

State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda

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When establishing the International Criminal Tribunals for the Former Yugoslavia (Yugoslav Tribunal) and for Rwanda (Rwanda Tribunal) in 1993 and 1994, the United Nations Security Council was aware of the fact that the success of the Tribunals would depend primarily on the cooperation of national states with these Tribunals. The contributions of states to the Tribunals' investigations, and national assistance to international court proceedings were considered, and later proved to be, the key factor in fulfilling the Tribunals' mandate — the prosecution of violations of international humanitarian law committed during the conflicts in former Yugoslavia and Rwanda in the beginning of the 1990ies.

Today, the Tribunals are fully operating, having overcome initial difficulties as well as several difficult interim problems. Even so, the cooperation of states remains an indispensable requirement for efficient proceedings of both Tribunals.

This article focuses on state cooperation with the International Criminal Tribunals from the national perspective. State responsibilities, compiled under the heading "state cooperation" will be presented, followed by a presentation of the legal implications that these responsibilities hold for states. Finally, this paper will highlight both the implementation of these responsibilities into national law, as well as state willingness to cooperate with the Tribunals in practice thus far.

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I. Legal Authorization of the International Criminal Tribunals

In response to the atrocities which accompanied the dissolution of the former multinational State of Yugoslavia beginning in June 1991 and the ineffectiveness of other measures to restore peace,¹ the UN Security Council, decided in Resolution 808 (1993) to establish an international tribunal to prosecute the most serious violations of international humanitarian law committed during the Yugoslav conflict.² It accordingly requested the Secretary-General to submit a report to the Council on all aspects of this matter, including specific proposals and appropriate options for the effective and expeditious implementation of the aforementioned decision.³

On 3 May 1993, the Secretary-General submitted a report⁴ which contained in its Annex a draft Statute for an International Tribunal for the Former Yugoslavia. This Statute was formally adopted in its entirety by Resolution 827 (1993). The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) was called into being.⁵

The Security Council's decision to establish the Tribunal under Chapter VII had the advantage that it would be effective immediately and would create binding obligations for all states.⁶ This decision qualifies as a matter short of the use of armed force under Article 41 of the Charter. Although Article 41 does not expressly authorize the Security Council to establish a war crimes tribunal, the Charter has been inter-

¹ See for example S/RES/743 (1992) of 21 January 1992 establishing the United Nations Protection Force (UNPROFOR) and S/RES/771 (1992) of 13 August 1992 where the Security Council condemned grave breaches of international humanitarian law, among others the so-called "ethnic cleansing".

² S/RES/808 (1993) of 22 February 1993.

³ S/RES/808 (1993), para. 2.

⁴ Doc. S/25704.

⁵ S/RES/827 (1993) of 25 May 1993. In the following, the Tribunal will be referred to as Yugoslav Tribunal or, shortly, ICTY.

⁶ Arts 2 para. 6 and 25 of the Charter.

preted as conferring on the Council all powers necessary to fulfill its responsibility for the maintenance of international peace and security.⁷

According to article 31 of its Statute, the ICTY has its seat at The Hague, the Netherlands. In September 1993, the Judges of the Tribunal were elected by the UN General Assembly according to article 13 para. 2 of the Statute. They held their first session in The Hague nearly two months later, on 17 November 1993.

A short time later, in April 1994, the world witnessed another conflict in which provisions of international humanitarian law were blatantly disregarded. The fighting in Rwanda between members of the Hutu-dominated governmental party and members of the Tutsi-dominated Rwandan Patriotic Front (RPF) escalated, culminating in the mass killing of more than 1 million people over the next three months. More than two million Rwandans became refugees, many of whom sought shelter in neighbouring states.⁸

Since the mass killing of the Tutsi population had assumed the dimensions of genocide, the Security Council decided to establish another criminal tribunal charged once again with the prosecution of the most serious violations of international humanitarian law. The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (ICTR), came into being by virtue of Resolution 955 (1994).⁹ Again, the Security Council acted under Chapter VII of the UN Charter.¹⁰ Annexed to Resolution 955 was the Statute of the Tribunal.

⁷ An instructive summary of the legitimacy of the Yugoslav Tribunal and the power of the Security Council to establish such tribunal is given by the Decision of the Appeals Chamber of the Yugoslav Tribunal of 2 October 1995, in the Case of Prosecutor v. D. Tadic, IT-94-1-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction.

⁸ Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, Doc. S/1999/1257 of 15 December 1999.

⁹ S/RES/955 (1994) of 8 November 1994.

¹⁰ In contrast to the Yugoslav conflict, which, after separation of several states from the former Federation, became an international conflict and therefore constituted a threat to international peace and security as defined by Article 39 of the UN Charter, see in this respect C. Greenwood, "The Devel-

The provisions of the Statute of the ICTR (Rwanda Statute) are almost identical to those of the Statute of the ICTY (Yugoslav Statute), particularly in structural organization and procedure. Both Tribunals consist of three organs — the Registry, which is responsible for the administration and servicing of the Tribunal,¹¹ the Chambers,¹² and the Office of the Prosecutor which is in charge of investigations and the preparation of indictments.¹³ The few provisions on procedural law that are contained in the Statutes, are identical, too.¹⁴ They only provide for some basic rights of the accused. More specific provisions on procedural matters are to be found in the Rules of Procedure and Evidence (RPE) which were enacted by the Judges of the Tribunals according to article 15 of the Yugoslav Statute and article 14 of the Rwanda Statute. The provisions of the RPE of both Tribunals are for the most part identical, too.¹⁵

A special link between the International Criminal Tribunals is created by the Office of the Prosecutor and by the Appeals Chamber of the Tribunals. According to article 15 para. 3 of the Rwanda Statute, the Prosecutor of the ICTY also serves as Prosecutor of the Rwanda Tribunal. A similar provision is set out in article 12 para. 2 of the Rwanda Statute for the Appeals Chamber. Consequently, there is only one Prosecutor and one Appeals Chamber serving both Tribunals.

The rules of international law applicable in armed conflict vary depending on whether the conflict is international or internal in character. The rules of law that govern an internal armed conflict are found primarily in common article 3 of the 1949 Geneva Conventions, which provide the minimum standard of conduct in such conflicts and in Ad-

opment of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia”, *Max Planck UNYB* 2 (1998), 96 et seq., (113 et seq.). The character of the Rwanda conflict in contrast was a mere national one. Nevertheless, a threat to international peace and security could be justified with serious violations of human rights law, as well as with enormous streams of refugees heading for shelter in the neighbouring states of Rwanda.

¹¹ See article 11 of the Yugoslav Statute and article 10 of the Rwanda Statute.

¹² Ibid.

¹³ See *ibid.* and in particular article 16 of the Yugoslav Statute and article 15 of the Rwanda Statute.

¹⁴ See article 20 et seq. of the Yugoslav Statute and article 19 et seq. of the Rwanda Statute.

¹⁵ The Rules are amended frequently. The author has used those of 14 July 2000 resp. 26 June 2000.

ditional Protocol II to the Geneva Conventions. Out of that reason the Ratione Materiae of the ICTR covers genocide, crimes against humanity and violations of article 3 common to the Geneva Conventions of 1949 and of the Additional Protocol II, whereas article 2 of the Yugoslav Statute refers to Grave Breaches of the Geneva Conventions in general.¹⁶

II. Contents of State Cooperation

1. General Obligation to Cooperate

In para. 4 of S/RES/827 (1993) and para. 2 of S/RES/955 (1994), the Security Council decided that:

“all States shall cooperate fully with the International Criminal Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 (resp. Article 28) of the Statute...”

Because of the binding nature of this provision, states are obliged to grant the International Tribunals any assistance they need. However, the founding Resolutions speak only in general terms about the duty of states to cooperate with the Tribunals. Specific responsibilities, compiled under the heading “cooperation”, are delineated in the provisions of the Statutes and, more particularly, in the RPE. In contrast to the Statutes, the RPE are derivative law and, therefore, have no binding effect *per se*. However, insofar as they are in harmony with the Statutes, the RPE are likewise binding. Furthermore, in the case of the ICTY the obligation to cooperate also results from the General Framework

¹⁶ For the applicable law of the Rwanda Tribunal see D. Shraga/ R. Zacklin, “The International Criminal Tribunal for Rwanda”, *EJIL* 7 (1996), 507 et seq. See also P. Akhavan, “The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment”, *AJIL* 90 (1996), 501 et seq.

Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) and its Annexes, concluded in 1995.¹⁷

Within the Statutes, it is article 29 of the Yugoslav Statute and article 28 of the Rwanda Statute which are the central provision of state cooperation. These virtually identical provisions read as follows:

“1. States shall cooperate with the International Tribunal ... in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal”

Para. 1 of arts 29 Yugoslav Statute and 28 Rwanda Statute merely repeats a general request for cooperation that is already mentioned in the founding Resolutions and affects every UN Member State. In contrast, para. 2 refers to requests addressed to individual states whose cooperation is solicited on a case by case basis. The power of the Tribunals to issue orders and requests is not limited to those enumerated under para. 2; the Tribunals can request the help of states in any respect they consider necessary.¹⁸

The obligation to comply with such requests is equally incumbent upon any UN Member State receiving an order, regardless of the role it played during the conflict in former Yugoslavia or in Rwanda. Its neutrality or even its active participation in those conflicts has no bearing on a state's obligation to cooperate with the International Tribunals.

It is a fundamental principle that international law can only prescribe the aim a state must accomplish; it may not prescribe the method

¹⁷ For the General Framework Agreement see inter alia P. Gaeta, “The Dayton Agreements and International Law”, *EJIL* 7 (1996), 147 et seq. P. Akhavan, “The Yugoslav Tribunal at Crossroads: The Dayton Peace Agreement and Beyond”, *HRQ* 18 (1996), 259 et seq. To discuss the General Framework Agreement would go beyond the scope of this article.

¹⁸ E.g. Doc. S/25704, para. 125.

or the means the state has to apply.¹⁹ A state usually has broad discretion to decide in what manner it will implement an international duty. Consequently, a state to whom a request for cooperation is directed by an International Tribunal is under strict obligation to comply, although its flexibility in implementing the request is preserved.

2. The Various Responsibilities of State Cooperation

According to the provisions of the Statutes of the International Tribunals, state cooperation is mainly required in four areas:

a.- State cooperation is required for the Prosecutor's pre-trial investigations, including production of evidence, conducting of on-site investigations, service of documents, questioning of victims and witnesses, and the identification and location of persons.

b.- State cooperation is further required when it comes to the execution of the Tribunals' arrest warrants and transfer orders.

c.-For the deferral of national court proceedings.

d.- Finally, state cooperation is needed in enforcing the final sentences pronounced by the Tribunals.

a. State Cooperation in Pre-trial Investigations

According to para. 1 of arts 18 Yugoslav Statute and 17 Rwanda Statute, investigation and preparation of an indictment lies with the Chief Prosecutor and his or her Office. Like any authority charged with criminal investigation, the Prosecutor must collect evidence, interview witnesses, victims, and suspects, and conduct on-site investigations to prepare an indictment. Article 18 respectively 17 empowers the Prosecutor to conduct such investigations on his own account. Because this necessarily takes place on "foreign" soil, host states must defer their sovereignty in the field of criminal investigation to the Prosecutor, either by simple grants of permission or by direct delegation of these specific powers to the Tribunals. If required, the Prosecutor may solicit the assistance of the state authorities concerned. Whereas arts 29 Yugoslav Statute and 28 Rwanda Statute confer to the Tribunals' Chambers the

¹⁹ An exception from this rule is made when international law, in particular an international treaty, *expressis verbis*, prescribes the way an international duty is to be implemented.

competence to address binding orders and requests to states, the Office of the Prosecutor is confined to seek national assistance in an informal way. Ideally, a state empowers its national authorities to comply with requests of the Office of the Prosecutor. If this is not the case, the Prosecutor must ask a Trial Chamber to formally request a state to bring about the cooperation of the authority concerned. Such formal requests states have to carry out according to para. 2 of article 29 Yugoslav and article 28 Rwanda Statute.

In addition to the competences granted by the Statutes, Rule 39 (i) of both RPE enable the Prosecutor and his Office to summon suspects, victims and witnesses and to record their statements. Such competence is necessary and in harmony with the Statutes. The power to question witnesses, victims and suspects granted by arts 18 respectively 17 of the Statutes would be void if the Prosecutor could not put those persons under the obligation to appear before him or if he could not record their statements.

According to Rule 39 (ii) of the Rules, the Prosecutor can undertake any other steps deemed necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants. To that end, the Prosecutor can seek not only the assistance of state authorities but also the assistance of any relevant international body, including the International Criminal Police Organization (INTERPOL).²⁰

Rule 39 (iv) of the Rules reiterates the power of the Prosecutor to request orders from a Trial Chamber or a Judge; however, before an order can be issued, the indictment of the person concerned must be confirmed by a Judge.²¹ Since preparation for and confirmation of an indictment consumes valuable time, the Prosecutor risks losing both evidentiary material and suspects. Rule 40 of the Rules consequently empowers the Prosecutor to request in case of urgency a state to take provisional measures to safeguard investigation proceedings. If so requested, a state shall provide for the provisional arrest of a suspect, seize or safeguard evidence, and protect witnesses and victims against injury or intimidation. Official requests for such provisional measures are just as binding on states as orders from a Trial Chamber under article 29 Yugoslav Statute and 28 Rwanda Statute. Nevertheless, provi-

²⁰ Rule 39 (iii) of the Rules.

²¹ See para. 2 arts. 19 Yugoslav Statute and 18 Rwanda Statute.

sional measures should be requested only in a case of urgency, when the usual procedure could not be adhered to.

b. Arrest and Transfer of Persons to the International Tribunals

Another obligation incumbent upon states is as mentioned above to carry out arrest warrants and transfer orders. Procedural aspects are regulated by Rules 55 et seq. of the Rules. According to Rule 55 (D) RPE of the ICTY and Rule 55 (B) RPE of the ICTR an arrest warrant is transmitted by the Registrar of the respective Tribunal to the national authorities of the state in whose territory or under whose jurisdiction or control the accused was last known to reside, together with a statement of rights and cautions to be read at the time of arrest, in a language the accused understands. A state receiving an arrest warrant and transfer order is obliged to ensure that national authorities execute the order promptly and effectively.²²

According to article 59 *bis* RPE of the ICTY, arrest and transfer orders can further be transmitted to international authorities or institutions with the capacity to search for and arrest accused persons. This provision was inserted during the 9th General Assembly of the Yugoslav Tribunal to enable an arrest and transfer order to be forwarded to the former Implementation Force (IFOR) and later to the Stabilization Force (SFOR), which were established by the General Framework Agreement for Peace in Bosnia and Herzegovina to safeguard the peace process in Bosnia and Herzegovina.²³ Whether IFOR and SFOR were not only authorized but legally obliged to carry out an international arrest warrant of the Yugoslav Tribunal was heavily disputed, given the hesitation of IFOR to do so.²⁴ The question remains academic, however, since, in practice, SFOR/KFOR demonstrated both a willingness and capacity to carry out such international arrest warrants.

At the time of an arrest, a member of the Office of the Prosecutor may be present to guarantee that the rights of the accused are protected. This also prevents the accused from subsequently raising objections that could invalidate an indictment. Immediately following the arrest, national authorities must arrange for the transfer of the accused

²² See Rule 56 RPE.

²³ See note 17.

²⁴ See K. Ambos, "Zur Rechtsgrundlage der Festnahme mutmaßlicher Kriegsverbrecher durch die SFOR im ehemaligen Jugoslawien", *Juristenzeitung* 53 (1998), 887 et seq.

through the Registrar of the respective Tribunal. Also involved in such arrangements are the national authorities of the Tribunals' host state.²⁵ The accused remains in custody while these arrangements are made. Since the Statutes require that transfer is made without undue delay,²⁶ any delay can only be accepted if the reason lies within the arrangements themselves, for instance if it turns out to be difficult to get a third state's permission to allow the accused to be transferred through its territory. Once the necessary arrangements are met, the Registrar informs the detention unit of the competent Tribunal of the day the accused will arrive.

Rules 55 et seq. RPE only authorize the arrest and transfer of an *accused* person to the International Tribunals. A suspect does not become an accused before the indictment is officially confirmed by a judge, at which time a formal accusation concerning the crime in questions is brought against the accused.²⁷ During the time between the preparation and confirmation of an indictment, the Prosecutor is immobilized for lack of an arrest warrant. To avoid the escape of suspects and ensure their future arrest, as mentioned above, the Prosecutor can request a state to provisionally arrest.²⁸ Furthermore, Rule 40 *bis* RPE²⁹ provides the Prosecutor with the option of requesting a judge to order an arrest and transfer of a suspect, provided the following requirements are met:

- (i) the person concerned must have already been taken into custody (or, at least, the Prosecutor must have asked the state to do so),
- (ii) the judge must conclude that the suspect could indeed have committed a crime under the jurisdiction of the Tribunal, and

²⁵ See Rule 57 RPE.

²⁶ See para. 2 arts 20 Yugoslav Statute and 19 Rwanda Statute.

²⁷ Before such confirmation is given, the Prosecutor has to establish a *prima facie case*; he/she will prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment will be transmitted to a judge who will review it and eventually confirm it if he or she is satisfied that the Prosecutor has been able to establish a *prima facie case*. If not satisfied, the indictment will be dismissed. As aforementioned, such confirmation is preconditional for the issuance of an arrest and transfer order as well as for any other order that may be required for the conduct of the trial. See arts 18 and 19 of the Yugoslav as well as arts 17 and 18 of the Rwanda Statute.

²⁸ See Rule 40 (i) RPE.

²⁹ Rule 40 *bis* RPE was added at the 10th Plen. Assembly of the Yugoslav Tribunal in April 1996; the Rules of the Rwanda-Tribunal were amended in like manner on 15 May 1996.

- (iii) the judge must agree that an arrest is necessary to prevent the suspect from fleeing, intimidating witnesses, or hampering proceedings in any other way.

If requested, states not only have to surrender supposed criminals to the International Tribunals but also witnesses who may be detained in their national prisons. A fair trial requires both the presence of the accused and anyone who might contribute to the exploration of the accused's guilt or innocence. If necessary, a judge may summon a witness currently serving a prison sentence in another state on the basis of Rule 90 *bis* (A) and (B) RPE. However, the transfer of detained witnesses should only be requested if their presence is no longer required in national proceedings and if their stay at the Tribunal will not exceed their term of confinement. The procedure for transferring a detained witness to an International Tribunal is comparable to the transfer of an accused or suspect.

c. Deferral of National Court Proceedings

According to para. 2 of article 9 Yugoslav Statute and article 8 Rwanda Statute, the International Tribunals have primacy over national courts. Due to this primacy, national courts may, at any stage of the procedure, be formally requested to defer to the competence of the International Tribunals.

As set out in Rules 8 et seq. of the Rules, deferral proceedings are initiated by request of the Prosecutor. When a crime that has been the subject of investigation or criminal proceedings in a court of a given state appears to fall within the jurisdiction of a Tribunal, the Prosecutor may request the forwarding of any relevant data.³⁰ If the prerequisites of Rule 9 RPE are met,³¹ the Prosecutor submits a formal request for deferral to the President of the respective Tribunal, who then forwards it to a Trial Chamber for review. If the Chamber considers a deferral appropriate, it will formally request the state to defer its current court proceedings. Once a trial has been deferred to a Tribunal, a completely new trial begins. Any previous determination of a national court has no binding effect on the Tribunals.³²

³⁰ Rule 8 RPE.

³¹ For those prerequisites see below.

³² Rule 12 RPE.

The Tribunals determine whether or not to exercise their competence in deferring pending national court proceedings. If they do, national courts are obliged to defer.

Such obligation does not exclude national courts from prosecuting crimes that belong within Tribunal jurisdiction. In this way, the International Tribunals and national courts share concurrent jurisdiction.³³ Because of the universality principle, national courts can declare their jurisdiction over serious violations of international humanitarian law, regardless of where those crimes were committed. The mere existence of an international institution charged with the prosecution of such crimes does not automatically exclude national jurisdiction; rather, both systems — one at the national, the other at the international level — complement each other.³⁴ National courts lose their jurisdiction only if the Tribunals exercise their primacy.

Since national courts of any state can exercise their jurisdiction over crimes contained in the Statutes of the Tribunals, the competence of the latter to interrupt and absorb national proceedings represents a significant limitation of national sovereignty in the field of criminal prosecution. When passing the Statute of the Yugoslav Tribunal, Member States of the Security Council recommended a narrow interpretation of article 9 of the Statute.

The Tribunals do not possess absolute competence to absorb national court proceedings. Rather, they may exercise this competence only if certain conditions set out in Rule 9 RPE are met. In case of the RPE of the ICTY, those conditions are:

- (i) the act being investigated or which is the subject of national court proceedings is treated as an ordinary crime
- (ii) there is a lack of impartiality or independence, or if the investigations or proceedings are designated to shield the accused from international criminal responsibility, or if the case is not diligently prosecuted, or
- (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations of prosecutions before the Tribunal...³⁵

³³ See para. 1 arts 9 Yugoslav Statute and 8 Rwanda Statute.

³⁴ R. Wolfrum, "The Decentralized Prosecution of International Offences through National Courts", in: Y. Dinstein, *War Crimes in International Law*, 1996, 233 et seq.

³⁵ Cf. also Rule 9 RPE of the ICTR.

The purpose of Rule 9 RPE is to assure that national proceedings against alleged war criminals are not trivialized. Besides, the Tribunals should be given the opportunity to exercise its jurisdiction in all cases in which legal or factual questions of a general importance are raised. The Tribunals do have a legitimate interest in exercising their primacy in all cases in which a person's alleged criminal behaviour may have legal or factual consequences for the investigations, prosecutions and convictions in other cases. Questions involving international law should be settled by the International Tribunals to ensure uniformity and consistency of decision-making.

The International Tribunals cannot exercise their primacy if the principle *non bis in idem* hinders a further trial. This principle, widely accepted on both the national and international level, has been incorporated into arts 10 Yugoslav Statute and 9 Rwanda Statute and is repeated by article 13 of the Rules. However, *non bis in idem* does not apply to the International Tribunals to the same degree as it does to national courts. According to para. 1, arts 10 Yugoslav Statute and 9 Rwanda Statute, no person shall be tried before a national court for crimes which have previously been tried by an International Tribunal.

In contrast, para. 2 of the provisions permits the International Tribunals to prosecute an individual who has already been tried by a national court. However, such exceptions to the *non bis in idem* principle are restricted to exceptional cases.

Should the Tribunals receive reliable information showing that a national court has brought criminal proceedings against a person who was previously tried by a Tribunal, a Trial Chamber will order that court to permanently drop its charges.³⁶

d. Enforcement of Sentences

Another responsibility which requires state cooperation is the enforcement of the Tribunals' final sentences (see in this respect also under Section V. 3 d.) Since the International Criminal Tribunals do not operate prison facilities, sentences can only be served in national prisons. Tribunal detention units hold accused persons only before or during a trial. As soon as the time-limit for appeal has elapsed, a convicted person is transferred to the state where he has to serve his prison term.³⁷

³⁶ See Rule 13 RPE.

³⁷ See Rule 103 (B) RPE.

In theory, states could be compelled to carry out Tribunal sentences. However, when the Statutes were adopted, this idea of compulsion was rejected, since the execution of sentences is likely to cover a long period of time. For this reason states should voluntarily assume this responsibility. States that are willing to place their prisons at the Tribunals' disposal should indicate their willingness to the Security Council.³⁸ From the Council's list, the Tribunals may select a state each time the question of enforcement arises. Such imprisonment shall be in accordance with the applicable law of the state concerned, subject to the supervision of the International Tribunal. In making the selection, the Tribunals will take the following items into consideration: the distances between the enforcement state, the state in which the conflict occurred, and the home country of the convicted person; the state's neutrality during the Yugoslav or the Rwanda conflict; its compliance with international prison standards; and the capacity of the state to cope with the financial burdens of the imprisonment.³⁹

The Tribunals supervise the execution of sentences and are at liberty to intervene when enforcement states do not appropriately fulfil their duty. According to Rule 104 RPE the Tribunals can also designate or appoint a separate body that will be in charge of the supervision of sentences.⁴⁰

³⁸ See arts 27 Yugoslav Statute and 26 Rwanda Statute and Rule 103 RPE.

³⁹ See in this respect V. Morris/ M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. I, 1995, 305.

⁴⁰ In contrast to article 26 Rwanda Statute, which allows imprisonment in Rwanda, article 27 Yugoslav Statute does not provide for imprisonment being served in the successor states of the Former Yugoslavia. Given the nature of the crimes committed during the Yugoslav conflict and given the international character of the Yugoslav Tribunal the framers of the Yugoslav Tribunal decided to have sentences enforced outside the former Yugoslavia. However, comments on the founding resolution of the Rwanda Tribunal remain silent why these reasons would not likewise apply to persons convicted by the Rwanda Tribunal. Because of language and cultural differences, the enforcement of sentences in a different state may be harder than the enforcement in the home country. However, enforcement in a neutral country seems indispensable if one wants to assure that the Tribunals' sentences are properly enforced. It is not completely out of question that third persons are trying to interfere with the enforcement of the Tribunals' sentences, if they sympathize with the convicted person, or if they sympathize with the victims.

As soon as national law declares a convicted person eligible for pardon or commutation of a sentence, the enforcement state shall notify the respective Tribunal.⁴¹ In contrast to bi- or multi-lateral agreements on the enforcement of sentences, a state enforcing the sentence of one of the Tribunals does not possess an exclusive right to pardon. The final decision rests with the respective Tribunal. According to article 28 Yugoslav Statute and article 27 Rwanda Statute, the President of the Tribunal, in consultation with the judges, "decides on the basis of the interests of justice and the general principles of law".⁴² This procedure guarantees that prisoners serving sentences in different states are treated equally and are considered for pardon based on the same criteria. Despite arguments to the contrary, the Tribunals' right to pardon does not restrict the competence of a national head of state, whose exclusive right it is to pardon any prisoner within his own jurisdiction.⁴³

Although the state enforcing a Tribunal sentence gains direct power over the convicted person, he or she is still considered a prisoner of the Tribunal that passed the sentence. Regardless of the primary responsibility resting with national authorities to execute the sentence, the prisoner indirectly remains in custody of the Tribunal throughout the term of imprisonment.⁴⁴

⁴¹ See arts 28 Yugoslav Statute and 27 Rwanda Statute.

⁴² According to Rule 125 RPE, the President, in determining whether pardon or commutation is appropriate, must take into account the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.

⁴³ See article 60 para. 2 of the German Basic Law; article 17 of the French Constitution; article 122 of the Dutch Constitution.

⁴⁴ Moreover, it would not be in accordance with the mandate of the Tribunals, if the final decision on pardon or commutation of sentences could be made by a state. The International Tribunals were entrusted with the mandate to prosecute serious violations of international humanitarian law. Prosecution also implies the execution of prison sentences insofar as the Tribunals consider it necessary. An individual state cannot be in the position to change a decision which the International Tribunals have made on behalf of the International Community.

e. Additional Responsibilities of States

The Rules of Procedure and Evidence contain some additional responsibilities requiring the cooperation of states with the International Tribunals:

-According to Rule 74 RPE, a Trial Chamber may under certain circumstances invite a state, organization or person to appear before it and to offer legal opinions or any other contribution that could facilitate the proper determination of a case (so-called *amicus curiae*).

-The assistance of national courts might be necessary in determining the ownership of property. Para. 3 of arts 24 Yugoslav and 23 Rwanda Statute enables a Trial Chamber to order the return of any property or proceeds acquired by criminal conduct to the rightful owner.⁴⁵ The details of restitution proceedings are set out in Rule 105 RPE. If the Trial Chamber is able to determine the rightful owner on the balance of probabilities, it will either order the restitution of the property or proceeds or determine some other appropriate course of action. If ownership cannot be determined by the Tribunals, they will leave judgment to the competent national authorities. It is not the mandate of the International Tribunals to solve problems of private law. This responsibility resides with national authorities which, for factual and legal reasons, are in a better position to do so.⁴⁶

National assistance is further required in the compensation of victims.⁴⁷ Although the Tribunals cannot directly rule on compensation, their sentences do form the basis of compensatory national court decisions. According to Rule 106 (B), a victim, or persons claiming through

⁴⁵ The duty to restitute is partially seen as an additional punishment besides imprisonment; in fact, its character is comparable to a civil law duty of compensation.

⁴⁶ If national courts or authorities are not able to determine rightful ownership either, it is proposed that the Security Council establishes a further institution, exclusively charged with the determination of property in cases of ethnic cleansing.

⁴⁷ During the elaboration of the Yugoslav Statute, proposals to grant the Tribunal the competence to decide on the matter of compensation were rejected. According to Resolution 808 (1993), the Tribunal was only vested with the power to prosecute serious violations of international humanitarian law. No mention was made of a power to compensate victims. Furthermore, compensation proceedings and investigation would require an enormous reservoir of financial and personal means, exceeding the limited means of the Tribunals.

the victim, may bring an action in a national court or other competent body for compensation. For the purposes of such a claim, the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

In addition to the provisions of the Statutes and RPE, the Annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina contain further responsibilities that fall upon some of the successor states of Former Yugoslavia.⁴⁸

Of major interest are the duties to grant free movement and unrestricted access to members of the Yugoslav Tribunal,⁴⁹ to exclude from public office⁵⁰ and from amnesty⁵¹ persons who are under indictment of the Yugoslav Tribunal, and to exclude such persons from repatriation until the Yugoslav Tribunal has been notified.⁵²

The host states of the Tribunals, the Netherlands and Tanzania, are obliged to cooperate even in a wider sense. In allowing the Tribunals to operate in their countries, these states have made significant concessions which limit their own sovereign rights. The various arrangements are set out in the Headquarter Agreements between the United Nations and the Kingdom of the Netherlands and the Republic of Tanzania respectively.⁵³

III. Nature of State Cooperation

According to para. 2 arts 29 Yugoslav Statute and 28 Rwanda Statute, states must comply with any request for assistance or order issued by a

⁴⁸ The Annexes to the General Framework Agreement have been signed by and are therefore binding upon the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska.

⁴⁹ See article XIII para. 4 of Annex 6 and article II para. 8 of Annex 4.

⁵⁰ See article IX of Annex 4.

⁵¹ Article VI of Annex 7.

⁵² Article IX and Annex 1 A.

⁵³ Agreement between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, of 27 May 1994; Agreement between the United Nations and the United Republic of Tanzania Concerning the Headquarters of the International Criminal Tribunal for Rwanda of 31 August 1995.

Trial Chamber of the International Tribunals. There is no legal difference between “order” and “request”, both are equally binding. Consequently, “request”(s) stemming from the International Tribunals carry a different legal meaning from those made by states within the traditional framework of international assistance in criminal matters.

In contrast to para. 2, para. 1 of arts 29 respectively 28 speaks of cooperation between states and the International Tribunals. The term “cooperate” refers to a joint action which is accomplished on the same level. If several units are cooperating, none of them is subordinated to the will of another. However, para. 2 clearly indicates that this cooperation between the Tribunals and states does not take place on the same level. States are unilaterally obliged to carry out the Tribunals’ orders and requests. States cannot invoke national law to evade an order or request of the International Tribunal. State interests are not considered when the Tribunals issue orders or requests. The interests of a state are subordinated to the will of the Tribunals. Thus, the relationship between states and the International Tribunals is not horizontally, but hierarchically organized. In view of such hierarchy, the term “cooperate” is not entirely accurate. It would be more appropriate to speak of national assistance.

Given the establishment of the International Tribunals on the basis of Chapter VII of the UN Charter and the absolute necessity of national action⁵⁴ for the success of the Tribunals, this hierarchical relationship is not only appropriate but essential.

When a state refuses to comply with an order or request of the International Tribunals, the President can notify the Security Council.⁵⁵ Whether the Security Council decides to take action against the state concerned remains to be seen.

IV. Necessity of State Cooperation

The cooperation of states is indispensable if the International Criminal Tribunals for the Former Yugoslavia and for Rwanda are to fulfil their mandate.

Though the Statutes grant the Prosecutor power to conduct on-site investigations, gather evidence, and question witnesses, victims, and

⁵⁴ See below.

⁵⁵ See Rules 7 *bis*, 11, 13, 59 and 61 RPE.

suspects in his own authority,⁵⁶ this competence cannot be exercised without the assistance of the state in whose territory such pre-trial investigation takes place. Criminal investigation activities are sovereign acts belonging exclusively to the state on the territory of which those acts are being performed (*principle of territoriality*). Without permission of the respective state, other states — or non-state entities like the International Criminal Tribunals — are excluded, in principle, from carrying out sovereign acts on the territory of a foreign state. An exception to the principle of territoriality can be made by international agreements. In fact, such exception is constituted by article 18 para. 2 Yugoslav and article 17 para. 2 Rwanda Statute. However, these provisions do not automatically become effective in the national legal systems of UN Member States. National law requires authorization delegating the competence of national criminal authorities to the International Tribunals. Since arts 18 and 17 are part of a Security Council Resolution under Chapter VII of the UN Charter, Member States are bound by international law to implement or grant such authorization. However, without such authorization, the Prosecutor cannot become active in any foreign state.

Furthermore, the Tribunals may not coerce the implementation of their decisions. Neither the Prosecutor nor any other organ of the Tribunals is authorized to force witnesses to make statements, execute an arrest warrant, or seize documents or objects. Those measures must be carried out by national authorities which are authorized to do so under national law.

The assistance of national authorities is especially important for the successful execution of arrest warrants and transfer orders. If a state refuses to comply with an arrest and transfer order, or if it shields someone from international prosecution, the Tribunals are paralyzed. Without the presence of the accused at the International Tribunals, criminal proceedings cannot be initiated. The Statutes do not provide for a *trial in absentia*. The only option the Tribunals can fall back on if a state refuses to execute an arrest and transfer order, is to initiate a so-called Rule-61 proceeding, which permits the Trial Chamber to issue an international arrest warrant, although it can never conclude a verdict about the guilt or innocence of the accused.⁵⁷

⁵⁶ See para. 2 of article 18 Yugoslav Statute and 17 Rwanda Statute.

⁵⁷ See F.P. King/ A.M. La Rosa, "The Jurisprudence of the Yugoslavia Tribunal 1994-1996", *EJIL* 8 (1997), 123 et seq., (216 et seq.).

National assistance is likewise essential when national court proceedings are deferred. National law usually does not allow for deferral of state court proceedings to a court not linked in the chain of the national stages of appeal. States must empower their courts to defer their proceedings to the International Criminal Tribunals, or there is no possibility for the Tribunals to absorb them. The Security Council could vest the Tribunals with the competence to order the deferral of national court proceedings, but it could not reach into national systems and empower state courts to defer a case to the Tribunals. A request for deferral can only be executed if states have enabled national courts to comply with requests for deferral. States are obliged to enact such authorization because of the binding character of the Tribunals' founding Resolutions. However, if states do not abide by this obligation, the Tribunals have no possibility to close national court proceedings and to initiate a trial of their own.

For the successful enforcement of sentences, the Tribunals again depend on state cooperation. Though states are not obliged to indicate their willingness to accept convicted persons (in contrast to other areas where assistance is a strict duty), here, cooperation is nevertheless essential. Without the willingness of states to open their national prison facilities, Tribunal sentences cannot be enforced.

In his speech before the UN General Assembly in 1995, Antonio Cassese, First President of the Yugoslav Tribunal, stressed the absolute need of state cooperation when he declared that:

“the decisions, orders and requests of the International Tribunals can only be enforced by others, namely national authorities. Unlike domestic courts, the Tribunal has no enforcement agencies at its disposal: without the intermediary of national authorities, it cannot execute arrest warrants, it cannot seize evidence, it cannot compel witnesses to give testimony, it cannot search the scene where crimes have been allegedly committed. For all these purposes, it must turn to State authorities and request them to take action. Our Tribunal is like a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the State authorities; without their help, the Tribunal cannot operate.”

V. National Law and State Cooperation

1. Necessity of a "Cooperation Act"

The enactment of special legislation which enables national authorities to cooperate with the International Criminal Tribunals for The Former Yugoslavia and for Rwanda was (and still is) necessary in most legal systems for two reasons. First, the obligations contained in the Statutes and RPE are of such nature that national authorities from a legal point of view usually will need a separate legal authorization to act accordingly. For example, the transfer of accused and the deferral of national court proceedings touch upon questions as fundamental as the right of the accused to due process and a trial by a judge. The execution of an arrest warrant encroaches upon the accused's right to personal freedom which is guaranteed by most constitutions. The power to question witnesses and seize evidentiary material usually lies with national authorities of the state on whose territory such acts are carried out. If such rights are conferred upon the Prosecutor of the International Tribunals, this necessarily implies a restriction of national sovereign rights for which many constitutions require legal authorization.

It is inadequate to fall back on laws of judicial assistance in criminal matters. The legal instruments existing in most national systems to regulate bi- and multilateral assistance in criminal matters cannot serve as a basis for assistance to the International Tribunals. The differences between inter-state cooperation in criminal matters and the national assistance required by the International Criminal Tribunals are too large. Traditional requests for judicial assistance in criminal matters are usually influenced by the equality of states as well as by the exclusive sovereignty of states in their own territory. Agreements regarding legal assistance in criminal matters usually contain numerous grounds allowing states to either reject a request or to set conditions. The requested state is usually permitted to review the request and refuse it if certain conditions are not met. In contrast to traditional requests for judicial assistance in criminal matters, as shown above, requests of the International Criminal Tribunals can neither be reviewed nor rejected. States are not equipped with a discretion allowing them to review cooperation requests of the International Tribunals. When requested to transfer a person to the International Tribunals, national courts may only review whether formal requirements are met and match the identity of the person requested by the Tribunal for transfer with the person appre-

hended. Neither the Statutes nor the RPE provide any grounds upon which states could justify a refusal to comply.⁵⁸

Furthermore, bi- or multilateral arrangements on judicial assistance in criminal matters usually follow the principle of reciprocity; this is not the case with the International Criminal Tribunals. States are unilaterally bound to comply with orders and requests of the International Tribunals, yet a similar obligation placed upon the Tribunals could hardly be realized and would not be in consistency with their mandate. As for the transfer of persons, the Statutes stress the difference between traditional extradition requests and the request of the Tribunals by avoiding the term "extradition". Extradition treaties usually stipulate grounds upon which requests for extradition may be rejected, including such grounds as the nationality of a person and affiliation with various religious, racial, or minority groups. States are often granted the right to review whether the crime for which extradition is requested would be punishable under the law of the requested state. Furthermore, extradition treaties generally include a clause stipulating the punishment of only those crimes for which extradition was requested. When requested to transfer a person to the International Tribunals, states have to comply with that request. They cannot invoke national law or reasons contained in extradition treaties to refuse compliance. With exception of the aforementioned formalities, national authorities do not possess a discretion which would allow them to review a request of the International Tribunals.

Given the fundamental differences between general international assistance in criminal matters and the assistance to the International Tribunals as such, the Security Council decided in the founding Resolutions that:

"all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute ...".⁵⁹

⁵⁸ As mentioned above, requests of the Tribunals do have the same binding effect as orders which the Tribunals can issue on the basis of para. 2 of arts 29 Yugoslav Statute and 28 Rwanda Statute.

⁵⁹ See para. 4 of Resolution 827 (1993); para. 2 of Resolution 955 (1994). To facilitate national legislation, the Registry of the Yugoslav Tribunal published the so-called "Tentative Guidelines for National Implementing Legislation of United Nations Security Council Resolution 827 of 25 May 1993". These Guidelines are mere proposals of the Registry of the Yugoslav Tribunal and do not have any binding effect upon states. Their intention is

2. Existence of "Cooperation Acts"

As of summer 2000 twenty three states have enacted a law or a similar legal instrument which authorizes national authorities to cooperate with the Yugoslav Tribunals.⁶⁰ A couple of states have done so concerning the Rwanda Tribunal.⁶¹ In some cases, such legislation applies to both Tribunals. In some cases, where a cooperation act regarding the Yugoslav Tribunal already existed, its provisions have simply been declared applicable for the Rwanda Tribunal. In other cases, separate legislation has been enacted but the provisions of both acts are virtually identical.

Concerning the ICTY a number of states have indicated that they do not require implementing legislation to carry out their responsibilities, including the Russian Federation, the Republic of Korea, Singapore and Venezuela.⁶² In addition, several states have indicated that they intend to adopt implementing legislation shortly.⁶³

to indicate those areas in which amendment of national law may be required to enable an effective cooperation between a state and the Yugoslav Tribunal. Although the Guidelines only concern cooperation with the Yugoslav Tribunal, they can also serve as guiding principle for legislation regarding cooperation with the Rwanda Tribunal.

⁶⁰ Those states are Australia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Germany, Greece, Finland, France, Hungary, Iceland, Ireland, Italy, New-Zealand, the Netherlands, Norway, Romania, Sweden, Switzerland, Spain, the United Kingdom and the United States. (7th Annual Report of the ICTY, Doc. A/55/273 of 7 August 2000—each year in November the President of the Tribunal submits the Report covering the activities of the Tribunal during the preceding period 1 August-31 July).

⁶¹ E. g. Austria, Australia, Belgium, Denmark, Germany, France, New-Zealand, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the United States.

⁶² 6th and 7th Annual Report of the ICTY, Docs A/54/187 of 25 August 1999 and A/55/273 of 7 August 2000.

⁶³ Ibid.

3. Implementation of Cooperation

a. Cooperation in Pre-trial Investigations of the Prosecutor

Most cooperation acts contain a provision enabling national authorities to conduct on-site investigations and interrogations of victims and witnesses if so requested by the Prosecutor.⁶⁴

Generally, national authorities are placed under the obligation to comply with such requests. Two exceptions include cases wherein national authorities are vested with the authority to review a request. For example under article 26 para. 3 of the Australian International War Crimes Tribunals Act. The Attorney-General, the direct recipient of the Tribunal's requests, is entitled to judge if the execution of a request might endanger Australian sovereignty, security, or other national interests. If it does, or if further "special circumstances" justify the rejection of a request, the Attorney-General is obligated not to carry it out. A similar provision can be found in article 57 of New-Zealand's cooperation act.⁶⁵ It is doubtful that these provisions are in conformity with the unrestricted obligation to execute as demanded by the Statutes of the Tribunals.

Many cooperation acts allow a representative of the Prosecutor's Office to be present when national authorities carry out a request of an International Tribunal.⁶⁶ However, with very few exceptions, these acts do not enable the Prosecutor or the representatives to take action themselves.

Only two cooperation acts authorize the Prosecutor to act independently on national territory. Article 7 of the Finnish cooperation act and article 3 para. 3 of the Norwegian act allow investigators from the Yugoslav Tribunal to question witnesses, victims, and suspects, and

⁶⁴ As far as responsibility remains with national authorities, this kind of judicial assistance is general practice in mutual assistance in criminal matters. From a national perspective, it can be sufficient to expand such regulation to the Tribunals. To allow the Prosecutor to undertake independent investigations, new legislation will be required.

⁶⁵ Article 57 of the New-Zealand Cooperation Act grants the Attorney-General of New-Zealand the competence to reject the enforcement of a request if enforcement would endanger the sovereignty, security or other national interests of New-Zealand.

⁶⁶ See article 8 of the French and article 10 para. 2 of the Belgium Cooperation Act.

conduct an investigation without the mediation of national authorities. If they wish, they can also seek national assistance. The German and Austrian cooperation acts require that national authorities be notified before the Prosecutor may begin independent investigation.⁶⁷ The Swiss and the Croatian cooperation act, the latter only applies for the ICTY, rule that the Office of the Prosecutor first seeks permission before it begins its activities on national territory.⁶⁸ Whereas simple notification of national authorities seems consistent with the intention and provisions of the statutes it is doubtful that the requirement to obtain permission is in harmony with international provisions. Given that national authorities are more familiar with people and locations, such notification can also be of advantage for the Tribunals. Permission proceedings, in contrast, can cause unnecessary delay, even if national authorities are placed under a strict obligation to grant permission. It is a matter of particular concern, that the cooperation act of Croatia, whose assistance is of special interest to the Yugoslav Tribunal, requires that permission first be granted by the Croatian Government.⁶⁹

Enforcement measures are usually left in the hands of the national authorities. Since the Statutes of the International Tribunals do not empower the Prosecutor to apply coercion, national cooperation acts can nevertheless be fully in accordance with international requirements. However, it is indispensable that national cooperation acts provide for the authorization of national authorities to take coercive measures if requested by the International Tribunals.

Many cooperation acts are progressive and innovative — para. 23 of the Swiss and para. 11 of the Austrian cooperation act enable the Tribunals to send a summon directly to its addressee. According to arts. 8 and 9 of the Finnish cooperation act, witnesses are under a strict obligation to follow a summon of the International Tribunal; he or she can be penalized for perjury. According to article 7 para. 2 of the Spanish and para. 11 of the Austrian cooperation act, witnesses can be paid in

⁶⁷ See article 9 para. 1 of the Austrian and article 4 para. 4 of the German Cooperation Act.

⁶⁸ Article 22 of the Swiss and article 7 of the Croatian Cooperation Act.

⁶⁹ Article 7 of the Croatian Cooperation Act reads: (English version) "The Tribunal and the Prosecutor may with the approval of the Government of the Republic of Croatia undertake specific actions on the territory of the Republic of Croatia in order to investigate the crimes under its jurisdiction, except the actions which require force or encroach upon the fundamental rights and freedoms of citizens."

advance for their travel expenses to the International Tribunals. And arts 36 et seq. of the New-Zealand and arts 41 et seq. of the Australian cooperation acts contain provisions permitting the Tribunals to sit in their territory should the Tribunals no longer be hosted by the Netherlands or by Tanzania.

b. Arrest and Transfer of Persons

Nearly all the cooperation acts implement the obligation of states to carry out arrest warrants and transfer orders of the International Tribunals. Each contain a provision, with one exception,⁷⁰ authorizing national authorities to arrest a person on the basis of a Tribunal's arrest warrant and to transfer him or her to the respective Tribunal.⁷¹

Due to their binding character, transfer orders of the International Tribunals could be interpreted to the effect that national authorities can execute them directly and automatically, without the involvement of a judge or a national court which could guarantee that the rights of the accused are observed. The requirements of the Statutes and the Rules of Procedure and Evidence regarding transfer proceedings are few. Rule 55 (E) RPE of the ICTY only prescribes that the accused at the time of arrest must be informed of his rights and of the crimes he is charged with.

However, national law requires more than simply informing accused persons about their rights and the crimes laid to their charge. Most legal systems require the observation of basic rights if a person's subjective rights are going to be encroached.⁷² With the exception of Australia and New-Zealand, all cooperation acts provide for the involvement of a judge or a national court so that the person concerned at least obtains the possibility to claim a mistake of identity. Some acts grant the right

⁷⁰ The Hungarian Cooperation Act simply refers to national law.

⁷¹ Although the majority of the Tribunals' indictees will very likely sojourn in the territory of the Successor States of the Former Yugoslavia or in Rwanda and its neighbouring states, this must not always be the case. Suspects and accused of both Tribunals have been arrested in different states all over the world. Even if the arrest of an accused seems to be unlikely because of the state's distance to the scene of the crimes, states need to have a regulation which allows the arrest and the transfer of the person concerned. Furthermore, the Tribunals can issue international arrest warrants on the basis of Rule 61 RPE which have binding effect on each UN Member State.

⁷² Chr. Tomuschat, *Sitzungsbericht Q - des Deutschen Juristentags*, 1994, 53 et seq., (66).

to appeal against the decision of the court of first instance.⁷³ Article 23 of the Croatian cooperation act even permits a constitutional claim against the decision of the court of appeal. However, those courts are not entitled to review legal aspects of the arrest warrant. Due to the unconditional and unrestricted obligation of states to execute the Tribunals' transfer orders, the discretion of a judge or court for review is reduced to a limited number of formal questions.⁷⁴

Particular problems may arise when a state is requested to transfer one of its own citizens. Numerous constitutions prohibit the extradition of nationals. This mainly applies to states that follow the continental system. Common law states usually do permit the extradition of nationals;⁷⁵ they make exceptions only on the basis of the principle of reciprocity. Common law states refuse the extradition of nationals if, within the framework of a bi- or multilateral agreement, the state requesting extradition does not extradite its own nationals.

The problem of transferring nationals is treated differently by different cooperation acts. States whose national law generally allows the extradition of nationals either permit the transfer of nationals to the Tribunals or have not ruled on the matter at all.⁷⁶ Some states whose

⁷³ See article 12 § 1 para. 4 and 5 of the Belgian Cooperation Act; article 26 Cooperation Act of Bosnia and Herzegovina; article 13 of the French; article 11 para. 2 of the Italian and article 3 para. 2 of the German Cooperation Act in connection with § 42 IRG.

⁷⁴ With view to transfer proceedings, some cooperation acts fall back on provisions regulating interstate extradition proceedings and hereby render inapplicable those provisions which are not consistent with the binding character of a transfer request. See, for instance, the Cooperation Acts of Germany, Denmark, Finland, Norway, the Netherlands and Sweden. Other Cooperation Acts have introduced special transfer proceedings; see the Cooperation Acts of Australia and New-Zealand, Belgium, Bosnia-Herzegovina, France, Italy, Croatia and the United States. If formal requirements are met, national authorities are obliged to transfer the person in question to the requesting Tribunal. For reasons other than that, a transfer order cannot be rejected. However, the cooperation acts of Australia and New-Zealand allow the rejection of a transfer order in cases where national authorities determine "special circumstances". See article 16 para. 2 of the Australian and article 12 para. 2 of the New-Zealand Cooperation Act.

⁷⁵ M. Bassiouni, *International Extradition: United States Law and Practice*, 1996.

⁷⁶ See the Cooperation Acts of Australia, New-Zealand, the United States and the United Kingdom.

constitutions principally forbid the extradition of nationals consider the transfer to the Tribunals as a new legal instrument to which extradition laws do not apply. Therefore, a special regulation in their cooperation acts was considered unnecessary.⁷⁷ Other states consider the transfer of nationals to the Tribunals as a subcase of extradition to which national extradition law generally applies. The prohibition of extradition of nationals, however, cannot be applied because the law of the Tribunals does not provide for such exception. Those states,⁷⁸ therefore, did not consider it necessary to implement a special permission of extradition of nationals. Still other states are of the opinion that prohibiting the extradition of nationals would also apply to the transfer of persons to the International Tribunals.⁷⁹ Those states have had to amend their national law to allow the transfer of nationals to the Tribunals. Their cooperation acts expressly provide for an authorization on the basis of which national authorities are empowered to transfer nationals to the International Tribunals.⁸⁰

c. Deferral of National Court Proceedings

A deferral of national court proceedings can have a fundamental impact on the rights of the accused, in particular on his or her right to due process. Furthermore, numerous constitutions contain a prohibition against exceptional courts. National courts or judicial authorities⁸¹ requested to defer a case to the Tribunals usually need legal authorization to comply with such a request. Even so, only a small number of cooperation acts provide for special deferral proceedings.⁸² According to such regulation, national courts have to review whether the crime for

⁷⁷ This is the case for the Belgium, the French, the Croatian, the Dutch and the Spanish Cooperation Act.

⁷⁸ Denmark, Finland, Norway, Sweden and Hungary.

⁷⁹ Germany, Switzerland and Austria.

⁸⁰ See article 5 of the Austrian and article 10 para. 2 of the Swiss Cooperation Act. Article 3 para. 1 of the German Cooperation Act.

⁸¹ In some states, investigations are carried out by authorities that are not connected to a court. According to Rule 8 RPE, those authorities are obliged to comply with the Tribunals' requests for deferral, too.

⁸² These are the cooperation acts of Belgium, Germany, France, Italy, Croatia, Austria, Spain, Switzerland, Sweden and the United Kingdom. Other acts authorize national courts to close pending proceedings if the same case is tried before one of the International Tribunals, but they do not empower them to defer to the Tribunals.

which a deferral is requested belongs within the jurisdiction of the Tribunal, and whether the deferral concerns the crime that is subject of the present proceedings. If both conditions are met, courts are not only authorized but obliged to defer proceedings to the requesting Tribunal. Some cooperation acts provide for a hearing before deferral is granted in order to give all parties the opportunity to present their opinion.⁸³ Against this decision, parties have the right to appeal.⁸⁴

Some cooperation acts provide for the re-opening or continuation of national proceedings in case an International Tribunal decides not to commence a trial of its own.⁸⁵

d. Enforcement of Sentences

Though states cannot be compelled by unilateral order to enforce the Tribunals' sentences, they are expected to indicate such willingness because of their general duty to cooperate with the International Tribunals, according to para. 1 of arts 29 Yugoslav and 28 Rwanda Statute respectively. The Secretary-General and the International Tribunals through their Presidents and their Registries have addressed several letters to states in which they asked for national assistance regarding the enforcement of sentences.

In the first years, some states had indicated to the Yugoslav Tribunal their willingness to enforce sentences of the Yugoslav Tribunal.⁸⁶ Some had indicated that they are not in the position to enforce sentences of the Yugoslav Tribunal.⁸⁷ Others have made certain reservations, such as

⁸³ See e.g. article 6 of the Belgium and article 9 para. 3 of the Croatian cooperation act. The latter provides for a hearing even in the absence of the accused.

⁸⁴ According to article 9 paras 4 and 5 of the Croatian Cooperation Act and article 3 para. 2 of the Italian act, all participants have the right to appeal to the Supreme Court within 8 days after the court of first instance issued its decision. The Supreme Court can confirm the decision of first instance, or it can amend or reject it. During the appeal, the case is suspended, i.e. it cannot be deferred to the requesting Tribunal.

⁸⁵ See for instance article 8 of the Belgian and article 4 para. 4 of the Austrian Cooperation Act.

⁸⁶ Pakistan, Bosnia and Herzegovina, Germany, Finland, the Islamic Republic of Iran, Italy, Croatia, Denmark, Spain and Sweden. See Yearbook of the ICTY 1996, 196 et seq.

⁸⁷ Bahamas, Belize, Burkina Faso, Ecuador, France, Liechtenstein, Malaysia, Poland and Slovenia. See Yearbook of the ICTY 1996, 197.

when the convicted person is a national of or has comparable link to the enforcement state.⁸⁸ Others have limited the number of persons they would be willing to accept.⁸⁹ The Netherlands, as the host state of the Yugoslav-Tribunal, has asked not to be the first state to enforce a sentence of the Yugoslav Tribunal.⁹⁰ Other states have indicated their general willingness to accept convicted persons but reserve the right to decide upon a case by case decision.⁹¹ As for enforcing the sentences of the Rwanda Tribunal, most African states, where the enforcement should preferably be done, have declared themselves unable to execute the Tribunal's sentences.⁹²

During 1999 three states have concluded agreements with the United Nations on the enforcement of sentences concerning the ICTY. On 23 July 1999, Sweden signed an agreement. In addition, an agreement with Spain was initialled on 18 June 1999. At the end of 1999 a total of five states had signed agreements: Austria, Finland, Italy, Norway and Sweden. The number increased in 2000 to seven after France and Spain signed Agreements.⁹³ Other states have indicated in 1999 and 2000 their willingness to either the Security Council, the Secretary-General or the President of the Tribunal, to enforce sentences of the Tribunal, although an agreement has not yet been concluded. These are Bosnia and Herzegovina, Croatia, Denmark, Germany, the Islamic Re-

⁸⁸ See notification of Sweden to the Registrar of the Yugoslav Tribunal of 19 December 1994, see Yearbook of the ICTY 1994, 163 (French version).

⁸⁹ See notification of Norway of 1 February 1995, see Yearbook of the ICTY 1995, 320.

⁹⁰ See A. Klip, "Nederland en de Internationale strafrechtshoven voor Rwanda en het voormalige Joegoslavië", *Tijdschrift voor de Rechterlijke Macht* 1997, 22 et seq.

⁹¹ See notification of Denmark to the Registrar of the Yugoslav Tribunal of 6 December 1994, see Yearbook of the ICTY 1994, 162, footnote 4.

⁹² But on 12 February 1999, the Registrar of the Tribunal and the Government of Mali signed an agreement on the enforcement of the Tribunal's sentences. This made Mali the first country to provide prison facilities for the enforcement of the Tribunal's sentences. The Republic of Benin became the second country to sign such an agreement on 26 August 1999. The Kingdom of Swaziland became the third country, and the agreement was signed on 30 August 2000. Belgium, Denmark, Norway and some African countries have also indicated their willingness to incarcerate (Fact Sheet of the ICTR No. 6).

⁹³ 6th Annual Report of the Tribunal, Doc. A/54/187 of 25 August 1999 and 7th Annual Report Doc. A/55/273 of 7 August 2000.

public of Iran, and Pakistan.⁹⁴ The provisions of those Agreements, which were elaborated according to a "model" agreement, indicate the authority to which enforcement requests must be directed, and describe the procedure for transferral of the convicted person to the enforcement state.⁹⁵ Another provision allows the International Committee of the Red Cross (ICRC) to regularly check the conditions of the imprisonment.⁹⁶ According to article 13 of the Enforcement Agreements, the Agreements themselves remain in force for the duration of the imprisonment. Article 13 is of major significance since the Yugoslav Tribunal, will be in existence only for a limited time. The question arose whether its sentences could still be enforced once the Tribunal has been dismantled. Article 13 of the Enforcement Agreements has solved this problem since one party of the Agreements is the United Nations Organization, not the Yugoslav Tribunal. Therefore, a state is answerable to the UN in its duty to enforce a sentence of the Yugoslav Tribunal.

VI. State Cooperation in Practice

Requests for deferral are rare. Since their financial and personal means are limited, the Tribunals make use of their primacy only in exceptional cases. Unless deferral is due to one of the reasons set out in Rule 9 RPE, trials are preferably left with national courts. In very few cases where states have been requested to defer, they have complied without hesitation. As to the enforcement of sentences, it has already been pointed out that the Tribunals cannot issue binding orders to states. In practice, state cooperation in pre-trial investigations and the execution of arrest and transfer orders are of primary interest.

The necessity of state cooperation and the consequences of a state's failure to cooperate became evident during the so-called *subpoena issue* that took place before the Yugoslav Tribunal in 1997 in the case of *Prosecutor v. T. Blaskic*.⁹⁷ Upon request of the Prosecutor, a Judge directed an order to Bosnia and Herzegovina and Croatia, and their respective state officials.⁹⁸ They were requested to produce certain docu-

⁹⁴ See above.

⁹⁵ See arts 2 and 3 of the Agreements on the Enforcement of Sentences.

⁹⁶ See article 6 para. 1 of the Agreements on the Enforcement of Sentences.

⁹⁷ Case No. IT-95-14-PT.

⁹⁸ The competent state officials were the Croatian Defence Minister, and for Bosnia and Herzegovina, the "Custodian of the records of the Central Ar-

ments that would serve as evidence in the *Blaskic* Case. Whereas Bosnia and Herzegovina tried its best to comply with the order, Croatia denied the competence of the Yugoslav Tribunal to address a *subpoena duces tecum* to a state and its officials. Thereafter, special proceedings took place in which the parties to the *Blaskic* Case as well as various other states and scholars could present their legal opinions about the competence of the Yugoslav Tribunal to bring about the cooperation of a state, and the state's duty to respond to Tribunal orders. Since Croatia appealed against the decision of the Trial Chamber, it took the Tribunal more than half a year to determine the limits of its competences and even longer to obtain (some of) the documents requested.⁹⁹ As the *subpoena issue* shows, even one state reluctant to cooperate with the International Tribunals can hamper their proceedings and can become a stumbling block in fulfilling their mandate.¹⁰⁰

In practise, the carrying out of the Tribunals' arrest and transfer orders is varied. States to whom arrest and transfer orders of the Yugoslav Tribunal have been addressed (mainly successor states of the former Yugoslavia) have initially been unable or unwilling to execute such or-

chive of what was formerly the Ministry of Defense of the Croatian Community of Herceg Bosna." Since the Ministry of Defence of the former Croat Community Herceg-Bosna had ceased to exist, both the Bosnian Government and the ordering judge held the Custodian was responsible for cooperation with the Yugoslav Tribunal.

⁹⁹ "Similarly, the Appeals Chamber found that the Tribunal did not have the inherent judicial power to subpoena a State or its officials whereas they did have the power to subpoena an individual by virtue of this source of power", D. Sarooshi, "The Powers of the United Nations International Criminal Tribunals", *Max Planck UNYB* 2 (1998), 141 et seq., (153), with further references. See also P. Malanczuk, "A note on the Judgement of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on the Issuance of Subpoena Duces Tecum in the Blaskic Case", *Yearbook of International Humanitarian Law* 1 (1998), 229 et seq.

¹⁰⁰ Although the Rwanda Tribunal is not bound *expressis verbis* by the decisions and statements of the Yugoslav Tribunal, the decisions of the *subpoena issue* can also be applied by the Rwanda Tribunal since they concern very basic questions about the Tribunals' basic law. When establishing the Rwanda Tribunal, the Security Council wanted to equip it with exactly the same competences as the Yugoslav Tribunal. Therefore, the competences of the Rwanda Tribunal should be defined in the same way as those of the Yugoslav Tribunal. Practise has already shown, that the Rwanda Tribunal is keen on following general decisions and statements of the Yugoslav Tribunal.

ders.¹⁰¹ It took a long time before the Yugoslav Tribunal could get hold of its first accused. IFOR also hesitated to execute international arrest warrants of the Yugoslav Tribunal.^{102 103}

Arrest and transfer warrants of the Rwanda Tribunal have been executed promptly and willingly by nearly all states to which such orders have been addressed. Arrest and transfer orders of the Rwanda Tribunal have mostly been addressed to African States, in particular to Kenya, Cameroon, Zambia and the Ivory Coast, but also to some European states as Belgium and Switzerland. Mention should be made of the spectacular *Naki* (Nairobi-Kigali) operation of 1997, in the course of which seven accused or suspects of the Rwanda Tribunal were arrested and transferred to the Rwanda Tribunal.¹⁰⁴ Among those were the former minister of Rwanda for Family and Women's Affairs, the first woman ever to be accused by an international tribunal.¹⁰⁵

VII. Conclusion

As practice shows, it depends for the most part on the cooperation of states whether the International Criminal Tribunals for the Former Yugoslavia and for Rwanda can fulfil their mandate and prosecute serious violations of international humanitarian law committed during the Yugoslav and the Rwanda conflicts. The Tribunals have been equipped with far-reaching legal and institutional means to guarantee an efficient

¹⁰¹ In particular Bosnia and Herzegovina seemed to be willing but did not have the necessary means to carry out arrest warrants of the Yugoslav Tribunal. The attitude of Croatia, which in the beginning was rather reluctant to execute such orders, seems to be changing. Only the Republic of Serbia and Montenegro has demonstrated that it is not willing to cooperate with the Yugoslav Tribunal.

¹⁰² As mentioned above, SFOR/ KFOR is undoubtedly authorized to execute international arrest warrants of the Yugoslav Tribunal. Whether it is put under obligation to do so, remains a contentious issue. However, this issue has lost its practical importance since SFOR had proved its willingness to execute arrest warrants of the Yugoslav Tribunal.

¹⁰³ The Yugoslav Tribunal has expressed its appreciation of the cooperation in its 5th Annual Report as well as in the 6th. and 7th.

¹⁰⁴ See C. Cissé, "The End of a Culture of Impunity in Rwanda?", *Yearbook of International Humanitarian Law* 1 (1998), 161 et seq.

¹⁰⁵ See for further developments the 5th Annual Report of the Tribunal, Doc. A/ 55/435 of 2 October 2000.

prosecution of such crimes. If the Tribunals are unable to fulfil their mandate, it will be the fault of the International Community.

The Tribunals remain paralyzed if their orders are not carried out. It is especially important that states cooperate in executing arrest warrants and transfer orders. If they do not, an international organization or institution, as a last resort, can step in and remedy the situation. Thanks to the efforts of SFOR/KFOR, the Yugoslav Tribunal successfully initiated criminal proceedings against some (major) criminals of the Yugoslav conflict. On the other hand, the example of the Rwanda Tribunal demonstrates that such an international force is not necessary if states fulfil their part and assist the Tribunal as prescribed by the Statutes.

The example of the Rwanda Tribunal further shows that a cooperation act is not necessarily needed to foster successful cooperation between the International Tribunals and states. Not one of the African states that have executed arrest and transfer orders of the Rwanda Tribunal had a legal instrument at their disposal authorizing national authorities to comply with such order. On the contrary the Yugoslav example made clear that the mere existence of a cooperation act is not necessarily an indication of a state's willingness to cooperate with the Tribunals. Some European states have enacted very clear cooperation acts, but when asked to execute an order, they claimed that compliance might threaten national security or similar national interests.

It is noteworthy that the persons currently facing trial at the Rwanda Tribunal are, without exception, the main instigators of the atrocities committed during the Rwanda conflict. Most of them held key positions in politics, media or the economy before and during the civil war. Until recently those standing trial before the Yugoslav Tribunal, were merely pawns of those who were primarily responsible for the atrocities. This is not to say that minor war criminals should not be prosecuted; every participant in the crimes should be subject to prosecution. However, because the resources of the International Tribunals are limited and their credibility is at stake, minor criminals should be left to the national courts which can exercise their jurisdiction according to the principle of universality. The extradition of Slobodan Milošević to the ICTY in July 2001 and the fact that B. Plavsic, formerly a member of the Presidency of the so called Serbian Republic of Bosnia and Herzegovina, and a member of the supreme command of the armed forces of the Serbian republic, who is indicted currently at the ICTY, have changed the picture for the ICTY.

Should serious violators of international humanitarian law principally be prosecuted by an international court? It may be argued that

leaving this task with national courts would preserve valuable resources. However, to ensure the equal dispensation of justice, to contribute to national reconciliation, and because of the preventative function of a criminal court, prosecution of violations of international humanitarian law should be handled by an international court. Even so, the aim of an international court should be the prosecution and conviction of the key figures.