them.



Also certain State obligations deriving from general international Human Rights instruments are relevant in this context, in particular the obligation to guarantee the right to a fair trial, due process and an effective appeal. These obligations, which also include the independence and impartiality of the judicial bodies, will -at least indirectly- be considered in the framework of the complementarity regime.

These treaty-based obligations have, at least in part, been confirmed by customary international law or even *jus cogens*, and they are to a large extent reinforced by their reiteration in the Statute. However, since the definitions of the core crimes are not always identical to those included in prior conventions, and since the Statute does not explicitly provide for universal jurisdiction, several of the prior obligations are still valid outside the scope of the ICC.

## **2. Main Features of Complementarity: Innovative Elements**

The complementarity regime under the Rome Statute strikes a balance between the concerns of States to protect their sovereignty on the one hand, and their willingness to let the Court intervene in exceptional cases on the other.

The Preamble of the Rome Statute recalls in its paragraph 6, that it is the duty of all States to exercise jurisdiction over those responsible for international crimes. According to the Preamble (par. 10) and Article 1 of the Statute, the ICC is complementary to national jurisdictions. In Article 17, the Statute addresses the relationship between the ICC and national jurisdictions. The Court is required to reject cases which are being or have been adequately dealt with by a national legal system. Only when the States concerned are unwilling or unable genuinely to investigate or prosecute, can the ICC act (see *infra*, par. II).

The question was raised whether these provisions amount to a binding obligation for State Parties to prosecute authors of core crimes. Most participants felt that it is at

least an implied obligation, which derives from the object and purpose of the Statute, namely to end impunity for these crimes.

The approach of the ICC Office of the Prosecutor (OTP) on complementarity was set out in a policy paper of February 2004, adopted after discussions with experts and a public hearing. It emphasizes the need to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes, by creating a permanent monitoring system and establishing informal and formal contacts with judicial authorities of the States Parties.

The paper also mentions the possibility for the Court and a State to agree to a consensual division of labour -as occurred in relation to crimes committed in Ituri, or Uganda-, by which the Court would prosecute the leaders of organized mass crimes, while other, 'smaller' cases would be left to the national justice system. This possibility derives from the fact that there is no obstacle to the admissibility of a case before the Court where no State has initiated any investigation.

Therefore, the main innovative elements of the complementarity regime are:

- The possible intervention of the court if a case is not or not genuinely investigated and/prosecuted at the national level;
- The continuous monitoring mechanism of the Prosecutor and the Court assessing the 'genuineness' and the quality of national proceedings;
- The possibility for a State to agree with the Court on a consensual division of labour in investigating and prosecuting cases under the jurisdiction of the Court.

The OTP's translation of the complementarity principle into practical terms reveals a strong presence of the Court, especially through its continuing monitoring mechanism. Different views were expressed on this point. Some feared that this active role and the broad criteria at its discretion to determine the quality of national proceedings, may be perceived by some States as an unwarranted intervention in their internal affairs. In this way, the monitoring role of the Court may be regarded by some as having the opposite

effect of what complementarity was also meant to achieve: protecting the sovereignty of States and confirming their responsibility and duty to exercise jurisdiction over international crimes. This was called a ‘vertical’ interpretation of complementarity. Others favoured a ‘horizontal’ interpretation, considering that the OTP’s approach in supporting national jurisdictions confirms the primacy of prosecutions at the national level.

It was concluded that overcoming this inherent conflict in the concept of complementarity will be one of the major challenges facing the Court.

## **II. Procedural Issues**

### **1. Provisions on Complementarity in the ICC Statute**

Article 17(1) states that a case is inadmissible in four situations, the first two being: *firstly* when the case is being investigated or prosecuted by a State that has jurisdiction over it; and *secondly* when the case has already been investigated and the State has decided not to prosecute. In such circumstances, the Court may only proceed where the State ‘*is unwilling or unable genuinely*’ to investigate or prosecute the case’.<sup>1</sup> The terms ‘unwilling’ and ‘unable’ are clarified in Article 17(2) and (3). Three criteria for ‘unwillingness’ are mentioned, namely shielding (*‘The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court’*); the second criteria is *‘an unjustified delay in the proceedings’*; and finally a State is considered to be ‘unwilling’ when *‘(t)he proceedings were not or are not being conducted independently or impartially’*. The two latter criteria are examined in the light of circumstances which may be inconsistent with the intent to bring the person concerned to justice.

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<sup>1</sup> Schabas, p. 67.

The criteria for establishing ‘inability’, is that the State is unable to obtain the accused or the necessary evidence or testimonies, or that it is otherwise unable to carry out its proceedings. These criteria are conditional upon ‘*a total or substantial collapse or unavailability of the State’s national judicial system.*’

The two remaining grounds for the inadmissibility of a case mentioned in Article 17(1), are when the person concerned has already been tried for conduct which is the subject of the complaint; or when the case is not of sufficient gravity to justify further action by the Court. When the accused has already been tried for the same conduct, Article 20, proclaiming the rule ‘*Ne bis in idem*’, prevents the Court from trying him, with two exceptions which are similar to those included in Article 17.

Participants in the working Group argued that the condition of ‘unwillingness to genuinely investigate or prosecute’ is particularly broad and may lead to various interpretations. The criteria of Article 17(2)c, and in particular that stated in the last paragraph, stating that a case shall be considered inadmissible if ‘*(t)he proceedings were not or are not being conducted independently or impartially (...)*’, refers to the procedural human right to a fair trial, so that interpretations of this right by regional human rights courts or by the relevant quasi-judicial bodies can guide the ICC in its decisions. Others warned that the ICC is not a human rights court, and that during the negotiations of the Statute, there was no consensus among States to establish such a link, even at the normative level. There was also some discussion about the differences between the terms *unwilling* and *unable*.

Finally, the question was raised to what extent complementarity differs from the rule of prior exhaustion of local remedies. While the qualitative assessment of local proceedings in the ICC system was considered to be the main distinguishing factor, participants recognized the underlying parallel.

Two other articles which have a direct relevance for the complementarity regime are Article 18, concerning preliminary rulings of the pre-Trial Chamber regarding

admissibility; and Article 19, which deals with challenges to the jurisdiction of the Court or the admissibility of a case.

## **2. Some Unresolved Issues**

Some of the issues for which no clear solution has been foreseen in the Statute, are the question of pardons and paroles, and that of Truth Commissions. During the negotiations, no agreement has been reached on how to deal with these situations, which is generally considered an important shortcoming. It has been argued that in some cases, solutions can be found in the Statute. For example, when a Truth Commission has completed its work with broad recognition within the State, as perhaps in the case of South Africa, the Prosecutor may decline to investigate where the interests of justice would not be served, or the Court could determine that truth and reconciliation proceedings are in fact genuine investigations. As for pardons and paroles, in blatant cases it may be possible for the Prosecutor to convince the Court that the measure was merely the final act in a complete travesty of justice and that therefore, the original prosecution was in fact not genuine. Despite these minor windows of opportunity, these lacunae in the Statute may well have to be addressed by the Assembly of States at its review conference in 2009.

It was concluded that although many questions still have to be clarified in practice, the Prosecutor seems to set a progressive and promising tone.

*Working Group on International Criminal Law*  
*Meeting of 4 March 2004*

**The Protection of Cultural Property in Times of Armed Conflict**

**I. Individual and State Responsibility**

By way of introduction, Prof. Francioni outlined the legal framework of the rules on individual and State responsibility for the destruction of cultural property during an armed conflict. As to individual criminal liability there are two main relevant documents, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and Protocol II Additional to the Hague Convention of 1954. Article 28 of the Hague Convention provides for sanctions in very general terms. Such vagueness has thus far resulted States failing to adopt implementing legislation laying down criminal sanctions. The Protocol II deals more specifically with individual criminal responsibility and only partially with State responsibility.

Concerning State responsibility for violations of the rules governing cultural property in armed conflict, the relevant rules of Protocol II, including the duty to provide reparation, were discussed. In this respect it was mentioned that the Protocol envisaged the establishment of a Committee to monitor the respect of the Protocol and allowed to impose sanctions on the State that committed a violation. The relevant rules applying under the law of treaties were also addressed, as well as the applicable rules under customary international law, including the prohibition of reprisals involving the destruction of cultural property.

Subsequently the presentation focused on the rules concerning the protection of cultural property in armed conflict contained in other international documents:

1. Art. 53, I Protocol Additional to the 1949 Geneva Conventions, which provides for the duty to respect cultural property;
2. Art. 85, 4, d), I Protocol Additional to the 1949 Geneva Conventions, which lists attacks on historic monuments, art works and on protected property within the framework

of competent organizations (i.e. UNESCO list of world heritage) among the grave breaches;

3. Art. 3, d) of the ICTY Statute
4. Art.8, b, 9 e art. 8,e ,4, ICC Statute

The specific content of Protocol II Additional to the 1954 Hague Convention was then examined. The Protocol distinguishes between serious violations and other violations. A very important feature of the Protocol is that Article 16 provides for the principle of *universal jurisdiction* as to the serious violations (that are to be considered as ‘grave breaches’ even if they are not termed as such). For less serious violations, States may establish disciplinary measures instead of criminal sanctions.

## II. ICTY Case Law

In some cases the ICTY judges have made reference to attacks on religious places on discriminatory grounds and to the destruction cultural monuments (i.e. *Blaškić*).

In *Krstić* (2001), the Trial Chamber I affirmed that the systematic destruction of religious places becomes an element to take into consideration to prove the mental element (*mens rea*) of genocide.

There has also been an important decision of the Human Right Chamber for Bosnia (1999) linking attacks on religious places with a violation of the right to religious freedom.

The discussion focused on the difference between the two regimes of responsibility: the insufficiently developed system of State responsibility, and individual criminal responsibility, which is evolving very rapidly on the international plane.

The discussion also underlined the fact that Protocol II to the 1954 Hague Convention also applies to internal conflicts, whereas it does not apply in time of peace. The UNESCO Declaration concerning the International Destruction of Cultural Heritage, adopted in 2003, should fill this lacuna, although is a non-binding legal text.

*Working Group on international criminal law*  
*25 March 2004*

**The European Arrest Warrant and the Prosecution of Crimes Falling Within  
the ICC Statute**

Luisa Vierucci presented the main features of the Decision on the European Arrest Warrant and Surrender Procedures (EAW) which was adopted by the Council of the European Union on 13 June 2002 (*Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States, 2002/584/JHA*).

This Framework Decision replaces the European Extradition Convention of 1957 and subsequent agreements on the simplification of extradition procedures. The new system provides for a mutual recognition of extradition requests and the enforcement of such requests in a speedy manner, i.e. within a maximum delay of 90 days. Interestingly, the modalities for inter-State cooperation set out in the Framework Decision also apply to citizens of non-Member States provided that they have committed a crime which falls under the Decision's scope within EU territory.

Given that all (with the sole exception of the Czech Republic) EU member States are also parties to the ICC Statute, the application of the Decision on the EAW may have consequences on the effective prosecution of ICC crimes.

Among the *advantages* that recourse to the EAW procedure may have for the prosecution of ICC crimes is the fact that it provides the EU states with an additional tool for locating and extraditing a person who has been requested by the ICC but cannot be found on the requested State territory. In this case, the EAW can be a means for an EU State to comply without delay with its obligation to cooperate with the ICC as prescribed in Articles 86 and 89 of the Statute. In addition, the EAW facilitates national prosecution of crimes falling within the jurisdiction of the ICC, on the basis of the complementarity



principles, for the very fact that it streamlines the extradition process between Member States.

The issue of immunity was considered as prominent in relation to potentially *conflicting obligations* arising for those States that are members both to the EAW and the ICC statute. This is so because art. 20 of the EAW Decision requires that, for immunities under international law, the issuing judicial authority shall request the waiver from the relevant State or international organization before proceeding to arrest and surrender. Yet, pursuant to art. 27 of the ICC statute, the Court may exercise jurisdiction without needing a waiver of immunity from prosecution. The question of compatibility between these two provisions is particularly stringent for those States that are parties to both treaties, because there can be no doubt that the statute removes immunities among the States parties in their relations with the Court.

Lacking any compatibility clause with the ICC statute, one may think that the provisions of the Decision should prevail over those of the ICC statute by virtue of the *principle lex posterior derogat anteriori*. However, as it was emphasized in the debate, such an argument is flawed because, given that the ICC statute provides for a special amendment procedure, no treaty derogation by only some parties *inter se* is allowed pursuant to articles 40 and 41 of the Vienna Convention on the Law of Treaties.

During the discussion the question was raised of the possibility that a judicial authority be faced with competing requests for surrender coming either from several EU Member States at the same time or by a Member State and a third State. This eventuality has been explicitly foreseen in the EAW (art. 16(4)), which recognizes the priority of the member's States obligations under the ICC statute in this respect.

*Working Group on International Criminal Law*  
*Meeting of 28 April 2004*

**The Extraordinary Criminal Chambers in the Courts of Cambodia for the  
Prosecution of Crimes Committed Under the Khmer Rouge Regime between 1975  
and 1979**

**Introduction**

Bruce Broomhall made a comprehensive presentation on the process leading to the conclusion of an agreement between the United Nations and the Cambodian government on the parameters for the judicial proceedings to be conducted by the Extraordinary Chambers, commenting on the terms of this agreement and highlighting the serious doubts which some States and NGO's have expressed thereon.

In 1997, the Cambodian government requested assistance from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those most responsible for the crimes committed under this régime. With the support of the USA, France, Australia, Japan, Canada and the Netherlands, the UN Secretary-General and the Cambodian government started negotiations on the establishment, with international assistance, of extraordinary chambers to this effect within the existing court structure of Cambodia. This process was hampered by internal political factors and tensions between the UN secretariat and the government of Cambodia, but a second round of negotiations led to the conclusion, in March 2003, of an agreement between the United Nations and the government of Cambodia.

**I. Main Points of the UN- Cambodia Agreement on the Extraordinary  
Chambers**

The Extraordinary Chambers will have *limited personal and temporal jurisdiction*, restricted to the senior leaders of Democratic Kampuchea and those most responsible for the crimes committed in the period from 17 April 1975 to January 1979.

The *law to be applied* is Cambodian law, as set out in the Law on the Establishment of the Extraordinary Chambers of 1991, which also enumerates the *crimes* to be considered. These include serious violations of Cambodian criminal law, international humanitarian law and custom, and international conventions recognized by Cambodia. On this point, some questions can be raised on the status of international customary law in the 1970's concerning crimes against humanity, as well as on the existence of an *international* armed conflict in Cambodia in the relevant period, a pre-condition for application of the Geneva Conventions.

It is also doubtful whether the crimes committed fall under the definition of genocide, since the targeted groups of the Khmer Rouge were not specifically religious, racial or religious, as required by the 1948 Genocide Convention.

The most controversial point of the agreement is the *composition of the chambers*, which provides for a majority of Cambodian judges. (Trial Chambers: 3 Cambodian and 2 international judges; Appeals Chamber: 4 Cambodian and 3 international judges), with a 'super-majority' requirement (4 judges at trial, 3 at appeal, thus requiring the assent of at least one international judge at each level). It is unclear to which decisions the supermajority system applies, i.e. final decisions of conviction/acquittal, or also all procedural questions.

The functions of the *investigating judges* and of the *prosecutors* are both divided between Cambodian and international personnel. In case of disagreement between the two co-prosecutors or co-investigating judges, the Pre-Trial Chamber will decide, with no avenue for appeal. In the absence of the required majority of votes, the investigation or prosecution may proceed. This provision has been criticized as a form of 'victor's justice'.

Concerning *procedures*, the agreement states that Cambodian law applies, as well as Articles 14 and 15 of the International Covenant on Civil and Political Rights of 1966. The vagueness of this provision has been severely criticized by NGOs including Amnesty International. Donors have also expressed concern about the provision on procedural guarantees, which are limited to the rights of the accused, without mentioning, for example, the protection of witnesses.

The lack of clarity on several aspects and the primacy of Cambodian law (which in itself is unclear or not in accordance with international standards on some points), have led a number of governments, including the Netherlands (and less explicitly Canada), and many international NGOs to disavow the process. Human Rights Watch and Amnesty International have stated that this mechanism should never have been agreed to.

On the other hand, the Open Society Justice Initiative, with which Bruce has worked, decided to try and influence the Cambodian government through a dialogue with the national authorities and with the donor community; and to support local NGOs and parallel investigations. It has created a 'legal clinic' in one of Cambodia's major law schools to provide training on human rights and international criminal law, and to monitor the Chambers.

Despite the above mentioned criticism, it seems that the process will indeed be put into practice, although its timing depends on the funding commitments to be made by donors. The first trials are not likely to start before 2006/2007.

## **II. Appropriateness of the Agreement**

Several participants of the Working Group questioned the propriety of putting the agreement into practice, since its lack of clarity on fundamental points and its procedural deficiencies would appear to exclude an adequate judicial process at the outset. Moreover, proceedings on this basis could set a negative precedent in the broader field of international justice, and would probably influence public opinion on international and

‘mixed’ judicial proceedings accordingly. It was deplored that geo-political and commercial interests of some donors (in particular the USA’s ‘neo-containment strategy’ towards China and Japan’s economic interests in Cambodia) seem to dictate their positions in respect of this judicial process, rather than considerations of ‘justice’ and human rights.

Furthermore, the question was raised if there were not alternatives to this process, such as an ad-hoc tribunal, or triggering the jurisdiction of the International Criminal Court. The creation of an ad-hoc tribunal had been the first recommendation by the United Nations in 1997, which was immediately rejected by the Cambodian government. At least until 1996 there was a certain threat of civil war, which could have been considered as a threat of international peace and security, enabling the Security Council to act under chapter VII of the UN Charter and create such a tribunal. However, after UNTAC left the country, Cambodia was no longer an international priority. Complaints before the ICC could, in theory, be made for widespread and systematic trafficking of women and children tied-in with the national power-structures, but not in connection with crimes committed in the 1970’s.

### **III. Urgent Need for Legal Training**

The need to address the lack of trained Cambodian people in, *inter alia*, the legal field was also discussed. This problem has its roots both in the systematic execution of professionals and academics of the ‘opposition’ under the Khmer Rouge, and in the lack of adequate university training in the country. Despite several ongoing longer-term training initiatives supported by France and the USA, there still is a long way to go. UNDP claims to co-ordinate the required training assistance, but is hampered by a lack of financial resources.

Finally, the regional dimension of the process towards judicial accountability in Cambodia was mentioned. There is very little experience with accountability for crimes committed by former regimes, in comparison with other regions (e.g. Truth Commissions

in Latin America and South Africa). Until recently, there has been limited faith in international judicial institutions in general, although in the last few years, two cases on maritime issues have been brought before the International Court of Justice. In this context, it is even more important to ensure an adequate and fair judicial process, and to avoid a negative precedent.

*Working Group on international criminal law*

*5 November 2004*

**Recent Developments Surrounding the Iraqi Special Tribunal,  
Abu Graib and Guantánamo Bay**

**1. Recent Developments Surrounding the Iraqi Special Tribunal, Abu Graib  
and Guantánamo Bay** (presentation by Elsa Gopala Krishnan)

*The Iraqi Special Tribunal (IST):*

At the end of 2003 the principle of a tribunal to prosecute and try Saddam Hussein and former agents of the Baath regime was accepted. Over the summer of 2004 a draft Statute was completed. It is envisaged that the ITS will be a hybrid tribunal, combining national and international aspects of criminal jurisdiction. Its provisional Statute and Rules of Procedure are very similar to the tribunal proposed by the US after the invasion of Iraq, as well as to those of other hybrid criminal tribunals. Some major inconsistencies were highlighted, such as the inclusion of a '*juge d'instruction*', based on Iraqi law, in a system mainly inspired by the common law accusatorial model, and in which no pre-trial chamber is envisaged, nor any modalities for review of the procedure.

Some doubts were raised as to the legitimacy of the tribunal, if it would be officially created during the transitional government, which was instituted by the Occupying Powers.

Also the problem of the applicable law was mentioned, considering that the crimes committed by the Baath regime occurred over a time span of some 30 years.

Moreover, reference was made to comments from some of the Iraqi judges designated to sit on the ITS bench, that they faced the dilemma of responding to international public opinion, by adapting the ITS to international proceedings and involving international judges; or responding to Iraqi public opinion, calling for proceedings based on national law and conducted by Iraqis.

In any case, in the current situation of ongoing violence, no progress can be expected; perhaps things will become clearer after the elections.

*Abu Graib:*

The scandal over torture of Iraqi prisoners at the Abu Graib prison in Iraq broke out in April 2003. In the past weeks, some of the accused American military pleaded guilty and received relatively low sentences after being judged by military courts. In these trials, the question of command responsibility was not raised, and no resignations followed the judgments. More trials are envisaged for January 2005.

*Guantánamo Bay:*

Whereas there are still some 500 persons detained at this US detention centre in Cuba, only 4 indictments have been made. The indicted detainees will be judged by specifically created 'military commissions', which fall outside any rules for military courts, and do not provide for the basic procedural guarantees. In June 2004, the US Supreme Court ruled that the detainees must be permitted to file habeas corpus petitions. However, it did not pronounce itself on the right to have access to their files and access to a lawyer.

In a new development, prisoners who may be released have to sign a declaration in which they renounce US citizenship; promise to discontinue terrorist activities; and renounce the right to seek remedy for their detention afterwards.

The military commissions are fiercely being attacked by lawyers defending the indicted detainees. The hope was expressed that after the recent presidential elections in the US, the expected changes within the administration will modify this abusive situation.