

The Impact of Criminal Prosecutions on Compliance with IHL: Challenges and Perspectives on the Way Forward¹

Serge Brammertz *

I. Introduction

Deterring crime and strengthening compliance with the rules of international humanitarian law (IHL) have been principal expectations for contemporary international criminal justice. In establishing tribunals to prosecute serious violations of IHL, States have expressed their conviction that prosecution of past crimes will contribute to deterring and preventing their future commission.² Many supporters of international criminal justice share that view.³ Of course, promoting compliance with IHL is not the only goal of international criminal tribunals, and prosecutions are not the only means to promote compliance. Yet the belief that criminal prosecutions deter future violations and increase compliance with IHL is widespread and enduring.

The focus on deterrence through prosecutions is commensurate with other changes in international law. Reprisals, a traditional method to promote and enforce compliance with the law of armed conflict, undermines the universality of IHL prohibitions by excusing violations in specific circumstances.⁴ As a form of “self-help”, reprisals also appear to be inconsistent with efforts to establish an international legal order in which rules are enforced impartially and uniformly through legal process. Prosecutions, on the other hand, vividly epitomize an

* Prosecutor of the ICTY.

¹ This article is based on presentations made at the Australian Red Cross conference “From Principles to Practice: Securing Compliance with the Laws of War,” in November 2014.

² See SC Res 808 (22 February 1993) (ICTY); SC Res 955 (8 November 1994) (ICTR); ICC Statute, Preamble; SC Res 1315 (14 August 2000) (SCSL).

³ See, e.g., David J. Scheffer, *War Crimes and Crimes Against Humanity*, 11 PACE INT'L L. REV. 319, 328 (1999) (“As instruments of deterrence, the tribunals are formidable partners that cannot be lightly ignored in the future.”); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 10 (2001); M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191, 192 (2003) (“The pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts.”).

⁴ On reprisals generally under IHL and the “trend to outlaw belligerent reprisals altogether,” see ICRC, *Customary International Humanitarian Law*, Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005, Rule 145.

international rule of law whereby every individual is subject to rules enforced by the international community.

Effectiveness is equally a critical issue. It has been argued that reprisals are not only incompatible with IHL, but ineffective in promoting compliance.⁵ As with other forms of deterrence, reliance on reprisals will be futile if a combatant does not have the credibility and capability to conduct reprisal attacks. Paradoxically, reprisals may also lead, not to a state of equilibrium, but to further escalation and violations as each reprisal attack gives cause for retaliation.

The question is now whether criminal prosecutions are effective in promoting compliance with IHL. Today, there are more accountability initiatives for crimes committed during armed conflicts than ever before.⁶ This is a positive development. At the same time, however, more people today are internally displaced by armed conflict and violence than ever before,⁷ and civilian casualties – direct and indirect – of armed conflict remain unacceptably high.

It would be false to conclude that criminal prosecutions are not increasing compliance with IHL based on simplistic before and after comparisons, particularly when so many other factors are influencing the nature and harms of armed conflicts today. But that should not

⁵ See, e.g., F. Kalshoven, *Belligerent Reprisals* (1971).

⁶ See, e.g., International Criminal Tribunal for the Former Yugoslavia (ICTY), available at <http://www.icty.org/> (accessed 1 February 2015); International Criminal Tribunal for Rwanda (ICTR), available at <http://www.unictf.org/> (accessed 1 February 2015); International Criminal Court (ICC), available at http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx (accessed 1 February 2015); Special Court for Sierra Leone (SCSL), available at www.rscsl.org/ (accessed 1 February 2015); Extraordinary Chambers in the Courts of Cambodia, available at <http://www.eccc.gov.kh/en> (accessed 1 February 2015). There are also a number of national mechanisms, including: Bosnia, War Crimes Chamber of the State Court of BiH, available at <http://www.sudbih.gov.ba/?jezik=e> (accessed 1 February 2015); Canada, War Crimes Program, available at <http://www.justice.gc.ca/eng/cj-jp/wc-cdg/prog.html> (accessed 1 February 2015); Netherlands, International Crimes Team, available at <https://www.om.nl/onderwerpen/international-crimes-0/> (accessed 1 February 2015); Serbia, Office of the War Crimes Prosecutor, available at http://www.tuzilastvorz.org.rs/html_trz/pocetna_eng.htm (accessed 1 February 2015); Switzerland, Competence Centre for International Criminal Law in the Office of the Attorney General, available at <http://www.bundesanwaltschaft.ch/aufgaben/00029/index.html?lang=en> (accessed 1 February 2015); Uganda, International Crimes Division, available at http://www.judicature.go.ug/data/smenu/18/International_Crimes_Division.html (accessed 1 February 2015); United States, Human Rights Violators and War Crimes Unit, available at <http://www.ice.gov/human-rights-violators-war-crimes-unit> (accessed 1 February 2015);.

⁷ The Internal Displacement Monitoring Centre estimates that there were 33.3 million internally displaced people in the world as of the end of 2013 due to armed conflict, generalized violence and human rights violations. This figure represents a 16% increase compared with 2012, and is a record high for the second year in a row. IDMC, *Global Overview 2014* (May 2014).

justify complacency. International criminal justice continues to face a number of significant challenges that directly and indirectly undermine its deterrent effect.

II. Overview of International Criminal Justice

International justice is still a rather recent development. Immediately after World War II, war crimes trials were held in Nuremberg, Tokyo, France, Poland and many other countries. Thousands of individuals were held accountable for horrific crimes committed against civilians and prisoners of war. Following this breakthrough, however, international justice retreated to the margins again. In the second-half of the 20th century, there was a marked absence of accountability measures for serious violations of international humanitarian law.

This situation changed again in the 1990s, and today, we now find ourselves in a world where international justice has been established as an integral part of our framework for responding to mass atrocities and conflict crimes. The International Criminal Tribunal for the former Yugoslavia (ICTY) was created by the UN Security Council almost 22 years ago to prosecute war crimes, crimes against humanity and genocide committed during the wars in the former Yugoslavia.⁸ Not long after, at the end of 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) to prosecute genocide and other crimes committed in Rwanda.⁹ These first *ad hoc* tribunals were then followed by UN-supported “hybrid” tribunals in Sierra Leone, Cambodia and Lebanon.¹⁰ The crowning achievement of this rapid evolution in the landscape of international justice was the creation of the International Criminal Court (ICC), established by the 1998 Rome Statute as a multi-lateral treaty-based body.¹¹ Unlike its temporary predecessors, the ICC is a permanent forum for the prosecution of war crimes, crimes against humanity, genocide and the crime of aggression.

⁸ SC Res 808 (22 February 1993); ICTY Statute.

⁹ SC Res 955 (8 November 1994); ICTR Statute.

¹⁰ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003; SC Res 1757 (30 May 2007) (establishing STL); STL Statute.

¹¹ ICC Statute.

There have been significant achievements over the last years. Two decades ago, holding anyone accountable for wartime atrocities, let alone high-level political and military figures, was hard to imagine. Yet in September 2013, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) affirmed the conviction of Charles Taylor, the former President of Liberia, for aiding and abetting and planning widespread atrocities committed during the Sierra Leonean Civil War and sentenced him to 50 years of imprisonment.¹² This judgment removed any doubt that a head of state could be convicted for international crimes.

The ICTR indicted 93 individuals and successfully prosecuted numerous accused, including senior political and military officials, for genocide and other crimes committed during the Rwandan genocide.¹³ The Extraordinary Chambers in the Courts of Cambodia is prosecuting leaders of the Khmer Rouge for crimes committed in Cambodia, with one case now completed and the second on appeal following convictions at trial.¹⁴ Most recently, in January 2014 the Special Tribunal for Lebanon began its first trial *in absentia* of those suspected of assassinating former Prime Minister of Lebanon Rafik Hariri in Beirut in 2005.¹⁵

The ICC is now fully operational, with investigations, trials and appeals all underway. In 2012 it captured the headlines with its first judgement in the *Lubanga* case.¹⁶ Thomas Lubanga Dyilo, founder of the Union of Congolese Patriots, was convicted for recruiting and using child soldiers during the Ituri conflict in the northeast of the Democratic Republic of Congo. That judgement was confirmed on appeal in December 2014.¹⁷ In March 2014, the ICC issued its third trial judgment, convicting Congolese militia leader Germain Katanga for crimes against humanity and war crimes, also committed during the Ituri conflict.¹⁸ The ICC

¹² *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013.

¹³ ICTR, Infographic: The ICTR in Brief, available at <http://www.unictl.org/en/tribunal> (accessed 1 February 2015).

¹⁴ *Case 001 Appeal Judgment (Kaing Guek Eav alias Duch)*, Case File/Dossier No. 001/18-07-2007-ECCC/SC, 3 February 2012; *Case 002/01 Judgment (Khieu Samphan and Nuon Chea)*, Case File/Dossier No. 002/19-09-2007/ECCC/TC, 7 August 2014.

¹⁵ STL, Press Release: *Ayyash et al. case opens at the Special Tribunal for Lebanon*, 16 January 2014, available at <http://www.stl-tsl.org/en/media/press-releases/16-01-2014-ayyash-et-al-case-opens-at-the-special-tribunal-for-lebanon> (accessed 1 February 2015).

¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012.

¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-3121, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014.

¹⁸ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, 8 March 2014.

has nine open investigations into crimes committed in eight countries, the most recent being Central African Republic II at that state's request.¹⁹

At the ICTY Office of the Prosecutor (OTP), we are in the final stages of our mandate, with our last four trials well under way²⁰ and our final four appeal proceedings ongoing.²¹ Since its creation, the OTP has indicted 161 persons, including heads of state, prime ministers, army chiefs of staff, interior ministers and many other high- and mid-level leaders from the various parties to the armed conflicts in the former Yugoslavia.²² Today, none of our indictees remains a fugitive from justice, an achievement that unfortunately no other international tribunal has yet reached.²³

We are currently prosecuting two of the most important cases in the Tribunal's history, against Radovan Karadžić and Ratko Mladić. Both are accused of ethnic cleansing throughout Bosnia and Herzegovina and of crimes committed during the four year siege of Sarajevo. Both are also accused of the Srebrenica genocide. They were the two men most prominently associated with the actions of Bosnian Serb forces during the war. They were also our most wanted fugitives.

III. Accountability and Compliance

As exemplified by the *Karadžić* and *Mladić* cases, experience over the last two decades at the ICTY and other international criminal tribunals has demonstrated that, ideally, prosecutions should focus on the highest-level perpetrators – the common reference today is to those “most responsible” for the crimes.²⁴ Leadership prosecutions address the root causes

¹⁹ See ICC, Infographic: Situations and Cases, available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (accessed 1 February 2015).

²⁰ *Prosecutor v Radovan Karadžić*, Case No. ICTY-95-5/18-T (adjourned for judicial deliberations); *Prosecutor v Ratko Mladić*, Case No. ICTY-09-92-T (mid-way through the Defence case at trial); *Prosecutor v Goran Hadžić*, Case No. ICTY-04-75-T (mid-way through the Defence case at trial); *Prosecutor v Vojislav Šešelj*, Case No. ICTY-03-67-T (adjourned for judicial deliberations).

²¹ *Prosecutor v Zdravko Tolimir*, Case No. ICTY-05-88/2-A (appeal judgment anticipated in Spring 2015); *Prosecutor v Mićo Stanišić & Stojan Župljanin*, Case No. ICTY-08-91-A (awaiting appeal hearing); *Prosecutor v Jovica Stanišić & Franko Simatović*, Case No. ICTY-03-69-A (awaiting appeal hearing); *Prosecutor v Jadranko Prlić et al*, Case No. ICTY-04-74-A (appeal briefing underway).

²² See ICTY, Infographic: ICTY Facts & Figures, available at <http://www.icty.org/sid/11186> (accessed 1 February 2015).

²³ See ICTY, Infographic: The Fugitives, available at <http://www.icty.org/sid/10010> (accessed 1 February 2015).

²⁴ See eg SCSL Statute, Art 1; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art 2.

and enablers of extreme criminality, and are likely to have the greatest deterrent effect and impact for the prevention of future crimes.

The International Committee of the Red Cross reached the same conclusion from its own empirical research. In a study called *The Roots of Behaviour in War*, based on a survey of some 15,000 civilians and combatants in 15 war zones, the ICRC concluded that the single most important step to promote compliance with IHL is to influence the people who are in charge, “the people who have an ascendancy over” combatants.²⁵ In conflict, where violence against those defined as the enemy is authorized, the behaviour of combatants is influenced more by group conformity and obedience to authority than by knowledge of norms or moral persuasion. The authors concluded that strategies to influence combatant behaviour and adherence to IHL thus should “be designed not to persuade free individuals of the need to adopt types of conduct in conformity with IHL but to convince more or less structured and hierarchically organized groups to respect these norms.”²⁶

This insight applies across the board to all armed forces, not just those directly engaged in combat activities, but also peacekeepers and militaries protecting societies in conflict. In June 2014, at the Global Summit to End Sexual Violence in Conflict, Lieutenant General David Morrison, Chief of the Australian Army, underscored that there can be zero tolerance for crimes of sexual violence, and that all soldiers have a single choice – “to be a protector or a perpetrator”, because, as he explained, being a bystander means being a perpetrator.²⁷ He argued that ending sexual violence in conflict requires systematic changes in military culture and values, changes that can only be made when they are driven by leaders.

International law provides a powerful mechanism to influence the measures leaders take to ensure compliance with IHL. For more than 80 years, it has been recognised that

Compare ICTY Statute, Art.1 (‘The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law’), with SC Res 1534 (26 March 2004), UN Doc S/RES/1534, para 5 (calling on the ICTY and ICTR, in reviewing and confirming new indictments, ‘to ensure that any such indictments concentrate on those most senior leaders suspected of being most responsible’).

²⁵ See Muñoz-Rojas, D, & Frésard, J, ‘The roots of behaviour in war: understanding and preventing IHL violations,’ Vol 86 No 853 *International Review of the Red Cross* (March 2004) 189 at 204.

²⁶ *Id.*, at 205.

²⁷ Lt. General David Morrison, The Global Summit to End Sexual Violence in Conflict, London, United Kingdom, 13 June 2014, available at <http://www.army.gov.au/Our-work/Speeches-and-transcripts/Chief-of-Army-addresses-the-Global-Summit-to-End-Sexual-Violence-in-Conflict> (accessed 1 February 2015).

military commanders can bear individual criminal responsibility for the criminal conduct of the troops under their command. Landmark cases after the Second World War – such as the *High Command* and *Hostages* cases at Nuremberg,²⁸ and the *Yamashita* case by United States military commission²⁹ – first articulated the doctrine that came to be known as “command” or “superior” responsibility. The duties underlying this doctrine were incorporated in Articles 86 and 87 of the Additional Protocol I to the Geneva Conventions. Under Article 86, superiors have a duty to take “all feasible measures within their power” to prevent or punish a breach of the laws of war.³⁰ Under Article 87 of Additional Protocol I, superiors have a duty to “initiate such steps as are necessary to prevent such violations ... and, where appropriate, to initiate *disciplinary or penal* action against violators thereof.”³¹ Building on these developments, superior responsibility was codified in the Statutes of the ICTY, ICC and other international tribunals.³²

In essence, to find a commander liable as a superior for crimes that were committed, the Prosecution must prove beyond a reasonable doubt three material elements: first, the commander must have “effective control” over his or her subordinates; second the commander must either know of his or her subordinates’ crimes or have reason to know of them; and third, the commander must fail to prevent the crimes or fail to punish them after they have occurred.³³

²⁸ *Trial of Wilhelm von Leeb and Thirteen Others*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10, Vol XI (Washington DC: United States Government Printing Office, 1950), Judgment, pp 462-697; *Trial of Wilhelm List and Others*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10, Vol XI (Washington DC: United States Government Printing Office, 1950), Judgment, pp 1230-1319.

²⁹ *Trial of General Tomoyuki Yamashita*, US Military Commission (Manila), 7 December 1945, Law Reports of Trials of War Criminals, Selected and Prepared by UN War Crimes Commission, Vol IV (London: His Majesty’s Stationery Office, 1948), pp 1-37. See also *In re Yamashita*, 327 US 1 (1946).

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 86.

³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 87.

³² ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3); ICC Statute, Art. 28; SCSL Statute, Art. 6(3); STL Statute, Art. 3(2). See also ICRC, Customary International Humanitarian Law, Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005, Rule 153 (“Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.”).

³³ See *Prosecutor v. Delalić et al.*, Case No. ICTY-96-21-A, Judgment, 20 February 2001, paras 239, 256; *Prosecutor v. Halilović*, Case No. ICTY-01-48-A, Judgment, 16 October 2007, para. 59; *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-A, Judgment, 26 October 2009, para. 842.

The ICTY OTP has successfully prosecuted a number of commanders for superior responsibility.³⁴ The *Celebici* case was the first contemporary prosecution at an international tribunal of a commander for superior responsibility.³⁵ One of the accused, the commander of a Bosnian Muslim detention camp, was convicted and held individually responsible for the crimes committed by his subordinates against detained Bosnian Serbs.³⁶ In the *Strugar* case, we successfully prosecuted a General of the Yugoslav Army (JNA) for unlawful attacks on civilians and civilian objects and destruction of cultural objects based on his superior responsibility for the crimes of his subordinates.³⁷ Strugar was the commander of JNA forces in military operations against the Croatian city of Dubrovnik, during which the JNA illegally shelled the city. We proved that Strugar had effective control over his forces, and yet failed to stop unlawful attacks of which he had notice or punish his subordinates after the fact. This case established an important precedent. Strugar had argued that his immediate subordinate, Admiral Jokić, was given the responsibility to investigate and take disciplinary action. However, the Trial Chamber accepted our evidence that Strugar knew that Jokić's investigation was a sham and concluded that Strugar retained the material ability to punish his subordinates for the crimes.³⁸

At the ICTY, our cases have also confirmed that superior responsibility is not just a matter for military commanders but is equally applicable to civilian leaders, provided that the superior-subordinate relationship is proven.³⁹ This is a major achievement that sends a clear message that compliance with IHL is the responsibility of all superiors, and is not confined to regular militaries.

³⁴ See eg *Prosecutor v. Jadranko Prlić et al.*, Case No. ICTY-04-74-T, Judgement, 29 May 2013, Vol 4, paras 1245-1252 (convicting Ćorić pursuant to superior responsibility); *Prosecutor v. Vujadin Popović et al.*, Case No. ICTY-05-88-T, Judgement, 10 June 2010, paras 2107, 2110 (convicting Borovčanin and Pandurević pursuant to superior responsibility); *Prosecutor v. Dragomir Milošević*, Case No. ICTY-98-29/1-A, Judgement, 12 November 2009, para 282 (entering convictions pursuant to superior responsibility as an alternate mode of liability).

³⁵ *Prosecutor v. Delalić et al.*, Case No. ICTY-96-21-T, Judgement, 16 November 1998; *Prosecutor v. Delalić et al.*, Case No. ICTY-96-21-A, Judgment, 20 February 2001.

³⁶ *Prosecutor v. Delalić et al.*, Case No. ICTY-96-21-T, Judgement, 16 November 1998, para. 1237.

³⁷ *Prosecutor v. Strugar*, Case No. ICTY-01-42-T, Judgment, 31 January 2005; *Prosecutor v. Strugar*, Case No. ICTY-01-42-A, Judgment, 7 July 2008.

³⁸ *Prosecutor v. Strugar*, Case No. ICTY-01-42-T, Judgment, 31 January 2005, paras 436-446.

³⁹ See *Prosecutor v. Zejnil Delalić et al.*, Case No. ICTY-96-21-A, Judgment, 20 February 2001, paras 195-196, 240. See also *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-A, Judgment, 22 February 2008, para. 257. But see further *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgment (Reasons), 3 July 2002, paras 50-55.

IV. Challenges for Successful Prosecutions

While there have been many positive results in the development of the doctrine of superior responsibility, our experiences at the ICTY have also shown that we still face many challenges in successfully prosecuting superiors for the crimes of their subordinates.

A. Investigations and Evidence

It is a common misconception to treat a superior responsibility charge as an easy option or fall-back position when evidence cannot be obtained of a commander's more direct involvement in the commission of crimes by his subordinates. However, as the ICTY's jurisprudence developed, it became increasingly clear that it can be difficult to prove that the accused possessed effective control over his subordinates. Similarly, proving negative conduct, such as a failure to prevent or punish crimes committed by subordinates, may also require considerable effort on the part of the prosecution.⁴⁰

International prosecutors are typically tasked with investigating and prosecuting mass atrocities, involving many victims and perpetrators over the course of many years. Investigations may often need to take place in the midst of an on-going conflict. It seems obvious that when atrocities are committed, it is important to get people on the ground immediately to secure crime scenes and safeguard critical evidence. But identifying, collecting and preserving evidence in conflict zones is fraught with problems.

At the ICTY we commenced our investigations in June-July 1994, but it was not until the end of 1995 that the Croatian and Bosnian conflicts ended. During the conflict and for some years after, we were only able to carry out limited investigations, primarily obtaining

⁴⁰ See eg *Prosecutor v Momčilo Perišić*, Case No. ICTY-04-81-A, Judgement, 28 February 2013, paras 119-120 (reversing conviction pursuant to superior responsibility); *Prosecutor v Ljube Boškoski & Johan Tarčulovski*, Case No. ICTY-04-82-A, Judgement, 19 May 2010, paras 224-273 (upholding Boškoski's acquittal pursuant to superior responsibility); *Prosecutor v Rasim Delić*, Case No. ICTY-04-83-T, Judgement, 15 September 2008, para 557 (convicting in part and acquitting in part Delić pursuant to superior responsibility); *Prosecutor v Naser Orić*, Case No. ICTY-03-68-A, Judgement, 3 July 2008, paras 77-78, 180-181 (reversing conviction pursuant to superior responsibility); *Prosecutor v Enver Hadžihasanović & Amir Kubura*, Case No. ICTY-01-47-A, Judgement, 22 April 2008, paras 155, 164, 231-232, 272 (reversing in part Hadžihasanović and Kubura's convictions pursuant to superior responsibility); *Prosecutor v Sefer Halilović*, Case No. ICTY-01-48-A, Judgement, 16 October 2007, paras 198-217 (upholding acquittal pursuant to superior responsibility); *Prosecutor v Tihomir Blaškić*, Case No. ICTY-95-14-A, Judgement, 29 July 2004, Disposition (reversing in part convictions pursuant to superior responsibility); *Prosecutor v Zejnil Delalić et al*, Case No. ICTY-96-21-A, Judgement, 20 February 2001, paras 312-314 (upholding Delić's acquittal pursuant to superior responsibility).

accounts of mass atrocities from refugees and other witnesses. We did not receive the access we needed to obtain evidence such as mapping crime scenes, exhuming mass graves and interviewing potential witnesses. Because there were no security services available to accompany ICTY investigators in the field or to secure crime scenes on our behalf, we needed cooperation from State and local authorities to obtain access, which was often not forthcoming.

When the Srebrenica genocide was committed in July 1995, there was no infrastructure in place to secure the crime scenes. It was twelve months before investigators were able to access the sites to carry out exhumations and collect other evidence. The scattered remains of Srebrenica victims are still being recovered from graves today. As we now know, delayed access enabled the Bosnian Serbs to remove the bodies from primary graves and relocate them to secondary graves in a bid to cover up the crimes.⁴¹ Even though we finally found and exhumed the mass graves, the reburial operation had disrupted the crime scenes. This has complicated the evidence and created opportunities for the defence to attack expert findings. After the conflict, when we were investigating crimes in the Republika Srpska, one of the two entities in Bosnia and Herzegovina, we were repeatedly denied access by the authorities and advised by the international community not to enter the area due to security concerns.

Another key source of evidence at the ICTY has been military records and other documents from military and civilian archives. We also faced serious difficulties accessing this evidence. It was not until December 1997 that we were able to do our first search and seizure mission in Prijedor, one of the municipalities in 1992 where thousands of Bosnian Muslims were brutally killed or detained in life-threatening conditions. The situation was even more difficult in Croatia and Serbia. It took ten years to get hold of documentation from

⁴¹ See eg *Prosecutor v Vidoje Blagojević & Dragan Jokić*, Case No. ICTY-02-60-T, Judgement, 17 January 2005, paras 380-390, especially para 382 (describing efforts to conceal crimes, opining ‘that the opening of the mass graves and the reburial of the victims in other locations was an attempt to conceal the evidence of the mass killings’); *Prosecutor v Vujadin Popović et al*, Case No. ICTY-05-88-T, Judgement, 10 June 2010, paras 600-606. There were similar efforts to conceal crimes committed during the conflict in Kosovo: *Prosecutor v Milan Milutinović et al*, Case No. ICTY-05-87-T, Judgement, 26 February 2009, Vol 2, paras 1263-1357, especially paras 1356-1357 (describing efforts to conceal crimes, determining the existence of a “clandestine operation” and “institutional cover-up” to “conceal over 700 bodies scattered throughout Kosovo from both citizens of the FRY and Serbia, and from the international community, including this Tribunal and NATO ground forces”); *Prosecutor v Vlastimir Đorđević*, Case No. ICTY-05-87/1-T, Judgement, 23 February 2011, paras 1290-1366, 1967-1982.

those governments. Both states invoked sovereignty and stated in no uncertain terms that the ICTY had no right to the documents. Even with the legal authority of the Security Council through Chapter VII of the United Nations Charter, the ICTY had to negotiate for access, in many instances with many of the same people who were in power during the conflict, including perpetrators of crimes or their superiors.⁴² By the time we finally gained access to archives, records had been destroyed or hidden. In our investigation of the Srebrenica genocide, while we eventually gained access to the military archives of units present during the crimes, many incriminating documents had already been removed and destroyed in an attempt to hide what had happened and who had been involved.

When investigating mass or organized crimes, so-called insider witnesses, who were involved in the suspect groups, are important sources of evidence. It should not be surprising that international prosecutors face difficulty accessing and interviewing such witnesses. In the early days at the ICTY, interviews were often monitored by local authorities and reports were sent back to central authorities. These are not ideal circumstances in which truthful evidence can be elicited. Witness interference has been a significant challenge in international prosecutions. Witnesses may be bribed, threatened or even killed before they testify. Interference was so widespread and had such an impact on the *Haradinaj* case that the Appeals Chamber ordered a re-trial.⁴³ The Tribunal also suspended trial proceedings in the *Šešelj* case in 2009 over fears that witnesses were being intimidated.⁴⁴ In general, we must be particularly conscious of the difficulties surrounding witness protection in conflict zones. Inadequate financial, human and technical resources mean that witness protection programmes are never as comprehensive as one would wish. It is also very hard to keep investigations confidential and discreet when all one's movements are accompanied by a security detail. Equally, in attempting to protect witnesses, we have to avoid creating too many incentives, which may provide a basis for challenging their credibility when they testify.

B. Case Selection

⁴² See *Prosecutor v Tihomir Blaškić*, Case No. ICTY-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para 31.

⁴³ *Prosecutor v Ramush Haradinaj et al*, Case No. ICTY-04-84-A, Judgement, 19 July 2010, para 50.

⁴⁴ *Prosecutor v Vojislav Šešelj*, Case No. ICTY-03-67-T, Decision on Prosecution Motion for Adjournment with Dissenting Opinion of Judge Antonetti, 11 February 2009.

Even if evidence is gathered, case selection is another challenge to successful prosecutions of superiors for the failure to prevent or punish crimes. Difficult choices have to be made about what and who to prosecute. The sad truth in our experience is that more crimes are committed than can ever be fully investigated and prosecuted. Given the massive scope of the cases and typically limited resources, an international tribunal can only cover a fraction of the atrocities committed.

As noted above, prosecutions should focus on those “most responsible” for the crimes. To prove the responsibility of senior leaders removed from the crimes requires a great deal of strong “linkage” evidence. It takes time and experience to gather this evidence and prove the links in the courtroom. At the ICTY, our leadership cases like Karadžić and Mladić have greatly benefited from prior prosecutions of low- and mid-level perpetrators. Faced with prosecution, both “trigger-men” and mid-level officials have pled guilty and agreed to provide evidence against more senior suspects.⁴⁵ Equally, by strategically timing our prosecutions, we have been able to test our evidence and establish important legal precedents before commencing our most difficult leadership cases. In the end, combining the “bottom-up”⁴⁶ and “top-down”⁴⁷ approaches has allowed us to look at the entire structure that played a part in the commission of the crimes, increasing the impact of our prosecutions.

At the same time, the hard truth is that in practice, those considered to be “most responsible” and targeted for investigation will be senior leaders who plan, order and

⁴⁵ See, e.g., *Prosecutor v. Drazen Erdemović*, Case No. ICTY-96-22-T, Sentencing Judgment, 29 November 1996; *Prosecutor v. Momir Nikolić*, Case No. ICTY-02-60/1-S, Sentencing Judgment, 2 December 2003; *Prosecutor v. Dragan Obrenović*, Case No. ICTY-02-60/2-S, Sentencing Judgment, 10 December 2003; *Prosecutor v. Miroslav Deronjić*, Case No. ICTY-02-61-S, Sentencing Judgment, 30 March 2004; *Prosecutor v. Milan Babić*, Case No. ICTY-03-72-S, Sentencing Judgment, 29 June 2004. See generally, ICTY, Infographic: Guilty Pleas, available at <http://www.icty.org/sections/TheCases/GuiltyPleas> (accessed 1 February 2015).

⁴⁶ For example, the Prosecution has indicted notorious physical perpetrators such as Milan Lukić, Goran Jelišić and Dragan Nikolić for crimes in Višegrad, Brčko, and Sušica Camp, respectively: *Prosecutor v. Milan Lukić & Sredoje Lukić*, Case No. ICTY-98-32/1; *Prosecutor v. Goran Jelišić*, Case No. ICTY-95-10; *Prosecutor v. Dragan Nikolić*, Case No. ICTY-94-2.

⁴⁷ For example, the Prosecution has indicted both political and military leadership figures. These have included the most senior military officers in the armies of Serbia, Republika Srpska, Bosnia and Herzegovina, and Herceg-Bosna, as well as senior military officers in the army of Croatia: *Prosecutor v. Dragoljub Ojdanić*, Case No. ICTY-05-87; *Prosecutor v. Momčilo Perišić*, Case No. ICTY-04-81; *Prosecutor v. Ratko Madić*, Case No. ICTY-09-92; *Prosecutor v. Rasim Delić*, Case No. ICTY-04-83; *Prosecutor v. Milivoj Petković*, Case No. ICTY-04-74; *Prosecutor v. Ante Gotovina & Mladen Markač*, Case No. ICTY-06-90. The Prosecution has also indicted a wide variety of political leaders: eg *Prosecutor v. Slobodan Milošević*, Case No. ICTY-02-54; *Prosecutor v. Radovan Karadžić*, Case No. ICTY-95-5/18; *Prosecutor v. Momčilo Krajišnik*, Case No. ICTY-00-39; *Prosecutor v. Milan Martić*, Case No. ICTY-95-11; *Prosecutor v. Milan Babić*, Case No. ICTY-03-72; *Prosecutor v. Biljana Plavšić*, Case No. ICTY-00-39&40/1; *Prosecutor v. Jadranko Prlić*, Case No. ICTY-04-74; *Prosecutor v. Slobodan Praljak*, Case No. ICTY-04-74; *Prosecutor v. Vojislav Šešelj*, Case No. ICTY-03-67; *Prosecutor v. Milan Milutinović*, Case No. ICTY-05-87; *Prosecutor v. Nikola Šainović*, Case No. ICTY-05-87.

encourage the commission of crimes. There will be fewer prosecutions – at the international level at least – of those who are only charged with failing to prevent or punish crimes committed by their subordinates. Again, these are difficult choices on how to best use scarce resources.

In making decisions, prosecutors must take into account the legal framework in which we operate. Compared with direct perpetrators and leaders participating in a common criminal purpose, military and civilian commanders convicted for superior responsibility have typically received lower sentences.⁴⁸ The perception may be that those who killed or wanted crimes to be committed are deserving of more severe punishment than superiors who allowed or failed to punish crimes, which almost always involves more distance from the crimes. This suggests that deterrence does not play a decisive role in sentencing. In the same vein, while both Karadžić and Mladić are charged with superior responsibility, they are also charged with responsibility for the crimes as participants in a joint criminal enterprise (JCE). Should the judges conclude that we have proved their responsibility beyond reasonable doubt for both JCE and superior responsibility, it is the practice of the Tribunal to enter convictions only for the former, with the superior responsibility simply taken into account in sentencing.⁴⁹

Case selection also impacts the scope of indictments. Early on at the ICTY, we made each indictment as comprehensive as possible, so that the largest number of victims would receive justice. As we learned, however, a comprehensive approach could, paradoxically, leave victims without any justice at all if the accused died before completion of their trial.⁵⁰ When Ratko Mladić was finally arrested, given his age and health difficulties, we reduced the scope of the indictment to the extent possible, while still ensuring that the geographic and temporal scope of the indictment was representative of the victims and the crimes committed, and including gender-based crimes in the charges.

⁴⁸ See, e.g., *Prosecutor v. Strugar*, Case No. ICTY-01-42-A, Judgment, 17 January 2008 (7.5 years imprisonment); *Prosecutor v Enver Hadžihasanović & Amir Kubura*, Case No. ICTY-01-47-A, Judgement, 22 April 2008 (3.5 and 2 years imprisonment); *Prosecutor v Rasim Delić*, Case No. ICTY-04-83-T, Judgement, 15 September 2008 (3 years imprisonment). See also *Prosecutor v Naser Orić*, Case No. ICTY-03-68-T, Judgement, 30 June 2006 (2 years imprisonment, conviction reversed on appeal).

⁴⁹ See *Prosecutor v Tihomir Blaškić*, Case No. ICTY-95-14-A, Judgement, 29 July 2004, para 91.

⁵⁰ See, e.g., *Prosecutor v Slobodan Milošević*, Case No. ICTY-02-54; *Termination of the Proceedings against the Accused IENG Sary*, Case File/Dossier No. 002/19-09-2007/ECCC/TC, 14 March 2013.

The alternative approach is to focus on smaller cases and conduct more of them. The ICC OTP initially adopted such a streamlined approach to its indictments.⁵¹ For example, while at the national level Lubanga was charged with a number of crimes allegedly constituting acts of genocide, the ICC only charged him with conscripting and using child soldiers. This charging practice also brings its own risks, of course, as it increases the chances that an accused will be acquitted should the evidence for the smaller number of crimes be insufficient. The prosecutor would then have to consider recommencing proceedings on another charge, potentially relying on the same contextual evidence already used. In its most recent Prosecution Strategy, the ICC OTP has revised its approach, which is now in part similar to the ICTY OTP's.⁵² This is a positive development that should help address some of the challenges and criticisms the ICC has faced in its first cases, and may help ensure that the ICC's prosecutions have a greater impact.

C. Fugitives

The failure to arrest fugitives is the main challenge to credible and effective international justice. At the ICC, President Al Bashir of Sudan, who is charged with genocide, crimes against humanity and war crimes, has still not been arrested almost six years after the first arrest warrant was issued.⁵³ He has traveled freely without fear of arrest, including to the territories of States Parties to the Rome Statute.⁵⁴ Arrest warrants were issued

⁵¹ See ICC, Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/report%20on%20prosecutorial%20strategy.aspx (accessed 1 February 2015).

⁵² ICC Office of the Prosecutor, Strategic Plan: June 2012-2015, pp 13, 14, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/documents.aspx (accessed 1 February 2015).

⁵³ See *Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009; *Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010.

⁵⁴ These States Parties appear to include Kenya, Chad, Djibouti, and Malawi. See, e.g., *Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Presence in the Territory of the Republic of Kenya, 27 August 2010; *Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Recent Visit to the Republic of Chad, 27 August 2010; *Prosecutor c Omar Hassah Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Demande de coopération et d'informations adressée à la République Centrafricaine, 1 December 2010; *Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Recent Visit to Djibouti, 12 May 2011; *Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision requesting observations about Omar Al-Bashir's Recent Visit to Malawi, 19 October 2011. See also *Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision Regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria, 15 July 2013;

in 2005 for five senior commanders of the Lord's Resistance Army in Uganda, including its leader Joseph Kony.⁵⁵ This group is reported to have forced over 20,000 children to fight as soldiers in the last 25 years. Recently, Dominic Ongwen, a top LRA commander, surrendered and will stand trial at the ICC.⁵⁶ However, Joseph Kony and two more LRA commanders remain at large, while another accused died without having been brought to trial. The ICTR still has 9 indictees at large.⁵⁷ The Special Tribunal for Lebanon has been unable to secure the arrest of any indictees, and their trial has begun *in absentia*.⁵⁸

The ICTY has been cited as an example of successful international justice. We can be considered a success to the extent that we are the only international tribunal with no fugitives from justice. However, it took the ICTY 18 years to achieve this.

A decisive factor in securing the arrest of the last ICTY fugitives was the diplomatic pressure applied to the States of the former Yugoslavia by the international community. This influence was concerted and clearly linked to both potential sanctions and incentives. The ICTY was able to mobilize this pressure, taking advantage of the legitimacy conferred by its role in championing the rule of law in the former Yugoslavia.

Sanctions and incentives were effectively blended by the policies of “conditionality” imposed on Serbia and Croatia by the European Union and the United States. These were vital to generating a change of political attitude, and securing the arrests of the fugitives. First, in 2001 the US Congress placed conditions on aid to Serbia, requiring the US President to certify that Serbia was cooperating with the ICTY.⁵⁹ Second, in 2002 the EU made

Prosecutor v Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, 5 September 2013.

⁵⁵ See, e.g., *Prosecutor v. Joseph Kony*, Case No. ICC-02-/04-01/05, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, 27 September 2005.

⁵⁶ See ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the surrender and transfer of top LRA Commander Dominic Ongwen, 21 January 2015, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-21-01-2015.aspx (accessed 1 February 2015).

⁵⁷ MICT, Searching for the Fugitives, available at <http://www.unmict.org/en/cases/searching-fugitives> (accessed 1 February 2015).

⁵⁸ See *Prosecutor v Salim Jamil Ayyash et al*, Case No. STL-11-01/I/TC, Decision to Hold Trial *In Absentia*, 1 February 2012.

⁵⁹ See eg Steven Erlanger, *U.S. Makes Arrest of Milosevic a Condition of Aid to Belgrade*, NY TIMES, 10 March 2001; Congressional Research Service, Report for Congress, Woehrel, S, *Conditions on US Aid to Serbia*, 7 January 2008, available at <https://www.fas.org/sfp/crs/row/RS21686.pdf> (accessed 1 February 2015), p1.

membership conditional on full cooperation with the ICTY,⁶⁰ which created powerful pressure. At each and every step of the EU accession process, the state's level of cooperation with the ICTY was evaluated. And this evaluation was based on ICTY assessments provided to the EU and to the Security Council. When progress was considered insufficient, the EU did not shy away from taking tough decisions. They postponed accession talks with Croatia in March 2005 and with Serbia in 2006, for example.

Without EU and US conditionality, many fugitives - and in particular Karadžić, Mladić and Hadžić - would still be at large. That said, to ensure the success of the conditionality policy, political action had to be coupled with investigations on the ground. We could not direct local authorities in their investigations as to the whereabouts of fugitives, but we could facilitate results by being present. Our tracking unit, and often the chief of investigations, were on the ground, asking questions and requiring information about the progress of the local investigation. What we obtained informed the assessments provided to the EU member states and the Security Council.⁶¹ Based on what we learned, the absence of

⁶⁰ See eg Bull EU 1/2-2003, Pt. 1.6.102; Bull EU 6-2004, Pt 1.7.31; European Commission 2004 Annual Report [2004] COM (2004) 202/2.

⁶¹ See e.g. ICTY, Address of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the Security Council, 4 June 2008, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/080604_proc_brammertz_un_sc.pdf (accessed 1 February 2015); ICTY, Address of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, 12 December 2008, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/081212_proc_brammertz_un_sc.pdf (accessed 1 February 2015); ICTY, Address of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the Security Council, 4 June 2009, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/090604_proc_brammertz_un_sc.pdf (accessed 1 February 2015); ICTY, Address of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the Security Council, 3 December 2009, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/091203_proc_brammertz_un_sc.pdf (accessed 1 February 2015); ICTY, Address of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the Security Council, 18 June 2010, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/100618_proc_brammertz_un_sc_e_n.pdf (accessed 1 February 2015); ICTY, Address of Serge Brammertz, Prosecutor, International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, 6 December 2010, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/101206_proc_brammertz_un_sc_e_n.pdf (accessed 1 February 2015); ICTY, Address of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the Security Council, 6 June 2011, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/110606_proc_brammertz_un_sc_e_n.pdf (accessed 1 February 2015); ICTY, Address of Mr Serge Brammertz, Prosecutor, International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, 7 December 2011, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/111207_proc_brammertz_un_sc_e_n.pdf (accessed 1 February 2015); ICTY, Address of Mr Serge Brammertz, Prosecutor, International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, 7 June 2012, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/120607_proc_brammertz_un_sc_e_n.pdf (accessed 1 February 2015).

concrete results could be criticized, shortcomings in the search methods for tracking fugitives identified, and remedies proposed.

Although the particular means by which the ICTY secured state cooperation were specific to the circumstances of the former Yugoslavia, the approach is transferable to other international courts and tribunals. The political conditions applicable to situations over which they have jurisdiction may be complex and challenging; but the ICTY's experience tells us that solving these challenges begins by recognizing that they are political problems. Outside the context of Europe, and in the complex political conditions in situations before the ICC, political and financial incentives need to be identified. The ICTY's experience in generating cooperation offers lessons that can be applied to other international criminal justice endeavors. The US State Department "War Crimes Rewards for Justice" program is a good example.⁶² This program has resulted in payment of rewards for information leading to the arrest and conviction of fugitives from ICTY, ICTR and SCSL. Active support, such as that provided by the US to Uganda's military forces searching for Joseph Kony, might also be a viable option.

One point is beyond dispute. Certainty of punishment is a key factor for deterrence.⁶³ This is not the situation today, considering the fugitive challenge facing international criminal justice. It unquestionably limits the impact of prosecutions on compliance with IHL. The impression is that the international community is not yet fulfilling fundamental responsibilities. External observers perceive that the international community is powerless or lacks will to enforce the law. Such obvious impunity may well encourage future perpetrators. It certainly does not deter them or promote compliance with IHL.

V. Moving Forward: Strengthening Compliance by Strengthening Prosecutions

A. International Prosecutions

The ICC represents the future of international criminal prosecutions. It goes without saying that universal ratification of the Rome Statute coupled with domestic implementation must be the final objective.

⁶² See US Department of State, 'Fugitives from Justice,' available at <http://www.state.gov/j/gcj/wcrp/c56848.htm> (accessed 1 February 2015).

⁶³ See Gary Becker, *Crime and Punishment: An Economic Approach*, 78 J POL.ECON. 169 (1968); Cesare Beccaria, *Des Délits et des Peines* (1764); Jeremy Bentham, *Punishments and Rewards* (1811).

Complaints are frequently leveled at the ICC that it improperly focuses on crimes committed in Africa. However, the ICC does not have universal jurisdiction. It is a treaty-based body that has been ratified by 123 States, a list that does not include many Great and Regional Powers.⁶⁴ The reality is that the ICC does not apply a double-standard; its cases reflect the limited jurisdiction that the ICC can exercise and the choices made by the Security Council in deciding which cases to refer to the ICC. Yet the perception that arises – the prosecution of some and not others – has a negative impact on the ICC’s credibility and limits its ability to promote compliance with IHL.

Until we achieve universal ratification, the Security Council’s power to refer country situations to the Court will remain crucial. The Security Council should apply the same criteria for referrals, regardless of the country concerned. There is room for improvement in this regard.

It is also important to be clear about the ICC’s role and act accordingly. The ICC as it currently stands, with a limited budget, is not capable of addressing all of the problems in the world today. If it is to fulfill the mandate given to it by States Parties and the Security Council, and avoid selectivity in its investigations and prosecutions, it needs more flexibility and a greater financial support, including an enlarged contingency budget. Citizens would never accept that a national prosecutorial authority is unable to investigate or prosecute serious crimes such as murder because it does not have enough resources. An informed decision needs to be made whether the international community will accept such a situation when confronted with the most horrific atrocities.

B. National Prosecutions

That decision, however, should not focus solely on the ICC, its financing and its capacities. While the ICC is the permanent international justice institution, it will not be the solution for every situation. Thirteen years of operation have shown the ICC’s limitations. It can likely only handle a limited number of cases, and has not yet attempted the scale of prosecutions that we accomplished at the ICTY and that situations around the world today

⁶⁴ ICC, Infographic: The States Parties to the Rome Statute, available at http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed 1 February 2015).

may require. Experience has also shown that justice is best served when it is delivered closer to the people who were affected. Where justice is handled locally by credible national or regional institutions, the local population may more easily accept judgments and the accountability process, which can further assist in peacebuilding. The lesson from the past two decades is that international tribunals, including the ICC, can't do all the work alone.

What is needed now is more attention to the Rome Statute system and the key principle of complementarity. It is becoming increasingly clear that the future of international justice will be at the national level. To reduce the impunity gap and ensure accountability, international justice is becoming increasingly nationalized.

Globally today, the overwhelming majority of prosecutions for genocide, crimes against humanity and war crimes are being undertaken by national prosecutors, in countries like Rwanda, Bosnia and Herzegovina, Serbia and Croatia. To give a sense of the scale, in Bosnia and Herzegovina alone it is estimated that some 800 cases against more than 2,500 alleged perpetrators remain to be prosecuted. These cases are not only happening in States where the crimes were committed. Prosecutions are underway in Belgium, France, Germany and other national courts as well.

Modern international criminal justice was strongly influenced at the outset by the perceived failure of national criminal justice to ensure accountability, particularly due to bias and partiality. At the time and in specific contexts, this may have been a valid assessment. The unfortunate consequence, however, was that initially insufficient attention was given to national criminal justice initiatives. International prosecutors were not specifically encouraged or mandated to cooperate with and support national prosecutions. This lesson has been learned, and cooperation between national and international authorities has now been firmly established as a core principle in justice initiatives for international crimes.

This shift from the international to the national has significant policy implications. What is needed is a re-orientation to greater support to national jurisdictions and more engagement with the rule of law on a national level. The mixed or hybrid court model for justice – bringing together international and national actors – has increasing relevance. Many

creative solutions have already been developed, such as the hybrid War Crimes Chamber in Bosnia and Herzegovina.⁶⁵ These should be carefully considered in the future.

Our experiences at the ICTY can also provide helpful guidance on practical ways to support national prosecutions. The ICTY's Completion Strategy, adopted by the Security Council, mandated us to focus our prosecutions on the most senior leaders, with the expectation that the remaining cases would be prosecuted by national authorities.⁶⁶ The OTP recognized the implications of this shift to more national prosecutions and took specific measures to re-orient our work accordingly, from a natural focus on our own prosecutions, to a more comprehensive approach aiming to close the impunity gap on every level.⁶⁷ This was an area in which the European Union and other States played a critical role by financially supporting capacity-building projects in the criminal justice sectors of the countries of the former Yugoslavia as part of the EU enlargement process.

First, we created in-house capacity to share our knowledge and expertise with national prosecutors. We established a dedicated unit in the OTP called the "Transition Team". This Transition Team enables direct communications between our prosecution teams and national prosecutors investigating related cases, allowing us to assist them to understand the evidence, the context and the issues for their investigations. It further processes requests for assistance, and oversees the transfer of our investigative case files to national prosecutors.

⁶⁵ State Court of Bosnia and Herzegovina, available at <http://www.sudbih.gov.ba/?jezik=e> (accessed 1 February 2015); ICTY, Press Release: *OHR-ICTY Working Group on Development of BiH Capacity for War-crimes Trial Successfully Completed*, 21 February 2003, available at <http://www.icty.org/sid/8298> (accessed 1 February 2015); ICTY, Press Release: *Joint Preliminary Conclusions of OHR and ICTY Experts Conference on Scope of BiH War Crimes Prosecutions*, 15 January 2003, available at <http://www.icty.org/sid/8312> (accessed 1 February 2015); Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, February 2006; Human Rights Watch, *Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina*, 12 March 2012; ICTJ, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, 2008, available at <http://www.ictj.org/publication/war-crimes-chamber-bosnia-and-herzegovina-hybrid-domestic-court> (accessed 1 February 2015); International Criminal Law Services, David Tolbert and Aleksander Kontic, *Final Report of the ICLS Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009*, 15 December 2008, available at <http://www.iclsfoundation.org/wp-content/uploads/2012/02/icls-bih-finalreportwebsitecorrected.pdf> (accessed 1 February 2015); Tarik Abdulhak, *Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina*, 9 INT'L CRIM. L. REV. 333 (2009); William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279, 286-87(2008).

⁶⁶ See SC Res 1503 (28 August 2003); SC Res 1534 (26 March 2004); ICTY, Infographic: Completion Strategy, available at <http://www.icty.org/sid/10016> (accessed 1 February 2015).

⁶⁷ See generally ICTY, Infographic: Working with the Region, available at <http://www.icty.org/sid/96> (accessed 1 February 2015); ICTY, Infographic: Transfer of Cases, available at <http://www.icty.org/sid/103> (accessed 1 February 2015).

We further developed the Transition Team concept by establishing the Liaison Prosecutor program. Under this program, funded by the European Commission, national prosecutors from Bosnia, Croatia and Serbia have been effectively seconded to our Transition Team. They work directly with us in The Hague, acting as additional contact points for their colleagues at home and accessing our databases and evidence collection on-site. In 2014, the Liaison Prosecutors handled 180 specific requests and handed over 3,086 documents comprising 102,314 pages, as well as 100 audio-visual records. We are the only international tribunal with this kind of horizontal cooperation between international and national prosecutors.

Second, we granted national prosecutors in the region direct access to our evidence and analysis. The OTP has over 9 million pages of documents, thousands of artifacts, hundreds of witness statements, and expert reports in forensic pathology, ballistics, demography, military analysis and other specialized forensic fields. We also certify materials from our evidence collection so they can be directly introduced into evidence in national trials. Similarly, we have provided national prosecutors with access to the analysis and reports generated by our experts in forensics, ballistics, military structures and operations, demography and other specialties, as well as access to the experts themselves. This allows national prosecutors to tender the reports into evidence through the ICTY experts who prepared them. Our evidence collection is an unparalleled resource that enables national prosecutors to more easily find and obtain materials that will assist their investigations and prosecutions. While the ICTY will soon close, the Mechanism for International Criminal Tribunals (MICT) will preserve our evidence collection and continue to make it available to investigators and prosecutors in the region and throughout the world.⁶⁸

Third, we engage in extensive capacity-building. Our staff has participated in numerous trainings, peer-to-peer meetings and seminars in the region. They share with their national counterparts the tools, techniques and expertise that have proven to be of assistance in our investigations and prosecutions. We have also instituted a young professional program to help build the capacity of national criminal justice systems, which again has been funded by the European Commission. Young professionals join the OTP as interns and work directly

⁶⁸ See SC Res 1966 (22 December 2010), Annex 1 (MICT Statute), Annex 2 (Transitional Arrangements).

with our trial teams, enabling them to develop quality skills in investigations, case management, oral advocacy and legal analysis.

Finally, we have invested in building national prosecution strategies and a regional cooperation framework. With our support, national prosecutors have created cooperation protocols governing operational matters between them. In addition, we supported the development of a national war crimes prosecution strategy in Bosnia and Herzegovina, in order to prioritize investigations and prosecutions as well as efficiently distribute cases among local courts and prosecutors.

This model should be applied to other international criminal justice initiatives to help reduce the impunity gap. Skills training for investigators and prosecutors is a key component of this support. National investigators and prosecutors have the local knowledge and presence; what they need are the specialized tools and techniques we have utilized for successfully prosecuting complex crimes. Such training has positive side-effects, as the skills developed can equally apply to other complex crimes like terrorism, corruption and organized crime.

National authorities should adopt key methodologies that are the rule at the international level, which international assistance can then support. At the ICTY, we relied heavily on multi-disciplinary investigative teams that included forensic pathologists, ballistic experts, demographers, military analysts, cartographers and political analysts. National prosecutors can learn from our experience and adopt this multi-disciplinary approach, particularly to understand the crimes in their context. Since such expertise may not always be available locally, international organizations should consider providing support with needed forensic specialties, as the International Commission for Missing Persons already does for forensic pathology, anthropology and DNA profiling.

National prosecutors' access to evidence is also an important issue. The ICTY received extensive cooperation from States and international organizations in gathering evidence, much of which was sensitive and implicated important State interests. National prosecutors of course need to develop their capacity to cooperate with other States. Nonetheless, it is unrealistic to expect that alone they will be able to achieve the same high-level of cooperation and access as the ICTY. What is needed is additional support to bridge

this gap between national prosecutors and potential information providers in other States and international organizations.

C. Investigation Commissions

Related to issues facing international and national tribunals, there is one area that offers immense potential to support prosecutions through relatively easy reforms: international investigation commissions. If crimes are committed, potential IHL violations must be subject to immediate evaluation and a determination regarding the appropriate response: providing technical help to the affected country, setting up hybrid national or international structures, or referring the situation to the ICC. This requires a small multidisciplinary team that has expertise and can be deployed at short notice.

This function has been undertaken by a multitude of international investigation commissions in many parts of the world. Since 1993, the United Nations alone has deployed more than 30 investigation or fact-finding commissions,⁶⁹ such as in response to the December 2007 assassination of Pakistani political leader Benazir Bhutto⁷⁰ and the violent 2009 crackdown on demonstrators in Guinea.⁷¹

Like *ad hoc* tribunals, these commissions face many challenges. The very existence of investigation commissions depends upon the political will to create them, endow them with concrete powers and continue to support them. Investigation commissions often “reinvent the wheel,” an inefficient use of critical time and resources. Staff have to be recruited, working methods and reporting structures established, resources assembled and logistical and security arrangements made. As of yet, there are no standard quality-controlled operating procedures for collecting and storing evidence or for investigative approaches. Similarly, there are no established mechanisms for these commissions to share knowledge, with each other, international and national tribunals, peacekeeping missions or the UN system. In some

⁶⁹ See Michelle Martin and Leticia Villareal Sosa, *An Empirical Analysis of United Nations Commissions of Inquiry: toward the Development of a Standardized Methodology*, in Siracusa Guidelines for International, Regional and National Fact-Finding Bodies, Cherif Bassiouni and Christina Abraham eds. (2013) (identifying 30 United Nations Commissions of Inquiry for analysis).

⁷⁰ Report of the United Nations Commission of Inquiry into the facts and circumstances of the assassination of former Pakistani Prime Minister Mohtarma Benazir Bhutto, 15 April 2010, available at <http://www.un.org/apps/news/infocusRel.asp?Body=Bhutto&Body1=&infocusID=77> (accessed 1 February 2015).

⁷¹ S/2009/693, Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, 18 December 2009.

instances more than one body has been established to investigate the same incident. For example, two distinct commissions were set up to investigate the 2010 Flotilla incident, one by the Secretary-General's Office and one by the Human Rights Council.⁷²

This overall lack of coordination has impeded the emergence of a uniform approach to running international investigations that can support national and international prosecutions. It is an area where effectiveness and cost-efficiency can be improved together. A promising option would be to establish a permanent international investigation commission within the United Nations framework that can provide a rapid response capacity and integrate investigation commissions into the framework for responding to conflict crimes and mass atrocities.

It would comprise a small, multi-disciplinary group of professionals – investigators, analysts, criminal lawyers and forensic experts – to be deployed at the direction of the relevant organs of the United Nations. This core group of personnel could be supplemented by experts who would be engaged depending on the task in question and their particular skill sets. This approach could build on developments that are already occurring within the field, such as the Justice Rapid Response Initiative, which aims to train personnel and facilitate the rapid deployment of experts for international investigations.⁷³ With a permanent institutional capacity, experts could be rapidly deployed to crime scenes; rather than weeks or months as is presently the case, investigators could be on the ground within days. Standard operating procedures and stores of immediately available technical equipment would further facilitate timely and effective responses to emerging situations.

States and supporters of international justice should seriously consider how to entrench and make better use of international investigation commissions. These commissions should not be seen as in competition with existing international justice mechanisms, such as the ICC, but as partners. Investigation commissions have the potential to greatly assist later

⁷² A/HRC/15/21, Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, 27 September 2010; Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011, available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf (accessed 1 February 2015).

⁷³ See Justice Rapid Response, Fact Sheet, available at http://www.justicerapidresponse.org/wp-content/uploads/2015/01/Justice_Rapid_Response_Fact_Sheet_ENGLISH_January-2015.pdf (accessed 1 February 2015).

accountability initiatives, at both the international and national levels, by obtaining contemporaneous evidence, mapping conflicts and crimes, identifying political and military structures and building support for criminal prosecutions. That potential is not being fully realized today, but a permanent UN capacity to support robust international investigation commissions, if properly mandated and tasked, would be an effective and cost-efficient mechanism to strengthen prosecutions and compliance with IHL.

VI. Conclusion

International justice alone will never end a conflict, stop ongoing serious violations of international humanitarian law or prevent their future commission. The ICTY was created in 1993, yet the Srebrenica genocide occurred in July 1995. The conflict only ended with a negotiated political settlement – the Dayton Agreement – in late 1995. The Kosovo conflict then took place in 1999, ending again only with a political settlement. Serious violations of IHL also continued after other accountability initiatives commenced in places like the Great Lakes region, Sierra Leone and the Central African Republic. To put a halt to crimes in conflicts, there first have to be political solutions to halt the conflicts themselves. The absence of a political settlement should not be masked behind decisions to create accountability mechanisms or refer situations to the ICC.

While prosecutions alone are not enough, they are still essential to any effort to improve compliance with IHL and deter future violations. International justice faces a number of challenges. Prosecutors, civil society and policy-makers each have a role to play in improving the effectiveness of the justice process. But the ultimate challenge today is that accountability and punishment remain the exception, not the rule. If international prosecutions still have imperfect impact and violations of IHL continue, the solution is more justice, not less. Then military and political leaders will know with certainty that they will be held accountable for crimes committed by their subordinates.