Freie Universität Berlin

Berliner Online-Beiträge zum Völker- und Verfassungsrecht

Beitrag Nr. 2
online seit 13.11.07

Robert Cryer:

Tylor, Hussein, Milošević
Will the leaders face justice?

herausgegeben von
Univ.-Prof. Dr. Heike Krieger

Zitiervorschlag:
Cryer, Taylor, Hussein, Milošević, Will the Leaders Face Justice?, in: Krieger, Berliner Online-Beiträge zum Völker- und Verfassungsrecht Nr. 1/2007, 2-5.

Dieser Aufsatz unterliegt dem Schutz des Urheberrechts und anderer Schutzgesetze. Er darf nicht zu kommerziellen Zwecken kopiert, verbreitet, verändert oder Dritten zugänglich gemacht werden.

Introduction

In the last fifteen years or so, there has been a swing to international criminal justice that is little short of amazing, in the literal sense of the word. One hundred years ago, in the Second Hague Conference, the idea was not even considered.[1] In 1993, when I first became interested in international criminal law, works on international criminal courts could be found in bookshops, unfortunately sharing shelves with books like the Lord of the Rings and other works of fancy and imagination. Few could, and even fewer would, have disagreed with that doyen of international lawyers (or at least British ones) Ian Brownlie, when he said in 1990, that "in spite of extensive consideration of the problem in committees of the General Assembly, the likelihood of setting up an international criminal court is very remote".[2]

Yet here we are, a decade on, with almost a plethora of functioning international criminal tribunals, such as the ICTY, ICTR the ICC, as well as the "Special Court" for Sierra Leone. Lest we forget even as recently as 1997 (and perhaps even, really, the Rome negotiations in 1998) it was questionable whether or not there would be a permanent international criminal court, and indeed when the Rome Statute was promulgated there were those that thought that the reason Article 126 of the Rome Statute required 60 ratifications before it came into force was essentially an American-led plot designed to make sure that the Rome Statute never came into force.[3] Yet it did, on 1 July 2002; fewer than four years after its promulgation. By way of comparison, the ICCPR took over 10 years to come into force, despite its far weaker enforcement mechanisms. As it stands, 105 States in the world (i.e. more than half of the States in the world) have ratified the Rome Statute, and early fears that only good international citizens like Norway would ratify rather than States with, shall we say, problems, have not proved justified in practice.

Nonetheless, we must be careful not to present what Georg Schwarzenberger described as the chocolate box version of international law and society.[4] There is often a feeling of triumphalism with respect to international criminal law, which ignore some rather important issues, some of which are referable to the nature of the international legal order, some of which are referable, on the other hand, to insalubrious forms of politics. It remains the case that the international legal order it torn between two imperatives, what Hedley Bull would have described as the pluralist and the solidarist views,[5] and the difference between an international society and an international community.[6] I will concentrate on the *a fortiori* case for prosecution, leaders of States, and those who, if we agree with what we will see it the general thrust of international criminal law, bear the greatest responsibility for international crimes,[7] those at the apex of the command structure, in particular, heads of government.

LEADERS OF MEN

This has been made clear, for example, in the Statute of the Special Court for Sierra Leone, by Article 15(1), which provide that 'The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law…'[8] Furthermore the Prosecutor of the ICC has himself said that his focus is not on the 'small fry', but on

[1] Although there had already been a private proposal, from Gustav Moynier, in 1872, see Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 57.

[2] Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 4th ed., 1990) pp.563-564.

[3] William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: CUP, 3rd ed., 2007).

[4] Georg Schwarzenberger, 'The Misery and Grandeur of International Law' (1964) 17 *Current Legal Problems* 184, pp.185-6.

[5] For modern expositions see Barry Buzan, *From International to World Society* (Cambridge: CUP, 2005) and Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: OUP, 2000) Chapter 1.

[6] See Jason Ralph, *Defending the Society of States: Why the US Opposes the International Criminal Court* (Oxford: OUP, 2007)

[7] The ICTY has consistently held that abuse of authority is an aggravating factor, see e.g *Prosecutor* v *Blaškić* , Judgment, IT-96-14-A, 29 July 2004, para 727; *Prosecutor* v *Babić,* Judgment, IT-03-72-A, 18 July 2005, para 81.

[8] See the discussion in *Prosecutor* v *Brima, Kamara and Kanu*, Judgment, SCSL-04-16-T, 20 June 2007 paras 640-659.

those that bear greatest responsibility for international crimes, and that he will not be concerning himself with lower-level offenders (unless perhaps they have committed particularly egregious crimes.[9]

This is consistent with the fact that the preamble of the Rome Statute of the International Criminal Court, which states that the Court is for the most serious crimes of concern to the international community of States as a whole, and Article 17(1)(d) of the Statute provides for the inadmissibility of the case when it is not sufficiently grave to justify the use of the Court.[10] At one level all international crimes are grave offences, they would certainly be seen as such in domestic legal systems. However, it must be remembered that the gravity test needs to be applied against the background of the fact that it applies within the class of international crimes over which the ICC has jurisdiction. Otherwise the provision would be unnecessary, as the court would have no material jurisdiction over the offences anyway, and that is a ground requiring the Prosecutor not to investigate at an earlier stage than admissibility under Article 53.

This interpretation has been confirmed by the Prosecutor in his response to communications relating to British actions in Iraq.[11] Here he rejected the claims that he should investigate UK officials for aggression, owing to the fact that Article 5(2) of the Rome Statute does not permit the ICC to exercise jurisdiction over aggression unless and until a definition is included in the Statute, and that the allegations relating to a small number of case relating to the mistreatment of detainees, including one relating to the killing of Baha Mousa, an Iraqi hotel receptionist in British custody, were not sufficiently grave to warrant the opening of an investigation by the ICC. Although this was not beyond controversy, the basic principle seems accepted.

Some, such as Geoffrey Robertson, the ex-president of the Special Court for Sierra Leone have gone as far as to say that international law has developed to the level that although at times amnesties for lower level offences may be granted, there is a current norm prohibiting any amnesty for those at the top level. This may (in relation to crimes not covered by treaty based obligations to prosecute) be a little in advance of what international law currently says, the accurate position is probably summed up in the *Kallon and Kamara* decision of the Special Court, 'that there is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law' is amply supported by materials placed before the Court [but the view] that it has crystallised may not be entirely correct…it is accepted that such a norm is developing under international law'.[12] Nonetheless, it is generally accepted that international courts, in particular ought to be 'aiming high' and indeed they are criticised when they do not, as the ICTY was in relation to its first defendant, the low level part-time persecutor Duško Tadić and, with less (but not no) justification, the ICC has in relation to Thomas Lubanga, its first defendant.

This is not to say that prosecuting lower-level offenders is not important, it is. Scholarly (and political) debate often concentrates on why it is important to prosecute those most responsible (for reason such as deterrence of those who otherwise think themselves beyond the law, telling the story of the conflict, and avoiding the paradox that a person who kills one person is more likely to be prosecuted than one who has killed thousands, as well as the idea that certain types of people need to be kept out of conflict situations when they have shown themselves to refuse to accept peace not solely on their terms). These may all be

---

[9] Paper on some policy issues before the Office of the Prosecutor', September 2003, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf p.7.

[10] See generally John T. Holmes, 'Complementarity: National Courts *versus* the ICC' in Antonio Cassese, Paula Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, OUP, 2002) 667.

[11] *Report of the Prosecutor on Communications Related to Iraq* June 2006 available at www.icc-cpi.int

[12] *Prosecutor* v *Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15-AR72(E) and SCSL 2004-16-AR72(E) 13 March 2004 para 82.

important (although there are questions about precisely how well prosecutions can fulfil these aims)[13] but there are other reasons that lower level offenders need punishment.

The first of these is quite simple, people at the local, ground level often see leaders as far away, and want to see the people who turned them from their homes, killed their families, and abused them prosecuted rather than walking around their home towns. Any reconciliative function that international criminal law can have can be undermined when people are expected to reconcile with their neighbours and erstwhile persecutors on the basis of a trial of someone who sat in the capital. It must be remembered that reconciliation is an individual process at least as much as a societal one.[14] Next is the problem, for many perpetrators, even those of a fairly high level, who are part of a bureaucratic system dedicated to the commission of international crimes, but who are, in Hannah Arendt's memorable phrase about Adolf Eichmann, although evildoers, 'banal' evildoers,[15] who allow themselves to become an unthinking cogs in a machine have, by doing that itself, engaged in considerable wrongdoing, and the message ought to be brought home, in part through the expressive function of punishment, that such persons are responsible for that wrongdoing, as has been said by Alain Finkielkraut[16] and Arne Vetlesen,[17] amongst others. This point retains its vitality, in spite of the fact that Arendt was probably wrong in relation to Eichmann himself, who was not the banal, unreflective bureaucrat he was portrayed as by his defence team.[18]

The Problems of Bringing Leaders to Justice

So, after that digression into the developing set of ideas relating to prosecuting leaders and followers, let us turn to some of the legal and practical problems that arise when we try to bring leaders to justice, particularly, although not exclusively, before international courts. As we will see, they are often interlinked.

Principles of Liability

Criminal law is, understandably, focussed primarily on the physical perpetrator of offences, the person who pulls the trigger, administers the fatal blow, or sells the narcotics. However, as William Schabas has noted, international criminal law tends to have a greater focus on those who are not direct perpetrators in this manner, but those who lead, order or permit offences from on high.[19] However, for the most part, leaders are far away from the actual offences, and pursuant to policies of plausible deniability tend not to write their orders down, but let others know their wishes in less permanent manners. Nazi Germany (and at times Saddam Hussein's Ba'ath regime) were exceptions in this regard. For most other cases though, as the Prosecution found in the *Milošević* case a considerable evidential hurdle has to be overcome to link those in lofty positions to the offences committed on the ground. As a result, two doctrines have been developed that seek, in addition to reflecting the way in which collective action crimes, which many if not most

[13] See generally Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: CUP, 2007) Chapter 2.

[14] See, in part, Arne J Vetlesen, *Evil and Human Agency, Understanding Collective Evildoing* (Cambridge: CUP, 2005).

[15] Hannah Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil* (Harmondsworth, Penguin, 1994).

[16] Alain Finkielkraut, (Roxanne Lapidus trans.), *Remembering in Vain*: *The Klaus Barbie Trial and Crimes Against Humanity* (New York, Columbia UP, 1992)

[17] Vetlesen, *supra* n14.

[18] *Ibid*.,

[19] William A. Schabas, "Enforcing International Humanitarian Law: Prosecuting the Accomplices" (2001) 843 *International Review of the Red Cross* 439, p.440. Although in certain civil law systems, the *Hintermann* idea is used to consider the director of offences committed by others to be perpetrators, Claus Kreß 'Claus Roxin's Lehre von der Organisationsherrschaft und das Völkerstrafrecht' (2006) *Goltdammer's Archiv für Strafrecht* 304.

international crimes are, tend to be committed: Command (Superior) Responsibility and Joint Criminal Enterprise.[20] Neither is uncontroversial.

Command Responsibility

Command responsibility is the liability that attaches to those in a position to prevent or punish international crimes committed by their subordinates. It applies to both civilian and military superiors.[21] It is reasonably well explained for present purposes by Article 7(3) of the ICTY Statute.

> The fact that [crimes were] 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.[22]

It has three major aspects, first, a superior/subordinate relationship; second, the 'mental element' and third, a failure to take reasonable measures to prevent or punish violations of international criminal law.[23] Importantly, it is an offence that can be proved by proof, not of giving orders, but of omission, and does not even require proof that the leader knew of the offences, merely that he had reason to know or should have known of them.[24]

The principle is an important one, but as, mentioned above, it is not without controversy. In its initial formulation, in the *Yamashita* case, one of its justifications was brought into the open, the court found hat he either must have tolerated them, or secretly ordered them.[25] Some criticise this, on the basis that failures in evidence should not lead the development of new incuplatory doctrines.[26] This is true, but it must be remembered that the doctrine is linked strongly to the duty on a superior to prevent international crimes over which he has control, a failure in this regard can be appropriately criminalised.[27]

Nonetheless, as it stands, command responsibility is problematic, perhaps because it covers too many different forms of liability. It moves from knowing failures to intervene despite a duty, which are close to traditional complicity ideas, to, in essence, negligent dereliction of duty.[28] This is recognised by the German law relating to the subject, which deals separately with failure to know of offences in dereliction of duty, failure to report an offence, and knowing tolerance of offences when there is a duty and ability to intervene

---

[20] The literature on both is huge, for a sample see Albin Eser, 'Individual Criminal Responsibility' in Antonio Cassese, Paula Gaeta and John R.W.D. Jones (eds.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford, OUP, 2002), 767; Mark Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity' (2005) 105 *Columbia Law Review* 1751; Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, T.M.C. Asser Press, 2003); W. Hays Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1; Mirjan Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 *American Journal of Comparative Law* 455.

[21] See Tokyo IMT Judgment, pp.48,442-7; *US* v *Karl Brandt et al (The Doctors' Trial*) IV LRTWC pp.91-3.

[22] Arts. 6(1) of the ICTR Statute and 6(1) of the SCSL Statute are essentially the same. Article 28 of the Rome Statute is slightly different, especially on the mental element required for civilian superiors and causation. The difference need not detain us here, however.

[23] *Delalić, Mucić, Delić and Landžo* (*Čelebići*), Judgment, IT-96-22-A, 11 November 1998, para 344. Gerhard Werle*, Principles of International Criminal Law* (Cambridge: CUP, 2005) pp.136-37. *Čelebići*, para 346.

[24] This is not the customary position, see *Prosecutor* v *Bagilishema*, Judgment, ICTR-95-1A-A 3 July 2002, para 52

[25] *In re Yamashita* (1945) 327 US 1, p.??

[26] Kai Ambos, 'Superior Responsibility' in Antonio Cassese, Paula Gaeta and John R.W. D Jones (eds.), *The Rome Statute for the International Criminal Court: A Commentary* (Oxford: OUP, 2002) 823.

[27] See Robert Cryer, 'General Principles of Liability in International Criminal Law' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal ad Policy Issues* (Oxford: Hart, 2004) 233, pp.260-261

[28] For an extremely useful discussion of this matter, see Damaška, above n21, pp.460-471.

to prevent it.[29] By making all akin to complicity, the ICTY and now the Rome Statute distort the concept of complicity considerably, extending it beyond knowledge of offences.[30] This also "display[s] a measure of insensitivity to the degree of the actor's own personal culpability",[31] and as William Schabas notes, providing for the negligent commission of intentional offences.[32]

Joint Criminal Enterprise

Despite the prominence Command Responsibility is thought to have in leadership trials, the more frequent approach by the ICTY prosecutor, including in the Milošević trial, is Joint Criminal Enterprise. This is a doctrine which was derived, not without controversy, from a few post-war cases in the *Tadić* decision. It is a principle of liability which lies somewhere between conspiracy and aiding and abetting and covers three situations: 'co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). …so-called "concentration camp" cases,' and 'type three' joint criminal enterprise, where crimes are committed by members of the group, outside its common purpose, but as a foreseeable incident of it.[33] It determined that all three types shared a common *actus reus*, namely that there was:

> i. A plurality of persons.
> ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.
> iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.[34]

The mental element is probably where the controversy really comes in, it extends to

> the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[35]

From the point of view of fairness to the defendant, the vague, 'elastic' nature of the doctrine has led to claims that it is overbroad, thus reliant on prosecutorial discretion rather than law to keep it in check.[36] Fears have also been expressed about the extent to which it encourages prosecutors to bring indictments

---

[29] There have been some attempts in the ICTY to cast command responsibility in a different light (see *Prosecutor* v *Hadžihasanović*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-54-AR72, 16 July 2003, Dissenting Opinion of Judge Shahabuddeen, para 33. See also *Prosecutor* v *Orić* Judgment, IT-03-68-T, 30 June 2006, para 294, but they are not how the principle has traditionally been seen, nor has is been so seen by the Rome Statute

[30] *Ibid.*

[31] *Ibid.*, p.456.

[32] William A. Schabas, "General Principles of Criminal Law in the International Criminal Court Statute (Part III)" (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 400, p.417.

[33] *Prosecutor* v *Tadić*, Judgment IT-94-1-A, 15 July, 1999, para 220. See also *Prosecutor* v *Gacumbitsi*, 2001-64-A, 7 July 2006, Separate Opinion of Judge Shahabbuddeen, para 40.

[34] *Ibid.*, para 227.

[35] *Ibid.*, para 228.

[36] Osiel, *supra* n21, pp.1799-1802.

that assert joint enterprises in a very general manner, making preparation difficult for the defence.[37] Turning to the *mens rea*, a person can be convicted of specific intent crimes such as genocide even if that person did not have the relevant *mens rea* for that offence, but the crimes were a natural and foreseen incident of the enterprise he or she was involved in on the basis of joint criminal enterprise.[38] This has led to criticisms of joint criminal enterprise liability, as allowing the prosecution to circumvent the proper *mens rea* requirements for such serious crimes,[39] especially as the ICTY considers Joint Criminal Enterprise as a form of perpetration rather than a separate principle of liability.[40] The principle does go some way to describing the joint nature of many international crimes and explaining the culpability of some participants not otherwise easily brought under the ambit of criminality, in spite of their blameworthiness.[41]

As can be seen, though, both of these ways which have been used to attempt to circumvent the evidential problems that arise when prosecuting leaders and reflect the way in which they participate in international crimes. Despite their positive aspects, we also have to accept that they are not always used or interpreted with sufficient care with respect to the principle of individual culpability. This is only one example of Mark Osiel's point that it is difficult to prosecute high-level offenders within a liberal framework[42] (although the difficulty is no reason not to, or to abandon a liberal framework for prosecution).

Prosecution Strategy

This leads on to a separate issue, which has recently arisen with respect to the trials of Slobodan Milošević and Saddam Hussein. This is the ambit of the indictment. Should the prosecutor move to indict a person, as the OTP of the ICTY did with charges that span the entire set of crimes for which they are thought to bear responsibility, or proceed, as the Prosecution in the Saddam Hussein proceedings did, and attempt to focus on one or more easy cases. Both strategies have their advantages.

The idea of the large indictment, which of course was the approach taken by the Nuremberg and Tokyo International Military Tribunals. These have the advantage, if it is one, of being able to provide a large narrative of the conflict(s) as a whole , and one of the asserted benefits of criminal trials is that they help combat denial (and some go further to say promote reconciliation) by subjecting the facts to forensic scrutiny.[43] They also, where they the charges are adequately proved, provide, so far as is possible, for retribution at the appropriate level to the offences committed. This is linked to the idea that all the person's victims will be given some satisfaction and have their suffering recognised. It also has the advantage of treating all the charges together, and in instances of crimes against humanity and, to some extent, genocide, where the contextual elements are of the essence in proving the charges, litigating broader aspects of the conflicts can be important.

Nonetheless, there are pitfalls to this it can lead to long, unwieldy trials, and give large leeway to the defence for dilatory tactics, either to delay proceedings excessively, or in the hope that the Tribunal will react in a manner that can be turned to their advantage and such that they can claim violations (sometimes justified) of breaches of fair trial rights. In addition, since leaders are often advancing in ears by the time they reach trial there is always the risk of their death during the trial, which leaves a taste of futility in the mouths of many. It also encourages prosecutors to issue indictments which mix charges which are not as

---

[37] Guénaël Mettraux, *International Crimes and the ad Hoc Tribunals* (Oxford, OUP, 2005) p.293.

[38] *Prosecutor* v *Brđjanin and Talić*, Judgment, IT-99-36-A, 19 March 2004.

[39] Mettraux*, supra* n.38, p.265; Osiel, *supra* n21, p.1796.

[40] *Prosecutor* v *Odjanić et al*, Decision on Motion on Jurisdiction-Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2005, para 20

[41] Mettraux, *supra* n38, 292; Osiel, *supra* n 22, pp.1786-1790, but see 1802.

[42] Mark Osiel, 'Why Prosecute, Critics of Punishment for Mass Atrocity' (2000) 22 *Human Rights Quarterly* 118.

[43] E.g. Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick: Transnational, 1997).

supported as others, and each acquittal serves to undermine part of the narrative that the prosecution was seeking to set up.[44] As noted above, there are inculpatory doctrines specific to international crimes which deal in some way with evidential problems, but they are risky, if they are expanded too broadly, they ignore culpability, and will be subjected to critique.

The virtues of the smaller charge, with the possibility of further charges later, approach are largely the converse of the critiques of the larger trial, they are comparatively simple, quick, and easy to run. The prosecutor in this instance is likely to investigate a number of different incidents, and begin with the case which is the strongest. This is what happened in the Dujalil trial. Still, they are not free from problems, the first being it can only partially reflect what the person is suspected of doing, and cases like Dujalil tend to be chosen not because they are especially representative, or comparatively serious, but because the prosecutor knows that he or she is going to be able to prove it. As a result, only a small part of the overall story gets told, and many victims will not have their tales told. It is true that there may be the possibility of further trials, but, where, as with the Saddam trial, the person is sentenced to death, this is impossible. In the particular case this means that the Kurds and the Iranians, as well as the Kuwaitis and Coalition personnel who were mistreated in 1991 will never see Saddam stand trial for offences against them. Even where this reprehensible punishment is not imposed, further trials will probably take a long time, longer than even a large trial is likely to, as the process has to go through all the relevant stages again.

Given the problems of both of these, it must be said, a prosecutor is offered a difficult choice, and is in some ways caught on the horns of an almost insoluble dilemma. Perhaps the best way forward is to try at least to deal with a manageable number of representative instances, where the evidence is strong.

Co-operation

This leads to a large problem, that of obtaining both evidence and defendants. Everything that has been said so far implies that the person concerned is actually already before the court and that there is (admissible) evidence against them. As we know, this is not always the case. The ICTY and ICTR both have strong powers to order compliance, whilst the ICC has somewhat weaker powers here.[45] Irrespective of the powers they have in theory, though, it is difficult to obtain people or evidence without some state co-operation, or a resort to irregular rendition as occurred in a number of cases before the ICTY such as Dokmanović.[46] In this area, a sympathetic *locus delicti*, as Rwanda has, usually[47] proved, means that co-operation is infinitely more likely to be forthcoming than in situations where it does not feel that it is in its interest to comply. When a sitting head of State or high ranking government official is being sought the State is essentially certain to decide it is not, and to weather the costs. It is only after Milošević was deposed in the wake of local protests that he was handed over to the ICTY, and then only after a large IMF loan was mothballed until he was handed over. Similarly, it is unthinkable to Rwanda to co-operate with any investigations into the possible liability of high-ranking members of the new government, and it has even been alleged that attempting to initiate such investigations cost Carla del Ponte her job as Prosecutor of the ICTR.[48] Where the *locus delicti* is unwilling, co-operation coming from third States relies

[44] On all the above aspects, see, for example, Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge: CUP, 2007).
[45] Compare Articles 29 ICTY Statute (28 ICTR Statute) and Articles 86, 89 and 91 Rome Statute.
[46] *Prosecutor v. Mrkšić Kvočka, Radić, Žigić and Prcać*, Decision on the Motion for Release by the Accused Slavko Dokmanović, IT-95-13a-PT, 22 October 1997.
[47] For an instance to the contrary see William A. Schabas, 'Prosecutor v Barayagwiza' (2000) 94 *American Journal of International Law* 563.
[48] Luc Reydams, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?' (2005) 3 *Journal of International Criminal Justice* 977.

on the happenstance of the person or evidence being found in that State and the State being willing to co-operate with the relevant tribunal or requesting State. Sometimes, as in the *Pinochet* litigation,[49] this is the case, at other times, such as with respect to Charles Taylor during his Nigerian exile, prior to the Liberian request that he be handed over to the Special Court, it is not.

Immunities

This itself brings us to the vexed question of immunities. Taylor was, of course indicted whilst he was a sitting head of State, and in relation to high level governmental officials (precisely which ones remains a matter of debate), as the ICJ reaffirmed in the *Yerodia* case,[50] retain their immunity before courts even when there are allegations of international crimes. There is an exception to this, such persons do not retain their immunity before 'certain international tribunals'. The ICTY and ICTR are clearly covered by this, as, according to Article 27 of the Rome Statute, is the ICC. This exception was controversially interpreted by the Special Court for Sierra Leone in the Taylor case to include that Court, even though its basis was a treaty between the UN and Sierra Leone, to which Liberia was not a party.[51]

Normally, though the personal immunity of high level governmental officials extends, absent any special applicable provision to the contrary, to arrest and detention for the purpose of arrest or transfer to international tribunals. The ICTY and ICTR are exceptions to this, but this can be put down to the fact that their Statutes were passed by Security Council Resolutions (827 and 955 respectively), under Chapter VII, and which, by virtue of Article 103 of the UN Charter, trumps those immunities. For parties to the Rome Statute, it is broadly accepted that parties have waived their immunity before foreign courts for the purposes of co-operation with the Court. For non-State parties, however, Article 98(1) of the Rome Statute requires State parties not to violate the immunities accepted in international law. All of which renders obtaining co-operation in the surrender of high-ranking officials even harder, a point which can be worrying, if it causes leaders to commit more crimes to stay in power as long as possible (or render themselves a necessary part of the peace process) in the hope of avoiding justice.[52]

Conclusion

All of which might sound unremittingly negative, if so, it must be emphasised that it is not intended to be, similarly nor is it counsel in favour of not attempting to prosecute leaders. It is precisely the opposite. The swing towards justice is an exceptionally important legal (and moral) development, and just as something is difficult does not mean that it ought not to be pursued with vigour. It is worth, however, doing so aware of the possible pitfalls that such prosecutions face, it is only by facing such problems that progress can be made.

In a statement released just after the Rome Conference, which adopted the Statute for the International Criminal Court (ICC) Amnesty International claimed: '[t]he true significance of the adoption of the statute may well lie, not in the actual institution itself in its early years, which will face enormous obstacles, but in the revolution in legal and moral attitudes towards the worst crimes in the world. No longer will these crimes be simply political events to be addressed by diplomacy at the international level, but crimes which all states have a duty to punish themselves, or, if they fail to fulfil this duty, by the international community

---

[49] *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others*, ex parte *Pinochet Ugarte (Amnesty International and others intervening*), (No. 3), [1999] 2 All E.R. 97. Rosanne van Alebeek, 'The Pinochet Case: International Human Rights Law on Trial', (2001) 71 *British Yearbook of International Law* 29

[50] *Case Concerning the Arrest Warrant of 11 April 2000* (DRC v Belgium) ICJ List 114, 14 February 2002.

[51] *Prosecutor v. Taylor,* Decision on Immunity from Jurisdiction, SCSL-2003-01-I-A, 31 May 2004.

[52] See further Cryer, Friman, Robinson and Wilmshurst, *supra* n14, Chapter 20.

in accordance with the rule of law.'[53] This assertion contains more than a grain of truth. Recent practice, including the creation of the ICC reflects, and contributes greatly to, a significant cultural turn to accountability. Fifteen years ago, most of those accused of international crimes could sleep soundly, fairly sure that they would not be required to stand trial for their conduct. It is unlikely that Augusto Pinochet or Hissene Habré thought that international law would be brought to bear upon them. Both of them, to different extents, have been proved wrong, even if, on the basis of what had occurred since Nuremberg and Tokyo, their opinion had an empirical basis.

If nothing else, we are now in the situation where they may begin to have to reassess the situation. In 1907 no-one at the Hague Conference could have seriously thought that an International Criminal Court would be in existence within the next hundred years. Perhaps in 2107, or, it is to be hoped, a little earlier, no-one could seriously imagine being without one, and those most responsible for international crimes are far more uncertain of the place they will spend their retirements they were in the twentieth century.

[53] Quoted in William Pace and Mark Thieroff, 'Participation of Non-Governmental Organizations' in Roy S. Lee *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer, 1999) 391, at 396.