SUÇ VE CEZA

CEZA HUKUKU DERGİSİ

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Sahibi
Türk Ceza Hukuku Derneği İktisadi İşletmesi adına
Av. Hasan Fehmi Demir

Genel Yayın Yönetmeni
Av. Fikret İlkiz

Sorumlu Müdür
Av. Mehmet İpek

İletişim Adresi
Türk Ceza Hukuku Derneği
Harbiye Mah. Maçka Cad.
No: 11 D3 Şişli-İstanbul

Basım Yeri
Birlik Fotokopi Baskı Ozalit Gıda San. Tic. Ltd. Şti.
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İçindekiler

ÖNSÖZ

"Uluslararası Cezalandırılabilirlik ve Uluslararası Ceza Mahkemesi" konulu uluslararası sempozyumu 26-28 Eylül 2011 tarihleri arasında İstanbul'da Okan Üniversitesi Akfırat-Tuzla Yerleşkesinde gerçekleştirmiştik. Bu Sempozyuma tebliğleriyle katılan Türk ve yabancı uzmanlar (akademik unvanlar etkinlik tarihine göre yazılmıştır) ve tebliğ konuları oturum sırasına göre şöyle olmuştur:

Arş. Gör. Hüseyin GÜNAL: Hukuk Politika İlişkisi Bağlamında Uluslararası Ceza Hukukunda Yetki Sorunu,

Dr. Nandor KNUST: Rechtspluralismus im System des internationalen Strafrechts (Uluslararası Ceza Hukuku Sistemi İçerisinde Hukuki Çoğulculuk) (Max-Planck Institut für auslaendisches und internationales Strafrecht, Freiburg-Federal Almanya),

Prof. Dr. Hamide ZAFER: Ulusal Hukuk Sistemlerinin Roma Statüsü ile Uyumlaştırılması - Alman Modeli- ve Statünün Türk Hukukuna Etkileri,

Dr. Philipp AMBACH : Der Internationale Strafgerichtshof: Grundlagen, derzeitiger Stand und Herausforderungen (Uluslararası Ceza Mahkemesi, Temeller, Bugünkü Durum ve Üstesinden Gelmesi Gereken Beklentiler (ICTY-Yugoslavya İçin Uluslararası Ceza Mahkemesi-Hollanda),

Dr. Helmut KREICKER: Völkerrechtliche Immunitaeten (Uluslararası Dokunulmazlıklar (Karlsruhe Federal Savcılığı-Federal Almanya),

Prof. Dr. Faruk TURHAN: Uluslararası Ceza Mahkemesi Savcısının Soruşturma Yetkisi ve UCM Önünde Davanın Açılması,

Dr. Stefanie BOCK: Die Opfer völkerrechtlichen Verbrechen

(Uluslararası Hukuk Suçlarının Mağduru) (Georg-August- Göttingen Üniversitesi Hukuk Fakültesi-Federal Almanya),

Dr. Paul BEHRENS: Trostfrauen-Ein Verbrechen gegen die Menschlichkeit (Cinsel İstismar Konusu Savaş Esiri Kadınlar (Comfort Women)- İnsanlığa Karşı Bir suç),

(Leicester Üniversitesi Hukuk Fakültesi- İngiltere)

Dr. Thomas Wayde PITTMAN: International Residual Mechanism for Criminal Tribunals: Origins and Comparative Developments (Ceza Mahkemeleri İçin Uluslararası Artık (Residual) Mekanizma: Kökleri ve Karşılaştırmalı Gelişim (ICTY-Yugoslavya İçin Uluslararası Ceza Mahkemesi-Hollanda),

Yrd. Doç. Dr. Barış ERMAN: U.C.M. Statüsü'ne Göre Uluslararası Suçlar ,

Yrd. Doç. Dr. Murat ÖNOK : Uluslararası Ceza Mahkemesi Karşısında Türkiye'nin Tutumu ve Durumu,

Dr. Hilde FARTHOFER: Funktionsweise und Zustaendigkeit des IStGH nach dem UN-Vertrag und IStGH-Statut (B.M. Antlaşması ve U.C.M. Statüsü'ne Göre U.C.M.'nin İşlevsellik Biçimi ve Yetkisi (Philipps-Universität Marburg-Federal Almanya),

Öğr. Gör. Aslıhan Iğdır AKARAS: Güvenlik Konseyinin Uluslararası Hukuk ve Politikadaki Yetkilerinin Uluslararası Ceza Mahkemesine Etkisi,

Yrd. Doç. Dr. Hakan KARAKEHYA: Tamamlayıcılık İlkesi Bağlamında Uluslararası Ceza Mahkemesinin Devletlerin Egemenlik Haklarına Müdahalesi,

Prof. Dr. Mustafa Ruhan ERDEM: Roma Statüsü ve Suçluların İadesi,

Prof. Dr. Olympia BEKOU: Die Legal Tools Projeckt (Legal Tools Projesi) (Nottingham Üniversitesi-İngiltere).

Sempozyuma katılmış, Federal Almanya, Hollanda, Amerika Birleşik Devletleri ve İngiltere'de çeşitli kurumlarda çalışmakta olan yabancı hukukçulardan bazılarının tebliğleri yazılı olarak elimizde

bulunmaktaydı. Bunlardan ancak birisinin tebliği, Türkçeye, o zamanlar Okan Üniversitesi Hukuk Fakültesinde Ceza ve Ceza Muhakemesi Hukuku Anabilim Dalında araştırma görevlisi olarak çalışmakta olan Bilgehan Savaşçı tarafından çevrilmiştir. Diğer yabancı dildeki yazılı tebliğleri ne yazık ki bugüne kadar Türkçeye çevirecek ortak bir çalışma gerçekleştirilememiştir. Bu nedenle, hiç olmazsa eldeki yazılı tebliğleri yayınlamak düşüncesinin, benim de üyesi bulunduğum Türk Ceza Hukuku Derneği'nin süreli yayınıyla gerçekleştirilmesinden mutluluk duymaktayım.

Bu vesileyle, üzerinden birkaç yıl geçmiş olsa da, epeyce emek harcanarak gerçekleştirilmiş Uluslararası Cezalandırılabilirlik ve Uluslararası Ceza Mahkemesi Uluslararası Sempozyumuna destek sağlayan Alman Akademik Değişim Merkezi DAAD ile o zamanki "Köksal Avukatlık Ortaklığı" adına Av. Dr. Mehmet Köksal'a burada teşekkür edebilmekten de mutluluk duymaktayım.

Uluslararası Ceza Mahkemesini kuran ve bu mahkemenin yargılayacağı uluslararası suçları gösteren Roma Statüsü, 7 Temmuz 1998'de kabul edilmiş ve imzaya açılmış; 1 Temmuz 2002 tarihinde yürürlüğe girmiştir. 26-28 Eylül 2011 tarihleri arasında yapılan Sempozyum, içeriği açısından, Uluslararası Ceza Mahkemesinin ve Roma Statüsünün daimi niteliğiyle daima güncel kalacaktır. Dolayısıyla, nihayet yayınlanan, her biri, alanında yetkin hukukçular tarafından kaleme alınmış tebliğlerin, Uluslararası Ceza Hukuku alanında okuyucuya yararlı olacağı kanaatindeyim.

Av. Prof. Dr. Serap KESKİN KİZİROĞLU
Akfırat-Tuzla/İstanbul

Arama ve Tarama

Prof.Dr. Serap KESKİN KİZİROĞLU[1]

1- ARAMA, ya suç işlendiği şüphesi üzerine adli amaçla ya da henüz herhangi bir suç işlenmeden önce bunu önlemek amacıyla idari amaçla yapılabilir; ilkine adli arama, ikincisine idari/önleyici arama denir. Her ikisinin de anayasal temeli Anayasa'nın 20. ve 21. maddeleridir. Adli aramanın yasal temeli öncelikle 5271 sayılı Ceza Muhakemesi Kanunu'dur. 2559 sayılı Polis Vazife ve Salahiyet Kanunu ise hem adli aramanın hem de idari/önleyici aramanın yasal temelidir.

ADLİ ARAMA İŞLENDİĞİNDEN ŞÜPHELENİLEN SUÇUN DELİLİNİ YA DA FAİLİNİ BULMAK İÇİN YAPILIR. ARANILAN YERDE YA DA KİŞİDE BUNLARIN BULUNABİLECEĞİNE DAİR SOMUT VERİLERİN BULUNMASI ZORUNLUDUR; RASTGELE ADLİ ARAMA YAPILAMAZ. YARGIÇ KARARIYLA OLUR; GECİKMEDE SAKINCA VARSA CUMHURİYET SAVCISININ YAZILI EMRİ İLE SAVCIYA ULAŞILAMIYORSA KOLLUK AMİRİNİN YAZILI EMRİ İLE YAPILABİLİR. ANCAK KONUTTA-İŞYERİNDE VE KAMUYA AÇIK OLMAYAN KAPALI ALANDA KOLLUK AMİRİNİN EMRİ İLE HİÇ BİR DURUMDAYAPILAMAZ.

ÖNLEYİCİ ARAMA TOPLUM İÇİNDE KİŞİLER BAKIMINDAN SOMUT TEHLİKENİN ZARARA DÖNÜŞMESİNİ ÖNLEMEK AMACIYLA YAPILIR. Önleyici aramayı düzenleyen 2559 sayılı Polis Vazife ve Salahiyet Kanunu'nun ''Önleme Araması'' başlıklı 9.maddesine göre polis, tehlikenin veya suç işlenmesinin önlenmesi amacıyla usulüne göre verilmiş SULH CEZA HÂKİMİNİN KARARI veya bu sebeplere bağlı olarak gecikmesinde sakınca bulunan hâllerde MÜLKÎ ÂMİRİN (VALİNİN-KAYMAKAMIN) VERECEĞİ YAZILI EMİRLE; kişilerin üstlerini, araçlarını, özel kâğıtlarını ve eşyasını arar; alınması gereken tedbirleri alır, suç delillerini koruma altına alarak 5271 sayılı Ceza Muhakemesi Kanunu hükümlerine göre gerekli işlemleri yapar.

[1] Okan Üniversitesi Hukuk Fakültesi, Ceza ve Ceza Muhakemesi Hukuku, Anabilim Dalı Öğretim Üyesi.

Spor karşılaşması, miting, konser, festival, toplantı ve gösteri yürüyüşünün düzenlendiği veya aniden toplulukların oluştuğu hallerde gecikmesinde sakınca bulunan hal var sayılır.(PVSK.md.9/6)

Adli ve Önleme Aramaları Yönetmeliği'nin ''Önleme Araması ve Kapsamı'' başlığını taşıyan 19.maddesine göre de önleme araması, ulusal güvenlik ve kamu düzeninin, genel sağlık ve genel ahlakın veya başkalarının hak ve özgürlüklerinin korunması, suç işlenmesinin önlenmesi, taşınması veya bulundurulması yasak olan her türlü silah, patlayıcı madde veya eşyanın tespiti amacıyla yapılan arama işlemidir.

ARAMA TALEP YAZISINDA, ARAMA İÇİN MAKUL SEBEPLERİN OLUŞTUĞUNUN GEREKÇELERİYLE BİRLİKTE GÖSTERİLMESİ GEREKİR.

Arama kararında veya yazılı emrinde;

a) Aramanın sebebi,

b) Aramanın konusu ve kapsamı,

c) Aramanın yapılacağı yer,

ç) Aramanın yapılacağı zaman ve geçerli olacağı süre belirtilir.

Önleme aramasının sonucu, arama kararı veya emri veren merci veya makama bir tutanakla bildirilir.

KONUTTA, YERLEŞİM YERİNDE VE KAMUYA AÇIK OLMAYAN İŞYERLERİNDE VE EKLENTİLERİNDE ÖNLEME ARAMASI YAPILAMAZ (PVSK.md.9/5; Arama Yön.md.19/son)

ANCAK POLİSE ARAMA YETKİSİ VEREN BU HÜKÜMLER YARGIÇ, SAVCI VE AVUKATLARA UYGULANAMAZ.

YARGIÇLAR VE SAVCILAR İÇİN 2802 SAYILI HAKİMLER SAVCILAR KANUNU'NUN 88.MADDESİ, AVUKATLAR İÇİN 1136 SAYILI AVUKATLIK KANUNU'NUN 58.MADDESİ BUNA ENGELDİR.

AVUKATLAR, SAVCILAR VE YARGIÇLARIN AĞIR CEZAYI GEREKTİREN SUÇ ÜSTÜ HALİ DIŞINDA ÜSTLERİNİN ARANMASI KANUNEN YASAKTIR; DOĞAL OLARAK YANLARINDA BULUNAN EŞYA DA ARANAMAZ.

2- TARAMA, ELEKTRONİK GÜVENLİK SİSTEMLERİYLE YAPILAN GÜVENLİK İŞLEMİDİR; ELLE YAPILAMAZ. AMACI, TOPLUM İÇİNDE VE BAZI KURUMLARA GİRİŞTE, TEHLİKE ORTAMININ OLUŞMAMASINI GÜVENCEYE ALMAKTIR. TARAMA, ARAMAYA DÖNÜŞTÜRÜLECEK BİÇİMDE YAPILAMAZ. KİŞİNİN BEDENİNE DOKUNULAMAZ. KİŞİ, YARGIÇ-SAVCI-AVUKAT HARİÇ, TARAMA SONUCUNDA ELEKTRONİK GÜVENLİK SİSTEMİ UYARI VERDİĞİNDE ELLE TARAMAYI (KABA ARAMA DA DENMEKTEDİR) KABUL ETMEZSE İÇERİ GİREMEZ. TARAMA, BU ÖZELLİĞİYLE İDARİ BİR İŞLEMDİR; ÖNLEYİCİ ARAMAYA BENZER, ANCAK ÖNLEYİCİ ARAMA, DİĞER DEYİŞLE ÖNLEME ARAMASI DEĞİLDİR.

TARAMA YETKİSİNE POLİS VE ÖZEL GÜVENLİK PERSONELİ AŞAĞIDAKİ DURUMLARDA SAHİPTİR:

SOMUT TEHLİKE ORTAMI ZATEN OLUŞMUŞSA POLİS VAZİFE VE SALAHİYET KANUNUNA GÖRE Polis, tehlikenin önlenmesi veya bertaraf edilmesi amacıyla **güvenliğini sağladığı bina** ve tesislere gelenlerin; herhangi bir emir veya karar olmasına bakılmaksızın, üstünü, aracını ve eşyasını **teknik cihazlarla, gerektiğinde el ile kontrol etmeye** ve **aramaya yetkilidir.** Bu yerlere girmek isteyenler kimliklerini, sorulmaksızın ibraz etmek zorundadırlar. Milletlerarası anlaşmalar hükümleri saklıdır.(PVSK.md.9/7)

ANCAK BU HÜKÜMDEKİ **ELLE KONTROL VE ARAMANIN** YARGIÇLAR VE SAVCILAR İÇİN UYGULANMASINA, HÂKİMLER SAVCILAR KANUNU'NUN 88.MADDESİ, AVUKATLAR İÇİN DE AVUKATLIK KANUNUNUN 58.MADDESİ ENGELDİR.

FAKAT ELEKTRONİK GÜVENLİK SİSTEMLERİYLE **TARAMAYA** ENGEL BİR HÜKÜM YOKTUR; ANCAK BU DURUMDA DA ELEKTRONİK GÜVENLİK SİSTEMİ (DEDEKTÖR, X-RAY, DUYARLI KAPI VS.) UYARI VERECEK OLDUĞUNDA **YARGIÇ, SAVCI VE AVUKATIN ÜSTÜ VE EŞYASININ ELLE TARANMASI VE ARANMASI DA YASAKTIR; ÖZEL KİŞİYE AİT OLMAYAN BİR BİNA, YANİ KAMU BİNASI İSE İÇERİ GİRMELERİNE DE ENGEL OLUNAMAZ.**

BİNANIN GÜVENLİĞİ ÖZEL GÜVENLİK GÖREVLİLERİNCE SAĞLANIYORSA 5188 SAYILI ÖZEL GÜVENLİK HİZMETLERİNE DAİR KANUNUN, ÖZEL GÜVENLİK GÖREVLİLERİNİN YETKİLERİNİ DÜ-

ZENLEYEN 7.MADDESİNE GÖRE, Özel güvenlik görevlileri, koruma ve güvenliğini sağladıkları alanlara girmek isteyenleri duyarlı kapıdan geçirme, bu kişilerin üstlerini dedektörle arama, eşyaları X-ray cihazından veya benzeri güvenlik sistemlerinden geçirme, toplantı, konser, spor müsabakası, sahne gösterileri ve benzeri etkinlikler ile cenaze ve düğün törenlerinde kimlik sorma, duyarlı kapıdan geçirme, bu kişilerin üstlerini dedektörle arama, eşyaları X-ray cihazından veya benzeri güvenlik sistemlerinden geçirme, hava meydanı, liman, gar, istasyon ve terminal gibi toplu ulaşım tesislerinde kimlik sorma, duyarlı kapıdan geçirme, bu kişilerin üstlerini dedektörle arama, eşyaları X-ray cihazından veya benzeri güvenlik sistemlerinden geçirmeye yetkilidir.

YANİ, ÖZEL GÜVENLİK GÖREVLİLERİNİN YALNIZCA ELEKTRONİK GÜVENLİK DENETİMİ DEMEK OLAN TARAMA YETKİSİ VARDIR; HİÇ BİR DURUMDA ELLE TARAMA YA DA ARAMA YETKİSİ YOKTUR. YARGIÇ, SAVCI, AVUKAT BAKIMINDAN TARAMADA İSTİSNA YOKTUR. FAKAT TARAMA UYARI VERDİĞİNDE YARGIÇ, SAVCI VE AVUKATIN ELLE KONTROLÜ DE YASAKTIR; **ÖZEL KİŞİYE AİT OLMAYAN BİR BİNA, YANİ KAMU BİNASI İSE İÇERİ GİRMELERİNE ENGEL OLUNAMAZ.**

BUNUN TEK İSTİSNASI CEZA İNFAZ KURUMLARINA(CEZAEVLERİNE) GİRİŞTE VARDIR. 5275 SAYILI CEZA VE GÜVENLİK TEDBİRLERİNİN İNFAZI HAKKINDA KANUNUN 86.MADDESİNE GÖRE: Kurum görevlileri ve dış güvenlik görevlileri dâhil olmak üzere, sıfat ve görevi ne olursa olsun, ceza infaz kurumlarına girenler duyarlı kapıdan geçmek zorundadır. Bu kişilerin üstleri metal dedektörle aranır; eşyaları x-ray cihazından veya benzeri güvenlik sistemlerinden geçirilir, ayrıca şüphe hâlinde elle aranır. Bu cihazların bulunmadığı yerlerde arama ve kontrol elle yapılır. **Ancak milletvekilleri, mülkî amirler, hâkim, Cumhuriyet savcıları ve bu sınıftan sayılanlar, avukatlar, noterler, ceza infaz kurumları ve tutukevleri kontrolörleri, izleme kurulu başkan ve üyeleri, uluslararası sözleşmelerle yetkileri tanınmış kişi ve kuruluşların temsilcileri, ceza infaz kurumu ve tutukevi koruma birlik komutanı ile kurum müdürünün üstleri ağır cezayı gerektiren suçüstü hâlleri dışında elle aranamaz. Duyarlı kapı cihazının ikazının sürmesi hâlinde bu kişiler ancak, elle aramayı kabul ettikleri takdirde kuruma girebilirler.** Ziyaret yerleri de ziyaret öncesi ve bitiminde aranır.

Ceza infaz kurumuna girişte dahi yargıç, savcı, avukat, milletvekili ve yukarıda kanunda sayılan diğer kişiler de taramadan geçmek zorunda olup, elektronik güvenlik sisteminin uyarı vermesi halinde elle aramayı kabul etmezlerse ceza infaz kurumuna (cezaevine) giremezler.

BUNDAN BAŞKA HERKES İÇİN GENEL BİR İSTİSNA 5442 SAYILI İL İDARESİ KANUNU'NUN EK 1.MADDESİNDEDİR. BUNA GÖRE, sivil hava meydanları, limanlar ve sınır kapılarında görevli mülki idare amiri genel güvenlik ve kamu düzeni bakımından gerekli gördüğü hallerde, binaları, uçakları, gemileri ve her türlü deniz ve kara taşıtlarını, giren çıkan yolcular ile buralarda görevli kamu kuruluşları ve özel kuruluşlar personelinin üstlerini, araçlarını ve eşyalarını aratabilir.

SONUÇ OLARAK GEREK ARAMA GEREKSE TARAMA İŞLEMİ BAKIMINDAN KANUNLARDA YARGIÇLAR, SAVCILAR VE AVUKATLAR AYNI KURALLARA TABİ TUTULMUŞLARDIR. BU BAKIMDAN YASALARDA BİR FARKLILIK YOKTUR. SORUN, AVUKATLAR ALEYHİNE HUKUKA VE KANUNA AYKIRI AYRIMCI UYGULAMADAN KAYNAKLANMAKTADIR. UYGULAMADA DA KANUNLARDAKİ AYNI HASSASİYET, ÖZELLİKLE BİÇİM YÖNÜNDEN DE GÖSTERİLMEK ZORUNDADIR. ADALET VE YARGININ OLMAZSA OLMAZI OLAN AVUKATLAR DA, AVUKATLIĞIN MESLEK VE ONURUNU ZEDELEYİCİ BU HAKSIZ UYGULAMAYI DOĞAL OLARAK ÖNCELİKLE HUKUKUN SAVUNMASI ADINA REDDETMEK DURUMUNDADIRLAR.

Völkerrechtliche Immunitäten – Schranken für eine Ahndung völkerrechtlicher Verbrechen?[1]

DR. HELMUT KREICKER[2]

I. Einleitung

Im Jahr 2002 hat der Internationale Gerichtshof eine Strafverfolgung des amtierenden kongolesischen Außenministers wegen völkerrechtlicher Verbrechen durch Belgien für unzulässig erklärt und dies damit begründet, amtierende Außenminister genössen, ebenso wie amtierende Staatsoberhäupter, gegenüber den nationalen Gerichten anderer Staaten Immunität. Dagegen hat der Internationale Strafgerichtshof (IStGH) sich nicht daran gehindert gesehen, Haftbefehle gegen den amtierenden Staatspräsidenten des Sudan, Al Bashir, sowie kürzlich gegen das libysche Staatsoberhaupt Gaddafi zu erlassen. Der IStGH hat betont, diesen Haftbefehlen stehe keine Immunität entgegen.

Was die Strafverfolgung von einfachen staatlichen Funktionsträgern anbelangt, etwa von Soldaten oder Regierungsbeamten, besteht Einigkeit darüber, dass diese Personen sich –anders als Staatsoberhäupter – gegenüber nationalen Gerichten nicht auf Immunität berufen können, wenn es um den Vorwurf einer Völkerstraftat geht.

Dieser Befund zeigt zweierlei: Zum einen muss man, wenn es um die Frage geht, inwieweit völkerrechtliche Immunitäten einer Strafverfolgung wegen völkerrechtlicher Verbrechen Schranken setzen, zwischen nationalen Strafverfolgungen einerseits und Strafverfolgungen durch den IStGH andererseits unterscheiden. Zum anderen muss man zwischen verschiedenen Personengruppen, genauer: zwischen verschiedenen Arten von Immunitäten, differenzieren.

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[1] Okan Üniversitesi Hukuk Fakültesi ve İstanbul Barosu'nca 26-28 Eylül 2011 tarihleri arasında birlikte yapılan, Prof.Dr. Serap Keskin Kiziroğlu tarafından organize edilen ''Uluslararası Cezalandırılabilirlik ve Uluslararası Ceza Mahkemesi Sempozyumu''nda 27 Eylül 2011 tarihinde sunulmuş tebliğdir.

[2] Richter am Landgericht, zurzeit tätig bei der Generalbundesanwaltschaft in Karlsruhe, Deutschland (27.09.2011)

Ich möchte im Folgenden einen Überblick über die wichtigsten völkerrechtlichen Immunitäten geben und aufzeigen, inwieweit diese eine Strafverfolgung wegen völkerrechtlicher Verbrechen verbieten, wobei ich jeweils zwischen einerseits nationalen Strafverfolgungen und andererseits Strafverfolgungen durch den IStGH unterscheiden werde.

2

II. Differenzierung zwischen Immunitäten ratione personae und Immunitäten ratione materiae

Vorab aber will ich auf die grundlegende Unterscheidung zwischen zwei Arten von Immunitäten

hinweisen, und zwar den Immunitäten ratione personae sowie den Immunitäten ratione materiae.

Die *Immunitäten ratione personae* beziehen sich auf bestimmte Personen und befreien diese wegen ihres besonderen Status, etwa als Staatsoberhaupt oder Diplomat, grundsätzlich umfassend von der Strafgerichtsbarkeit anderer Staaten. Wer Immunität ratione personae genießt, kann – solange diese Immunität besteht – überhaupt nicht strafrechtlich zur Verantwortung gezogen werden, also weder wegen Taten, die in Ausübung des Dienstes begangen wurden, noch wegen Taten, die als Privatperson verübt wurden. Unerheblich ist auch, wann die Taten begangen wurden. Dagegen beziehen sich die *Immunitäten ratione materiae* nicht auf eine bestimmte Person, sondern auf bestimmte Diensthandlungen. Personen, die Immunität ratione materiae genießen, sind nur dann vor einer Strafverfolgung geschützt, wenn die Tat, um die es geht, eine Diensthandlung für ihren Staat war. Wegen Straftaten, die sie als Privatperson verübt haben, können diese Personen also zur Verantwortung gezogen werden. Ganz wichtig ist, dass die Bezeichnungen „Immunität ratione personae“ und „Immunität ratione materiae“ nur *Sammelbezeichnungen* für verschiedene Immunitäten sind, und zwar zum einen für statusbezogene Immunitäten, zum anderen für handlungsbezogene Immunitäten. Es gibt also nicht *die* Immunität ratione materiae. Wenn man sich die Frage stellt, inwieweit völkerrechtliche Immunitäten einer Strafverfolgung wegen völkerrechtlicher Verbrechen entgegenstehen, ist deshalb stets auf die einzelne

jeweils in Betracht kommende konkrete Immunität zu blicken. Leider wird in der wissenschaftlichen Diskussion dieser Aspekt häufig übersehen, was leicht zu falschen Beurteilungen führt.

III. Die Immunitäten ratione personae

1. Die Immunität amtierender Staatsoberhäupter und Regierungsmitglieder

Seit jeher ist geltendes Völkergewohnheitsrecht, dass amtierende Staatsoberhäupter Immunität ratione personae genießen. Sie sind der Strafgerichtsbarkeit anderer Staaten in vollem Umfang entzogen. Kein Staat darf ein Strafverfahren gegen das amtierende Staatsoberhaupt eines anderen Staates durchführen, unabhängig davon, was der Person zur Last gelegt wird. Nach wie vor nicht vollständig geklärt ist dagegen die Frage, ob diese Immunität neben Staatsoberhäuptern auch anderen besonders hochrangigen Staatsvertretern zukommt. Der IGH hat in dem von mir eingangs erwähnten Verfahren betont, dass auch amtierende Außenminister der Strafgerichtsbarkeit anderer Staaten entzogen sind. Wenn dem so ist, dann kann die Rechtsstellung von Regierungschefs nicht anders sein. Auf jeden Fall genießen damit Staatsoberhäupter, Regierungschefs und Außenminister umfassende Immunität ratione personae. Ob auch andere Fachminister, etwa Verteidigungsminister, durch umfassende Immunität geschützt sind, ist noch nicht vollstän3 dig geklärt. Allerdings hat ein englisches Gericht einem israelischen Verteidigungsminister vor einigen Jahren Immunität ratione personae zuerkannt. Für die uns hier interessierende Frage, ob die Immunität auch bei völkerrechtlichen Verbrechen gilt, muss man unterscheiden zwischen nationalen Strafverfolgungen durch einzelne Staaten und Strafverfolgungen durch den IStGH.

a) Unzulässigkeit einer Strafverfolgung wegen völkerrechtlicher Verbrechen durch einzelne Staaten

Einzelne Staaten sind selbst dann an einer Strafverfolgung von amtierenden Staatsoberhäuptern,

Regierungschefs und Außenministern gehindert, wenn es um den Vorwurf einer Völkerstraftat gilt. Dies hat der IGH in seiner Entsche-

idung von 2002 unmissverständlich klargestellt. Allerdings gilt diese Immunität nur so lange, wie die betreffende Person in Amt und Würden ist. Ich werde an anderer Stelle noch darauf zu sprechen kommen, dass ehemalige Staatsoberhäupter, Regierungschefs und Außenminister nicht mehr durch eine Immunität vor einer Strafverfolgung wegen völkerrechtlicher Verbrechen geschützt sind.

b) Zulässigkeit 1einer Strafverfolgung wegen völkerrechtlicher Verbrechen durch den IStGH

Anders ist die Rechtslage bei Strafverfolgungen durch den IStGH. Dieser darf auch Strafverfahren

gegen amtierende Staatsoberhäupter, Regierungschefs und Außenminister durchführen. Deshalb ist in immunitätsrechtlicher Hinsicht an den von mir eingangs erwähnten Haftbefehlen gegen den amtierenden Staatspräsidenten des Sudan *Al Bashir* sowie gegen das libysche Staatsoberhaupt *Gaddafi* nichts auszusetzen. Man könnte es sich leicht machen und zur Begründung der Irrelevanz dieser Immunität für den IStGH einfach auf Artikel 27 IStGH-Statut verweisen. Art. 27 IStGH-Statut legt fest, dass Immunitäten für den IStGH ohne Bedeutung sind. Doch ist Folgendes zu bedenken: Der IStGH ist kein UN-Organ, er ist vielmehr eine internationale Organisation, die von den Vertragsstaaten durch einen völkerrechtlichen Vertrag gegründet wurde und von den –mittlerweile 118 – Vertragsstaaten getragen wird. Drittstaaten, also Staaten, die das Römische Statut nicht ratifiziert haben, können durch dieses und damit auch durch Art. 27 IStGH-Statut nicht gebunden werden (Art. 34 WVRK). Dies bedeutet, dass Art. 27 IStGHStatut unproblematisch nur im Verhältnis zu den Vertragsstaaten des Römischen Statuts gilt; diese habe durch die Ratifikation des Statuts und damit auch des Art. 27 auf alle ihren Funktionsträgern zukommenden Immunitäten verzichtet. Soweit es dagegen um die Immunitäten von Staatsoberhäuptern, Regierungschefs und Außenministern von Drittstaaten geht, reicht der Hinweis auf Art. 27 IStGH-Statut nicht aus; diesen gegenüber gilt Art. 27 IStGH-Statut nicht.

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Allerdings bedeutet dieses Zwischenergebnis nicht, dass Staatsoberhäupter, Regierungschefs und Außenminister von Drittstaaten auch

gegenüber dem IStGH Immunität genießen. Lediglich die juristische Argumentation ist etwas komplexer. Wenn, wie in den Fällen *Al Bashir* und *Gaddafi*, der UN-Sicherheitsrat den IStGH nach Art. 13 lit. b) IStGH-Statut ermächtigt, Strafverfolgungen durchzuführen, dann erklärt der UN-Sicherheitsrat damit auch, dass eine Strafverfolgung nicht an Immunitäten scheitern soll; diese werden implizit für unbeachtlich erklärt. An eine solche Unwirksamkeitserklärung sind die betroffenen Staaten nach Art. 25 UN-Charta gebunden. Schon aus diesem Grunde sind die Haftbefehle des IStGH gegen *Al Bashir* und *Gaddafi* völkerrechtskonform, obwohl weder der Sudan noch Libyen Vertragsstaaten des Römischen Statuts sind und diesen Staaten gegenüber Art. 27 IStGH-Statut keinen Immunitätsausschluss bewirken kann. Im Übrigen darf man nach meinem Dafürhalten mittlerweile davon ausgehen, dass sich in den letzten Jahren ein (neuer) Rechtssatz des Völkergewohnheitsrechts dahingehend herausgebildet hat, dass die Immunitäten amtierender Staatsoberhäupter, Regierungschefs und Außenminister gegenüber internationalen Strafgerichtshöfen wie dem IStGH generell nicht gelten. Man kann nämlich auf eine mittlerweile beachtliche Staatenpraxis verweisen, die deutlich macht, dass die Staaten eine solche Immunitätsausnahme gegenüber internationalen Strafgerichtshöfen für geltendes Recht halten. Ich will insofern nur auf die Anklage gegen den damaligen jugoslawischen Staatspräsidenten *Milosević* vor dem ICTY, die Anklage gegen *Tylor* vor dem Sondertribunal für Sierra Leone sowie auf die Haftbefehlsentscheidungen des IStGH in den Verfahren gegen *Al Bashir* und *Gaddafi* verweisen, gegen die kein Protest seitens der Staaten erhoben worden ist. Im Übrigen ist auch der IGH in seiner Haftbefehlsentscheidung von 2002 von einer solchen völkergewohnheitsrechtlichen Immunitätsausnahme ausgegangen.

Als *Zwischenfazit* lässt sich damit festhalten: Während eine Strafverfolgung von amtierenden Staatsoberhäuptern, Regierungschefs und Außenministern durch andere Staaten wegen deren Immunität ratione personae selbst bei völkerrechtlichen Verbrechen unzulässig ist, gilt für Strafverfolgungen von amtierenden Staatsoberhäuptern, Regierungschefs und Außenministern durch den IStGH eine generelle Immunitätsausnahme.

2. Die Immunität von Diplomaten

Immunität ratione personae genießen – von einigen Sonderfällen abgesehen – auch amtierende Diplomaten und deren Familienangehörige nach dem Wiener Übereinkommen über diplomatische Beziehungen (WÜD). Diese dürfen im Empfangsstaat keiner Strafverfolgung unterworfen werden. Diese Immunität erfährt auch bei völkerrechtlichen Verbrechen keine Ausnahme. Denn weder findet sich im WÜD eine derartige Immunitätsausnahme noch gibt es irgendwelche Staatenpraxis, die für eine Ausnahme von der Immunität bei völkerrechtlichen Verbrechen ins Feld geführt werden könnte. Dies bedeutet, dass Diplomaten und ihre Familienangehörigen vom Empfangsstaat selbst dann nicht

strafrechtlich verfolgt werden dürfen, wenn ihnen eine Völkerstraftat zur Last gelegt wird.

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Anders sieht die Situation allerdings wiederum in Bezug auf den IStGH aus. Diesem gegenüber gilt die Immunität ratione personae der Diplomaten nicht. Allerdings reicht es auch insofern nicht, einfach auf Art. 27 IStGH-Statut zu verweisen. Wie ich vorhin schon erwähnt habe, können nur die Vertragsstaaten des Römischen Statuts durch Art. 27 IStGH-Statut gebunden werden. Nur die Diplomaten aus den 118 Vertragsstaaten des Statuts haben deshalb aufgrund von Art. 27 IStGH-Statut keinen Immunitätsschutz gegenüber dem IStGH.

Zwar kommt im Ergebnis auch den Diplomaten aus Drittstaaten gegenüber dem IStGH keine Immunität zu, doch ist die rechtliche Argumentation, die zu diesem Ergebnis führt, kompliziert: Ausgangspunkt ist die Überlegung, dass die diplomatischen Immunitäten nur gegenüber dem jeweiligen Empfangsstaat gelten. Alle anderen Staaten sind durch sie nicht gebunden. Da der IStGH seine Strafverfolgungskompetenz auf die an ihn übertragenen Strafverfolgungskompetenzen der Vertragsstaaten stützt und für völkerrechtliche Verbrechen das Weltrechtsprinzip gilt, also alle Staaten zu einer Strafverfolgung befugt sind, kann der IStGH seine Befugnis zur Strafverfolgung von Diplomaten aus Drittstaaten zwar nicht aus der Verfolgungskompetenz des Empfangsstaates ableiten, weil dieser aufgrund der Immunität keine Strafverfolgung betreiben darf, wohl aber aus der Strafverfolgungskompetenz aller übrigen

Vertragsstaaten des Römischen Statuts. Als *weiteres Zwischenfazit* lässt sich damit festhalten: Während eine Strafverfolgung von amtierenden Diplomaten und deren Familienangehörigen durch den jeweiligen Empfangsstaat wegen deren Immunität ratione personae selbst bei völkerrechtlichen Verbrechen unzulässig ist, sind andere Staaten (Drittstaaten) sowie der IStGH an einer Strafverfolgung nicht durch die diplomatische Immunität gehindert. Neben Staatsoberhäuptern, Regierungschefs, Außenministern und Diplomaten genießen nur noch ganz wenige andere Personengruppen Immunität ratione personae, insbesondere die Leiter internationaler Organisationen. Schon aus Zeitgründen will ich auf diese Personengruppen aber nicht weiter eingehen, sondern mich nun den Immunitäten ratione materiae zuwenden.

IV. Die Immunitäten ratione materiae

1. Die Staatenimmunität

Die grundlegende Immunität schlechthin ist die Staatenimmunität, für die im Deutschen verschiedene Begriffe gebraucht werden, etwa „funktionelle Immunität", „Immunität der Hoheitsträger" sowie „Act of State Doktrin". Die Staatenimmunität ist Ausfluss des Prinzips der souveränen Gleichheit der Staaten (Art. 2 Nr. 1 UN-Charta). Weil alle Staaten völkerrechtlich gleichrangig sind, darf kein Staat einen anderen Staat seiner Gerichtsbarkeit unterwerfen. In erster Linie hat die Staatenimmunität Relevanz bei zivilrechtlichen Klagen. Grundsätzlich kann ein Staat nicht vor Gerichten eines anderen Staates verklagt werden, etwa auf Schadensersatz, wobei allerdings seit geraumer Zeit anerkannt ist, dass die Staatenimmunität nur noch für hoheitlich-staatliches Handeln gilt (acta iure imperii),

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nicht aber, wenn ein Staat im Gerichtsstaat wie eine Privatperson auftritt, etwa Einkäufe tätigt (acta iure gestionis). Die Staatenimmunität gilt aber nicht nur für das Zivilrecht, sondern auch für das Strafrecht. Sie verbietet es den Staaten, Funktionsträger anderer Staaten vor ihren Gerichten für Handlungen strafrechtlich zur Verantwortung zu ziehen, die diese Personen als Hoheitsakte für ihren Staat vorgenommen haben. Denn indirekt säße man auch dann über einen fremden Staat zu

Gericht und würde gegen den Grundsatz der souveränen Gleichheit verstoßen, wenn man Personen, die für einen anderen Staat gehandelt haben, hierfür verurteilen würde. Der ICTY hat die strafrechtliche Bedeutung der Staatenimmunität in einer Entscheidung von 1997 wie folgt beschrieben:

„State officials acting in their official capacity […] are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. […] they enjoy so-called 'functional immunity'. This is a well established rule of customary international law […] and is based on the sovereign equality of States (*par in parem non habet imperium*)."

Nun werden völkerrechtliche Verbrechen in aller Regel und typischerweise von staatlichen Funktionsträgern, etwa Soldaten, für ihren Staat vorgenommen. Damit liefe das Völkerstrafrecht praktisch leer, wenn die Staatenimmunität auch bei völkerrechtlichen Verbrechen gälte. Insofern überrascht es nicht, dass seit den Nürnberger Prozessen anerkannt ist, dass die Staatenimmunität bei völkerrechtlichen Verbrechen nicht gilt; sie erfährt insofern eine völkergewohnheitsrechtlich anerkannte Ausnahme. Ich möchte erneut aus der Entscheidung des ICTY aus dem Jahr 1997 zitieren. Der ICTY hat dort ausgeführt:

„[…] exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke

immunity from national or international jurisdiction even if they perpetrated such crimes while acting

in their official capacity."

Dies bedeutet: Die Staatenimmunität gilt generell bei völkerrechtlichen Verbrechen nicht. Weder nationale Gerichte noch der IStGH sind aufgrund der Staatenimmunität an einer Strafverfolgung wegen völkerrechtlicher Verbrechen gehindert. Wichtig ist diese Erkenntnis insbesondere für eine Strafverfolgung von Soldaten anderer Staaten wegen völkerrechtlicher Verbrechen: Da Soldaten, von Verträgen wie dem NATO-Truppenstatut einmal abgesehen, keine besondere Immunität,

sondern „nur“ die Staatenimmunität genießen, können sie wegen völkerrechtlicher Verbrechen in aller Regel

von Drittstaaten sowie dem IStGH verfolgt werden, ohne dass immunitätsrechtliche Aspekte dem entgegenstünden.

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2. Die Immunität ratione materiae ehemaliger Staatsoberhäupter und Regierungsmitglieder

Ich habe bereits erwähnt, dass amtierende Staatsoberhäupter, Regierungschefs und Außenminister gegenüber der Strafgerichtsbarkeit einzelner Staaten umfassende Immunität ratione personae genießen und damit von einzelnen Staaten nicht einmal wegen völkerrechtlicher Verbrechen verfolgt werden dürfen. Diese Immunität ratione personae gilt aber nur solange, wie die betreffenden Personen im Amt sind. Sie erlischt mit der Beendigung der Funktion. Allerdings wird immer wieder darauf hingewiesen, dass ehemalige Staatsoberhäupter und Regierungsmitglieder weiterhin Immunität für ihre früheren Diensthandlungen genießen. Wegen Handlungen, die sie während ihrer Amtszeit im Dienst und als Staatshandlungen vorgenommen haben, können sie zeitlich unbegrenzt auch nach dem Verlust ihres Amtes von anderen Staaten nicht zur Verantwortung gezogen werden. Diese Feststellungen sind grundsätzlich richtig. Ehemaligen Staatsoberhäuptern und Regierungsmitgliedern kommt zwar nicht mehr Immunität ratione personae, wohl aber Immunität ratione materiae, also Immunität für ihre früheren Diensthandlungen zu. Wenn man diesen Satz jetzt so stehen ließe, so bedeutete dies, dass ehemalige Staatsoberhäupter und Regierungsmitglieder zeitlich unbegrenzt auch für völkerrechtliche Verbrechen Immunität genössen, die sich in ihrem Amt begangen haben. Dies wird – ich meine zu Recht – überwiegend für äußerst unbefriedigend gehalten. Deshalb wird in der Literatur zum Teil die These vertreten, völkerrechtliche Verbrechen müssten – in immunitätsrechtlicher Hinsicht – als Privathandlungen angesehen werden, womit sie verfolgt werden könnten, weil die Immunität ratione materiae Privathandlungen nicht erfasst. Diese Auffassung vermag allerdings meiner Meinung nach nicht zu überzeugen. Denn das besondere Unrecht von Völkerstraftaten liegt in der Regel gerade darin, dass sie von einem Staat verantwortet werden. Sie zu Privathandlungen zu erklären, hieße, das Unrecht

in nicht akzeptabler Weise zu relativieren und die Realität zu verkennen. Diese Argumentation ist aber auch deshalb zurückzuweisen, weil sie gar nicht erforderlich ist, um das allgemein für wünschenswert erachtete Ergebnis einer Verfolgbarkeit völkerrechtlicher Verbrechen zu erreichen. Insofern ist Folgendes zu bedenken:

Als Grund dafür, warum ehemaligen Staatsoberhäuptern und Regierungsmitgliedern Immunität ratione materiae zukommt, wird stets angeführt, dass verhindert werden soll, dass ein Staat durch eine Strafverfolgung eines ehemaligen Staatsoberhauptes oder Regierungsmitgliedes wegen früherer Diensthandlungen letztlich Staatshandeln eines anderen Staates durch seine eigenen Gerichte überprüft und damit unter Verstoß gegen den Grundsatz der Gleichheit der Staaten über einen anderen Staat zu Gericht sitzt. Dies ist aber genau der Rechtsgrund der Staatenimmunität! Damit zeigt sich, dass die Immunität ratione materiae ehemaliger Staatsoberhäupter und Regierungsmitglieder gar keine eigenständige Immunität ist, sondern lediglich ein Anwendungsfall der Staatenimmunität. Die Staatenimmunität aber gilt – wie ich bereits erwähnt habe – bei völkerrechtlichen Verbrechen nicht.

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Ein *weiteres Zwischenfazit* lautet damit: Ehemalige Staatsoberhäupter und Regierungsmitglieder genießen „nur noch“ Staatenimmunität, weshalb sie wegen völkerrechtlicher Verbrechen, und zwar auch solcher, die sie während ihrer Amtszeit verübt haben, sowohl von Gerichten anderer Staaten als auch vom IStGH ohne Einschränkung durch eine Immunität verfolgt werden können. Kurz gesagt: Pinochet genoss keine Immunität!

3. Die Immunität ratione materiae von Mitgliedern diplomatischer und konsularischer Vertretungen sowie von Bediensteten internationaler Organisationen

Immunität ratione materiae kommt nach dem Wiener Übereinkommen über diplomatische Beziehungen (WÜD) und dem Wiener Übereinkommen über konsularische Beziehungen (WÜK) auch Konsuln, nachrangigen Mitarbeitern von Botschaften und Konsulaten sowie ehemaligen Diplomaten zu. All diese Personen können vom Empfangsstaat

wegen Taten, die sie in Ausübung ihres Dienstes begangen haben, nicht strafrechtlich zur Verantwortung gezogen werden, wohl aber für Taten, die sie als Privatpersonen verübt haben. Das Gleiche gilt nach den einschlägigen völkerrechtlichen Verträgen für Bedienstete von internationalen Organisationen.

In der Literatur wird nun behauptet, Konsularbeamte, nachrangige Mitarbeiter von Botschaften und Konsulaten, ehemalige Diplomaten sowie Bedienstete internationaler Organisationen könnten ohne Weiteres wegen Völkerstraftaten auch von Drittstaaten zur Verantwortung gezogen werden. Denn sie genössen „nur" Immunität ratione materiae, und diese gelte, wie die Diskussion zur Staatenimmunität zeige, bei Völkerstraftaten nicht.

Diese Argumentation ist jedoch schon im Ansatz unzutreffend. Denn der Begriff Immunität ratione materiae ist – wie ich eingangs bereits sagte – nicht mehr als eine Sammelbezeichnung für verschiedene Immunitäten, die nicht mehr vereint, als dass sie auf bestimmte Handlungen und nicht auf den Status einer Person bezogen sind. Es ist daher falsch, aus der Bezeichnung einer Immunität als Immunität ratione materiae den Schluss zu ziehen, dass sie – ebenso wie die Staatenimmunität – bei völkerrechtlichen Verbrechen nicht gilt. Die Unterschiede beispielsweise zwischen den Immunitäten ratione materiae nach dem WÜD und WÜK einerseits und der Staatenimmunität andererseits sind

mannigfaltig, so dass sich undifferenzierte Parallelsetzungen verbieten. Zwei bedeutende Unterschiede seien genannt: Die Staatenimmunität gilt gegenüber allen anderen Staaten, also erga omnes, während die Immunitäten nach dem WÜD und WÜK nur gegenüber dem jeweiligen Empfangsstaat gelten. Die Staatenimmunität gilt nur bei hoheitlichdienstlichen Handlungen (acta iure imperii), während die Immunitäten ratione materiae nach dem WÜD und WÜK überwiegend für alle Diensthandlungen gelten, also auch für solche privatrechtlicher Natur.

Dies bedeutet, dass die uns hier interessierende Frage, ob die Immunitäten ratione materiae für Mitglieder diplomatischer und konsularischer Vertretungen sowie für Bedienstete internationaler Organisationen bei völkerrechtlichen Verbrechen gelten oder nicht, isoliert anhand der einschlägigen Verträge, insbesondere als anhand des WÜD und WÜK

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zu beantworten ist. Eine Analyse dieser Verträge und der Staatenpraxis zeigt, dass diese Immunitäten gerade keine Ausnahme bei völkerrechtlichen Verbrechen erfahren. Gleichwohl aber werden sie in der Praxis nur in wenigen Fällen einer Strafverfolgung entgegenstehen. Insofern ist nämlich wiederum zu bedenken, dass die Immunitäten des WÜD und WÜK nur den jeweiligen Empfangsstaat verpflichten, nicht jedoch alle anderen Staaten und damit auch nicht den IStGH. Die Immunitäten für Bedienstete internationaler Organisationen gelten allein gegenüber den anderen Vertragsstaaten der betreffenden

Organisation, so dass auch sie – bis auf eine Ausnahme, zu der ich sogleich komme – für den IStGH irrelevant sind, weil dieser seine Strafverfolgungskompetenz in einem solchen Fall aus der an ihn delegierten Verfolgungskompetenz derjenigen Vertragsstaaten des Römischen Statuts schöpfen kann, die der betreffenden internationalen Organisation nicht angehören. Etwas anderes gilt nur für Bedienstete der Vereinten Nationen. Alle Vertragsstaaten des Römischen Statuts sind auch Mitglieder der Vereinten Nationen. Sie sind damit an die Immunität ratione materiae der Bediensteten der Vereinten Nationen gebunden. Da die Verfolgungskompetenz des IStGH sich aus den Verfolgungskompetenzen seiner Vertragsstaaten ableitet, darf mithin auch der IStGH kein Strafverfahren gegen Bedienstete der Vereinten Nationen führen, solange nicht die Vereinten Nationen einen Immunitätsverzicht erklärt haben. Im Hinblick auf die Bediensteten der Vereinten Nationen ist Art. 27 IStGH-Statut damit nicht anwendbar. Praktische Bedeutung kann dies insbesondere für UN-Blauhelmsoldaten haben. Diese gelten als Bedienstete der UN, so dass sie nur mit Genehmigung des UN-Generalsekretärs vom IStGH verfolgt werden könnten. Diese Rechtslage wird im Übrigen im Relationship Agreement zwischen dem IStGH und den Vereinten Nationen ausdrücklich anerkannt.

V. Resümee

Die Frage, inwieweit völkerrechtliche Immunitäten einer Strafverfolgung wegen völkerrechtlicher Verbrechen Schranken setzen, kann nicht einheitlich beantwortet werden. Bis auf die Immunität für Bediens-

tete der Vereinten Nationen sind Immunitäten für den IStGH generell irrelevant. Anders sieht es in Bezug auf nationale Strafverfolgungen durch einzelne Staaten aus. Zwar gilt die Staatenimmunität bei völkerrechtlichen Verbrechen nicht, so dass einzelne Staaten auch ehemalige Staatsoberhäupter und Regierungsmitglieder anderer Staaten wegen Völkerstraftaten verfolgen dürfen. Die Immunitäten ratione personae, insbesondere die Immunität amtierender Staatsoberhäupter und Regierungsmitglieder, sowie die übrigen Immunitäten ratione materiae verbieten es den Staaten dagegen selbst dann, strafrechtliche Maßnahmen zu ergreifen, wenn es um völkerrechtliche Verbrechen geht. Für eine ausführlichere Darstellung der Relevanz völkerrechtlicher Immunitäten bei Strafverfahren wegen völkerrechtlicher Verbrechen siehe:

Helmut Kreicker: Immunität und IStGH. Zur Bedeutung völkerrechtlicher Exemtionen für den Internationalen Strafgerichtshof. ZIS 2009, S. 350-367

Online: http://www.zis-online.com/dat/artikel/2009_7_336.pdf

Funktionsweise und Zuständigkeit des IStGH nach dem UN-Vertrag und IStGH-Statut[1]

DR. HILDE FARTHOFER

I. Einleitung

Das Erfordernis der Einrichtung eines ständigen internationalen Strafgerichts wurde bereits nach denen als Siegerjustiz kritisierten Prozessen in Nürnberg[2] und Tokio[3] erkannt, die Idee konnte sich aber zunächst in der Staatengemeinschaft nicht durchsetzen. Art. 13 (1) (a) UN-Charta verpflichtet die Mitgliedstaaten, Forschung hinsichtlich des Völkerrechts zu betreiben und in der Folge dessen Kodifizierung voranzubringen. Als Reaktion wurde am 21 November 1947 die *International Law Commission* (ILC) von der Generalversammlung eingerichtet.[4] 1954 gab der ILC seinen ersten Entwurf für die gesetzliche Ahndung von Verbrechen gegen den Frieden und die Sicherheit der Menschheit heraus,[5] der zweite folgte erst 37 Jahre später.[6] Der endgültige Durchbruch konnte aber erst 1998 erzielt werden, durch die Annahme der UN-Konvention über die Einrichtung eines ständigen internationalen Strafgerichtshofes in Rom.

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1 Okan Üniversitesi Hukuk Fakültesi ve İstanbul Barosu'nca 26-28 Eylül 2011 tarihleri arasında birlikte yapılan, Prof.Dr. Serap Keskin Kiziroğlu tarafından organize edilen ''Uluslararası Cezalandırılabilirlik ve Uluslararası Ceza Mahkemesi Sempozyumu''nda 28 Eylül 2011 tarihinde sunulmuş tebliğdir

2 Die rechtliche Grundlage des Internationalen Militär Tribunal von Nürnberg (IMT) ist das Londoner Statut vom 8. August 1945, dem Abkommen zwischen den drei Siegermächten, der USA, Großbritannien und der Sowjetunion, und Frankreich. Das Statut sieht drei Kategorien von Verbrechen vor: Kriegsverbrechen, Verbrechen gegen den Frieden und Verbrechen gegen die Menschlichkeit. Die UN-General Versammlung bestätigte die aus dem Londoner Statut und den Hauptkriegsverbrecherprozessen resultierenden Nürnberger Prinzipien 1946 in einer Resolution. (UN GA Res. 95 (I), 11. Dezember 1946).

3 Das Internationale Militär Tribunal für den Fernen Osten wurde von General McArthur in seiner Funktion als Oberbefehlshaber der Alliierten im Januar 1946 eingerichtet.

4 UN GA Res. 174 (II), 21. November 1947.

5 YB ILC, 1954, Vol. II, Draft Code of Offences against the Peace and Security of Mankind (Part I), Doc. A/CN.4/85, 112 *et seq.*

6 YB ILC, 1991, Vol. II, Draft Code of Offences against the Peace and Security of Mankind (Part II), Doc. A/CN.4/SER.A/1991/Add.l, 79 *et seq.*

II. Die Anfänge des IStGH

Zum ersten Mal seit den Kriegsverbrechertribunalen von Nürnberg und Tokyo wurde in den 90er Jahren ein neuer Schritt in Richtung einer internationalen Strafrechtsjustiz unternommen. Die ad hoc Tribunale, eingerichtet durch Resolutionen des UN-Sicherheitsrates, haben die strafrechtliche Aufarbeitung der Verbrechen begangen auf dem Territorium des ehemaligen Jugoslawiens (JStGH)[7] und in Ruanda (RStGH)[8] zum Ziel. Der Sicherheitsrat bezog sich bei der Errichtung der ad hoc Tribunale auf Kapitel VII der UN-Charter,[9] dennoch wurde die Entstehung beider Gerichtshöfe u.a. wegen des Verstoßes gegen das *nullum crimen nullum poena sine lege* Prinzip in Frage gestellt.[10]

Im Jahre 1998 wurde schließlich mit dem Römischen Statut (IStGHSt.)[11] die rechtliche Grundlage für ein ordentliches permanentes internationales Strafgericht geschaffen, das die Bestrafung von Völkermord, Verbrechen gegen die Menschlichkeit, Kriegsverbrechen und mit Einschränkungen des Verbrechens der Aggression[12] vorsieht.

Seit seinem in Kraft treten am 1. Juli 2002 beschäftigt sich der Internationale Strafgerichtshof (IStGH) mit 15 Fällen aus sieben Situationen.[13] Das erste Urteil im Verfahren gegen *Thomas Lubanga Dyilo*, angeklagt wegen der Zwangsverpflichtung, Einschreibung und Verwendung von Kindersoldaten in militärischen Verbänden,[14] erging am 14. März 2012. Der Ausspruch der Strafe steht noch aus.

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7 SC Res. 827 (1993).

8 SC Res 955 (1994).

9 Auch diese Kompetenz ist nicht unumstritten; Prosecutor v. Tadic, Berufungskammer, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2. Oktober 1995, § 33 et seq.

10 Prosecutor v. Tadić, Berufungskammer, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2. Oktober 1995, § 8 b) und 65 et seq.

11 UN Doc. A/CONF.183/9 (17. Juli 1998).

12 Die Definition für das Verbrechen der Aggression wurde in dem, im Zuge der Review Conference in Kampala neu geschaffenen Art. 8*bis* IStGHSt. aufgenommen. Gemäß Art. 15*bis* IStGHSt. kann ein solches Verbrechen aber erst nach Anerkennung der Mehrheit der Mitgliedstaaten am 1. Januar 2017 zum Gegenstand der Gerichtsbarkeit des IStGH werden.

13 Demokratische Republik Kongo, Zentralafrikanische Republik, Uganda, Darfur/Sudan, Elfenbeinküste, Kenia und Libyen.

14 *Prosector v. Lubanga*, Verfahrenskammer I, ICC-01/04-01/06-2842, Judgement pursuant to Article 74 of the Statute, 14. März 2012.

Seit 1. Juli 2012 sind es nunmehr 121 Mitgliedsstaaten, die die Gerichtsbarkeit des IStGH anerkennen und sich zur Zusammenarbeit nach den Vorschriften des Teils 9 des IStGHSt. mit diesem entschlossen haben. Das bedeutet aber weder, dass der IStGH Vorrang vor der nationalen Strafgerichtsbarkeit der Mitgliedstaaten hat noch, dass der Gerichtshof ohne weiteres Fälle die vor einem nationalen Gericht verhandelt werden, an sich ziehen kann. Ein solches Primat ist jedenfalls beiden ad hoc Tribunalen eingeräumt worden.[15]

Der IStGH kann eben nur dann tätig werden, wenn eine Situation, d.h. ein bewaffneter Konflikt in dem es möglicherweise zu Gräueltaten gekommen ist, zur Ermittlungen an den Chefankläger des IStGH gemäß einer der in Art. 13 IStGHSt. aufgezählten Optionen überwiesen wird. Daneben dürfen die Kriterien des Art. 17 IStGHSt. nicht vorliegen, ansonsten kommt nach dem Prinzip der Komplementarität der nationalen Strafjustiz Vorrang zu.

III. Grundsätzliche Fragen der Gerichtsbarkeit

Bereits Art. 1 IStGHSt. macht deutlich, dass die Zuständigkeit des ständigen internationalen Strafgerichtshofes nicht unendlich ist, sondern in vielerlei Hinsicht Begrenzungen unterworfen wird.[16] Auch für den IStGH gelten die den meisten nationalen Strafrechtsordnungen bekannten Voraussetzungen für die Zulässigkeit der Gerichtsbarkeit. Darunter sind die Eingrenzung des zeitlichen Geltungsbereiches, die materiellrechtlichen Beschränkungen durch die Tatbestandsvoraussetzungen und die individuelle strafrechtliche Verantwortung eines bestimmten Täters zu verstehen. Darüber hinaus gilt es für den Chefankläger des IStGH noch formale Voraussetzungen im Sinne des Art. 12 IStGHSt. zu beachten.[17]

1) Zeitlicher Geltungsbereich (ratione temporis)

Die Gerichtsbarkeit des IStGH darf gemäß Art. 11 (1) IStGHSt. ausschließlich auf jene Verbrechen angewendet werden, die nach in Kraft

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15 Art. 9 (2) JStGHSt.; Art. 8 (2) RStGHSt.

16 Eine nähere Auseinandersetzung zu diesem Thema findet sich in O. Triffterer, Art. 1, in: Triffterer (Hg.), Commentary on the Rome Statute of the International Criminal Court (2008) 49 et seq.

17 Für einen ausführlichen Überblick siehe K. Ambos, Internationales Strafrecht (3. Aufl., 2011) 312 et seq.

treten des Statuts, also nach dem 1. Juli 2002, begangen wurden. Strikt zu trennen von diesem ist Art. 22 (1) IStGHSt.[18] Dieser normiert das Rückwirkungsverbot (*nullum crimen sine lege*), welches auf die Taten des einzelnen potentiellen Täters anzuwenden ist, aber nicht als gesetzliche Grundlage für einen Ausschluss der Gerichtsbarkeit des IStGH dienen kann.

Für jeden neu dazukommenden Mitgliedsstaat gilt Art. 11 (2) IStGHSt. Erst nach dem Beitritt des betreffenden Staates zum Römischen Statut können auf dessen Territorium begangene Verbrechen durch den IStGH verfolgt werden. Ausgenommen davon sind Situationen in Staaten, die ohne Mitglied zu werden, die Gerichtsbarkeit des IStGH anerkannt haben[19] oder Situationen, die vom Sicherheitsrat an den Chefankläger überwiesen wurden[20].

2) Räumlicher Geltungsbereich – formale Voraussetzung

Art. 12 IStGHSt. beschränkt die Gerichtsbarkeit des IStGH in nicht unerheblicher Weise. So kann der Gerichtshof nur dann tätig werden, wenn die Verbrechen auf dem Territorium oder durch einen Bürger eines Vertragsstaates begangen wurden. Somit wendet der IStGH, anders als die nationale Strafgerichtsbarkeit in Hinblick auf Verbrechen im Sinne des Art. 5 IStGHSt., nicht das Prinzip der Universalität an, sondern ausschließlich das des Territorialitäts- und des aktiven Personalitätsprinzips. Nicht-Vertragsstaaten können eine Anerkennungserklärung gemäß Art. 12 (3) IStGHSt. abgeben. Diese kann zeitlich unbegrenzt sein oder die Aufklärung eines bestimmten Geschehens in einem festgelegten Zeitraum betreffen. Der IStGH deckt somit einen kleineren Strafanwendungsbereich ab, als dies das nationale Strafanwendungsrecht der meisten Staaten vorsieht.[21]

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18 W. Schabas, Introduction to the International Criminal Court (4. Aufl., 2011) 69 et seq.

19 Die Elfenbeinküste hatte bereits am 18. April 2003 eine Erklärung unter Art. 12 (3) IStGHSt. abgegeben und wiederholte diese im Dezember 2010. Die Anerkennung der Gerichtsbarkeit des IStGH führte dazu, dass die auf die Wahlen 2010 folgenden Auseinandersetzungen vom Chefankläger untersucht werden können, mit dem vorläufigen Resultat der Anklage des ehemaligen Präsidenten Laurent Gbagbo wegen Verbrechen gegen die Menschlichkeit.

20 Bislang hat der Sicherheitsrat zwei Situationen überwiesen: Dafur/Sudan mittels SC Res. 1593 (2005) und Libyen mittels SC Res. 1970 (2011).

21 C. Safferling, International Criminal Procedure (2011) 84 *et seq.*

3) Materiellrechtlicher Geltungsbereich

Art. 5 IStGHSt. normiert die *ratione materiae*. Unter die Gerichtsbarkeit des IStGH fallen somit nur die sogenannten Kernverbrechen, d.h. Völkermord, Verbrechen gegen die Menschlichkeit, Kriegsverbrechen und mit Einschränkungen Verbrechen der Aggression.[22]

4) Individuelle strafrechtliche Verantwortung

Die individuelle strafrechtliche Verantwortung wird in Art. 25 IStGHSt. geregelt. Ausschließlich natürliche Personen können vor dem Internationalen Strafgerichtshof angeklagt werden.[23] Das Römische Statut sieht keine Staatenverantwortlichkeit vor, dies fällt unter die Zuständigkeit des Internationalen Gerichtshofs (IGH).[24]

Anders als vor nationalen Strafgerichten kann staatliche Immunität die Gerichtsbarkeit des IStGH aber nicht ausschließen. Gerade um die bis 2002 bestehende Lücke in der strafrechtlichen Verantwortung von Personen mit hohen politischen und militärischen Funktionen zu schließen, wurde Art. 27 IStGHSt. (*irrelevance of official capacity*) in das Römische Statut aufgenommen. In der Situation der Zentralafrikanischen Republik führte genau diese Problematik zur Überweisung der Verfolgung von *Jean-Pierre Bemba Gombo* an den Chefankläger. Das Kassationsgericht der Zentralafrikanischen Republik hatte in seiner Entscheidung festgestellt, dass es nicht möglich ist, den zu diesem Zeitpunkt amtierenden Vize-Präsident der Demokratischen Republik Kongo, vor einem nationalen Gericht anzuklagen, da seine diplomatische Immunität eine Auslieferung verhindern würde.[25]

III. Trigger Mechanismen

Art. 13 IStGHSt. enthält drei mögliche Szenarien, die die Gerichtsbarkeit des IStGH oder besser erweiterte Ermittlungstätigkeiten durch

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22 Näheres zu den Besonderheiten beim Verbrechen der Aggression in diesem Kontext siehe C. Safferling, International Criminal Procedure (2012) 83 et seq.

23 W. Schabas, The International Criminal Court, A Commentary on the Rome Statute (2010) Art. 25, 421 et seq.

24 C. Safferling, International Criminal Procedure (2012) 83.

25 Zit. in Prosecutor v Bemba, Berufungskammer, ICC-01/05-01/08 OA 3, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 19. Oktober 2010, Rz. 45.

den Chefankläger auslösen können. Die erste und die dritte Option, d.h. die Überweisung durch einen Staat und die *proprio motu* Einleitung von Ermittlungen durch das Büro des Chefanklägers, sind nur in Bezug auf einen Mitgliedstaat möglich. Ausgenommen sind jene Fälle, in denen sich der betroffene Staat zur Abgabe einer Erklärung im Sinne des Art. 12 (3) IStGHSt. entschließt.[26] Der Sicherheitsrat kann jede Situation ohne Rücksicht auf die Mitgliedschaft überweisen.

a) Überweisung durch einen Vertragsstaat

Ein Mitgliedsstaat kann gemäß Art. 13 (a) IStGHSt. eine Situation an den Chefankläger zur Durchführung von Vorermittlungen überweisen. Diese Möglichkeit wurde bereits zum vierten Mal genutzt, aber anders als ursprünglich bei den vorbereitenden Verhandlungen zum Römischen Statut vorgesehen, ging es dabei nicht um Verbrechen die auf dem Territorium eines anderen Staates begangen wurden, sondern um Situationen im eigenen Land. Die vorbereitende Kommission ging davon aus, dass ein Staat einen anderen Staat nur in sehr extremen Fällen diskreditieren würde, an die nun bereits mehrfach genutzte Möglichkeit Situationen im eigenen Land an den IStGH zu verweisen, hatte damals niemand gedacht.[27]

Uganda, die Demokratische Republik Kongo, die Zentralafrikanische Republik und nun auch die Elfenbeinküste – wenn auch kein Mitgliedstaat – haben die Situationen in ihren Ländern selbst an den Chefankläger des IStGH überwiesen. Kritisiert wird dieses Vorgehen wegen der Abwälzung der staatlichen Verantwortung, Verbrechen, die auf dem eigenen Staatsgebiet begangen wurden, strafrechtlich zu verfolgen.[28]

Gemäß Art. 14 IStGHSt. hat der Staat, der dem Büro des Chefanklägers eine Situation unterbreitet, diesem alle ihm zugängliche Unterlagen zur Verfügung zu stellen. Im Zusammenhang mit der Überweisung von Verbrechen begangen auf dem eigenen Territorium wird auf die imminente Möglichkeit verwiesen, dass die daraus resultierenden

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[26] S. Williams/W. Schabas, Art. 13, in: Triffterer (Hg.) Commentary on the Rome Statute of the International Criminal Court (2008) 563 et seq.

[27] A. Müller/I. Stegmiller, Self-Referrals on Trial, Journal of International Criminal Justice 8 (2010) 1268 et seq.

[28] C. Safferling, International Criminal Procedure (2012) 87.

Ermittlungen einseitig gegen nur eine der beteiligten Gruppe geführt werden.[29] Der Chefankläger des IStGH ist gemäß Art. 54 (1) (a) IStGHSt. zur Durchführung objektiver Ermittlungen verpflichtet, problematisch dabei ist aber, dass er auf die Zusammenarbeit mit den Behörden vor Ort angewiesen ist, da ihm keine eigenen Exekutivbeamten zur Verfügung stehen.[30]

b) Überweisung mittels Resolution des Sicherheitsrats

Artikel 13 (b) IStGHSt. sieht als zweite Möglichkeit die Überweisung einer Situation durch den Sicherheitsrat, basierend auf Kapitel VII der UN-Charta, an den Chefankläger vor. Während der Vorbereitungen zur Rom Konferenz war der Sicherheitsrat als Kontrollorgan für den Ankläger vorgesehen. Die Mitgliedstaaten entschieden sich aber schlussendlich für einen unabhängigen Chefankläger, wodurch der Gerichtshof insgesamt eine Aufwertung erfuhr.[31]

Bis dato wurden zwei Resolutionen durch den Sicherheitsrat erlassen. Im Fall der Verbrechen begangen in der Krisenregion Darfur im Sudan[32] wurde erstmalig gegen ein amtierendes Regierungsoberhaupt ein Haftbefehl erlassen. Die anfängliche Zustimmung wich aber kurze Zeit später der Ablehnung durch einige Staaten, unter anderem durch China. Diese rechtfertigten ihre Kontraposition damit, dass der Haftbefehl gegen Al Bashir kontraproduktiv für den laufenden Friedensprozess wäre.[33] Der nunmehr mit zwei internationalen Haftbefehlen Gesuchte hielt sich zwischenzeitlich in verschiedenen Ländern u.a. in Malawi, dem Chad und in Kenia auf. Die Vorfahrenskammer machte in ihrer Entscheidung gegen Malawi deutlich, dass der Einwand der

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29 W. Schabas, The International Criminal Court, A Commentary on the Rome Statute (2010) Art. 14, 307 et seq.; der Autor kritisiert, dass der Chefankläger in Uganda nur in Bezug auf die Verbrechen begangen durch die Lord Resistance Army ermittelt und ermittelt hat, nicht aber wegen jener begangen von Regierungstruppen. Nach seiner Meinung liegt der Grund dafür in der Selbstüberweisung der Situation an den IStGH.

30 M. Bergsmo/P. Kruger, Art. 54, in: Triffterer (Hg) Commentary on the Rome Statute of the International Criminal Court (2008) 1079 *et seq.*

31 C. Safferling, International Criminal Procedure (2011) 88 et seq.

32 UN SC Res. 1593 (31. März 2005).

33 SC, S/PV.5947, 31 Juli 2008; China machte während dieser Sitzung deutlich, dass sie eine konträre Position hinsichtlich des Haftbefehls gegen Omar Al Bashir einnimmt: "The indictment of the Sudanese leader proposed by the Prosecutor of the International Criminal Court (ICC) is an inappropriate decision taken at an inappropriate time." (S. 6.)

Immunität eines Staatsoberhauptes eines anderen Landes, nicht gegenüber dem IStGH vorgebracht werden kann. Darüber hinaus stellte die Kammer ihre uneingeschränkte Kompetenz über eine derartige Frage zu entscheiden fest.[34]

Am 26. Februar 2011 überwies der Sicherheitsrat die Situation Libyen an den Chefankläger.[35] Nach Durchführung der Vorermittlungen wurde gegen drei Personen Haftbefehl erlassen. Der Fall Muammar Gaddafi wurde nach der Bestätigung seines Todes beendet. Die Verteidigung beantragte im Mai 2012 den Chefankläger im Fall von *Saif Al Islam Gaddafi* seines Amtes wegen Parteilichkeit zu entheben. Sie brachte vor, dass er die neue libysche Regierung in ihren Bemühungen unterstütze, den Fall vor einem nationalen Gericht zu verhandeln.[36] Ein solcher Prozess würde aber in keiner Weise den Anforderungen an einen fairen Prozess, unter Berücksichtigung der Angeklagtenrechte, gerecht werden.[37] Die Berufungskammer lehnte den Antrag ab.[38]

c) Proprio motu Ermittlungen des Chefanklägers

Die wohl umstrittenste Option wird in Art. 13 (c) IStGHSt. vorgesehen. Der Chefankläger kann aufgrund jedweder Information über mögliche Verbrechen, eigenständig Ermittlungen in der Sache beginnen. Stellt er *prima facie* einen hinreichenden Grund fest, die Ermittlungen fortzuführen, so hat er die Situation der Vorverfahrenskammer zur Autorisierung vorzulegen (Art. 15 IStGHSt.).[39]

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34 Prosecutor v Al Bashir, Vorverfahrenskammer I, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12. Dezember 2011, Rz. 11 und 44.

35 UN SC Res. 1970 (26. Februar 2011).

36 Prosecutor v Gaddafi und Al-Senussi, Verteidigung, ICC-01/11-01/11-133, Request to Disqualify the Prosecutor from Participating in the Case Against Mr. Saif Al Islam Gaddafi, 3. Mai 2012, Rz. 4.

37 Prosecutor v Gaddafi und Al-Senussi, Verteidigung, ICC-01/11-01/11-154, Defence Request and Response to the „Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge", 21. Mai 2012, Rz. 26.

38 Prosecutor v Gaddafi und Al-Senussi, Berufungskammer, ICC-01/11-01/11-140, Decision in the request to temporarily suspend the Prosecutor from conducting any prosecutorial activities related to the case pending the determination of the request for disqualification, 11. Mai 2012.

39 C. Safferling, Internationales Strafrecht (2011) 281 et seq., Rz. 21; M. Brubacher, Prosecutorial Discretion within the International Criminal Court, Journal of International Criminal Justice 2 (2004) 71, 77 et seq.

Bislang begann der Chefankläger erst einmal mit eigenständigen Ermittlungen. In Kenia, Mitgliedstaat des IStGH, kam es nach den Wahlen 2005 zu gewaltsamen Auseinandersetzungen. Die Ermittlungen wurden am 31. März 2010 durch die Vorverfahrenskammer autorisiert[40] und führten zu Anklagen gegen sechs Personen, die hohe politische Ämter in der Regierung bekleiden. Kenia bestritt zwar die Zuständigkeit des IStGH, die Berufungskammer entschied jedoch, dass die Anforderungen des Art. 17 IStGHSt. nicht erfüllt werden konnten und daher die Anklage vor dem IStGH zulässig ist. Der Gerichthof konnte nicht feststellen, dass Kenia ernstzunehmende Ermittlungen gegen die sechs vor dem IStGH angeklagten Personen durchgeführt habe oder dieses in nächster Zukunft beabsichtige.[41]

IV. Komplementarität

Anders als bei den ad hoc Tribunalen, die Vorrang vor nationaler Gerichtsbarkeit haben, kommt dem IStGH eine komplementäre Funktion zu. Mit anderen Worten, erfüllt die nationale Strafgerichtsbarkeit ihre Aufgabe und führt Ermittlungen und in der Folge Strafverfahren durch, so darf der IStGH seine Gerichtsbarkeit nicht ausüben. Das in den Art. 1 und 17 IStGHSt. festgelegte Prinzip der Komplementarität ist ein Grundpfeiler der Gerichtsbarkeit des IStGH, der nur dort tätig werden soll, wo der betroffene Staat nicht willens oder nicht fähig ist, seiner Verpflichtung selbst nachzukommen.[42]

Art. 17 (1) IStGHSt. ist negativ formuliert, d.h. wenn eines der aufgezählten Kriterien erfüllt ist, liegt Unzulässigkeit vor. Eine solche ist gegeben (1) wenn ernsthafte Ermittlungen und ein Strafverfahren vom verantwortlichen Staat durchgeführt werden, (2) das Strafverfahren ge-

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40 Situation in the Republic of Kenya, Vorverfahrenskammer II, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya.

41 „The mere preparedness to take such steps or the investigation of other suspects is not sufficient." Prosecutor v Ruto, Kosgey und Sang, Berufungskammer, ICC-01/09-01/11-307, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Rz. 41.

42 Büro des Chefanklägers, Prosecutorial Strategy 2009-2012, 1. Februar 2010, 16 et seq.; C. Safferling, Internationales Strafrecht (2011) 282 et seq, Rz. 22 et seq.

gen eine bestimmte natürliche Person aus nachvollziehbaren Gründen eingestellt wurde, (3) die Tat bereits Sache eines abgeschlossenen Gerichtsverfahrens war und (4) die Tat nicht schwerwiegend genug ist um Ermittlungen durch den Chefankläger zu rechtfertigen.[43]

a) Konkurrierende Gerichtsbarkeit

Die Prinzipien, die das Strafanwendungsrecht bestimmen, sind weltweit anerkannt, unter anderem zählen dazu das Territorialitätsprinzip und das aktive Personalitätsprinzip, wie es auch für den IStGH Gültigkeit hat. Die Regelungen des internationalen Strafanwendungsrechts sollen sicherstellen, soweit möglich, dass kein rechtsfreier Raum entsteht. Daraus kann für den betroffenen bzw. zuständigen Staat nicht nur die Möglichkeit zur Aburteilung von Verbrechen, z.B. begangen auf seinem Territorium, abgeleitet werden, sondern auch eine Verpflichtung dies zu tun.[44] Deutschland versucht dieser Verantwortung, einerseits durch die Einführung eines eigenen Völkerstrafgesetzbuches und andererseits durch die strafrechtliche Ahndung von im Ausland begangenen Verbrechen vor nationalen Gerichten, gerecht zu werden.[45] In der Strafprozessordnung ist aber für die Staatanwaltschaft die Option vorgesehen, von einer Anklage abzusehen, wenn keine Verbindung zu Deutschland hergestellt werden kann.[46]

Seit 2011 findet gegen zwei Mitglieder der *Forces Démocratiques de Libération du Rwanda* (FDLR) ein Prozess wegen Verbrechen gegen die Menschlichkeit und Kriegsverbrechen vor dem Oberlandesgericht Stuttgart statt. Der dritte zu dieser Gruppe gehörende in Europa lebende Verdächtige wurde vor dem IStGH angeklagt. Die Vorverfahrenskammer bestätigte die Anklage gegen ihn aber nicht;[47] diese Entscheidung fand die Zustimmung der Berufungskammer.[48]

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43 L. Lafleur, Der Grundsatz der Komplementarität (2010) 150 et seq.

44 Z.B § 152 deutsche Strafprozessordnung.

45 C. Safferling, Internationales Strafrecht (2011) 7 et seq.

46 § 153 (1) deutsche StPO: Wenn kein Interesse des deutschen Staates an der Strafverfolgung vorliegt, kann von einer solchen abgesehen werden.

47 Prosecutor v Mbarushimana, Vorverfahrenskammer I, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, 16. Dezember 2011.

48 Prosecutor v Mbarushimana, Berufungskammer, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30. Mai 2012.

Der Umfang des Begriffes Staat, gem. Art. 17 (1) (a) IStGHSt, beinhaltet einige kontroverse Punkte. Die Auslegung des Wortes entscheidet über die Vereinbarkeit, der die Ermittlungen und das darauffolgende Strafverfahren durchführenden Institutionen mit dem Prinzip der Komplementarität. Es ist nicht unproblematisch, wenn einer nach einem Konflikt eingerichteten Wahrheitskommission die Aufgabe übertragen wird, die Ermittlungen und im Folgenden die Strafverfolgung durchzuführen. Ist eine solche Kommission nicht mit der ordentlichen Gerichtsbarkeit verbunden,[49] erfüllt sie die Anforderungen des Art. 17 IStGHSt. nicht. Grundsätzlich muss daher die jeweilige Kommission abhängig nach ihrer Konzeption und Zielsetzung beurteilt werden. Gleiches gilt für den Erlass von Amnestien, insbesondere von Generalamnestien.[50]

Wahrheitskommissionen, Amnestiegesetzgebungen und der IStGH konkurrieren nicht, sondern sie ergänzen sich und sollen zu einer für alle Seiten annehmbaren Aufarbeitung von Massenverbrechen beitragen. Die Gerichtsbarkeit des IStGH richtet sich gerade eben gegen Personen die verantwortlich sind, als indirekte oder direkte Täter, für die Verübung von Massenverbrechen, diese z.B. ausgelöst oder maßgeblich unterstützt haben. Die Erkenntnisse gewonnen von Wahrheitskommissionen sollten in die Ermittlungen des Anklägers des IStGH mit einfließen und stellen grundsätzlich keinen Ausschluss der Gerichtsbarkeit des IStGH dar. Etwaige Amnestien sind zugunsten der großen Masse von direkten Tätern ein gangbarer Weg, nicht aber für jene, die z.B. einen Völkermord geplant haben. Personen mit hohen politischen oder militärischen Ämtern sind oftmals in der Position Verbrechen solchen Ausmaßes zu verhindern und tragen daher eine erhöhte Verantwortung der Gemeinschaft gegenüber.[51]

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49 In Südafrika wurde nach Ende des Apartheidsregime einen Wahrheits- und Versöhnungskommission eingerichtet. Eine Amnesty stand nur demjenigen offen, der „had made full disclosure of all relevant facts" (Truth and Reconciliation Commission Report Vol. 6, S. 4, § 3). Wer diese Voraussetzung nicht erfüllte, gegen den wurde vor einem ordentlichen Gericht ein Verfahren wegen der verübten Delikte und Verbrechen geführt.

50 C. Stahn, Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court, 3 Journal of International Criminal Justice (2005) 695, 709 et seq.

51 H. Farthofer, Complementarity, in: Safferling (Hg), International Criminal Procedure (2012) 95, 97 et seq.

Darüber hinaus können sich auch Konkurrenzen in der Zuständigkeit des IStGH mit anderen internationalen oder internationalisierten Gerichtshöfen ergeben. Sowohl der JStGH wie für das Tribunal für Sierra Leone haben, aufgrund ihres noch andauernden zeitlichen Geltungsbereichs, Vorrang vor dem IStGH.[52] Im Verhältnis zum RStGH können keine derartigen Probleme auftreten, dessen Zuständigkeit wurde bereits bei seiner Einrichtung auf den Zeitraum vom 1. Januar bis 31. Dezember 1994 begrenzt. Die Gerichtsbarkeit des überwiegenden Teils der hybriden oder internationalisierten Tribunale, wie z.B. die zur Aufarbeitung der im Jahre 1999 begangenen Verbrechen in Ost Timor eingerichteten Speziellen Kammern des Distrikt Gerichtshof in Dili, wurden bereits bei Errichtung in ihrem zeitlichen Geltungsbereich eingeschränkt.[53]

b) Unfähigkeit im Sinne des Art. 17 (1) (a) IStGHSt.

Wie bereits erwähnt ist die Durchführung von ernsthaften Ermittlungen im Sinne des Art. 17 (1) IStGHSt. eine Grundvoraussetzung für die Unzuständigkeit des Gerichtshofs. Wenn man hier als Messlatte Art. 54 (1) (a) IStGHSt. heranzieht bedeutet dies, dass dabei alle relevanten Fakten und Beweise berücksichtigt werden müssen. Darüber hinaus müssen bei der Durchführung der Ermittlung die Rechte des Angeklagten ebenso wie die der Zeugen beachtet und eingehalten werden.[54] Wenn ein nationaler Staatsanwalt nach Durchführung solcher, das heißt ernsthafter Ermittlungen zum Schluss kommt, dass aus nachvollziehbaren Gründen keine Anklage erhoben wird, so führt dies ebenfalls zur Unzuständigkeit des IStGH nach Art. 17 (1) (b) IStGHSt.

Unfähigkeit liegt bei einem Staat jedenfalls dann vor, wenn Art. 17 (3) IStGHSt. erfüllt ist, d.h. das Justizsystem des betroffenen Staates funktioniert kaum oder überhaupt nicht. Ein Indiz dafür könnte sein, dass es den staatlichen Behörden unmöglich ist, Beweise zu sichern oder in den betroffenen Gebieten Zeugen zu vernehmen. Eine rechtliche Unfähigkeit liegt in jenen Fällen vor, in ein Tatbestand aufgelistet

52 JStGH: Art. 1 JStGHSt., zeitlicher Geltungsbereich beginnt mit dem 1. Januar 1991; Art. 1 (1) Statut für den Special Court for Sierra Leone, *ratione temporis* beginnend mit 30. November 1996.

53 H. Farthofer, Complementarity, in: Safferling (Hg), International Criminal Procedure (2012) 95, 98

54 W. Schabas, The International Criminal Court, A Commentary on the Rome Statute (2010) Art. 17, 340 et seq.

in Art. 6-8 IStGHSt. nicht einmal in einer Umschreibung im nationalen Gesetz unter Strafe gestellt wird.[55]

c) Unwilligkeit im Sinne des Art. 17 (1) (a) IStGHSt.

Diese Option richtet sich vor allem gegen die Anerkennung von Showprozessen, die nicht mit der Intention der Wahrheitsfindung vereinbar sind, sondern vielmehr dazu dienen, eine bestimmte Person der Gerichtsbarkeit des IStGH zu entziehen. Die Unwilligkeit kann sich ebenso aus einer unbegründeten überlangen Verfahrensdauer ergeben. Der Maßstab für die Beurteilung kann hier nur der Stand im betroffenen Land sein und kann daher nur individuell beurteilt werden. Als letzter Punkt wird in der demonstrativen Aufzählung auf die Prozessgarantien der Unabhängigkeit und Unbefangenheit verwiesen.[56] Auch hier ist der Staat nicht an einer Strafverfolgung ernsthaft interessiert. Dabei ist aber vom IStGH das Doppelbestrafungsverbot zu beachten.

d) Ne bis in idem

Das Doppelbestrafungsverbot tritt dann ein, wenn der Täter für dieselbe Tat bereits vor einem ordentlichen Gericht verurteilt oder freigesprochen worden ist. Zu bedenken bleibt aber, dass alle Instanzenzüge vor nationalen Gerichten ausgeschöpft worden sein müssen, beziehungsweise das Urteil in letzter Instanz rechtskräftig geworden sein muss. Im Fall von *Jean-Pierre Bemba Gombo* stellte das Gericht fest, dass aufgrund der Berufung durch den nationalen Staatsanwalt gegen die das Verfahren einstellende Entscheidung eines Einzelrichters keine endgültige Entscheidung in der Sache selbst gefällt wurde und somit kein Verstoß gegen *ne bis in idem* vorliegt.[57] Aber auch wenn all die

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55 H. Satzger, Internationales und europäisches Strafrecht (5. Aufl., 2011) 264, Rz. 19; im Falle von Thomas Lubanga Dyilo wurde von kongolesischer Seite festgestellt, dass der Straftatbestand der Zwangsrekrutierung und Eingliederung von Kinder in bewaffneten Verbänden bis zu diesem Zeitpunkt nicht im kongolesischen Strafgesetzbuch enthalten war (Review Conference on the Rome Statute, ICC RC/ST/CM/1, Stocktaking of international criminal justice, Tacking stock of the principle of complementarity: bridging the impunity gap, 22. Juni 2010, Rede von Colonel Toussaint Muntazini Mukimapa, Stellvertretender Rechnungshofpräsident der Demokratischen Republik Kongo, § 34).

56 M Zeidy, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice (2008) 195 et seq.

57 Prosecutor v Bemba, Berufungskammer III, ICC-01/05-01/08-962, Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled

aufgezählten Voraussetzungen gegeben sind, muss der Chefankläger prüfen, ob das fragliche Verbrechen die Schwelle der Schwere der Tat überschritten hat.

c) Schwere der Tat

Die sogenannte „Minima-Klausel" verlangt die Prüfung der Schwere der Tat.[58] Kann der Ankläger diese nicht feststellen, wie z.B. im Falle Iraks[59] in Bezug auf die systematische Verübung von Kriegsverbrechen, hat er die Ermittlungen abzubrechen. Die Schwere bestimmt sich unter anderem nach der Zahl der Opfer, nach der Systematik der Verbrechen und der Natur der Verbrechen. Die Vorverfahrenskammer legte in ihrer Entscheidung zur Situation in der Demokratischen Republik Kongo die für sie bestimmenden Kriterien fest. Die Verbrechen müssen systematisch und im großen Ausmaß verübt worden sein und darüber hinaus die internationale Gemeinschaft in Alarmbereitschaft versetzen.[60]

d) Zusammenfassung

Die Funktionsweise des IStGH wird von den Trigger Mechanismen und dem Prinzip der Komplementarität bestimmt. Es wurden viele Kontrollmechanismen eingebaut, um einen zu starken und vielleicht auch politisch motivierten Eingriff in die staatliche Souveränität durch den IStGH, beziehungsweise insbesondere durch den Chefankläger zu verhindern. Bis dato kann nicht festgestellt werden, dass der Chefankläger über die Gebühr von seinem großen Einfluss auf die Zulassung einer Situation oder in der Folge auf einen bestimmten Fall einer bestimmten Person Gebrauch gemacht hat. Dem Ziel die Strafbarkeitslücke, die hinsichtlich der strafrechtlichen Verfolgung von Personen mit großem politischen oder militärischem Einfluss besteht, zu schließen, ist die Welt ohne Zweifel seit Einrichtung des IStGH ein großes Stück näher gekommen.

"Decision on the Admissiblity and Abuse of Process Challenges", 19. Oktober 2010, Rz. 65 et seq.; H. Farthofer, Complementarity, in: Safferling (Hg), International Criminal Procedure (2012) 95, 106 et seq.

58 H. Satzger, Internationales und Europäisches Strafrecht (5. Aufl., 2011) 265, Rz. 20.

59 Büro des Chefanklägers, Situation in Iraq, 9. Februar 2006, 8.

60 IStGH, Situation in the Democratic Republic of the Congo, Vorverfahrenskammer I, ICC-01/04-02/06-20-Anx2, 10. Februar 2006, Decision on the Prosecutor's Application for Warrants of Arrest, Art. 58, Rz. 47.

The 'Comfort System' – A Crime Against Humanity
İNSANLIĞA KARŞI BİR SUÇ- RAHATLATMA SİSTEMİ [1]

DR. PAUL BEHRENS[2]
ÇEVİREN: BİLGEHAN SAVAŞÇI TEMİZ

Bu savaş, beklendiği üzere, edebi kelamları etkilemiştir. Şehirler "alınmış", "sivil zayiat" meydana gelmiş, "dost ateşi" açılmıştır. Ancak edebi bir kelam sayılan bu ifadelerden bazıları artık zorlukla sindirilmektedir. Bir yardım derneğini hatırlatan "Rahatlatıcı- Kadın" tabiri de bunlar arasında temel bir yerdedir. Tabir, İkinci Dünya Savaşı'nda Japon ordusu tarafından istihdam edilen cinsel kölelerden oluşan sistemi açıklamak için kullanılmaktadır.[3]

Binlerce kadın, etkileri Japonya'nın mağlubiyetinden sonra da uzun süreli hissedilen bu sistemin mağduru olmuştur. "Rahatlatıcı kadın"-lar kendi ülkelerinde ve kendi toplumlarında dahi bu istismar biçimini tartışamamışlardır. Yargısal anlamda ne faillerin bireysel cezai sorumluluğu ne de Japon İmparatorluğu'nun olası sorumluluğu söz konusu olmuştur.

II. Dünya Savaşı'nın bitiminden yaklaşık yetmiş yıl sonra, faillerin sayısının azaldığı bir zamanda, "rahatlatma sistemi" sorgulanmaya başlanmıştır. Sistem uluslararası hukuk konusu olarak değerlendirilmektedir; bu değerlendirme en azından hayatta kalanlar, aileleri ve toplumsal belleğin korunması için önemlidir. Cinsel kölelik sisteminin sadece Japonya tarafından da kullanılmaması ayrıca önemlidir. Tecavüz kampları ve cinsel sömürünün diğer biçimleri silahlı çatışmalara eşlik etmeye

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2 School of Law, University of Edinburgh.

3 *Edinburgh Üniversitesi Hukuk Fakültesi
** Arş. Gör., Atatürk Üniversitesi Hukuk Fakültesi, Ceza ve Ceza Usul Hukuku ABD
İstihdam(ianfu) kelimesinin Japoncası ve çağrışımları üzerine bkz. Chin Kim / Stanley S Kim, 'Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves' 16 *UCLA Pacific Basin Law Journal* (1998), 263 ve dipnot 1.

devam etmektedir; bir "rahatlatma sistemi" değerlendirmesinin hem bu nedenle hem de diğer bağlamlarda önemli bulgular vermesi beklenmektedir.

Bu bölümün amacı II. Dünya Savaşı boyunca uygulanan "rahatlatma sistemi" hakkında genel bir bakış sağlamak ve uygulanabilecek olan uluslararası ceza hukuku bakış açısını ana hatlarıyla belirlemektir. Çalışmada özellikle sistemin özelliklerini en iyi yansıtacak ve Uluslararası Ceza Mahkemesi Statüsü'ne dâhil olan belirli bir suçun üzerinde durulacaktır: İnsanlığa Karşı Suçlardan Fuhşa Zorlama Suçu.

1. İkinci Dünya Savaşı'nda Rahatlatma Sistemi

Japon askerlerine cinsel hizmet sağlayan rahatlatma istasyonlarının kökü 19. yüzyılın sonlarına kadar dayanmaktadır, 1895 Japonya-Sino Savaşı boyunca bu tür özel istasyonlar oluşturulmaya başlanmıştır.[4] Daha resmi bir biçimi 1932'de Şangay Vakasından ve 1937'de Nanking İşgalinden sonra oluşturulmuştur.[5] 1940'larda sistem Japon kontrolü altındaki topraklara yayılmıştır: Tayvan, Endonezya ve özellikle Kore. [6]

Sisteme uyum sağlanması çeşitli nedenlere dayanmaktadır. Japon askerlerin konuşlanmış oldukları bölgelerde kadınlara tecavüz etmelerini önlemek ve zührevi hastalıkların yayılmasını engellemek bunların arasında en bilinenleridir.[7] Güvenlik endişeleri de diğer bir nedendir: Rahatlatma İstasyonları Japon Ordusu tarafından oluşturulmuştur ve asker olmayan kişilerin girmesi mümkün değildir; böylece Japon askerlerinin sırlarının casuslara geçme riski de azalmıştır.[8]

Kadınların hangi yöntemle alındığı "rahatlatma sistemi" üzerine büyük önem kazanan siyasi aynı zamanda da akademik bir tartışmadır. Modern Japonya'da sağ siyasetçiler tarafından "rahatlatma kadınları"nın gönüllü olarak cinsel hizmet verdikleri ya da parayla tutulmuş fahişe-

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4 Pyong Gap Min, 'Korean "Comfort Women": The Intersection of Colonial Power, Gender, and Class', 17:6 *Gender and Society*, (2003), 938, at 948.

5 Christine J Hung, 'For Those Who Had No Voice: The Multifaceted Fight for Redress by and for the "Comfort Women"', 15 *Asian American Law Journal* (2008), 177, 183.

6 Min, 941.

7 Hung, 184.

8 Christine Wawrynek, 'World War II Comfort Women: Japan's Sex Slaves or Hired Prostitutes?' 19 *New York Law School Journal of Human Rights* (2003), 913, 915, ve bkz. Hung, 184.

ler oldukları iddia edilmektedir.[9] Gönüllü olarak hizmet sunulduğuna ilişkin soru işaretleri olmasına rağmen[10] Japonya'dan istasyonlarda çalıştırılmak üzere fahişe istihdam edildiği kanıtlanmış olabilir.[11] Ancak pek çok genç kadın, istasyonlara garsonluk, daktilografiklık,[12] aşçılık ya da temizlikçilik gibi iş vaatleriyle kandırılarak alınmıştır.[13] Bazılarına rahatlatma istasyonlarında hizmet verecekleri söylenmiş ancak işin doğası hakkında yanıltılmışlardır: Bu kadınlara yaralı askerleri ziyaret edecekleri söylenmiştir.[14]

Bildirilen durumlardan birisi fakir ailelerin kızlarını fuhuş için satmalarıdır.[15] Faillerin açıkça zor kullanmaları da yine başka bir durumdur. Bu metodun yasal kaynağı Ulusal Genel Seferberlik Kanunu'dur ve Koreli kadınların zorla alımı için 1942'de oluşturulmuştur.[16] 1996 Coomaraswamy Raporu Japon kontrolü altındaki ülkelerde, köle baskınlarına karşılık gelen geniş ölçekli zorlamadan ve kadınların zor kullanılarak kaçırılmasından bahsetmektedir.[17]

İstasyonlarda her ne kadar Japon işgali altındaki çeşitli bölgelerden kadınlar ve kızlar olsa da, "rahatlatıcı kadınlar"ın büyük çoğunluğunu

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9 Bkz. Wawrynek, 920 and 917.

10 Min, 939.

11 Carmen M. Argibay, 'Sexual Slavery and the "Comfort Women" of World War II', 21 *Berkeley Journal of International Law* (2003), 375, 378.
Hung, 184; James Ladino, '*Ianfu*: No Comfort yet for Korean Comfort Women and the Impact of House Resolution 121', 15 *Cardozo Journal of Law and Gender* (2009), 333, 335. On the relatively low proportion of Japanese prostitutes in the 'comfort stations', see also Christopher P Meade,'From Shanghai to Globocourt: An Analsyis of the "Comfort Women's" Defeat in Hwang v Japan', 35 *Vanderbilt Journal of Transnational Law* (2002), 211, 220.

12 Carmen M. Argibay, 'Sexual Slavery and the "Comfort Women" of World War II', 21 *Berkeley Journal of International Law* (2003), 375, 378.

13 Hung, 185.

14 Argibay, 378.

15 Min, 952.

16 Hung, 185.

17 United Nations, Economic and Social Council, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission. Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms. Addendum: Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45. Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, 4 January 1996, UN Doc. E/CN.4/1996/53/Add.1 [buradan sonra 'Coomaraswamy Report'], para 27.

1910'dan beri Japon işgali altında olan Kore'den gelenler oluşturmaktadır. Literatürde rahatlatıcı kadınların % 80'inin Kore kökenli olduğuna atıf yapılmaktadır.[18] Rahatlatıcı istasyonlarındaki uygulamalar korkunç bir vahşet derecesine ulaşmıştır. Kurtulanlarla çeşitli görüşmeler yapan Pyong Gap Min mağdurların günde 30 kez Japon askerlerle ilişkiye girmeye zorlandıklarını bildirmiştir.[19] Dayak, işkence ve diğer fiziksel istismar biçimleri de buna düzenli olarak eşlik etmiştir.[20] Düzenli zührevi hastalık kontrollerine rağmen "rahatlatıcı kadınlar"ın bazıları çeşitli hastalıklara yakalanmış,[21] bazıları ise ölmüştür.[22] Hamile kalan mağdurlar kürtaja zorlanmıştır.[23] İntiharlar meydana gelmiş,[24] ancak bazı durumlarda askeriye bunu göz önüne alarak kendilerini öldürdükleri takdirde ailelerine zarar verecekleri konusunda kadınları tehdit etmiştir.[25] Askerlerin, rahatlatıcı kadınları öldürdükleri durumlara da rastlanmıştır.[26] Rahatlatıcı kadın olarak kullanılan mağdur sayısının toplamda 200.000 kadından[27] oluştuğu tahmin edilmektedir.[28]

Japonya'nın yenilgisi mağdurların acılarının sona erdiği anlamına gelmemiştir. Mağdurların birçoğu muhafazakâr ve ataerkil toplumlardan gelmekteydi, bu yüzden "rahatlatma sistemi"nden kurtulan pek çok kadın tecavüz mağduru oldukları için utanç duymuş ve toplumla tekrar uyum sağlamakta zorluk yaşamıştır.[29] Evlerine dönen rahatlatıcı

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18 Ladino, 336, speaks of 'up to eighty percent'; Wawrynek of 'more than 80%', Wawrynek, 914. Bkz. Jinyang Koh, 'Comfort Women: Human Rights of Women from Then to Present', 79 *University of Georgia School of Law, LLM Theses and Essays*, Paper (2007), 5 ('Nearly 80%').

19 Min, 941. Coomaraswamy raporunda kadınların günde 60 ila 70 erkeğe sunulmasının umulduğunu belirtilmiştir, Coomaraswamy Report, para 34.

20 Hung, 186; Min, 941; Coomaraswamy Report, para 10

21 Karen Parker / Jennifer F Chew, 'Compensation for Japan's World War II War-Rape Victims', 17 *Hastings International and Comparative Law Review* (1994), 497, 509.

22 Min, 941.

23 Yvonne Park Hsu, '"Comfort Women" from Korea: Japan's World War II Sex Slaves and the Legitimacy of their Claims for Reparations', 2 *Pacific Rim Law & Policy Journal* (1993), 97, 114.

24 Min, 941.

25 Sue R Lee, 'Comforting the Comfort Women: Who Can Make Japan Pay?', 24 *University of Pennsylvania Journal of International Economic Law* (2003), 509, 515.

26 Wawrynek, 913; Min, 941.

27 Yazarın kullandığı women and girls ifadesi kadın ve kızlar yerine kadın olarak çevrilmiştir. ç.n.

28 Cf Nathalie I Johnson, 'Justice for the "Comfort Women": Will the Alien Tort Claims Act Bring them the Remedies they Seek?', 20 *Penn State International Law Review* (2001), 253, 260; Meade, 211; Min, 941; Lee, 509.

29 Cf Janet L Tongsuthi, '"Comfort Women" of World War II', 4 *UCLA Women's Law Journal* (1994), 417; bkz. Hung, 187.

kadınların aileleri ve arkadaşları tarafından reddedilmesi üzerine birçok kadın evlerine dahi dönememiştir.[30]

Toplumsal bu damgalama yüzünden "rahatlatıcı kadınlar" Kore'de ancak 1990'larda su yüzüne çıkmaya ve yaşadıkları hakkında konuşmaya başladılar. Kim-Hak Sun'un 1991'deki kamu tanıklığı bir dönüm noktası olmuş[31] ve diğer mağdurlar da yavaş yavaş onu izlemiştir.[32] Ancak 50 yıl sonra dahi kendi toplumlarından aldıkları tepki anlayışlı olmamıştır. Japon Büyükelçiliği önünde gösteri yapan mağdurlara Koreliler gülmüştür.[33]

Japonya geçmişiyle çok zor yüzleşmiştir. Japonya Başbakanı Murayama "rahatlatıcı kadınlara" yapılanlar yüzünden özür dilemiştir,[34] ancak 2000'li yıllardaki ardılı Shinzo Abe, istasyonların yönetiminde Japon ordusunun olduğunu önce reddetmiş,[35]Asya uluslarının olumsuz tepkileri üzerine özür dilemiştir.[36]

"Rahatlatıcı kadın" vakası mahkemelerde de başarılı olamamıştır. Mağdurlar Tokyo Savaş Suçları Mahkemesi'nden önce tanıklık yapmış ancak yargılama hükme bağlanamamıştır.[37] Endonezya'da kurulan Hollanda Askeri Mahkemesi (Batavia Askeri Mahkemesi) bu suçların faillerini -Boling'e göre, rahatlatıcı sistem bağlamında sadece cinsel kölelik faillerini cezalandıran mahkeme-, yargılamayı denemiştir.[38] Hollandalı kadınlar da sistemin mağdurları arasındadır (Endonezya İkinci Dünya Savaşı'nın sonuna kadar Hollanda sömürgesi olmuştur.) ve yargıla-

30 Meade, 215; Min, 941.

31 Cf Anne Barker, 'Justice Delayed', 8 *Michigan State University-DCL Journal of International Law* (1999), 453, 459.

32 Timothy Tree, 'International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?', 5 *UCLA Journal of International Law and Foreign Affairs* (2000-2001), 461, 463; Min, 949.

33 Min, 950.

34 Wawrynek, 916.

35 Hung, 181.

36 Ibid, 182.

37 David Boling, 'Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?', 32 *Columbia Journal of Transnational Law* (1995) 533, 546; Hung, 186.

38 Boling, 547. Mahkeme Endonezya'da tutsak olarak tutulan 35 Hollandalı kadının davasını incelemiştir. Mahkeme kayıtları 2025'e kadar onaylanmış kalacaktır. Meade 2002, dipnot 97. Davanın Hollanda askeri mahkemesinden önce Awochi davasından ayrılması gerekmektedir. (aşağıda bkz, 58. not).

ma sadece mağdur olan Hollandalı kadınlar için yapılmıştır.[39] Japonya Mahkemelerinde yapılan birçok yargılama da başarısız olmuştur.[40]

1992 yılında Gönüllü Kadın İşçi Birliği'nin yedi üyesi ve "rahatlatıcı kadın" olarak çalıştırılmış üç kadın tarafından açılan Kan Pu Davası da yargısal anlamda kayda değer bir istisnadır.[41] Mahkeme - Yamaguchi Bölge Mahkemesi Shimonoseki Şubesi - 1998 yılında kararını vermiştir. Mahkeme sistem için oldukça sert ifadeler kullanmış, nazilerin barbarca uygulamalarına eşit olabilecek oranda ciddi insan hakkı ihlallerinin yaşandığını[42] ve "rahatlatıcı kadınları"na zarar verildiğini belirtmiş,[43] ancak resmi bir özür gerekliliğinden bahsetmemiştir.[44]

On yıldan fazla bir süre sonra rahatlatıcı sistemi ve Japonya'nın sistemden dolayı sorumluluğu özellikle Güney Kore ve Japonya arasında hala önemli bir sürtüşme konusudur. 2011 Ağustos'unda Güney Kore Anayasa Mahkemesi, hükümetin Japonya ile anlaşmazlıkları çözmek için somut bir çaba sarf etmemesini Anayasa'ya aykırı bularak tartışmaya ağırlık kazandırmıştır.[45] Ancak görünürde tatmin edici bir çözüm yoktur ve yakın gelecekte de gerçekleşme umudu bulunmamaktadır.[46]

2. "Rahatlatma Sistemi" ve Fuhuşa Zorlama Suçu

İkinci Dünya Savaşı'nda uygulanan Rahatlatma Sistemi, devletlerin sorumluluğuyla ve uluslararası insancıl hukuk ihlalleriyle ilgilidir. Aynı

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39 Hung, 186, 187.

40 Ibid, 189

41 Kim, 264.

42 Ibid, 263 and 277.

43 Ibid, 263. Wawrynek 'nominal para yargılaması'ndan bahsetmektedir, Wawrynek, 918.

44 Kim, 277; Kim, başka türlü ifade etmektedir. Davalar Birleşik Devletler'de Yabancıların Haksız Fiil Talepleri Anlaşmasına göre ele alınmıştır. Bu konu üzerine bkz. Hung, 189.

45 Asia-Japan Women's Resource Centre, '"Comfort Women": Korean constitutional court orders negotiation', 27 September 2011, available onhttp://www.ajwrc.org/eng/modules/bulletin/index.php?page=article&storyid =129 [son ziyaret 6 Mart 2013].

46 Seul'de Japon elçiliğinin önüne rahatlatıcı kadınların anısına bir heykel dikilmek istenmesi devam eden tartışmaları göstermektedir. Rahatlatıcı kadınlar ve onları savunanlar, Japon elçiliğinin önünde çektikleri acıların tanınması için düzenli gösteriler yapmıştır. Gösterilerden 20 yıl sonra Aralık 2011de şehri temsil eden bir grup rahatlatıcı kadınları sembolize eden bir kız heykeli dikmiştir. Güney Kore Dışişleri Bakanı yardımcısı Japonya'yı rahatlatıcı sistem sorununun çözülmesi için çaba sarfetmeye davet ederken, Japon büyükelçisi heykelin hemen kaldırılmasını istemiştir. Channel NewsAsia, 'South Korea presses Japan on wartime sex slavery', 1 Mart 2012; Japan Economic Newswire, 14 December 2011. Sonradan Japonya başbakanı olacak Yoshihiko Noda, heykelin […] Japon askerlerin cinsel kölesi olarak anlaşılmasının doğru olup olmadığı konusunda büyük bir tutarsızlık sergilediğini belirtmiştir, The Korea Herald, 29 Mart 2012.

zamanda da konunun kapsamı özellikle savaş suçları ve insanlığa karşı suçlar bağlamında uluslararası ceza hukukuna uzanmaktadır.

Rahatlatma Sistemine uluslararası hukuk açısından yapılabilecek en kapsamlı değerlendirme doğrudan mağdurların acılarıyla ilgili olan alanlara odaklanmaktır, ancak şimdiye kadar bu durum göz ardı edilmiş ya da önemsenmemiştir. Örneğin, ilgili diğer unsurlar da mevcut ise genç kızların ve kadınların zorla istasyonlara götürülmesi başlı başına bir insanlık suçu olarak değerlendirilebilir.

Ancak bu çalışmada daha sınırlı bir noktaya odaklanmak amaçlanmıştır ve sistemin belirli bir suçla ilişkisi ele alınacaktır. Güncel tartışmalarda önemli bir yeri olan ve sistemin bir açısını vurgulayan bir suç: Fuhşa Zorlama Suçu.

Uluslararası Ceza Mahkemelerinin Statüleri ve Yargılamaları incelendiğinde fuhşa zorlama suçunun kısa bir süre önce kodifike edildiği izlenimi oluşabilir. Nürnberg Anlaşmasında yer alan "insanlığa karşı suçlar" hükmü köleliği de içerecek şekilde sistemde işlenen diğer suçlar bakımından uygulanabilir olsa da fuhşa zorlama suçuna açıkça atıf yapmamaktadır.[47] Tokyo Savaş Suçları Mahkemesi Anlaşması için de aynı durum geçerlidir.[48] Nürnberg Yargılamalarının dayandığı Güvenlik Konseyi'nin kontrol altındaki bölgelerle ilgili aldığı 10 numaralı Karar'da da insanlığa karşı suçlar kapsamında kölelik ve tecavüzden bahsedilmiş ancak fuhuşa zorlama bakımından sessiz kalınmıştır.[49] Eski Yugoslavya (ICTY) Uluslararası Ceza Mahkemesi Statüsü için de aynı durum geçerlidir.[50] Ruanda Uluslararası Ceza Mahkemesi Statüsünde ise fuhşa zorlama, savaş suçları kapsamında yer almış, insanlığa karşı suç olarak değerlendirilmemiştir.[51]

1998 Uluslararası Ceza Mahkemesi Statüsü fuhşa zorlama suçunun açıkça yer aldığı ilk uluslararası yargısal organ statüsüdür.[52] Suçun un-

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47 Article 6(c) of the Charter of the International Military Tribunal at Nuremberg ['Nuremberg Charter'] (1945).

48 Article 5(c) of the Charter of the International Military Tribunal for the Far East ['Tokyo Charter'] (1946).

49 Article II(1)(c) of Control Council Law 10 ['CCL 10'] (1945).

50 Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ['ICTYSt'] (1993).

51 Cf Articles 3 and 4(e) of the Statute of the International Criminal Tribunal for Rwanda ['ICTRSt'] (1994).

52 Article 7(1)(g) of the Statute of the International Criminal Court ['ICCSt'] (1998).

surları fiilin bireysel yönleri bakımından çok daha fazla ayrıntı sağlamaktadır.[53]

Ancak buradan ICC statüsünün yürürlüğünden önce fuhşa zorlama suçunun insanlığa karşı bir suç olarak kabul edilmediği sonucunu çıkarmak hatalı olur. Aslında dikkate alınması gereken husus ICC Statüsünden önce hiçbir belgenin bu kategoriye giren suçların eksiksiz bir listesini yapmamasıdır. Bunlar tam tersine ya tüm "diğer insanlık dışı hareketlere"[54] toplu atıf yapmış ya da Güvenlik Konseyi'nin 10 Numaralı Kararı'nda olduğu gibi suç listelerinin açık uçlu olduğunu farklı biçimde ifade etmiştir.[55]

Batavia Askeri Mahkemesi, cinsel kölelik sistemiyle ilişkili suçları "fuhşa zorlama"[56] iddiası altında yargılamaya çalışmış, ancak Hollanda Mahkemelerinde de görüldüğü üzere, suç, "savaş suçu" olarak kabul edilmiştir.[57] Ancak bağlamsal unsurları dışında suçun anayasada önemli bir değişiklik yapmak gereği anlamına gelmediği ileri sürülmüştür.[58] Hollanda Doğu Hint Adaları Ulusal Kanunu "fuhşa zorlama amacıyla kızların ve kadınların kaçırılmasına"[59] atıf yapmıştır (1919'da kurulan Savaş Faillerinin Sorumluluğu ve Cezaların İnfaz Komisyonunda suç, savaş suçları listesinde yer almıştır).[60]

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53 Article 7(1)(g)-3 of the Elements of Crime of the International Criminal Court, PCNICC/2000/1/Add.2 (2000) (hereinafter 'Elements of Crime').

54 Art 6(c) Nuremberg Charter; Art 5(c) Tokyo Charter; Art 5(i) ICTYSt; Art 3(i) ICTRSt.

55 CCL 10 contains, in Art II1(c), kötü muamele kelimesi öldürmeyi de içine almakla birlikte bununla sınırlanmamaktadır. […]'

56 Argibay (2003), 382.

57 Ibid, 382 and 383.

58 Bağlamsal unsur failin hareketinden bağımsızdır. Özellikle insanlığa karşı suç alanında, uluslar arası ceza hukukunun gelişmesi ile birlikte bağlamsal element de bir takım değişikliklere uğramıştır. Modern uluslararası ceza hukukunda bireysel hareket sivil nüfusa yönelmiş geniş çapta ya da sistematik bir saldırı niteliğinde ise sadece 'insanlığa karşı suç' olarak sınıflandırılabilir. Art 7(1) ICCSt. Uluslararası silahlı çatışmalarda savaş suçlarının bağlamsal unsuru international (Arts 8(2)(a) and 8(2)(b) ICCSt), ulusal silahlı çatışmalarda ise (Arts 8(2)(c) and 8(2)(e) ICCSt)

59 Art. 1, para. 7 of Statute Book Decree No. 44 of 1946 concerning the 'Definition of War Crimes', Cf Case No 76, Trial of Washio Awochi, Netherlands Temporary Court-Martial at Batavia, Judgment, 25 October 1946, Birleşmiş Milletler Savaş Suçları Komisyonunda rapor edilmiştir, , *Law Reports of Trials of War Criminals*, Vol XI-XV, Buffalo, New York, 1997, 123 [buradan sonra 'Awochi']. Batavya Askeri Yargılaması kayıtlarının (yukarıda bkz., 35. not) sınıflandırıcı karakteri dolayısıyla bu hukukun Yargılamanın değerlendirmelerine göre şekil alıp almayacağı tam olarak açık değildir.

60 M Adatci, 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', 14 *AJIL* (1920), 95. Birinci Dünya Savaşı'nın bitimine yakın Paris Barış Konferansı'nda

Dava bu bağlamda önem kazanmış, Batavia'da restaurant ve bara bitişik bir genelev olarak tanımlanan[61] Sakura Kulübü'nün sahibi Washio Avochi, Hollanda Mahkemesi'nde (bu davada Hollanda Geçici Askeri Mahkemesi) yargılanmıştır. Her ne kadar vaka, rahatlatma sistemi ile ilgili olmasa da, kulüpte seçkin Japon sivillere hizmet sunulmaktaydı,[62] askeri mahkeme fuhşa zorlama suçuna, kendi döneminde anlaşıldığı haliyle, ışık tutacak şekilde bir yargılama yapmıştır. Vaka, rahatlatıcı kadın uygulaması ve istihdamı ile bazı benzerlikler göstermektedir, kız ve kadınların büyük bir kısmı işe alınma sırasında genelevin varlığından habersizdir ve ayrılmak istediklerinde ki hepsi istemiştir, hapis ya da sınır dışı edilmekle tehdit edilmişlerdir.[63]

Yargılama üç temel nedenden ötürü dikkat çekicidir. Her şeyden önce, Hollanda Mahkemesi yargısal değerlendirmesinde 1919 Komisyonunda önemi ortaya çıkan insan kaçırma suçundan ziyade fuhşa zorlama suçuna vurgu yapmıştır (Awochi o dönem mevcut değildi).[64] İkinci olarak dava suçun hareket unsuru bakımından örnek teşkil etmektedir: Örneğin mağdurların hareket özgürlükleri büyük ölçüde kısıtlanmıştır, Japon askeri polisi tarafından tehdit edilen kızlar ayrılmak istemektedir, bu durumlar mahkeme tarafından "fena muamele, daha da kötüsü özgürlükten mahrum edilme" olarak yorumlanmış, tehditler, mağdurların Japon müşterilerle birlikte olmaları bakımından ciddi bir zorlama olarak kabul edilmiştir.[65]

Sonradan ortaya çıkan "zorlama" kavramı kelimenin geleneksel anlamıyla benzeşir görünmektedir. Ancak burada değerlendirilmesi gereken üçüncü bir açı daha vardır: Mahkeme kızların çoğunun "aşırı yoksul ve çok zor koşullarda" olduğuna atıf yapmamıştır. Bu koşullar özellikle verilecek ceza için önemli olsa da (benzer koşullarda sanık avantaj kazanmıştır) maddi hukuk değerlendirmesini pek etkilememiş-

kurulan Komisyon, özellikle Almanya ve müttefiklerinin işledikleri savaş suçlarını incelemek için oluşturulmuştur. 29 Mart 1919 tarihli raporunda, Komisyon aralarında "fuhşa zorlama amacıyla kız ve kadınların kaçırılması"nında olduğu 32 suç iddiasına ilişkin daha fazla bilgi toplanmasını önermiştir. Ibid, 114.

61 Awochi, 122.

62 Ibid.

63 Ibid, 122 and 123; and cf Antonio Cassese, *International Criminal Law*, OUP 2003, 55, dipnot 11.

64 Awochi, 124.

65 Ibid.

tir.[66] Bu, görüleceği üzere, daha yakın geçmişte açıklığını kaybedebilecek bir değerlendirmedir.

İkinci Dünya Savaşı ve Batavia Yargılamaları'nın sonrasında, fuhşa zorlama suçu özellikle uluslararası insancıl hukuk kapsamında görünür olmuştur. Awochi'den 3 yıl sonra, Dördüncü Cenevre Sözleşmesi'nin 27. maddesinde kadınların onurlarına yönelik her türlü saldırıdan, özellikle tecavüz, fuhşa zorlama ve her türlü sarkıntılığa maruz kalmaktan korunacakları kabul edilmiştir. [...]'.[67]

1977'de onaylanan Cenevre Sözleşmeleri Ek Protokolü, cinsiyete bakılmaksızın korunan kişiler için fuhşa zorlamanın yasaklanmasını kabul etmiştir.[68] İkinci Ek Protokol'de yer alan bu hüküm Ruanda için Uluslararası Ceza Mahkemesi Statüsü'nü de etkilemiş ve hükme Statü'de atıf yapılmıştır.[69] Eski Yugoslavya için Uluslararası Ceza Mahkemesi'nin yargılamalarında fuhşa zorlama suçu açıkça insanlığa karşı suç sayılmıştır.[70] Suç, hem Ruanda için Uluslararası Ceza Mahkemesi'nin hem de Eski Yugoslavya için Uluslararası Ceza Mahkemesi'nin statülerinde yer alan "diğer insanlık dışı hareketler" ifadesine dâhil sayılmış ve suçun "uluslararası insan hakları enstrümanlarının birçoğuna göre de tartışmasız olarak insanlık onuruna ciddi bir saldırı" teşkil ettiğini kabul etmiştir.[71] Eski Yugoslavya için Uluslararası Ceza Mahkemesi'nin dayanaklarından biri Birleşmiş Milletler Genel Sekreterliği'nin 1993 yılında yayınlanan[72] ve eski Yugoslavya'daki çatışmada yaşanan tecavüz ve fuhşa zorlama dâhil olmak üzere her türlü cinsel saldırının "insanlık

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66 Ibid, 125.

67 Madde 27, Convention Relative to the Protection of Civilian Persons in Time of War (buradan sonra 'Geneva Convention IV'), 12 Ağustos 1949.

68 Art 75(2)(b) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977 (buradan sonra 'AP1'); Art 4(2)(e) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (buradan sonra 'AP2'). Ayrıca bkz. Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1987, 874, para 3049.

69 Art. 4(e) ICTRSt. Yukarıda bkz, 48. not.

70 Art 5(i) ICTYSt; Art 3(i) ICTRSt.

71 Dava No: IT-95-16-T, Zoran Kupreškić ve diğerleri, (Dava Dairesi), 14 Ocak 2000, para 566.

72 See eg Dava No IT-95-17/1-T, Anto Furundžija, (Dava Dairesi), 10 Aralık 1998, dipnot 201 (buradan sonra 'Furundzija (Dava Dairesi)').

dışı hareket" kapsamında sayılacağını belirttiği raporudur.[73] Ancak Eski Yugoslavya için Uluslararası Ceza Mahkemesi kararlarında tartışılan cinsel suçlar bakımından, vurgu genellikle ilgili suçun farklı yönlerine yapılmıştır.

Örneğin Kunarac davasında, mağdurlara karşı işlenen fiiller kölelik dolayısıyla cezalandırılmıştır. Davaya neden olan olaylar rahatlatma sistemi ile benzerlikler göstermektedir.[74] Dava dairesi, 6 ay boyunca bir evde hapsedilen ve defalarca tecavüze uğrayıp, "eve dönen askerlere cinsel hizmet sağlamak için kullanılan" iki kıza göndermede bulunmuş ve kızların aslında "kendilerine yapmaları emredilen her şeyi" yaptıklarını ve kaçma şanslarının bulunmadığını belirtmiştir.[75]

Mahkemenin suçun unsurları konusunda oldukça liberal bir tavır sergilediğini belirtmekte fayda vardır. Mahkeme sadece mağdurun özgür iradesinin kırılmasını değil, cebri, aldatmayı, gerçek olmayan vaadi, güvenin kötüye kullanılmasını, mağdurun konumundan yararlanmayı, esareti, gözaltını, psikolojik baskıyı ve sosyo-ekonomik koşulları da zorlama kabul etmiştir.[76] Zorla çalıştırmaya veya zorunlu hizmete zorlama, örneğin fuhuş yoluyla, açıkça kölelik göstergesi sayılmış[77] ve bu şekilde iki suç arasında bağlantı kurulmuştur. Tek başına gözaltı ve devam eden esaretin kölelik bulgusuna ulaşmak için genellikle yeterli olmadığı açığa kavuşturulmuştur.[78]

Bununla birlikte Eski Yugoslavya için Uluslararası Ceza Mahkemesi insanlığa karşı suçlara farklı şekilde yaklaşmıştır. Köleleştirme ve fuhşa zorlama suçları bakımından zorunlu bir suç unsuru getirilmiş, ancak uluslararası ceza mahkemeleri tarafından suçların farklı yorumlanma olasılığı da göz ardı edilmemiştir.[79]

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73 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Presented 3 May 1993, para 48, S/25704.

74 Dava No IT-96-23-PT, Dragoljub Kunarac and Radomir Kovać Islah Davası, 8 Kasım 1999, para 10.1.

75 Dava No IT-96-23-T & IT-96-23/1-T, Dragoljub Kunarac, Radomir Kovać and Zoran Vuković (Trial Chamber), 22 Şubat 2001, paras 732 – 742. (buradan sonra Kunarac (Dava Dairesi)').

76 Ibid, para 542.

77 Ibid.

78 Ibid.

79 Ancak aşağıda bkz., 81 – 83. deki notlarda, uluslararası ceza hukukundaki zorlayıcı unsur kavramı ile bir noktada birleşilmektedir.

UCM Statüsü'nde[80] fuhşa zorlama suçunun insanlığa karşı suçların içine dâhil edilmesiyle kodifiye edilen uluslararası cinsel suçların kapsamı genişlemiştir. Roma müzakerelerindeki Cinsiyet Adaleti İçin Kadın Kurultayı'nın çalışmaları sayesinde[81] Statü, bugün diğer tüm Uluslararası Ceza Mahkemeleri kurucu statülerinden daha kapsamlı bir cinsel suç kataloğuna sahiptir.

Suçun unsurları, suça ilişkin daha çok ayrıntı sağlamaktadır. Fail, mağdur üzerinde cinsel davranışlar gerçekleştirmeli ya da gerçekleştirmeye kalkışmalı veya bu davranışlarla ilgili olarak bir çıkar beklentisi (maddi çıkar olması şart değildir) içinde olmalıdır.[82]

Ancak zorlayıcı unsur Kunarac kararını yansıtmaktadır. "Fuhşa zorlama"nın modern anlamı, köleleştirmede olduğu gibi, geleneksel anlayıştaki cebri hareketlerle sınırlı değildir. Suçun unsurlarına göre failin cinsel davranışları "bu tür kişi ve kişilere ya da diğer kişilere karşı cebir, baskı, alıkoyma, manevi baskı ya da güveni kötüye kullanma gibi zorlama veya cebir tehdidi ile veya ortamın zorlayıcılığı dolayısıyla çıkar sağlamak suretiyle veya bu kişi veya kişilerin gerçek anlamda rıza gösterme kudreti olmamasından faydalanarak" gerçekleştirmesi gereklidir.[83]

Bu suçun saldırgan yapısını yansıtan kapsamlı bir listedir. İnsanlığa karşı suçlar kapsamında zorlayıcı unsurun nasıl anlaşılması gerektiğini de göstermektedir. "Zorlama" kavramının üzerinde, tecavüz suçunda[84] ve insanlığa karşı suçlar kapsamında yer alan cinsel suçlarda[85] olduğu gibi, mağdurların "zorla transferi" suçunda[86] da ayrıntılı bir şekilde üzerinde durulmaktadır.

Peki, Awochi günlerinden beri değişen ne oldu?

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80 Art. 7(1)(g) ICCSt.

81 Bkz. Gerhard Werle, *Principles of International Criminal Law*, CUP 2009, 323, fn 206.ss

82 Suçun unsurları, Art 7(1)(g)-3, birinci ve ikinci unsur.

83 Ibid, birinci unsur

84 Ibid, Art 7(1)(g)-1, ikinci unsur.

85 Ibid, Art 7(1)(g)-6, birinci unsur. Ancak hareketin içinde yer alan tüm zorlayıcı ögeler değil, sadece fuhşa zorlama suç unsuru olacaktır, örneğin hamileliğe zorlama gibi çeşitli zorlama alternatifleri fuhşa zorlama sayılmayacaktır. Ibid, Art 7(1)(g)-4, para 1. Kısırlaştırma suçu bakımından suç unsuru, suçun mağdurun rızası olmaksızın işlenmesidir, aldatma ile alınan bir rıza ise geçerli değildir, ibid, Art 7(1)(g)-5, para 2, fn 20.

86 Ibid, Art 7(1)(d), 1. unsur, dipnot 12.

İlk bakışta, Batavia Askeri Mahkemesinin "fuhşa zorlama" suçu yorumunun UCM Statüsü'ne göre oldukça sınırlayıcı olduğu görülebilir. Davada yukarıda açıklanan etkenler, - mağdurların hapsedilmesi, tehditlere maruz kalmaları, tehditlerin ağırlığı[87], kümülatif şartlar olarak anlaşılmış, hangi davranışların bu tür bir durum sayılacağı belirlenmiştir.

Ancak bu askeri mahkemenin suçu anlama biçimi değildir. Dava raporunda belirlenen etkenlerin "fuhşa zorlama" suçunun temel unsurları bakımından "örnek" niteliğinde olduğu, suçun olası tüm biçimlerinde zorlama sayılabilecek davranışlar olması gerektiği belirtilmiştir.[88]

Awochi yargılamasında, kulübün, mağdurları istihdam ve çalıştırma biçimi büyük önem taşımaktadır. Durum "rahatlatma sistemi"nde kullanılan kadınları hatırlatabilir, birçok görüşe göre, Japonya'dan getirilen profesyonel fahişeler[89] kısmı, akademik tartışmalarda önemli görülmüştür. Sisteme "gönüllü" katılanlar ile sisteme zorla dâhil edilenler arasındaki ayrım bazı akademisyenlere göre önemlidir, diğerlerine göre ise, Min'in de dikkat çektiği gibi, askeri geneleve sürükleyen ekonomik koşullar dolayısıyla Japon rahatlatıcı kadınlar da "rahatlatma sistemi" mağduru haline gelmişlerdir.[90]

Awochi kriteri uygulandığında, mağdurların nasıl istihdam edildiği ikincil bir öneme sahip olmaktadır. Raporda, isteyerek ve bilerek fahişeliği kabul eden kadınların sonradan sistemden ayrılmak istemelerine rağmen izin verilmemesinin ve tehdit edilmelerinin bu az sayıda vaka bakımından belirleyici faktör olduğu belirtilmiştir.[91] Bu durum, ilk nedenin, motivasyonun ne olduğuna bakılmasından uzaklaşıldığını ve ilgili hareketin yapıldığı andaki koşulların incelendiğini göstermektedir. Bu, eşzamanlılık kuralının da dâhil olduğu Uluslararası Ceza Hukukunun temel prensipleriyle de uyumlu olan doğru bir yaklaşımdır.[92]

Rahatlatma kadınlarının durumu, bu konuda Awochi mağdurları ile karşılaştırılabilir yani rahatlatma sisteminde de kadınların istihdam bi-

87 Yukarıda bkz. 62. not.

88 Awochi, 124.

89 Yukarıda bkz. 8. not.

90 Min, 939.

91 Awochi, 123.

92 Bu akış açısı üzerine bkz. Paul Behrens, 'Assessing international criminal evidence: The case of the unpredictable génocidaire', 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2011), 681.

çimi fuhşa zorlama suçunun oluşmasını engellemez. Rahatlatma sisteminde de belirleyici faktör mağdurların kaçmaya çalıştıklarında daha ağır yaptırımlara maruz kalmasıdır: Lee, kaçmaya çalışan rahatlatıcı kadınların genellikle fiziksel işkenceye maruz kaldıklarını belirtmiştir.[93]

Diğer taraftan Awochi tespitleri dikkate alınırken kararın fuhşa zorlama suçu bakımından çizdiği sınırlar gözetilmek zorundadır. Tehdit olmaksızın, örneğin sadece mağdurların ve ailelerin yoksulluğundan faydalanarak, fuhşun gerçekleştirildiği durumların fuhşa zorlama kapsamında sayılıp sayılmayacağı sorusunu cevaplamak zordur. İçtihat hukukunun yetersizliği karşısında bu konular geleneksel Uluslararası Ceza Hukuku temelinde değerlendirilmesi gereken konulardır. Awochi Kararı, fuhşa zorlama suçunun zorlayıcı unsurunun geniş bir şekilde anlaşılmasına izin vermemektedir, her ne kadar raporda zorlama unsuru suçun tüm olası biçimlerini kapsayacak şekilde ele alınmışsa da mağdurların ekonomik durumunun sömürülmesi sadece usuli olarak dikkate alınmıştır. [94]

Modern Uluslararası Ceza Hukukunda konuya ilişkin kapsamlı bir liste verilmesine rağmen, suçun unsurları, fuhşa zorlama suçunda zorlayıcı unsuru tanımlar ve bu konuda kesin bir sonuca varılmasına izin vermez.

Kunarac Dava Dairesi, mağdurun rızasının ya da özgür iradesinin yokluğuna veya imkansızlığına yol açan etkenler bağlamında sosyo-ekonomik durumlara atıf yapmıştır.[95] Zorlayıcı unsur belirlenirken, fuhşa zorlama suçunun diğer bir insanlığa karşı suç olan köleleştirme suçundan ayrılması kolay değildir. Aslında suçun unsurlarında fuhşa zorlama suçu bakımından zorlayıcı unsurun daha dar şekilde anlaşılması gerektiğine dikkat çekilmiştir.[96] Yoksulluğun sömürülmesi durumundan ise söz edilmemiştir.

Buradan, böyle koşullardan yararlanmanın zorlayıcı unsuru yerine getiremediği sonucuna ulaşılamaz. Örneğin, eğer ekonomik koşulların sömürülmesi ile fail adına üstün bir pozisyon sağlanıyorsa (sömürge

93 Lee, 515.

94 Cezalandırma düşünceleri üzerine yukarıda bkz, 63. not.

95 Kunarac (Dava Dairesi), 542.

96 Yukarıda bkz. , 80. not.

baskısında kolayca görülebildiği gibi), suç oluşturan davranışın kendisi "manevi baskı", "güveni kötüye kullanma", "zorlayıcı çevreden çıkar sağlama" ya da suçun unsurlarından sayılan diğer durumlardan birini yaratabilir.[97] Ancak daha sonra bu davranış başka zorunlulukları gerektirebilir.

Ekonomik sıkıntıların zorlayıcı unsur yönünden ele alınması, bugün zorluk teşkil etmektedir, 1940'larda yaygın bir biçimde kabul gören fuhşa zorlama kavramına bunların dâhil edilmesi itirazlara neden olmaktadır. Cebir, tehdit, fuhuştan kaçmaya çalışan mağdurun cezalandırılması gibi etkenlerin yokluğu karşısında, ekonomik durumun sömürülmesinin bu bağlamda bir zorlama biçimi olarak değerlendirilmesi ciddi zorluklarla karşılaşılmasına neden olabilir.

3. Sonuç Düşünceler

Fuhşa zorlama suçu, 1919 Savaş Faillerinin Sorumluluğu ve Cezaların İnfazı Komisyonu'nun raporundan beri ciddi oranda değişikliğe uğramıştır. Kaçırma şartının gerekliliği dahi 1940'lardan bu yana terkedilmiştir. Modern Uluslararası Ceza Hukukunun suç bakımından getirdiği en önemli değişiklik zorlayıcı unsurun yorumlanmasında olmuştur, bugün suçun unsurları içerisinde yer alan ve çeşitli alternatiflerin yer aldığı önemli liste bunu göstermektedir.

Rahatlatma sisteminin içindeki kadın ve kızlara yönelik kötü muamele, kaçmaya çalışan mağdurların çeşitli şekillerde cezalandırılması, vakaların ezici oranda çokluğu, yaşananların, o zamanda dahi, fuhşa zorlama suçunun tanımına kolayca uyduğunu ileri sürmek için iyi bir nedendir.

Rahatlatma sistemi haricindeki her fuhuş davası için ise aynı şey söylenemez. Ekonomik koşulların sömürülmesi suretiyle fuhşa katılma gerçekleşmiş ise, geleneksel anlayış bu durumu otomatik olarak suç kapsamına almamaktadır. Modern Uluslararası Ceza Hukukunda da durum aynıdır. Ancak Roma Statüsü ve suçun unsurları bu tür baskı yöntemleriyle, güç durumun sömürülmesi ya da zorlayıcı çevre koşullarının kullanılması gibi gerçekleşen fuhuş biçimlerinin de suç kapsamına alınmasına olanak sağlamaktadır.

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97 Ibid.

Bu, fuhşa zorlama suçunun modern düzenlenişinin daha ilerici olduğu anlamına mı gelmektedir?

Suçun unsurlarında yer alan alternatif listelere göre, bu cazip bir sonuçtur. Suçun geleneksel olarak katı bir biçimde anlaşıldığı sonucunu da ortaya çıkarmaktadır.

Ancak, 1946 Awochi kararı farklı bir okumaya olanak sağlamaktadır. Zorlama kavramını tüm olası biçimlerdeki baskı olarak yorumlamış, davranış örneklerini göstermiş ancak kavramın sınırsızlığını iddia etmemiştir.[98] Sonuç olarak suç esnek yapıdadır ve farklı yargısal yorumlara izin vermektedir. Bu değerlendirme ışığında, suçun unsurlarının yer aldığı metindeki geleneksel fuhşa zorlama kavramının daha az avantajlı olduğu söylenebilir. İleri sürüldüğü üzere, adaletin çıkarları gereği, zorlamaya dayanan fuhşun dayandığı saldırgan karakteri vurgulayan gerçeklikler suç bakımından dikkate alınabilir.

Bununla birlikte bu durum kendi içinde zorluklar taşımaktadır. Dikkate alınması gereken gerçeklikler esnek bir yaklaşımla çeşitlendirilebilir, bu da sanık bakımından ağır olabilir. Çeşitlilik temel olarak, ilgili hareketin suç niteliğine ilişkin önceden yapılacak nazik ikazların güvence altına alınmasını sağlar.[99] Kanunilik ilkesi ortaya çıkan ikazlardan birisidir, vurgulanan gerçeklikler önceden yapılacak nazik ikazların bir değerlendirmesi ise suç normu sadece hareket yapıldığı anda var olmakla kalmayacak, aynı zamanda, bu şartın etkin bir biçimde yerine getirilmesinde de yeterli olacaktır.[100]

Uluslararası Ceza Hukuku çeşitli bağlamlarda bu durumlarla mücadele etmektedir, tecavüz suçunu[101] oluşturan hareketin belirlenmesi ve UCM Statüsü'ndeki "diğer insanlık dışı hareketler"in[102] yorumlanması

98 Cf Awochi, 124.

99 Cf eg, James M West, 'Martial Lawlessness: The Legal Aftermath of Kwangju', 6 *Pacific Rim Law and Policy Journal* (1997), 127.

100 Jared L Watkins; Randle C Defalco, 'Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia', 63 *Rutgers Law Review* (2010), 201, 203.

101 Cf Furundzija (Dava Dairesi), paras 177, 184.

102 Bkz. Dava No IT-97-24-T, Milomir Stakić (Dava Dairesi), 31 Temmuz 2003, para 719 ve Temyiz Dairesi Dava No IT-95-14/2-A, Dario Kordic and Mario Cerkez, (Temyiz Dairesi), 17 Aralık 2004. Suçu oluşturan insanlık dışı hareketlerin geniş düşünülmesi halinde kanunilik ilkesinin ihlal edilebileceği, insanlık dışı hareket ifadesinin bu potansiyeli taşıdığı belirtilmiştir.

buna örnektir. Bu durumun Ceza Hukukunun kodifiye edilmesinde bir etkiye sahip olduğu da göz önüne alınmalıdır, yasaları hazırlayanlar yasal belirlilik getirmeye çalışırken geleneksel hukukun eksikliklerini bulmakta zorlanırlar. Bu bağlamda dikkate alındığında, suçun unsurlarında görüldüğü gibi, 1946 Batavia Askeri Mahkemesi görüşünde öne sürülen fuhşa zorlama suçu kavramını, kabul edilmiş savunma hakları ile birlikte düşünmek daha iyi olacaktır.

Ancak hazırlanan kapsamlı listelerin yürürlüğünde sorun olmayacağını söylemek mümkün değildir. Ortaya çıkacak en büyük zorluk cinsel suçlarda mağdurların gerçek rızalarını belirlemek yönünden olacaktır. Örneğin ekonomik koşulların ağırlığının zorlayıcı unsur oluşturup oluşturmayacağı, sefalet içinde yaşayan mağdurların gerçekten bu konuda rıza göstermeye ehil olup olmadıkları, bu mağdurların gösterdiği rızanın yargısal kararlarda önem taşıyıp taşımayacağı ortaya çıkan sorunlardandır.

Çok farklı senaryolarda ortaya çıkan fuhşa zorlama ya da sözde fuhşa zorlama iddiaları, -Birinci Dünya Savaşı'ndan Eski Yugoslavya'daki çatışmalara değin, durumlar arasında ve suçun unsurunun tanımlanmasında ortaklıklar olup olmadığı sorularını ortaya çıkarmaktadır.

Barış döneminde ya da sivil topluma yönelik büyük kampanyalar döneminde suçun önemli bir yere sahip olması tesadüf değildir. Onun temel özelliği, göründüğü gibi, maddi bir yarardan ziyade, rahatlatma sisteminin görünüşteki planlayıcılarının manevi bir yarar sağlamasıdır.[103]

Bu nesnelleştirme sürecini gerçekten sembolize eden şey mağdurların en mahrem hareketleri dâhil olmak üzere kolaylıkla faillerin emrinde olduklarıdır. Tüm korkunçluğuna rağmen bu bireylere yönelen kişisel bir suçtan çok daha ötedir, faillerin bu tür durumlarda mağdur topluluğu üzerinde sahip olduğu genel tutum bu durumu fazlasıyla göstermektedir. Bu nedenle barış döneminde ve kampanyalar dönemindeki bağlantının devam etmesi ile umulmaktadır ki yakın gelecekte bu tür bir suç ortadan kalksın.

Fuhşa zorlama suçunun unsurlarını anlamak ve suçu çeşitli bağlamlarda incelemek bakımından rahatlatma sistemi vakası önemlidir:

[103] Yukarıya bkz., 5. ve 6. notlar.

Suçun kökenleri ve bunun ötesinde zorlayıcı unsuru geliştiren örnekleri değer taşımaktadır; suçun meydana gelmesi durumlarına dikkat çekmekte ve böylece erken bir uyarı mekanizması sağlamaktadır. Aynı zamanda, daha erken safhalarda suçun gelişmesini önleyecek stratejilerin belirlenmesine ve suçun etkili bir biçimde önlenmesine yardımcı olmakta, böylece suça eşlik eden acı ve aşağılanmaların da bitmesine destek olmaktadır.

The 'Comfort System' – A Crime Against Humanity[1]

DR. PAUL BEHRENS[2]

That war attracts euphemisms, is to be expected. Cities are 'taken', 'collateral damage' is caused, 'friendly fire' has occurred. And yet, some euphemisms are particularly difficult to digest. The term 'comfort women' must have a principal place in that context – a term which conjures up associations of charity on the one hand and grief on the other. In the Second World War, the phrase was used to describe the system of sexual slavery employed by the Japanese military.[3]

Thousands of women became victims of the system, whose consequences were felt long after Japan had surrendered to the allied powers. Many of the former 'comfort women' did not feel that they could discuss this form of abuse even within their countries of origin and within their own societies. Nor did the judicial reaction to the 'comfort system' prove adequate – neither with regard to the individual criminal liability of the perpetrators, nor with regard to the potential responsibility of the Japanese Empire.

Nearly seventy years after the end of World War II, and at a time when the numbers of the perpetrators are dwindling, the usefulness of reflections on the 'comfort system' raises questions. But its evaluation under international law matters – not least for the survivors and their families and for the preservation of societal memory. It also matters because Japan was not the only country to employ a system of sexual slavery. Rape camps and other forms of sexual exploitation continue to accompany armed conflict, and an assessment of the 'comfort system'

1 Okan Üniversitesi Hukuk Fakültesi ve İstanbul Barosu'nca 26-28 Eylül 2011 tarihleri arasında birlikte yapılan, Prof.Dr. Serap Keskin Kiziroğlu tarafından organize edilen ''Uluslararası Cezalandırılabilirlik ve Uluslararası Ceza Mahkemesi Sempozyumu''nda 27 Eylül 2011 tarihinde sunulmuş tebliğdir.

2 School of Law, University of Edinburgh.

3 On the Japanese word that was employed (ianfu) and its connotations, see Chin Kim / Stanley S Kim, 'Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves' 16 *UCLA Pacific Basin Law Journal* (1998), 263 and fn 1.

may therefore yield findings which are expected to be of significance in other contexts as well.

It is the objective of this chapter to provide an overview of the 'comfort system' as operated during the Second World War and to outline selected aspects of international criminal law which apply to its assessment. Particular emphasis will be placed on one specific crime which appears to best reflect the features of the system and which is today incorporated in the Statute of the International Criminal Court: the crime against humanity of enforced prostitution.

1. The 'Comfort System' in the Second World War

'Comfort stations' – places in which sexual services were provided to Japanese soldiers – can trace their roots even to the late 19th century, when, during the Sino-Japanese War of 1895, privately run stations of this kind had come into existence.[4] A more 'formal' system was established in Shanghai in 1932 after the 'Shanghai Incident' and then in 1937 after the occupation of Nanking.[5] In the 1940s, the system encompassed territories which were under Japanese control: including Taiwan, Indonesia and, prominently, Korea.[6]

The adoption of this system had been based on a variety of reasons. Prominent among them was the intention to prevent Japanese soldiers from raping women in the territories in which they were stationed, but also the desire to avoid the spread of veneral diseases.[7] Security concerns were a further issue: the 'comfort stations' were regulated by the Japanese army, and nonmilitary men did not have access to them, so that the risk of the passing on of secrets by Japanese soldiers to spies, was reduced.[8]

For the political, but also academic debate on the 'comfort system', the methods by which the women were recruited, have attained con-

4 Pyong Gap Min, 'Korean "Comfort Women": The Intersection of Colonial Power, Gender, and Class', 17:6 *Gender and Society*, (2003), 938, at 948.

5 Christine J Hung, 'For Those Who Had No Voice: The Multifaceted Fight for Redress by and for the "Comfort Women"', 15 *Asian American Law Journal* (2008), 177, 183.

6 Min, 941.

7 Hung, 184.

8 Christine Wawrynek, 'World War II Comfort Women: Japan's Sex Slaves or Hired Prostitutes?' 19 *New York Law School Journal of Human Rights* (2003), 913, 915, and see Hung, 184.

siderable importance. In modern Japan, claims have been advanced by members of the political right that the 'comfort women' volunteered their sexual services or that they were 'hired as paid prostitutes'.[9] That some professional prostitutes from Japan were employed in the 'comfort stations', can be substantiated[10] – although questions have been raised about the 'voluntariness' of their service.[11] But many young women were recruited through deception: by promises of jobs as waitresses, typists[12], as cooks or cleaners.[13] Some were told that their service would take place in 'comfort stations' but misled about the nature of their work: they were told that their tasks would eg extend to visiting wounded soldiers.[14]

In other situations, poor families reportedly sold their daughters into prostitution.[15] In other cases again, perpetrators proceeded with undisguised force. A legal basis of this method was constituted by the National General Mobilization Law which from 1942 was utilised for the forcible recruitment of Korean women.[16] The 1996 Choomaraswamy Report speaks of 'large-scale coercion and violent abduction of women in what amounts to slave raids in countries under Japanese control.'[17]

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9 See on this Wawrynek, 920 and 917.

10 Hung, 184; James Ladino, '*Ianfu*: No Comfort yet for Korean Comfort Women and the Impact of House Resolution 121', 15 *Cardozo Journal of Law and Gender* (2009), 333, 335. On the relatively low proportion of Japanese prostitutes in the 'comfort stations', see also Christopher P Meade,'From Shanghai to Globocourt: An Analsyis of the "Comfort Women's" Defeat in Hwang v Japan', 35 *Vanderbilt Journal of Transnational Law* (2002), 211, 220.

11 Min, 939.

12 Carmen M. Argibay, 'Sexual Slavery and the "Comfort Women" of World War II', 21 *Berkeley Journal of International Law* (2003), 375, 378.

13 Hung, 185.

14 Argibay, 378.

15 Min, 952.

16 Hung, 185.

17 United Nations, Economic and Social Council, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission. Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms. Addendum: Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45. Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, 4 January 1996, UN Doc. E/CN.4/1996/53/Add.1 [hereinafter 'Coomaraswamy Report'], para 27.

While women and girls from several territories under Japanese occupation were affected, a majority of the 'comfort women' appears to have come from Korea, which had been under Japanese control since 1910. In the literature, reference is made to about 80% of 'comfort women' who were of Korean ethnicity.[18]

Treatment in the 'comfort stations' was marked by a considerable degree of brutality. Pyong Gap Min, who conducted several interviews with survivors, reports that the victims were forced to have intercourse with soldiers of the Japanese army up to 30 times per day.[19] Beatings, torture and other forms of physical abuse took place on a regular basis.[20] While regular examinations for venereal diseases took place, many 'comfort women' contracted such illnesses,[21] and some died of them.[22] Some victims who had become pregnant were forced to have abortions.[23] Suicides occurred,[24] but in some cases, the military took even this option away from the victims by warning them that their families would be harmed if they killed themselves.[25] At the same time, cases have become known where murder of the 'comfort women' at the hands of the soldiers had taken place.[26] The total number of victims used by the 'comfort system' is commonly estimated at about 200,000 women and girls.[27]

The defeat of Japan did not spell an end to the suffering of the victims. Many of them came from conservative, patriarchal societies; having survived the 'comfort system', many women now faced the ad-

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18 Ladino, 336, speaks of 'up to eighty percent'; Wawrynek of 'more than 80%', Wawrynek, 914. See also Jinyang Koh, 'Comfort Women: Human Rights of Women from Then to Present', 79 *University of Georgia School of Law, LLM Theses and Essays*, Paper (2007), 5 ('Nearly 80%').

19 Min, 941. Coomaraswamy states that the women were 'expected to serve as many as 60 to 70 men per day', Coomaraswamy Report, para 34.

20 Hung, 186; Min, 941; Coomaraswamy Report, para 10

21 Karen Parker / Jennifer F Chew, 'Compensation for Japan's World War II War-Rape Victims', 17 *Hastings International and Comparative Law Review* (1994), 497, 509.

22 Min, 941.

23 Yvonne Park Hsu, '"Comfort Women" from Korea: Japan's World War II Sex Slaves and the Legitimacy of their Claims for Reparations', 2 *Pacific Rim Law & Policy Journal* (1993), 97, 114.

24 Min, 941.

25 Sue R Lee, 'Comforting the Comfort Women: Who Can Make Japan Pay?', 24 *University of Pennsylvania Journal of International Economic Law* (2003), 509, 515.

26 Wawrynek, 913; Min, 941.

27 Cf Nathalie I Johnson, 'Justice for the "Comfort Women": Will the Alien Tort Claims Act Bring them the Remedies they Seek?', 20 *Penn State International Law Review* (2001), 253, 260; Meade, 211; Min, 941; Lee, 509.

ditional challenge of reintegration in a community in which shame was attached even to victims of rape.[28] Many 'comfort women' even felt that they could not return home; others faced rejection by their friends and families.[29]

It is this societal stigma which accounts to a significant part for the fact that it was only in the 1990s that former 'comfort women' began to come forward in Korea and to talk about their experiences. The public testimony of Kim Hak-Sun in August 1991 was a landmark[30] – an example which was gradually followed by other victims.[31] But even fifty years after the events, the reaction which they received from their own society was not always one of understanding. Min recounts that 'many Koreans' were laughing at the former victims when they demonstrated in front of the Japanese embassy.[32]

Japan too found it difficult to come to deal with its own past. The Japanese Prime Minister Murayama did apologise for the treatment of the 'comfort women',[33] but his successor in the 2000s, Shinzo Abe, initially denied that the Japanese military had been involved in the management of the stations.[34] It was only after negative reactions had been received from other Asian nations, that Abe apologised for the use of the 'comfort women' by the military.[35]

The case of the 'comfort women' did not fare well in the courts either. Victims of the system did testify before the International Military Tribunal for the Far East (the 'Tokyo War Crimes Tribunal'), but the tribunal did not adjudicate the treatment of the victims.[36] But a Dutch military court (the 'Batavia Military Tribunal') which was established in

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28 Cf Janet L Tongsuthi, '"Comfort Women" of World War II', 4 *UCLA Women's Law Journal* (1994), 417; see also Hung, 187.

29 Meade, 215; Min, 941.

30 Cf Anne Barker, 'Justice Delayed', 8 *Michigan State University-DCL Journal of International Law* (1999), 453, 459.

31 Timothy Tree, 'International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?', 5 *UCLA Journal of International Law and Foreign Affairs* (2000-2001), 461, 463; Min, 949.

32 Min, 950.

33 Wawrynek, 916.

34 Hung, 181.

35 Ibid, 182.

36 David Boling, 'Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?', 32 *Columbia Journal of Transnational Law* (1995) 533, 546; Hung, 186.

Indonesia, did try perpetrators of these crimes – according to Boling, the 'only tribunal that punished perpetrators of sexual slavery' in the context of the 'comfort system'.[37] Dutch women too had been among the victims (Indonesia was a Dutch colony until the end of the Second World War), and the trial only dealt with cases in which Dutch women had been victims.[38] More recent cases which were filed by former 'comfort women' in Japanese courts, have been largely unsuccessful.[39]

A notable exception was the Kan Pu Trial which originated from a lawsuit brought by three former 'comfort women' and seven former members of the 'Female Labor Volunteer Corps' in 1992.[40] The court – the Shimonoseki Branch of the Yamaguchi District Court – rendered its judgment in 1998. It found harsh words for the 'comfort system', which it called a 'serious violation of human rights that could be equivalent to the barbaric conduct of the Nazis',[41] and awarded (very modest) damages to the former 'comfort women',[42] but it did not go so far as to order the issuing of an official apology.[43]

More than a decade later, the topic of the 'comfort system' and the Japanese responsibility for it is still the cause of considerable friction, especially between South Korea and Japan. In August 2011, the South Korean Supreme Court weighed into the debate, finding that it was unconstitutional for the government of that State not to make a 'tangible effort' to settle disputes over this issue with its Japanese counterpart.[44] But a satisfactory solution is not in sight, and recent developments do not give reason to hope that a change may be effected soon.[45]

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37 Boling, 547. The court dealt with a case concerning 35 Dutch women who had been enslaved in Indonesia. The records of the tribunal however remained sealed until 2025. Meade 2002, fn. 97. The case needs to be distinguished from the Awochi case before the Dutch Court-Martial (see below, at note 58).

38 Hung, 186, 187.

39 Ibid, 189.

40 Kim, 264.

41 Ibid, 263 and 277.

42 Ibid, 263. Wawrynek speaks of a 'nominal money judgment', Wawrynek, 918.

43 Kim, 277; paraphrasing by Kim. Lawsuits were also brought in the United States, under the Alien Tort Claims Act. See on this matter Hung, 189 et seq.

44 Asia-Japan Women's Resource Centre, '"Comfort Women": Korean constitutional court orders negotiation', 27 September 2011, available on http://www.ajwrc.org/eng/modules/bulletin/index.php?page=article&storyid =129 [last visited 6 March 2013].

45 The argument over the setting up of a statue outside the Japanese embassy in Seoul as a memorial to the 'comfort women', offers an illustration of the ongoing debate. 'Comfort women' and their

2. The 'Comfort System' and the Crime of Enforced Prostitution

The Japanese 'comfort system' of the Second World War invites a wide range of legal considerations, including questions relating to State responsibility for slavery, but also for violations of international humanitarian law. But they also extend to questions of international criminal law – in particular, the commission of war crimes and crimes against humanity.

A more comprehensive assessment of the 'comfort system' under international law would carry the additional advantage that it could direct the spotlight on areas which are directly related to the suffering of the victims, but have hitherto been marginalised or ignored altogether. That would apply for instance to a consideration of the forcible transfer of young women and girls to the 'comfort stations', which itself might qualify as a crime against humanity, if the relevant elements are in place.

For the purposes of this paper however, a more limited focus will be employed, and the 'comfort system' will be discussed in its relation to one particular crime, which however addresses an aspect of the system that obtained a prominent place in current debate: the crime of enforced prostitution.

A textual reading of the statutes of international criminal courts and tribunals might convey the impression that the codification of enforced prostitution happened only recently. The provision in the Nuremberg Charter on 'crimes against humanity' does not expressly refer to it, even though it mentions other crimes that play a role in the assessment of the 'comfort system', including that of enslavement.[46] The same applies

supporters have held regular demonstrations outside that embassy in their quest for a recognition of their suffering. After 20 years of demonstrations, a civic group set up a statue of a girl, symbolising the 'comfort women', in December 2011. The Japanese Ambassador called for the immediate removal of the statue; whereas the Vice Foreign Minister of South Korea called on Japan to make efforts to effect a resolution of the issue of the 'comfort system' . Channel NewsAsia, 'South Korea presses Japan on wartime sex slavery', 1 March 2012; Japan Economic Newswire, 14 December 2011. Yoshihiko Noda, then Prime Minister of Japan, reportedly said that 'a large discrepancy' existed on the question whether the 'description of the statue […] as an expression of a sexual slave of the Japanese soldiers is accurate', The Korea Herald, 29 March 2012.

[46] Article 6(c) of the Charter of the International Military Tribunal at Nuremberg ['Nuremberg Charter'] (1945).

to the Charter of the Tokyo War Crimes Tribunal.[47] Control Council Law 10, on which the 'subsequent Nuremberg trials' were based, mentions enslavement and refers also to rape as a crime against humanity, but is again silent on enforced prostitution.[48] The same applies to the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).[49] The statute of the International Criminal Tribunal for Rwanda (ICTR) mentions 'enforced prostitution' as a war crime (among 'outrages upon personal dignity'), but not as a crime against humanity.[50]

The first statute of an international judicial body to expressly include 'enforced prostitution' in the latter category, was the 1998 Statute of the International Criminal Court (ICC).[51] The Elements of Crime provide further elaboration on the individual aspects of the criminal conduct.[52]

But it would be a mistake to conclude from this development that 'enforced prostitution' was not recognised as a crime against humanity before the ICC Statute entered into force. The fact must be taken into account that none of the preceding instruments to which reference has been made, intended to provide an exhaustive list of crimes that fall in this category. They do, on the contrary, all incorporate a reference to 'other inhumane acts'[53] or, in the case of Control Council Law 10, make clear in other ways that their list of crimes is open ended.[54]

At the Batavia Military Tribunal, offences relating to the sexual slavery system were indeed tried under charges of 'enforced prostitution',[55] but it appears that the Dutch courts, too, considered the conduct a 'war crime'.[56] Yet it is suggested that this does not imply a material change

47 Article 5(c) of the Charter of the International Military Tribunal for the Far East ['Tokyo Charter'] (1946).

48 Article II(1)(c) of Control Council Law 10 ['CCL 10'] (1945).

49 Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ['ICTYSt'] (1993).

50 Cf Articles 3 and 4(e) of the Statute of the International Criminal Tribunal for Rwanda ['ICTRSt'] (1994).

51 Article 7(1)(g) of the Statute of the International Criminal Court ['ICCSt'] (1998).

52 Article 7(1)(g)-3 of the Elements of Crime of the International Criminal Court, PCNICC/2000/1/Add.2 (2000) (hereinafter 'Elements of Crime').

53 Art 6(c) Nuremberg Charter; Art 5(c) Tokyo Charter; Art 5(i) ICTYSt; Art 3(i) ICTRSt.

54 CCL 10 contains, in Art II1(c), the words 'Atrocities and offenses, including but not limited to murder […]' (Emphasis added).

55 Argibay (2003), 382.

56 Ibid, 382 and 383.

to the constitution of the crime, except for its contextual element.[57] The municipal law of the Netherlands East Indies on war crimes did refer to the 'abduction of women and girls and women for the purpose of enforced prostitution'[58] (a crime based on the list of war crimes established by the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties).[59]

A case which gained some prominence in that context, was that of Washio Awochi, the owner of the 'Sakura Club' in Batavia – a place which the Dutch court (in this case, the Netherlands Temporary Court-Martial at Batavia) described as a 'brothel to which a restaurant and a bar were attached'.[60] While the case did not concern the 'comfort system' – the services of the club were 'exclusively' provided to Japanese civilians –[61] the judgment of the court-martial does shed light on the concept of 'enforced prostitution' as it was understood at the time. The relevant facts also displayed certain similarities to the recruitment and treatment of 'comfort women' – the girls and women, for the most part, did not know about the existence of the brothel at the time of recruitment, and when they wanted to leave the place – which all of them did – they were threatened with imprisonment or deportation.[62]

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57 The contextual element is an element which exists independently from the conduct of the perpetrator. Especially in the field of crimes against humanity, the contextual element has undergone some change throughout the development of international criminal law. Under modern international criminal law, the individual conduct can only be classed a 'crime against humanity' if it has been committed 'as part of a widespread or systematic attack directed against any civilian population', Art 7(1) ICCSt. The contextual element of war crimes is the existence of an international (Arts 8(2)(a) and 8(2)(b) ICCSt) or internal (Arts 8(2)(c) and 8(2)(e) ICCSt) armed conflict.

58 Art. 1, para. 7 of Statute Book Decree No. 44 of 1946 concerning the 'Definition of War Crimes', Cf Case No 76, Trial of Washio Awochi, Netherlands Temporary Court-Martial at Batavia, Judgment, 25 October 1946, reported in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol XI-XV, Buffalo, New York, 1997, 123 [hereinafter 'Awochi']. Because of the classified character of the records of the Batavia Military Tribunal (see above, note 35), it is not entirely clear whether this law formed the basis of the Tribunal's considerations as well.

59 M Adatci, 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', 14 *AJIL* (1920), 95. The Commission had been set up by the Paris Peace Conference at the close of the First World War to investigate, inter alia, facts underlying war crimes committed by Germany and her allies. In its report of 29 March 1919, the Commission suggested the collection of further information on a list of 32 charges, one of them being the 'abduction of girls and women for the purpose of enforced prostitution'. Ibid, 114.

60 Awochi, 122.

61 Ibid.

62 Ibid, 122 and 123; and cf Antonio Cassese, *International Criminal Law*, OUP 2003, 55, fn. 11.

The judgment appears remarkable for three principal reasons. First of all, in its assessment, the Dutch court emphasised the element of 'enforced prostitution' itself – rather than the aspect of 'abduction' which appeared to have mattered to the 1919 Commission (and which was not present in Awochi).[63] Secondly, the case exemplifies the forms of conduct which the court understood as relating to the required coercive element: the fact for instance, that the freedom of movement of the victims was severely restricted, the fact that girls wishing to leave were threatened with the Japanese military police – interpreted by the court as threats of 'ill-treatment, loss of liberty or worse' –, and the fact that the threats were of a sufficiently serious character to coerce the victims to 'give themselves to the Japanese visitors'.[64]

The emerging concept of 'force' then appears to correspond to a rather traditional understanding of the word. But there is a third aspect which merits consideration: the court did refer to the fact that the girls 'were mostly in poverty-stricken and difficult circumstances'. These conditions were, however, of significance for sentencing considerations (the accused took advantage of such circumstances) – they do not seem to have affected the assessment of the substantive law.[65] It is an evaluation which, as will be seen, may have lost some of its clarity in the more recent past.

Following the Second World War and the judgments of the Batavia courts, the concept of 'enforced prostitution' made its appearance particularly in the context of international humanitarian law. Three years after Awochi, the Fourth Geneva Convention provided in its Article 27 that women 'shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. [...]'.[66] The Additional Protocols to the Geneva Conventions affirmed in 1977 that the prohibition on enforced prostitution applied to protected persons regardless of their gender.[67] It is the rel-

63 Awochi, 124.

64 Ibid.

65 Ibid, 125.

66 Article 27, Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter 'Geneva Convention IV'), 12 August 1949.

67 Art 75(2)(b) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977 (hereinafter

evant provision in the Second Additional Protocol which subsequently influenced the incorporation of 'enforced prostitution' in the Statute of the ICTR, to which reference has been made above.[68] The case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) made clear that enforced prostitution can be a crime against humanity as well: the phrase 'other inhumane acts' which appears in the Statutes of both ICTY and ICTR,[69] was found to include that crime, which, in its opinion, was 'indisputably a serious attack on human dignity pursuant to most international instruments on human rights'.[70]

One of the bases on which the ICTY relied for this assessment was the report of the Secretary General of the United Nations on a tribunal for the Former Yugoslavia, issued in 1993,[71] which stated that 'inhumane acts' committed in the conflict in the former Yugoslavia had extended to 'widespread and systematic rape and other forms of sexual assault, including enforced prostitution.[72] But when sexual crimes were discussed in ICTY judgments, the emphasis was usually placed on different aspects of the relevant offence.

In the case of Kunarac and others, for instance, charges of enslavement were advanced where the treatment of certain victims was concerned.[73] The facts of the case certainly show similarities to the situation in which victims of the 'comfort system' found themselves. The Trial Chamber thus referred to two girls who were kept in a house for about six months, where they were repeatedly raped and 'used for

'AP1'); Art 4(2)(e) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (hereinafter 'AP2'). See also Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1987, 874, para 3049.

68 Art. 4(e) ICTRSt. See above, at note 48.

69 Art 5(i) ICTYSt; Art 3(i) ICTRSt.

70 Case No IT-95-16-T, Prosecutor v. Zoran Kupre ki et al, (Trial Chamber), 14 January 2000, para 566.

71 See eg Case No IT-95-17/1-T, Prosecutor v. Anto Furundija, (Trial Chamber), 10 December 1998, fn 201 (hereinafter 'Furundzija (Trial Chamber)').

72 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Presented 3 May 1993, para 48, S/25704.

73 Case No IT-96-23-PT, Prosecutor v. Dragoljub Kunarac and Radomir Kovać Amended Indictment, 8 November 1999, para 10.1.

sexual services whenever the soldiers returned to the house', were in fact made to do 'anything they were ordered to do' and had no viable option of escaping their situation.[74]

It is interesting to note that the ICTY took a fairly liberal position on the concept of the coercive element which inhabits the crime. It it was not only force that negated the free will of the victim, but also 'the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.'[75] The 'exaction of forced or compulsory labour or service', for instance through prostitution, was expressly mentioned as indication of slavery[76] and thus marks one of the links between the two offences. The tribunal did however make clear that detention and the maintenance of captivity, on its own, would 'usually' not suffice to reach a finding of enslavement.[77]

All the same, the fact must be taken into account that the ICTY was here concerned with a different crime against humanity; and while the coercive element is an essential part of both enslavement and enforced prostiution, the possibility cannot be discounted that varying interpretations of its contours may be embraced by international criminal tribunals.[78]

The incorporation of 'enforced prostitution' in the list of crimes against humanity in the Statute of the International Criminal Court[79] was part of a general expansion of the codification of sexual international crimes. Thanks in large part to the work of the Women's Caucus for Gender Justice at the Rome negotiations,[80] the Statute today includes the most extensive list of sexual crimes of any foundational statute of an international criminal court in existence.

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74 Case No IT-96-23-T & IT-96-23/1-T, Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vukovi, (Trial Chamber), 22 February 2001, paras 732 – 742. (Hereinafter 'Kunarac (Trial Chamber)').

75 Ibid, para 542.

76 Ibid.

77 Ibid.

78 But see below, at notes 81 – 83 on the increasingly converging concepts of the coercive element in international criminal law.

79 Art. 7(1)(g) ICCSt.

80 See on this Gerhard Werle, *Principles of International Criminal Law*, CUP 2009, 323, fn 206.

The Elements of Crime provide further elaboration on the individual aspects of the offence. The perpetrator must have caused the victim to engage in acts of a sexual nature and must have obtained, or expected to obtain, an advantage (not necessarily of a pecuniary nature) in connection with these acts.[81]

But it is the coercive element which invokes echoes of the Kunarac decision. The modern understanding of 'enforced prostitution', like that of enslavement, is clearly not limited to forcible actions in the traditional understanding of the term. According to the Elements of Crime, the perpetrator must have caused the sexual acts through 'force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.'[82]

It is an extensive list, yet one which better reflects the circumstances which underlie the offensive nature of the crime. It is also indicative of the way in which the coercive element is increasingly understood in the context of crimes against humanity. A similarly wide concept is adopted where the adverb 'forcibly' is used to elaborate on the 'forcible transfer' of victims,[83] where the coercive element of 'rape' is concerned,[84] or that of the crime against humanity of sexual violence.[85]

What then, has changed since the days of Awochi?

At first blush, it may appear that the interpretation of 'enforced prostitution' adopted by the Batavia court-martial, was, by comparison to

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81 Elements of Crime, Art 7(1)(g)-3, elements 1 and 2.

82 Ibid, element 1.

83 Ibid, Art 7(1)(d), element 1, footnote 12.

84 Ibid, Art 7(1)(g)-1, element 2.

85 Ibid, Art 7(1)(g)-6, element 1. But not all Elements of Crime which refer to a forcible aspect of the underlying conduct, are that explicit in their approach towards the concept of 'force': the crime of 'forced pregnancy' (in which the forcible nature of the pregnancy has the status of a circumstantial element) does not elaborate on the various alternatives of the forcible element (which could have come into existence through acts of a third person). Ibid, Art 7(1)(g)-4, para 1. The Elements of Crime for 'enforced sterilization' merely state that the conduct must have been carried out without the 'genuine consent' of the victim, and specify that genuine consent is absent if consent had been obtained through deception, ibid, Art 7(1)(g)-5, para 2, fn 20.

the codification of the same crime in the ICC Statute, exceedingly restrictive. That would certainly be the case if the factors outlined above – the detention of the victims, the threats to which they were exposed and the gravity of the threats –[86] were understood as cumulative requirements, identifying the precise kind of situation in which conduct of this kind can occur.

But that is not the way in which the court-martial appears to have understood the crime. The report of the case made clear that these factors were 'illustrative' of the principal elements of 'enforced prostitution', conduct, which 'amount[ed] to compulsion in all its possible forms'.[87]

The Awochi judgment carries particular significance where the evaluation of the method of recruitment and the treatment in the club is concerned. It may be recalled that the women who were used in the 'comfort system' included, according to several acounts, a section of professional prostitutes from Japan –[88] a circumstance which has carried some meaning in academic debate. The distinction between 'voluntary' participants and those who were forced to participate in the system matters to some scholars, whereas others, as Min points out, have advanced the view that the Japanese 'comfort women' were victims as well, since their economic conditions 'pushed them to military brothels'.[89]

However, if the Awochi critiera are applied, the initial method of recruitment carries, at best, secondary importance. The report notes that in 'a few cases' the girls did indeed 'willingly and knowingly' accept the prostitution, but the decisive factor was that all of them wanted to leave the system, were not allowed to do so and were subjected to threats.[90] This indicates a shift of emphasis away from initial motivations and towards the actual treatment at the time of the relevant conduct. It is a preferable approach – not least in light of its better compatibility with

86 See above, at note 62.

87 Awochi, 124.

88 See above, at note 8.

89 Min, 939.

90 Awochi, 123.

fundamental principles of international criminal law, including the rule of simultaneity.[91]

To the extent to which the situation of the 'comfort women' was in this regard comparable to that of Awochi's victims, the method of recruitment therefore does not preclude a finding of enforced prostitution. Where their treatment is concerned, a decisive factor is again the presence of severe sanctions if victims tried to escape: in this regard, Lee states that 'comfort women' who tried to flee, were 'usually' subjected to 'physical torture'.[92]

On the other hand, a'n application of the Awochi findings also has to take into account the limitations of the concept of enforced prostitution which emerges from the judgment. It is, in particular, difficult to answer the question whether cases in which prostitution would occur in the absence of threats – for instance, 'merely' by taking advantage of the poverty of the victims and their families – could fall within the scope of 'enforced prostitution'.

These are issues which require assessment on the basis of customary international criminal law as it existed at the time – a task considerably hampered by the paucity of available case law on this crime. The Awochi judgment does not necessarily allow for the conclusion that the coercive element of enforced prostitution was, in the 1940s, understood in such a wide sense: despite the court's reported intent to cover compulsion 'in all its possible forms', the fact bears observing that the exploitation of the economic plight of the victims was apparently considered merely in a procedural context.[93]

Even modern international criminal law, inspite of the extensive list of situations which, according to the Elements of Crime, constitute the coercive element of enforced constitution, does not easily permit an unambiguous conclusion on this matter.

The Kunarac Trial Chamber did refer to 'socio-economic conditions' in the context of ascertaining factors which led to the impossibility or

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91 On this aspect, see Paul Behrens, 'Assessing international criminal evidence: The case of the unpredictable génocidaire', 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2011), 681.

92 Lee, 515.

93 As a sentencing consideration. See above, at note 63.

irrelevance of consent or free will of the victim.[94] But even if it could be assumed that the determination of this element could easily travel from the crime of enslavement to other crimes against humanity, the fact would have to be taken into account that the coercive aspect of enforced prostitution had been given a somewhat narrower understanding in the Elements of Crime.[95] There, exploitation of conditions of poverty was no longer mentioned.

That does not mean that taking advantage of such conditions could not still fulfil the coercive element. If, for instance, the exploitation of poverty is linked to a particular position of assumed superiority on the part of the perpetrator (as may easily be the case in instances of colonial oppression), the criminal conduct might well present itself as 'psychological oppression', 'abuse of power' or the 'taking advantage of a coercive environment' – alternatives, which all find mention in the relevant Elements of Crime. [96] But such conduct then has to fulfil the additional requirements which the relevant alternative imposes.

The difficulty which the recognition of socio-economic distress as an aspect of the coercive element constitutes even today, enhances the challenge faced by any attempt to include it in the prevailing concept of enforced prostitution in the 1940s. In the absence of additional factors, such as the actual use of force or credible threat with significant sanctions if victims try to escape conditions of prostitution, the evaluation of exploitation of poverty as a form of coercion will in this context encounter significant difficulties.

3. Concluding Thoughts

The crime of enforced prostitution has been subject to considerable change since its appearance in the 1919 report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The requirement of an element of abduction had been abandoned even by the 1940s. The most significant change which modern international criminal law has brought to the understanding of the

94 Kunarac (Trial Chamber), 542.

95 See above, at note 80.

96 Ibid.

crime has to be seen in its interpretation of the coercive element, as demonstrated by the substantial list of alternatives which the Elements of Crime today provide in this context.

Given the abusive treatment suffered by women and girls who were subjected to the 'comfort system', and given in particular the presence of severe sanctions for those who tried to escape, there is good reason to argue that the overwhelming number of cases would fit easily into the definition of enforced prostituiton which existed even at that time.

The same cannot be said of every case of prostitution outside the 'comfort system'. Even where participation in prostitution had been effected through the exploitation of specific socio-economic conditions, a traditional understanding would not automatically extend the scope of the crime to these instances. Nor, it appears, does modern international criminal law. But the Rome Statute and the Elements of Crime facilitate the inclusion of these forms of prostitution by referring to methods of coercion which may often be present in situations of this kind – such as the abuse of a position of power or the utilisation of a coercive environment.

Does that mean that the contemporary regulation of the crime of enforced prostitution is more progressive?

In view of the list of alternatives provided in the Elements of Crime, this is a tempting conclusion. It is, however, a view which suggests that the crime, in its traditional form, had been understood in a rigid fashion.

But the text at least of the 1946 Awochi judgment allows for a different reading. It rather appears that the concept of 'enforcement', described in the report as amounting to 'compulsion in all its possible forms', was advanced through the provision of examples which illustrated the conduct but did not claim exclusivity.[97] The result is a crime with flexible contours, and one which allows for further elucidation through judicial interpretation. In the light of this consideration, the 'traditional' concept of 'enforced prostitution' can be said to carry advantages which are lacking in the text of the Elements of Crime. The

[97] Cf Awochi, 124.

interests of justice, one might argue, are better served if the relevant crime is capable of taking into account the realities underlying the offensive character of prostitution based on a situation of coercion.

That, however, is an opinion which carries its own difficulties. The fact must be taken into account that the variety which a flexible approach promises, comes at a cost for the rights of the accused – principally, for the fundamental guarantee of fair warning of the criminal nature of the relevant act.[98] The principle *nullum crimen sine lege* is one of its emanations, and one which allows for further elaboration: if its underlying rationale is the consideration of 'fair warning', the relevant criminal norm will not only have to exist at the time of the commission of the act – it also has to be precise enough to effectively fulfil this requirement.[99]

International criminal law has struggled with this condition in various contexts – the determination of acts constituting the crime of rape[100] and the interpretation of the words 'other inhumane acts' in the ICTY Statute[101] are examples. It is at any rate a consideration which has to have an impact on the codification of criminal law, and it would be difficult to find fault with drafters who decide to bring the necessary precision, which the norm of customary law lacked, into the legal text. If this aspect is taken into account, the concept of 'enforced prostitution', as it appears in the Elements of Crime, must be considered better aligned with the established rights of the defence than the concept of the same crime as it appears in the opinion of the Batavia court-martial in 1946.

That is not to say that the incorporation of an extensive list of situations does not bring other problems in its train. A particular difficulty

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98 Cf eg, James M West, 'Martial Lawlessness: The Legal Aftermath of Kwangju', 6 *Pacific Rim Law and Policy Journal* (1997), 127.

99 Jared L Watkins; Randle C Defalco, 'Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia', 63 *Rutgers Law Review* (2010), 201, 203.

100 Cf Furundzija (Trial Chamber), paras 177, 184.

101 See on this Case No IT-97-24-T, Prosecutor v. Milomir Stakiɕ (Trial Chamber), 31 July 2003, para 719 and the Appeals Chamber in Case No IT-95-14/2-A, Prosecutor v. Dario Kordic and Mario Cerkez, (Appeals Chamber), 17 December 2004, para 117, noting that 'the potentially broad range of the crime of inhumane acts may raise concerns as to a possible violation of the *nullum crimen* principle'.

deserves observation where sexual crimes are concerned in which the conduct of the victims – in particular, the absence of genuine consent – has a significant impact on the concept of the offence. If, for instance, socio-economic conditions were included in the list of grounds which constitute the coercive element, one may ask whether it truly benefits the position of the victims if the law assumes that victims living in poverty are incapable of giving consent or if their consent in such conditions does not matter to the judicial assessment. The resulting norm may well be hailed as a widening of the protective reach, but it also risks the emergence of a law based on paternalistic tendencies which not all victim communities might welcome.

The presence and alleged presence of enforced prostitution in so many different scenarios – ranging from the First World War to the conflict in the former Yugoslavia – raises questions about commonalities between the situations and, ultimately, about the defining element of the crime.

It is no coincidence that the crime makes a prominent appearance in situations of warfare or extensive campaigns against a civilian population. Its essential characteristic, it appears, is not so much the obtaining of an 'advantage' – and be it 'merely' the non-pecuniary advantage which the planners of the 'comfort system' envisaged.[102] What is truly emblematic for it is the process of objectification, by which the perpetrators demonstrate that everything over which the victims could claim ownership, including their most intimate acts, is easily at their disposal. That is more than a personal offence committed against individuals, though this would be gruesome enough. It is often enough a representation of the general attitude which the perpetrators adopt towards the victim community in situations of this kind. It is thus an aspect which can be expected to continue its liaison with warfare and campaigns against the civilian population, and there is little hope of its disappearance in the foreseeable future.

Understanding the elements of enforced prostitution as they appear in the case of the 'comfort women' therefore yields valuable lessons for the adjudication of these crimes in various contexts. Understand-

[102] See above, at notes 5 and 6.

ing the roots of enforced prostitution, and in particular the instances which allow the coercive element to develop, has value beyond that. It helps to draw attention to those situations in which the crime is likely to occur and thus works as an early warning mechanism. It also assists in the design of strategies to counter its development at an early stage and helps to develop ways to work towards the effective prevention of the crime and the suffering and humiliation that accompany its implementation.

The International Criminal Court – Structure, Functioning and Challenges[1]

DR. PHILIPP AMBACH[2]

Teşekkür ediyorum. Sona kaldık, çok uzatmayacağım. Türk Ceza Hukuku Derneği'nin ifade özgürlüğü hakkındaki toplantısına gelirken şöyle düşündüm: "A, hala böyle bir toplantıya izin veriliyormuş!". Bunun bile şaşkınlıkla karşılanacağı tuhaf bir dönemden geçiyoruz. Hakikaten bunu samimi olarak hissettim bu arada, yani belki de iptal olur diye düşündüm.

Ocak ayı birçok faili meçhul cinayetin işlendiği bir ay ama maalesef baktığımız zaman bu cinayetler giderek de arttığı için, neredeyse senenin her gününe ya da bir gün sonrasında, bir gün öncesinde bir katliam, cinayet, faili meçhul cinayetin düştüğü bir ülkede yaşıyoruz. Biz bu faili meçhul cinayetlerde yakınlarını kaybedenler olarak bir araya gelmiştik bundan 6-7 sene evvel ve Toplumsal Bellek Platformu adında bir oluşumu hayata geçirdik. Amacımız da sayımızın artmamasıydı. Maalesef bundan sonra da faili meçhul cinayetler devam etti ve bu Platform' un üyelerinin sayısı arttı ve artmaya da devam ediyor. Tüm bu örneklerde gördük maalesef devlet içerisinde bu tür faili meçhul cinayetleri sahiplenme, üzerini kapatma, ört bas etme eğilimi çok kuvvetlidir. Biz de maalesef bunu Toplumsal Bellek Platformu olarak yakından gözlemleme imkânı bulduk. Bir araya gelen tüm bu aileler, videoda izlediğiniz mesela Meryem Abla, Fadime Teyzeyle ben o platform vesilesiyle bir araya geldiğimde tanıştım. Bir araya geldik ve Meclis'e faili meçhul siyasi cinayetlerin araştırılması için önerge verilmesi için baskıda bulunduk ve bu önergeler verildi. Ne istiyorduk? Siyasi cinayetlerin araştırıl-

[1] Okan Üniversitesi Hukuk Fakültesi ve İstanbul Barosu'nca 26-28 Eylül 2011 tarihleri arasında birlikte yapılan, Prof.Dr. Serap Keskin Kiziroğlu tarafından organize edilen ''Uluslararası Cezalandırılabilirlik ve Uluslararası Ceza Mahkemesi Sempozyumu''nda 27 Eylül 2011 tarihinde sunulmuş tebliğdir.

[2] Dr. jur. Philipp Ambach (*assessor iuris*) is employed at the International Criminal Court as Special Assistant to the President. The views expressed in this article are of the author alone and not attributable to the International Criminal Court.

ması için komisyon kurulsun. Fazla bir talebimiz yoktu, gayet de doğal bir talepti. Yaklaşık olarak altı ya da yedi defa CHP milletvekilleri tarafından bu önerge verildi. MHP ve HDP'nin -o zamanki adıyla BDP'nin- de lehine oy vermesine rağmen; AKP defalarca bunu reddetti ve bunun için de herhangi bir gerekçe göstermedi. Bize gösterdikleri gerekçe şuydu: "Yakında tatile gidiyoruz, daha sonra bakalım.", "Şimdi Borçlar Kanunu görüşüyoruz, ondan sonra bakarız.". Önce oyalamaya başladılar. Daha sonra oyalamayı da kestiler, resmi olarak dediklerine göre; "Bu işlere bakmak istemiyoruz, bunun sonu nereye varır bilmiyoruz, çok da huzursuz oluyoruz, gerek yok, eski defterleri açmayın." gibi bir tavırla karşılaştık. Zannederim bu tavır devletin genel olarak bu tip siyasi cinayetlere yaklaşımını özetliyor. Bir başka örnek de, Hrant Dink davasında Ali Kemal bahsetti, biliyorsunuz Meclisimiz ombudsman seçti, bu ombudsman Yargıtay'da Hrant Dink hakkındaki kararı veren hâkimlerden biriydi. Kendisine bu mesele sorulduğu zaman "Ben o kararın Hrant Dink hakkında olduğunu bilmiyordum." dedi. Nasıl bilmiyordun dediler. "Adı Frant Dink olarak geçiyordu resmi olarak, ben bilmiyordum onun Hrant Dink olduğunu." dedi. Bütün ülkenin konuştuğu bir davadan bahsediyoruz, bir Yargıtay üyesi, bu kadar rahatlıkla, hepimizle dalga geçer gibi bu ifadeyi kullanabildi. Ondan sonra "Bilseydim valla böyle yapmazdım." gibi açıklamalarda bulundu. Tekrar üzerine gidince "Kararın arkasındayım, Türk kanı kirli değildir, hiçbir kan kirli değildir, insan kanı kirli olmaz." diye bir açıklama yaptı. Yani karşımızda bizimle böyle dalga geçen bir zihniyet var maalesef ve bu Toplumsal Bellek Platformu içerisindeyken şunu fark ettim; aramızda çeşitli zamanlarda öldürülmüş insanların yakınları vardı ve bu siyasi cinayetlerin yoğunlaştığı dönemler olduğunu fark ettik. Birincisi malum 12 Eylül öncesindeki çatışma ortamında öldürülen insanlar, zaten arkasından 12 Eylül geliyor. 2.si; 90'lı yıllarda iki koldan giden siyasal cinayetler olduğunu fark ettik: Bir, daha çok laiklik niteliğiyle bilinen aydınların öldürülmesi ve güneydoğudaki, daha sonra Cumartesi Anneleri hareketini oluşturan, siyasi cinayetler. 90'lı yıllarda bunu görüyoruz ve ondan sonra ülke 90'ların sonunda bir iktidar değişikliği yaşadı. Daha sonra Hrant Dink, Zirve Yayınevi, Rahip Santoro katliamı gibi Ergenekon ve Balyoz davalarını meşrulaştıracak, bunlara bir zemin yaratacak siyasi cinayetlerle karşılaştığımızı gördük; o da cemaat ve AKP koalisyonuyla devlet içerisinde topyekûn bir tasfiyeyle sonuçlandı. Bugün de aslında benzer

bir durumla karşı karşıyayız. Tahir Elçi ve Rus Büyükelçisi dışında Allah'tan teker teker hedeflenmiş siyasi cinayetler olmuyor. Olmuyor dediğimiz de bunlar yani, bir sürü insan öldürüldü. Ancak Türkiye'nin herhalde bugüne kadar hiç yaşamadığı oranda büyük toplu katliamlarla karşı karşıyayız. Zannederim haziran seçimleri öncesi HDP'nin Diyarbakır mitinginde başlayan, daha sonra Suruç katliamıyla asıl ivmesini kazanan ve sayamayacağımız kadar çok toplu katliamla karşılaştık. Hatta katliamlardan hangisi önceydi hangisi sonraydı onu bile karıştırır hale geldik. Geçen kendimi bir arkadaşıma Rus Büyükelçisi Beşiktaş katliamından önce mi sonra mı öldürülmüştü sorusunu sorarken buldum. İnsanlarla karşılaşırken "En son seninle ne zaman karşılaşmıştık, darbe girişiminden önce mi karşılaşmıştık, yoksa şu patlamadan önce mi?" şeklinde konuşmaya başladığımız ve buna da maalesef alıştığımız bir dönemdeyiz. Bahsettiğimiz bütün bu siyasi cinayetler sonrasında bir siyasi sonuca da ulaşıyor. 12 Eylül'deki gibi, 90'lardan sonra iktidar değişiminde gördüğümüz gibi ya da Ergenekon ve Balyoz operasyonlarının meşrulaştırılması gibi; yani bir amaca hizmet ediyor bu katliamlar, boşuna yapılmıyorlar. Bugün de katliamlarla beraber OHAL süreci de devam ediyor -ki darbe girişiminden sonra OHAL ilan edilmeden OHALvari kararlar alındığı zaman ben "Bari OHAL ilan edilsin de hukuki, anayasal bir sistem içerisinde kararlar alınsın." diye düşünmüştüm-. Anayasa Mahkemesi'nin 90'lı yıllarının başında vermiş olduğu içtihadı var nasıl olsa; KHK'leri en azından bir denetleme imkânımız olur diye düşünüyordum. Hukuk eğitimi almış olmanın insana getirmiş olduğu bir geri zekâlılık varmış, bunu ben de yaşamış bulundum. En azından bir yargısal denetim imkânımız olur diye düşünmüştüm ancak bugün Anayasa Mahkemesi üyeleri Türkiye Cumhuriyeti'nde hiç addedilmeyen maaşlar alan kişiler olarak hayatlarına devam ediyorlar; çünkü kendi kendilerini imha etmiş, intihar etmiş bir yargı organıdır. OHAL KHK'lerini kendi içtihatını çiğneme pahasına, muhtemelen iki üyesinin gözaltına alınıp tutuklandıklarından korktukları için, deli saçması diyebileceğimiz bir karar verdiler. Bugün bir OHAL KHK'si ile "Anayasa Mahkemesi üyeleri bundan sonra her toplantıya sadece kırmızı don giyerek ve başlarına bir külah takarak gitmek zorundalar" şeklinde bir kararı çıksa, Anayasa Mahkemesi üyeleri OHAL KHK'sini iptal edemeyecekler, denetleyemeyecekler ve o kırmızı don ve kafalarına külahlarını takarak o toplantıya girmek zorunda kalacaklar. Hukukta "argu-

mantum ad absurdum" dedikleri Latince bir teknik vardır, onu uyguluyorum; en saçma örneği göstererek içinde bulunduğumuz vaziyetin fenalığını gösterme açısından bunu söylüyorum ve aynı zamanda umarım toplantıdaki bu sözler de kulaklarına gider de biraz utanırlar diye ümit etmek istiyorum. Demin Fatih Polat güzel bir anekdottan bahsetti: İnsan haklarının insan haysiyetiyle bağlantısı. Haysiyetimizi korumaya çalışıyoruz demiş 68 Kuşağı, Çiçek Çocuklar. Hakikaten bize de hukuk fakültesinde insan hakları bahsi geçtiği zaman insan haklarının amacının insan haysiyetini korumak olduğu, ana çekirdeğinin, aslının insan haysiyeti olduğu söylenirdi. Ne kadar insan haklarının kısıtlandığı bir ülkede yaşıyorsanız o kadar haysiyetinize karşı bir saldırıyla karşı karşıyasınız demektir. Yani bu düzen sizi haysiyetsiz olmaya itiyor. Uyum sağlayacaksınız, haysiyetinizi bırakacaksınız, haysiyetsiz insanlar olarak devam edeceksiniz. Bundan çekinmeyen, hatta memnunluk duyan bir sürü insan da var; ancak buna direnme hakkımız olduğunu da düşünüyorum. Şununla bağlayacağım; aynı zamanda üniversitede hukuk fakültesinde ders de veriyorum ve benim ders verdiğim alan Ceza Hukuku değil, eski adıyla Devletler Umumi Hukuku, şimdiki adıyla Uluslararası Hukuk'tur. Her zaman uluslararası hukuk gerçek hukuk değil diye takılırdı meslektaşlarım: Yaptırım mekanizmaları yok, ne yaptığınız belli değil, mahkemelerinizin verdiği kararlara kim uyuyor belli değil, kurallarınız hep değişebiliyor, devletler bir araya geliyor, anlaşma yapıp değiştiriyorlar vs. Bugün aynı şeyi ben ceza, idare, anayasa hukukçularına söylüyorum. Sizinki de hukuk mu canım, ceza hukuku nedir, kim uyuyor, OHAL olduktan sonra idare hukuku nedir, içinden geçtiğimiz süreçte Anayasa hukuku nedir? Bu bir tesadüf değil, bunların hepsi kamu hukukunun dalları ve şu anda adını koymak lazım; ciddi bir karşı devrim süreciyle karşı karşıyayız. Geçenlerde bir AKP'li yetkili, Metin Kırıklar "İki yüz senenin intikamını alıyoruz." dedi. Yüzden iki yüze çıkardılar bu arada, iki yüz sene derken Sened-i İttifak'tan bahsediyordu. İnsanın durup durup Sened-i İttifakla bir hınç içerisine girmesi de gerçekten enteresan bir vakadır. Bu arada Binali Yıldırım da dedi ki; "Bütçeyi Meclis yapacak, bu Magna Carta'dan gelen bir kural, biz buna uyacağız.". Sabah Gazetesi'nde şöyle bir haber okudum: "Yeni yasada Magna Carta ilkelerine uyulacak". Ciddi söylüyorum bu haberi okudum; neymiş efendim bütçeyi Meclis yapacakmış, hakikaten tuhaf bir ortamdayız. Ama kamu hukukunun bütün dallarının ciddi anlamda sarsılması

gerçekten hukuki bir boşlukta olmamızdan kaynaklanıyor ve düzen değişiyor, rejim değişiyor, rejim değiştiği zaman devletin üzerine oturduğu kamu hukukunun dalları da sarsılmaya başlıyor; ceza, anayasa, idare hukuku. Devletler umumi hukukunu zaten takan yoktu, en son Büyükelçi'nin öldürülmesiyle beraber zaten diplomatik dokunulmazlıkla ilgili bütün dünya literatürüne girecek bir hamlede bulunmuş olduk ülke olarak ve maalesef dünyada bütün derslerde anlatılacak; çünkü bunun modern zamanlarda olan çok bir örneği yoktur. Bizimkisi zaten sarsılmıştı, diğer dallar da sarsılmaya başlıyor. Buradan şu anki koşullarda olumlu bir tablo ortaya koymak pek mümkün değil; ancak Bourdieu'nün bir lafıydı sanırım: "Sosyoloji bir dövüş sporudur." diyor. Aynı şekilde hukuk da bir dövüş sporudur aslında, ne için? İnsan haysiyetini korumak, insan haklarını artırmak için bir dövüş sporudur. Ben en azından hukuku öyle algılayanlardan biriyim, sadece teknik bir kurallar manzumesi olarak algılanmaması gerektiğini düşünüyorum. Bizde hukuk, anayasa kalmasa da, OHAL KHK'leri döneminde tamamen hukuki boşluk içerisinde olsak dahi, özellikle ceza hukukundaki hukuki mücadelenin hiç olmasa bile tarihi bir arşiv değeri olduğunu düşünüyorum ve bu devran dönecektir. Nasıl bir hasarla bitecek onu bilmiyoruz ama böyle devam etmeyeceği açıktır. Üç sene mi sürer, iki ay mı sürer, on sene mi sürer bilmiyorum ama bitecektir ve bugünkü hukukçuların insan hakları için yaptığı mücadeleler tarihe geçecektir. İleriki dönemde dönüp baktıkları zaman en azından bazı insanlar direnmişler, bu gidişata dur demek istemişler diyecektir ve bu bile başlı başına insan haysiyetini korumak için yeterli ve gerekli bir çabadır, diyerek hepinize çok teşekkür ediyorum.

Die Opfer völkerrechtliche Verbrechen[1]

DR. STEFANIE BOCK[2]

I. Einleitung

Das 20. Jahrhundert war ein Jahrhundert der Massenmorde. Von den Gräueltaten zweier Weltkriege über den Völkermord an den Juden bis hin zu den ethnischen Säuberungen im ehemaligen Jugoslawien und dem Bürgerkrieg in Ruanda, der sich zum „ersten afrikanischen Weltkrieg“[3] auswuchs: die Welt wurde Zeuge von Gewaltexzessen bisher ungeahnter Ausmaße. Mehrere Millionen Menschen wurden getötet, gefoltert, verstümmelt, vergewaltigt und vertrieben. Auch wenn sie mit unvorstellbarer Brutalität gegen ihre Opfer vorgehen – Konsequenzen fürchten die Täter in der Regel nicht. Die Gewalttaten werden typischerweise im Auftrag oder mit Billigung der Machthaber begangen, die den Tätern Straffreiheit zumindest in Form faktischer Nichtverfolgung garantieren. Die Opfer erfahren keine Gerechtigkeit, sondern werden vielmehr aus der öffentlichen Wahrnehmung verdrängt.[4]

Erst die Auseinandersetzungen im ehemaligen Jugoslawien und der Bürgerkrieg in Ruanda haben die Weltöffentlichkeit für staatliche und -staatsverstärkte Kriminalität sensibilisiert. Die Staatengemeinschaft war nicht mehr bereit, die systematische und massenhafte Verletzung el-

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1 Okan Üniversitesi Hukuk Fakültesi ve İstanbul Barosu'nca 26-28 Eylül 2011 tarihleri arasında birlikte yapılan, Prof.Dr. Serap Keskin Kiziroğlu tarafından organize edilen ''Uluslararası Cezalandırılabilirlik ve Uluslararası Ceza Mahkemesi Sempozyumu''nda 27 Eylül 2011 tarihinde sunulmuş tebliğdir.

2 Verf. ist akademische Rätin auf Zeit und Habilitandin am Lehrstuhl von RiLG Prof. Dr. *Kai Ambos,* Institut für Kriminalwissenschaften der Georg-August Universität Göttingen. (27.09.2011)

3 *Obembo,* The International Criminal Court – a Work in Progress in the Democratic Republic of the Congo, in: Humanitäres Völkerrecht - Informationsschriften 2005, 11-23, S. 11.

4 Siehe hierzu vertiefend *Bock,* Das Opfer vor dem Internationalen Strafgerichtshof (Duncker & Humblot: Berlin 2010), S. 166-8; zur Einordnung völkerrechtlicher Verbrechen als (staatsverstärkte) Makrodelinquenz und ihren Charakteristika siehe auch *Ambos,* Der allgemeine Teil des Völkerstrafrechts – Ansätze einer Dogmatisierung (Mohr Siebeck: 2. Aufl. Berlin 2004), S. 50-1; *Jäger,* Makroverbrechen als Gegenstand des Völkerstrafrechts – Kriminalpolitisch-kriminologische Aspekte, in: *Hankel/ Stuby* (Hrsg.), Strafgerichte gegen Menschheitsverbrechen – zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen (Hamburger Edition: Hamburg 1995), S. 325–354.

ementarer Menschenrechte zu tolerieren. Dies führte zur Gründung der beiden *ad hoc* Tribunale für Jugoslawien (ICTY)[5] und Ruanda (ICTR)[6]. Die Bedeutung, die dieser Schritt auch für die überlebenden Opfer hat, bringt das ICTY augenfällig dadurch zum Ausdruck, dass es sein Mandat unter der Überschrift „Bringing war criminals to justice, bringing justice to victims" zusammengefasst hat. Seinen Höhepunkt hat die Institutionalisierung des Völkerstrafrechts 1998 mit der Gründung des Internationalen Strafgerichtshofs (IStGH)[7] erreicht. Seine Aufgabe ist die Verfolgung der „schwersten Verbrechen, welche die Menschheit als ganze berühren" (Art. 5 IStGH-Statut). Das Vollzugsdefizit des Völkerstrafrechts soll beseitigt, der Straflosigkeit völkerrechtlicher Verbrechen ein Ende bereitet werden. Damit weckt der IStGH nahezu zwangsläufig Hoffnungen der Opfer auf Gerechtigkeit. Die Vertragsstaaten waren sich der Bedeutung der Völkerstrafgerichtsbarkeit auch und gerade für die Opfer bewusst. So gedenken sie in der Präambel des IStGH-Statuts den „Millionen von Kindern, Frauen und Männern", die im letzten Jahrhundert „Opfer unvorstellbarer Gräueltaten geworden sind, die das Gewissen der Menschheit zutiefst erschüttern". Damit reiht sich das IStGH-Statut in eine internationale Bewegung ein, die das Opfer nicht mehr ausschließlich als Mittel zur Informationsbeschaffung, als Zeugen, ansieht. Vielmehr wird dem Opfer zunehmend die Möglichkeit gewährt, aktiv auf das Prozessgeschehen Einfluss zu nehmen.

II. Struktur und Folgen völkerrechtlicher Verbrechen

Diese zunehmende Opferorientierung des Straf- und Strafprozessrechts beruht auf der Erkenntnis, dass die Opferwerdung eine einschneidende Erfahrung ist, die selbst bei sogenannten Bagatelldelikten das Leben der Betroffenen maßgeblich verändern kann. Unabhängig von der objektiven Tatschwere werden von den Opfern zumeist die psychischen Tatfolgen am intensivsten empfunden.[8] Dies liegt daran, dass

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5 Gegründet durch Resolution 827/1993 des UN-Sicherheitsrats v. 25.5.1993.

6 Gegründet durch Resolution 955/1994 des UN-Sicherheitsrats v. 8.11.1994.

7 Gegründet durch völkerrechtlichen Vertrag v. 17.7.1998, UN Doc A/CONF.183/9. Das Statut IStGH trat am 1.7.2002 in Kraft und wurde zuletzt durch Resolution RC/Res.6, Advance Version vom16.6.2010.

8 *Kiefl/Sieger,* Kein Ausweg für Karin? – Anmerkungen zur Opferkarriere, in: Kriminalistik 1993, 261-7, S. 264; *Schneider,* Die gegenwärtige Situation der Verbrechensopfer in Deutschland, in:

die Viktimisierungserfahrung im Widerspruch zu elementaren Grundannahmen steht. Basis für ein funktionierendes menschliches Zusammenleben sind die Überzeugung, dass die Mitmenschen wohlmeinend sind, und der Glaube an eine übergeordnete Gerechtigkeit. Zumindest unterbewusst gehen fast alle Menschen davon aus, dass sie in Sicherheit leben und dass sie ihre Zukunft selbst und eigenverantwortlich gestalten können.[9] Verbrechen werden nicht negiert, sondern in dieses Konzept durch den Glauben an eine gerechte Welt integriert. In einer gerechten Welt bekommt jeder, was er verdient und jeder hat das verdient, was er bekommt. Ist jemand Opfer einer Straftat geworden, so muss er dies verschuldet oder verdient haben.[10] Der Einzelne grenzt sich auf diese Weise so weit vom Geschädigten ab, dass er subjektiv zu der Überzeugung gelangt, dass er selbst vor vergleichbaren Übergriffen sicher ist. Auch wenn diese Kernannahmen über die Güte und Gerechtigkeit der Welt nicht der Realität entsprechen, sorgen sie für ein hohes psychisches Funktionsniveau und befähigen zu sozialen Interaktionen mit Mitmenschen. Durch die eigene Opfererfahrung wird diese subjektive Theorie der Wirklichkeit[11] erschüttert. Sie steht daher in einem grundlegenden Widerspruch zum eigenen Selbst- und Weltbild. Welche psychischen Auswirkungen dies auf den Betroffenen hat, hängt ganz erheblich von dessen individueller Disposition, seiner Fähigkeit und seinen Ressourcen zur Stressbewältigung und seiner kulturellen Prägung ab. Dessen ungeachtet besteht ein direkter Zusammenhang zur Tatschwere. Je massiver die erlebte Gewalt ist, desto höher ist die Wahrscheinlichkeit, dass der Betroffene eine post-traumatische Belastungsstörung oder ein vergleichbares Krankheitsbild entwickelt.[12]

Juristenzeitung 2002, 231-7, 234; siehe auch die Studie von *Richter*, Opfer krimineller Gewalttaten – Individuelle Folgen und ihre Verarbeitung (Weißer Ring: Mainz 1997), S. 46.

9 *Lerner,* The Belief in a Just World – A Fundamental Delusion (Plenum Press: New York 1980), S. 11 ff.; *Hestermann,* Verbrechensopfer – Leben nach der Tat (Rowohlt: Hamburg 1997), S. 36; *Bock,* o. Fn. 2, S. 54-5 mit weiteren Nachweisen.

10 *Lerner*, o. Fn. 7, S. 11; *Weigend*, Deliktsopfer und Strafverfahren (Duncker & Humblot: Berlin 1989), S. 384; *McFarlane/van der Kolk,* Trauma and its Challenge to Society, in: *van der Kolk/McFarlane/Weisaeth* (Hrsg.), Traumatic Stress – The Effects of Overwhelming Experience on Mind, Body and Society (Guildford Press: New York 1996), 24-46, S. 28; *Hansen,* Traumatisierung von Frauen durch Gewalt (Kova Verlag: Hamburg 1999), S. 7.

11 *Hansen*, o. Fn. 8, S. 8.

12 *Bock,* o. Fn. 2, S. 157 mit weiteren Nachweisen.

Der Zuständigkeit des IStGH unterfallen ausschließlich die völkerrechtlichen Kernverbrechen, namentlich Völkermord, Verbrechen gegen die Menschlichkeit und Kriegsverbrechen. Diese Delikte beinhalten ausnahmslos erhebliche Individualrechtsverletzungen. Die Opfer werden in ihren elementaren Rechtsgütern Leben, körperliche Unversehrtheit, sexuelle Selbstbestimmung, Freiheit und Würde verletzt.[13] Hinzu kommt, dass diese massiven Gewalterfahrungen kein singuläres Ereignis sind. Vielmehr ziehen sich die Verbrechen über einen langen Zeitraum, mehrere Monate oder sogar Jahre hin, so dass ein gesamter Lebensabschnitt der Betroffenen von Gewalt geprägt ist. Man spricht in diesem Zusammenhang von einer sequenziellen Traumatisierung des Typs II.[14] Psychische Langzeiterkrankungen sind in solchen Konstellationen sehr häufig; sie stellen nahezu den Regelfall dar.[15]

Verschärft wird diese Situation durch die strukturellen Besonderheiten völkerrechtlicher Verbrechen. Primäres Angriffsziel ist typischerweise nicht das einzelne Opfer, sondern das Kollektiv, dem es angehört.[16] Besonders deutlich wird dies beim Völkermord, bei dem sich die genozidale Absicht des Täters gegen eine geschützte Gruppe richten muss.[17] Aber auch beim Verbrechen gegen die Menschlichkeit wird ein Kollektiv – die Zivilbevölkerung – angegriffen. Ähnliches gilt für Kriegsverbrechen, die nur im Rahmen eines bewaffneten Konflikts

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13 *Ambos*, Internationales Strafrecht (Beck Verlag: München, 3. Aufl. 2011), § 5 Rn. 3 (allgemein), § 7 Rn. 125-6 (Völkermord), § 7 Rn. 173 (Verbrechen gegen die Menschlichkeit), § 7 Rn. 231 (Kriegsverbrechen) m.w.N.

14 Siehe hierzu *Schubbe,* Störungskonzepte und Neurobiologie, in: *Haenel/Wenk-Ansohn* (Hrsg.), Begutachtung psychisch reaktiver Traumafolgen im aufenthaltsrechtlichen Verfahren Beltz: Basel 2004), 11-36, S. 13.

15 Siehe nur *Heinl,* „Maikäfer flieg, dein Vater ist im Krieg..." – Seelische Wunden aus der Kriegskindheit (Kösel: München 1994), S. 73; *Turner,* Surviving sexual assault and sexual torture, in: *Mezey/King* (Hrsg.), Male Victims of Sexual Assault (Oxford University Press: Oxford 1992), 75–86, S. 78; *Eissler,* Die Ermordung von wie vielen seiner Kinder muss ein Mensch symptomfrei ertragen können, um eine normale Konstitution zu haben?, in: Psyche 5 (1963), 241–291, S. 263.

16 *Möller,* Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte (Lit Verlag: Münster 2003), S. 350; *Safferling,* Das Opfer völkerrechtlicher Verbrechen, in: Zeitschrift für die gesamte Strafrechtswissenschaft 115 (2003), 352-384, S. 357; *Bock,* Das Opfer vor dem Internationalen Strafgerichtshof, in: Zeitschrift für die gesamte Strafrechtswissenschaft 119 (2007), 664-80, S. 668.

17 *Ambos,* o. Fn. 11, § 7 Rn. 125, 161; *Bock,* o. Fn. 2, S. 157 mit weiteren Nachweisen. Siehe auch *Prosecutor v. Jelisi*, Trial Chamber Judgement v. 14.12.1999, IT-95-10-T, Rn. 66; *Prosecutor v. Akayesu,* Trial Chamber Judgement v. 2.9.1998, ICTR-96-4-T, Rn. 521.

begangen werden können. Der Angriff auf den Einzelnen erfolgt regelmäßig lediglich aufgrund seiner Zugehörigkeit zu einer bestimmten Gruppe, die von der – typischerweise mächtigeren[18] – Tätergruppe als minderwertig angesehen wird. [19] Die massiven Rechtsgutsverletzungen sind regelmäßig Teil einer Strategie der systematischen Entrechtung, Herabwürdigung, Demütigung und letztendlich Vernichtung sowohl der Individuen als auch des Kollektivs, dem diese angehören. Diese kollektive Komponente der Viktimisierung führt dazu, dass das gesamte soziale Umfeld des Opfers ebenfalls traumatisiert ist. Damit erhöht sich für jeden einzelnen die Wahrscheinlichkeit psychischer Langzeitfolgen.[20] Aber sogar wenn ein Familienmitglied nicht selbst traumatischen Ereignissen ausgesetzt war, kann der Kontakt mit dem Überlebenden zu einer mittelbaren Traumatisierung und damit zu psychischen Störungen führen. Zudem gibt es Hinweise darauf, dass die Traumatisierung auch an die nächste Generation, also an Kinder, die zur Zeit des traumatischen Ereignisses noch nicht geboren sind, weitergegeben werden kann.[21] Dies potenziert die gesamtgesellschaftliche Brisanz der Taten.

III. Opfergerechte Ausgestaltung des IStGH-Statuts

Der IStGH wird daher mit einer großen Anzahl psychisch hoch belasteter Individualopfer konfrontiert, die aufgrund der überlebten Taten

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18 *Schneider,* Opfer des Völkermordes, in: *Schneider* (Hrsg.), Das Verbrechensopfer in der Strafrechtspflege (de Gruyter: Berlin 1982), 305-18, S. 305; *Möller*, o. Fn. 14, S. 399.

19 *Scurfield,* Posttraumatic Stress Disorder in Vietnam Veterans, in: *Wilson/Raphael* (Hrsg.), International Handbook of Traumatic Stress Syndromes (Plenum: New York 1993), 285-95, S. 290; *Safferling,* o. Fn. 14, S. 352, 357; *Grossmann*, Eine Anatomie des Tötens, in: *Gleichmann/Kühne* (Hrsg.), Massenhaftes Töten – Kriege und Genozide im 20. Jahrhundert (Klartext: Essen 2004), 55–104, S. 72; *Bock,* o. Fn. 14, S. 668.

20 *Almqvist/Brandell-Forsberg*, Refugee Children in Sweden: Posttraumatic Stress Disorder in Iranian Preschool Children Exposed to Organized Violence, in: Child Abuse & Neglect. 21 (1997), 351-66, S- 364.

21 Siehe dazu ausführlich *Bock*, o. Fn. 2, S. 159-65 mit weiteren Nachweisen. Insbesondere zur transgenerationellen Traumatisierung *Grubrich-Simitis*, Extremtraumatisierung als kumulatives Trauma, in: Psyche 33 (1979), 991-1032, 1008; *Rosenbeck/Fontana*, Transgenerational Effects of Abusive Violence on the Children of Vietnam Combat Veterans, in: Journal of Traumatic Stress 11 (1998), S. 731-42

Rosenthal, Die Shoah im intergenerationellen Dialog – Zu den Spätfolgen der Verfolgung in Drei-Generationen-Familien, in: *Friedmann/Glück/Vyssoki* (Hrsg.), Überleben der Shoah und danach – Spätfolgen der Verfolgung aus wissenschaftlicher Sicht (Picus: Wien 1999), S. 68–88.

in besonderem Maße auf Rücksichtnahme angewiesen sind. Das Verfahren auch auf ihre Bedürfnisse auszurichten, erscheint als ein elementares Gebot der Menschlichkeit, stellt aber gleichzeitig auch eine große Herausforderung dar. Im Folgenden möchte ich einige mir besonders wichtig erscheinende Problemfelder hervorheben.

1. Gleichheit der Opfer und Notwendigkeit von Selektionsprozessen

Zunächst besteht ein Spannungsfeld zwischen dem Wunsch der Opfer nach Gerechtigkeit und den begrenzten Ressourcen des IStGH. Das Strafverfahren kann verschiedene Interessen und Bedürfnisse der Opfer befriedigen: Es kann einen Beitrag zur Ermittlung der Wahrheit leisten, die begangenen Verbrechen als Unrecht brandmarken, die Verantwortlichen identifizieren und die Voraussetzung für ihre Bestrafung schaffen.[22] All dies sind Maßnahmen zur Wiedergutmachung der erlittenen Taten.[23] Aufgrund der Endlichkeit seiner Ressourcen ist es dem IStGH allerdings schlicht nicht möglich, sämtliche völkerrechtlichen Verbrechen aufzuklären und zu ahnden. Selektionsprozesse sind unvermeidbar. Da der Tatort- und der Täterstaat aber i.d.R. nicht willens oder in der Lage sein werden,[24] die Taten selbst zu verfolgen, bedeuten Selektionsentscheidungen auf internationaler Ebene zumeist *de facto* Straflosigkeit für die Täter. Opfer können dies als Bagatellisierung oder sogar Billigung des von ihnen erlittenen Unrechts missverstehen. Daher ist es von entscheidender Bedeutung, dass die Auswahlprozesse transparent und nachvollziehbar ausgestaltet werden. Dies betrifft drei verschiedene Ebenen:

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22 Ausführlich *Bock,* o. Fn. 2, S. 170-208.

23 Siehe hierzu nur die ständige Rechtsprechung des Inter-American Court of Human Rights (IACHR) *Case of El Amparo v. Venezuela* (Reparations and Costs), IACHR 14.9.1996, Rn. 35; *Case of Bulacio v. Argentina,* (Merits, Reparations and Costs), IACHR 18.9.2003, Rn. 96; *Caso de los Hermanos Gómez Paquiyauri v. Perú* (Fondo, Reparaciones y Costas), IACHR 8.7.2004, Rn. 215; *Case of Ricardo Canese v. Paraguay* (Merits, Reparations and Costs), IACHR 31.8.2004, Rn. 205; *Caso Caesar v. Trinidad y Tobago* (Fondo, Reparaciones y Costas), IACHR 11.3.2005, Rn. 126; *Caso Vargas Areco v. Paraguay* (Fondo, Reparaciones y Costas), IACHR 26.9.2006, Rn. 150; *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela,* IACHR 5.8.2008, Rn. 242; *Case of Usón Ramírez v. Venezuela* (Preliminary Objections, Merits, Reparations, and Costs), IACHR 20.11.2009, Rn. 210

24 Siehe hierzu ##.

Zunächst geht es um die Frage, in welchen Situationen der Ankläger Ermittlungen aufnimmt. Die Einleitung eines Verfahrens durch einen Mitgliedstaat oder den Sicherheitsrat (vgl. Art. 13 IStGH-Statut) ist immer das Ergebnis eines politischen Abwägungsprozesses; Opferinteressen werden insoweit allenfalls am Rande und selektiv berücksichtigt. Von zentraler Bedeutung für die Effektivität und politische Unabhängigkeit des IStGH sind daher die *ex officio* Befugnisse des Anklägers, die es ihm ermöglichen, aus eigenem Recht Ermittlungen in einer bestimmten Situation einzuleiten.[25] Auf diese Weise wird sichergestellt, dass die internationale Justiz – auch im Interesse der Opfer – nicht nur dort eingreift, wo sie erwünscht ist. Es erscheint aber durchaus fraglich, ob die bisherige Praxis diesen Ansprüchen gerecht wird. Zu Beginn seiner Tätigkeit war der Ankläger in der Ausübung seiner *proprio-motu* Befugnisse sehr zurückhaltend. Er bevorzugte es, sich auf Situationen zu konzentrieren, in denen er mit Rückendeckung des Sicherheitsrats oder des betroffenen Staates tätig werden konnte.[26] Daran hat sich grundsätzlich auch nichts mit der Aufnahme von *proprio motu* Ermittlungen in Kenia und der Elfenbeinküste geändert, da auch insoweit Kooperationszusagen der betroffenen Staaten vorliegen.[27] Auch wenn dieses Vorgehen prozessökonomisch verständlich ist, so stellt es doch die politische Unabhängigkeit des IStGH in Frage.[28]

Zweifel an der Strategie des Anklägers werden auch dadurch genährt, dass es den Auswahlentscheidungen z.T. an Transparenz mangelt. Nach eigenen Aussagen hat der Ankläger von Juli 2002 bis Mai 2011 9.214 Informationen über begangene Verbrechen von mehr als 140 Ländern

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25 Siehe nur *Williams/Schabas*, Article 13, in: *Triffterer* (Hrsg.), Commentary on the Rome Statute of the International Criminal Court (Beck Verlag: München 2. Aufl. 2008), Rn. 17; *Ambos/Bock,* Procedural Framework, in: *Reydams/Wouters/Ryngaert* (Hrsg.), International Prosecutors (Oxford University Press: New York 2012), 488-541, S. 533.

26 Dies zeigte sich beispielsweise daran, dass der Ankläger in der Kongosituation aktiv auf eine Staateneigenüberweisung (sog. self-referral) hingewirkt hat, anstatt das Verfahren *proprio motu* einzuleiten, siehe *Office of the Prosecutor*, Report on the activities performed during the first three years (June 2003–June 2006) (Den Haag, 12 September 2006), Rn. 12.

27 Zu Kenia siehe *Office of the Prosecutor*, Policy Paper on Preliminary Examinations, Draft (2010), Rn. 81. Die Elfenbeinküste ist ein Drittstaat, der das IStGH-Statut nicht ratifiziert, der aber die Zuständigkeit des IStGH nach Artikel 12 Abs. 3 IStGH-Statut anerkannt hat, siehe hierzu http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/C%C3%B4te+dIvoire/.

28 Siehe hierzu auch *Ambos/Bock,* o. Fn. 23, S. 533-5.

erhalten, die sog. communicatons.[29] Ungefähr die Hälfte hiervon soll sich auf Taten beziehen, die offensichtlich nicht der Zuständigkeit des IStGH unterfallen. In drei Fällen – Irak, [30]Venezuela[31] und Palästina[32] – hat der Ankläger ausdrücklich und öffentlich die Aufnahme von Ermittlungen abgelehnt und diese Entscheidung auch entsprechend begründet. Was aber mit den anderen communications geschehen ist, ist weniger offensichtlich. Bisher hat der Ankläger die Öffentlichkeit lediglich über die Aufnahme von Vorermittlungen z.B. in Afghanistan, Kolumbien und Korea informiert. Über den Stand der Vorermittlungen gibt es zwar regelmäßig öffentlich zugängliche updates,[33] diese sind allerdings sehr allgemein gehalten. Insoweit wäre es wünschenswert, wenn der Ankläger seine Informationspolitik weiter ausbauen würde, um auf diese Weise die Akzeptanz seiner Selektionsentscheidungen bei den Opfern weiter zu erhöhen.[34]

Die zweite Selektionsebene betrifft die Frage, auf welche Taten und welche Täter sich die Ermittlungen konzentrieren. Der Ankläger hat sich von Anfang an dafür ausgesprochen, gegen die Hauptverantwortlichen, the persons most responsible, vorzugehen.[35] Unter Gerechtigkeitsaspekten erscheint es durchaus sinnvoll, vor allem die Planer, Entscheidungsträger und Hauptstrategen in die Verantwortung zu nehmen. Dieses Vorgehen birgt jedoch die Gefahr, dass es zu einer *de facto* Amnestie für untergeordnete Täter, die sog. *middle* und *low rank perpetrators* kommt.[36] Dies kann aus Opfersicht schwer nachvollziehbar sein, weil gerade dies diejenigen Menschen sind, die die Taten unmittelbar ausgeführt haben. Es ist für die Geschädigten nur schwer

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29 http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/.

30 OTP response to communications received concerning Iraq (9 February 2006).

31 OTP response to communications received concerning Venezuela (9 February 2006).

32 OTP, Situation in Palestine (3 April 2012).

33 Siehe insbesondere OTP, Report on Preliminary Examination activities (13 December 2011).

34 *Ambos/Bock,* o. Fn. 23, S. 533-5 mit weiteren Nachweisen.

35 OTP, Paper on some policy issues before the Office of the Prosecutor (September 2003), S. 3.

36 Vertiefend zu den Selektionsprozessen *Seils*, The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court, in Bergsmo (Hrsg.), Criteria for Prioritizing and Selecting Core International Crimes Cases (Torkel Opsahl Academic EPublisher: Oslo, 2. Aufl. 2010), S. 69-78; *Stegmiller*, The Pre-Investigation Stage of the ICC (Duncker & Humblot: Berlin, 2011), S. 239 ff.

zu ertragen, wenn sie in ihrem Dorf weiterhin ihrem Folterer oder dem Mörder ihrer Familie begegnen müssen.[37] Will man, dass sie dennoch die Verfahren vor dem IStGH als Form der Gerechtigkeit ansehen und akzeptieren, müssen die Gründe für die Konzentration auf die hauptverantwortlichen Täter immer wieder erläutert werden. Dies ist eine wichtige Aufgabe des outreach Programms des Gerichtshofs.

Ein weiterer Selektionsprozess greift bei der Auswahl der Anklagepunkte. Dies zeigte sich bereits im ersten Verfahren gegen *Thomas Lubanga Dyilo*. Der Ankläger beschloss, die Anklage auf die Rekrutierung von Kindersoldaten zu beschränken, obwohl es auch einige Anhaltspunkte dafür gibt, dass Lubanga für Sexualverbrechen in großem Ausmaß verantwortlich ist. Eine nachvollziehbare, stichhaltige Erklärung für diese Vorgehensweise ist der Ankläger bisher schuldig geblieben.[38] Insgesamt bleibt festzuhalten, dass Selektionsprozesse unvermeidbar sind. Sie sind für die Opfer aber nur erträglich, wenn sie Teil einer transparenten und schlüssigen Gesamtstrategie sind.

2. Das Opfer als Zeuge: Schutz vor sekundärer Viktimisierung

Richten wir nach diesen eher grundsätzlichen Überlegungen nun den Blick etwas genauer auf das Opfer und die verschiedenen Rollen, die es im Verfahren vor dem IStGH einnehmen kann. Aus Sicht der Justiz ist auch der Opferzeuge zunächst einmal Instrument zur Wahrheitsfindung. Auch im internationalen Strafverfahren ist seine Aussage das wichtigste Beweismittel.[39] Dementsprechend statuiert Rule 65 eine grundsätzliche Aussagepflicht für sämtliche Zeugen.[40]

Die Aussage als Zeuge kann allerdings eine erhebliche Belastung darstellen. Sie verlangt von den Opfern eine erneute Auseinandersetzung mit dem traumatischen Ereignis, ein erneutes Durchleben der Tat und kann daher zu einem Wiederaufleben der durchlittenen Ängste

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37 Siehe hierzu auch *Bock,* o. Fn. 2, S. 201.

38 *Seils,* o. Fn. 34, S. 58; *Ambos/Bock,* o. Fn. 23, S. 538.

39 *Bock,* o. Fn. 2, S. 372 mit weiteren Nachweisen.

40 Vertiefend hierzu *Kreß,* Witnesses in Proceedings Before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure, in: *Fischer/Kreß Lüder* (Hrsg.), International and National Prosecution of Crimes under International Law (Berliner Wissenschaftsverlag: Berlin 2001), 309-83, S. 323-5.

führen. Darüber hinaus müssen die Opferzeugen in ein fremdes Land reisen und werden dort mit einer fremden Rechtskultur, d.h. mit ihnen unbekannten, unter Umständen sogar unverständlichen Verhaltensvorschriften des IStGH konfrontiert. Zudem sind sie von ihrem sozialen Umfeld, von dem unterstützende und stabilisierende Wirkungen ausgehen könnten, isoliert. Das internationale Strafverfahren birgt daher in besonderem Maße die Gefahr, dass die aus der Tat resultierenden psychischen Schäden zusätzlich verstärkt werden.[41] Diese sogenannte sekundäre Viktimisierung[42] zu verhindern, ist die vornehmste Aufgabe eines opfergerechten Strafverfahrensrechts. Dies dient nicht nur dem Schutz der Würde und körperlichen Unversehrtheit der Opferzeugen, sondern auch der Effektivität des Gerichtsverfahrens. Fühlen sich die Zeugen ernst genommen, verstanden, geachtet und sicher, also den Umständen entsprechend wohl, erhöht dies nicht nur ihre generelle Kooperationsbereitschaft, sondern auch ihre Gedächtnisleistung und damit ihre Fähigkeit, sich zu erinnern. Die Schaffung einer möglichst entspannten Aussageatmosphäre dient also auch dem Interesse der internationalen Justiz an der Sachverhaltsaufklärung.

Rechtlicher Ausgangspunkt für sämtliche Maßnahmen des Opfer- und Zeugenschutzes ist Art. 68 Abs. 1 IStGH-Statut. Hiernach ist der Gerichtshof verpflichtet, geeignete Maßnahmen zum Schutz der Sicherheit, des körperlichen und seelischen Wohles, der Würde und der Privatsphäre der Opfer und Zeugen zu treffen. Etabliert wird damit eine allgemeine Schutz- und Fürsorgepflicht des Gerichts für Opfer und Zeugen. Diese greift auch bei prozessimmanenten Belastungen. Aufgabe des Gerichtshofs ist es damit auch, eine sekundäre Viktimisierung nach Möglichkeit zu verhindern.[43] Gleiches gilt für die Abteilung für Opfer und Zeugen. Diese hat ein Unterstützungsprogramm für Opfer und Zeugen entwickelt, das u.a. die Zurverfügungstellung von psychologischen, medizinischen, sozialen und rechtlichen Hilfen umfasst.[44]

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41 Hierzu ausführlich *Bock,* o. Fn. 2, S.70-3, 403.

42 Zum Begriff *Kiefl/Lamnek,* Soziologie des Opfers (Fink: München 1986), S. 239; *Tampe,* Verbrechensopfer (Boorberg: München 1992), S. 36; *Herman,* The mental health of crime victims: Impact of legal intervention, in: Journal of Traumatic Stress 16 (2003), 159-166, S. 159.

43 *Bock,* o. Fn. 2, S. 404-5.

44 Vgl. Regel 17 der Verfahrens- und Beweis regeln; Regulation 83 der Geschäftsordnung der Kanzlei.

Diese Maßnahmen sollten so früh wie möglich wirksam werden; am besten sobald der Ankläger vor Ort zum ersten Mal Kontakt mit potentiellen Zeugen aufnimmt. Dies ist allerdings äußerst kostenintensiv. Vor allem die Erfahrungen der *ad hoc* Tribunale haben gezeigt, dass aus finanziellen Gründen die Betreuung der Opfer und Zeugen im Feld größtenteils NGOs und nationalen Hilfsorganisationen überlassen werden muss.[45] Im Mittelpunkt der Tätigkeit der Opfer- und Zeugeneinheit steht daher die Begleitung der Zeugen bei ihrer Aussage. Dazu gehört zunächst, ihre Anreise nach Den Haag und ihre Unterbringung zu organisieren. Während des Aufenthalts in Den Haag steht den Zeugen ein umfassendes Unterstützungsprogramm zur Verfügung, das 24 Stunden am Tag erreichbar ist. Soweit notwendig gehört hierzu auch psychologische Betreuung, vor allem vor, während und unmittelbar nach der Aussage vor Gericht.[46] Insbesondere führt die Opfer- und Zeugeneinheit das sog. *witness familiarisation* durch. Hier werden die Zeugen zunächst über den Verfahrensablauf vor Gericht sowie die Prozessbeteiligten und ihre Aufgaben informiert. Zudem wird ihnen ihre Rolle im Verfahren verdeutlicht, erklärt, wie eine Zeugenbefragung abläuft und der Gerichtssaal gezeigt.[47] Auf diese Weise wird den Opfern die Angst vor der ungewohnten Situation genommen. Gleichzeitig wird ihnen gezeigt, dass sie nicht bloßes Mittel zur Wahrheitsfindung sind, sondern dass das Gericht an ihrem Wohlbefinden interessiert ist.

Während der Hauptverhandlung obliegt es in erster Linie der Verfahrenskammer, einer Retraumatisierung der Opfer entgegenzutreten. Hierzu hat sie u.a. die Möglichkeit, durch prozessleitende Verfügungen und Einzelanweisung die Art der Befragung zu kontrollieren und besonders belastende Vernehmungsmethoden, wie aggressiv geführte

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45 *Heikkilä,* International Criminal Tribunals and Victims of Crime (Institute for Human Rights, Åbo Akademi University: Saarijärvi 2004), S. 106-8.

46 Regulation 83 Abs. 2 Regulations of the Registry; siehe hierzu auch *Prosecutor v. Lubanga,* Victims and Witnesses Unit recommendations on psycho-social in-court assistance, ICC-01/04-01/06-1149, 31.1.2008.

47 Siehe hierzu ausführlich *Prosecutor v. Lubanga,* Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, TC I, ICC-01/04-01/06-1049, 30.11.2007, Rn. 29; *Prosecutor v. Lubanga,* Decision on the Practices of Witness Familiarisation and Witness Proofing, PTC I, ICC-01/04-01/06-679, 8.11.2006, order; Ambos, "Witness proofing" before the ICC: Neither legally admissible nor necessary, in: Stahn/Sluiter (Hrsg.), The Emerging Practice of the International Criminal Court (Martinus Nijhoff Publishers: Leiden, 2009), S. 599-614.

cross-examinations, zu untersagen. Besonders schutzbedürftigen Zeugen kann zudem gestattet werden, per *video-link* oder in Anwesenheit einer Vertrauensperson oder eines Psychologen auszusagen. Insgesamt betrachtet gibt das Verfahrensrecht des IStGH zahlreiche Möglichkeiten, der Gefahr einer sekundären Viktimisierung effektiv zu begegnen.[48]

3. Das Opfer als Beteiligter: Fairness für alle Verfahrensbeteiligten

Über die passive Zeugenrolle hinaus gewährt das IStGH-Statut erstmals in der Geschichte des Völkerstrafprozessrechts den Opfern die Möglichkeit, sich aktiv am Verfahren zu beteiligen. Die aktive Wahrnehmung prozessualer Rechte kann dem Opfer helfen, die durch Tat und Täter ausgelösten Ohnmachtsgefühle zu überwinden und sein Selbstbewusstsein zumindest teilweise wiederherzustellen. Somit können Beteiligungsrechte dem Opfer bestenfalls bei der Tatverarbeitung helfen, jedenfalls aber einer sekundären Viktimisierung durch den Prozess entgegenwirken.[49]

Art. 68 Abs. 3 IStGH-Statut – die zentrale Vorschrift zur Opferbeteiligung – lautet wie folgt:

Sind die persönlichen Interessen der Opfer betroffen, so gestattet der Gerichtshof, dass ihre Auffassungen und Anliegen in von ihm für geeignet befundenen Verfahrensabschnitten in einer Weise vorgetragen und behandelt werden, welche die Rechte des Angeklagten sowie die Fairness und Unparteilichkeit des Verfahrens nicht beeinträchtigt oder damit unvereinbar ist.

Hieraus folgt zunächst, dass die Opfer ein Recht auf Beteiligung haben. Die jeweils zuständige Kammer kann die Opfer nicht vollständig vom Verfahren ausschließen. Es obliegt aber dem Gericht, Zeitpunkt und Art der Beteiligung zu bestimmen. Der Umfang der Partizipationsrechte liegt damit vollständig im Ermessen des Gerichts. Die Einbeziehung der Opfer kann dadurch flexibel, unter Berücksichtigung der konkreten Umstände des Einzelfalls bestimmt werden.[50] Im Mit-

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48 Siehe hierzu ausführlich *Bock,* o. Fn. 2, S. 403-30.

49 *Herman*, o. Fn. 40, S. 158.

50 ICC, *Prosecutor v. Katanga and Ngudjolo*, Decision on the Modalities of Victim Participation at

telpunkt steht dabei der Begriff der „Betroffenheit der persönlichen Interessen". Dieser bestimmt nicht nur das „Ob", sondern auch das „Wie" der Beteiligung. Welche Opferinteressen von Art. 68 Abs. 3 IStGH anerkannt werden, ist hochumstritten.[51] Nach einem sehr restriktiven Ansatz soll ausschließlich das Interesse an Wiedergutmachung der erlittenen Tatschäden gemeint sein.[52] Nach einer anderen Auffassung, die auch mehr und mehr Zuspruch in der Rechtsprechung des IStGH findet, ist daneben auch das Interesse an der Sachverhaltsaufklärung („the right to truth"), an der Klärung der Schuldfrage und an der Bestrafung der Täter erfasst.[53] Dieser Ansatz ermöglicht eine umfangreiche Einbeziehung der Opfer in das Verfahren.

Dessen ungeachtet führt die von Art. 68 Abs. 3 IStGH-Statut vorausgesetzte Festlegung der Beteiligungsrechte auf einer *case-by-case*-Basis zu einer nicht unerheblichen Rechtsunsicherheit für alle Beteiligten. Weder die Opfer noch die Parteien können mit Sicherheit vorhersehen, wie stark die prozessuale Stellung der Geschädigten in einem bestimmten Verfahrensabschnitt sein wird. Zudem kann jede Kammer ihre eigene Prozessstrategie gegenüber den Opfern entwickeln. Bereits die bisherigen Erfahrungen haben gezeigt, dass Umfang und Ausmaß der Partizipationsrechte von Kammer zu Kammer und von Fall zu Fall variieren. Die hieraus resultierende Ungleichbehandlung der Opfer kann als gerichtliche Wertentscheidung missverstanden werden. Geschädigte, denen nur geringere Rechte zugebilligt werden, können sich als Opfer zweiter Klasse fühlen. Diese Gefahr ist umso größer, sollten irgendwann in einer Situation verschiedene (Vor-)Verfahrenskammern parallel tätig werden. Daher sollten sich die Kammern ihrer Autonomie zum Trotz um eine möglichst kongruente Rechtsprechungspraxis be-

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Trial, Doc. No. ICC-01/04-01/07-1788, TC II, 22.1.2010, para. 46; *Bock,* o. Fn. 2, S. 442 mit weiteren Nachweisen.

51 Ausführlich Vasiliev, Article 68(3) and personal interests of victims in the emerging practice of the ICC, in Stahn/Sluiter (Hrsg.), The Emerging Practice of the International Criminal Court (Martinus Nijhoff Publishers: Leiden, 2009), S. 635-690; *Bock,* o. Fn. 2, S. 448-52.

52 In diese Richtung argumentiert beispielsweise der Ankläger IStGH, *Prosecutor v. Lubanga*, Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation , Doc. No. ICC-01/04-01/06-1219, 10.3.2008, Rn. 20-1.

53 Siehe hierzu IStGH, *Prosecutor v. Katanga and Ngudjolo, Decision on the Set of Procedural Rights* Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Doc. No. ICC-01/04-01/07-474, PTC I, 13.5.2008, Rn. 30-44;

mühen. Ein gewisses Maß an Unvorhersehbarkeit und Diskrepanzen ist allerdings unvermeidbar, da dem Gericht die Möglichkeit bleiben muss, die Partizipationsrechte der Opfer an die Besonderheiten des Einzelfalls anzupassen.[54]

Dessen ungeachtet ist die aktive Einbindung der Opfer ins Verfahren vor dem IStGH mit nicht unerheblichen Problemen verbunden. Die große Anzahl der Opfer droht den Prozess unzumutbar auszudehnen. Die Verteidigung nimmt die Opfer als zusätzliche Ankläger, die das Prozessgleichgewicht stören, wahr. Der Ankläger sieht sich teilweise in Konkurrenz zu den Opfern und befürchtet, die Kontrolle über das Verfahren und sensible Informationen zu verlieren. Dennoch erscheint es möglich, die divergierenden Interessen zu vereinbaren und den Opfern eine starke prozessuale Stellung im Verfahren zuzubilligen, ohne dass grundlegende Verfahrensgarantien aufgegeben werden müssten. Voraussetzung hierfür ist, dass die Kammer eine starke, prozessleitende Rolle übernimmt. Je mehr Beteiligte im Verfahren involviert sind, desto weniger ist es möglich, die Prozessgestaltung dem freien Spiel ihrer Kräfte zu überlassen. Ist die Kammer aber bereit, bei Bedarf jederzeit regulierend tätig zu werden, können die Opfer grundsätzlich mit umfangreichen Befugnissen ausgestattet werden.[55]

Wichtigste Maßnahme zur Wahrung des Rechts des Angeklagten auf einen zügigen Prozess ist die Beiordnung eines kollektiven Rechtsbeistands. Hierbei werden Opfer zu einer oder mehreren Gruppen zusammengefasst, die dann von einem gemeinsamen *legal representative* vertreten werden. Auch wenn dies prozessökonomisch sinnvoll ist,[56] darf man nicht verkennen, dass die Ernennung eines kollektiven Rechtsbeistands mit dem Wunsch der Opfer, in ihrer Einzigartigkeit und Individualität anerkannt zu werden, kollidiert.[57] Was nun den Umfang der Beteiligungsrechte im Einzelnen angeht, so gelten folgende Grundregeln: Opfer, die von einem *legal representative* vertreten werden,

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54 Ausführlich *Bock,* o. Fn. 2, S. 442-4.

55 *Bock,* o. Fn. 2, S. 555.

56 Siehe beispielsweise IStGH, *Prosecutor v. Kony et al.* – Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications of participation […], PTC II, ICC-02/04-01/05-134, 1.2.2007, Rn. 6.

57 *Mohan,* The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal, in: International Criminal Law Review 9 (2009), 733–75, S. 758.

haben mehr und weitreichendere Rechte als Opfer ohne Rechtsbeistand.[58] Zudem steigt der Umfang der Aktivrechte grundsätzlich mit jedem Verfahrensabschnitt. Am ausgeprägtesten sind dementsprechend die Beteiligungsrechte in der Hauptverhandlung. Hier werden den Opfern bzw. ihren Anwälten regelmäßig folgende Rechte gewährt: Halten eines Eröffnungs- und Schlussvortrags, Beteiligung an der Beauftragung und Anweisung von Sachverständigen, Anregung von bestimmten Beweiserhebungen sowie Befragung von Zeugen und Sachverständigen. Zudem können die Opfer auch beantragen, im Verfahren selbst als Zeuge gehört zu werden.[59] Durch diese umfangreichen Beteiligungsmöglichkeiten leistet der IStGH einen wichtigen Beitrag zur Gerechtigkeit: er gibt den Opfern eine Stimme.

4. Wiedergutmachung: Kampf um die knappen Ressourcen

Last, but not least gibt Art. 75 IStGH-Statut der zuständigen Kammer die Möglichkeit, den Opfern auf Antrag oder aus eigenem Antrieb Wiedergutmachungsleistungen zuzusprechen. Verpflichteter ist der Verurteilte. Daneben kann Wiedergutmachung aber auch durch den extra zu diesem Zweck gegründeten Treuhandfond geleistet werden (Art. 79 IStGH-Statut). Die Integration von Wiedergutmachungsleistungen ins Strafverfahren ist eine sinnvolle Maßnahme, um das Konzept „Gerechtigkeit für die Opfer" abzurunden. Das IStGH-Statut akzeptiert dabei grundsätzlich jede Form der Wiedergutmachung – sei sie materiell oder ideell.[60] Ein optimales Ergebnis kann dann erreicht werden, wenn die verschiedenen Reparationsarten zu einem einheitlichen Konzept verbunden werden.

Allerdings ist die Wiedergutmachung von völkerrechtlichen Verbrechen mit nicht unerheblichen Problemen verbunden. Zunächst sind die Tatfolgen so schwerwiegend, dass sie nicht vollständig kompensiert werden können.[61] Umso wichtiger ist die symbolische Funktion der Wiedergutmachung. Sie ist ein Akt des Mitgefühls, der Anerkennung,

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58 Zu dieser Zweiteilung *Prosecutor v. Kony et al.,* o. Fn. 54, Rn. 7 ff.

59 Ausführlich mit umfangreichen Rechtsprechungsnachweisen *Bock,* o. Fn. 2, S. 510-50.

60 Siehe hierzu *Bock,* o. Fn. 2, S. 560-7.

61 Report of the Truth and Reconciliation Commission of South Africa (2003), Section II Chapter VII Rn. 8.

der Solidarisierung mit den Opfern.[62] Genugtuungsmaßnahmen – so bedeutsam sie auch sein mögen – sind wegen der gravierenden Tatfolgen dennoch nicht ausreichend. Wegen der großen Anzahl an Opfern ist es allerdings ausgeschlossen, alle in angemessenem Umfang monetär zu entschädigen. Dies würde sowohl die Ressourcen der Täter als auch die des Treuhandfonds bei weitem übersteigen. Vorzugswürdig sind daher kollektive Reparationen,[63] die einer Opfergruppe als solche zugutekommen. Dadurch wird der Kreis der Begünstigten erweitert und einer Ungleichbehandlung der Opfer entgegengewirkt.[64] Die Kammer kann zudem nur den Opfern Wiedergutmachung zusprechen, die durch den Verurteilten geschädigt wurden. Da völkerrechtliche Verbrechen nicht von einem Einzeltäter begangen werden, stellt sich insbesondere die Frage, wie sich das Mitverschulden anderer auf den Umfang der zu leistenden Entschädigung auswirkt.[65] Außerdem ist das Opfer gezwungen, Art und Ausmaß der erlittenen Schädigungen zu beweisen. Hier droht erneut eine sekundäre Viktimisierung.[66]

Diese Probleme lassen sich erheblich reduzieren, wenn der Treuhandfonds bei Wiedergutmachungsmaßnahmen eine federführende Rolle übernimmt.[67] Von seinen Leistungen kann jedes Opfer völkerrechtlicher Verbrechen profitieren, ohne dass zuvor geklärt werden müsste, welcher Täter in welchem Umfang für die erlittenen Schäden verantwortlich ist. Zudem kann der Fonds bereits dann tätig werden, sobald der Ankläger des IStGH Ermittlungen in einer Situation, wie beispielsweise im Kongo, aufnimmt.[68] Dadurch wird sichergestellt, dass frühzeitig eine möglichst große Anzahl von Opfern in den Ge-

62 *Bock,* o. Fn. 2, S. 176-7, 561-2.

63 Siehe Regel der Verfahrens- und Beweisregeln.

64 *Zegveld,* Remedies for victims of violations of international humanitarian law, International Review of the Red Cross 65 (2003), 497–526, S. 522; *Tomuschat,* Darfur – Compensation for the Victims, JICL 3 (2005), 579–589, S. 586.

65 *Wierda/de Greiff*, Reparations and the International Criminal Court: A Prospective Role for the Trust Fund of Victims, 2004, S. 10 (abrufbar unter http://ictj.org/sites/default/files/ICTJ-Global-ICC-TrustFund-2004-English.pdf); *dies.,* The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints, in: *de Feyter/Parmentier/Bossuyt/Lemmens* (Hrsg.), Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations (Intersentia: Antwerpen 2005), S. 225–243, S. 238.

66 *Rombouts/Sardaro/Vandeginste,* Rn. 172.

67 *Bock,* o. Fn. 2, S. 5a9-600.

68 Vgl. Nr. 50 ff. der Geschäftsordnung des Treuhandfonds.

nuss der Leistungen des Fonds kommt. Durch die Zusammenarbeit mit internationalen und nationalen Hilfsorganisationen kann er zudem sicherstellen, dass unter Berücksichtigung der spezifischen Bedürfnisse der Opfer ein schlüssiges und widerspruchsfreies Gesamtkonzept zur Wiedergutmachung völkerrechtlicher Verbrechen entsteht.

IV. Fazit

Die umfassende Einbeziehung der Opfer in das Verfahren vor dem IStGH kommt einer Revolution des Völkerstrafprozessrechts gleich. Sie ist aber nicht nur aus humanitären Gründen zu begrüßen. Vielmehr erhöht sie die Akzeptanz und damit die Legitimität des Gerichtshofs. Die Umsetzung des opferorientierten Strafverfahrensrechts stellt die Rechtspraxis allerdings vor erhebliche Herausforderungen. Die bisherigen Erfahrungen sind aber ganz überwiegend ermutigend. Es steht zu hoffen, dass sich der Gerichtshof auch in Zukunft seiner besonderen Verantwortung gegenüber den Opfern völkerrechtlichen Verbrechen bewusst bleibt.

The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals

From Completion to Continuation

THOMAS WAYDE PITTMAN[1]

Abstract

The article begins with the background and context under which the UN's newest international criminal tribunal, the International Residual Mechanism for Criminal Tribunals (IRMCT), was established. Its roots are traced from parentage, the international criminal tribunals for the formerYugoslavia (ICTY) and Rwanda (ICTR) with their ad hoc temporal nature, through the formation of these Tribunals' completion strategies and subsequent implementation efforts. The next section highlights how the implementation phase included a dimension of foresight as to the impact of mandate completion on the continuing work (or legacy) of the Tribunals within national jurisdictions. This in turn gave rise to identifying the need for a mechanism to carry out the Tribunals' essential, residual functions after closure. Thereafter, the article focuses on the process of deciding upon which qualities this mechanism-to-be should possess as it evolved over time into the form and substance of a Tribunal in its own right. The author devotes the final section of the article to describing the main features of the IRMCT, created by Security Council Resolution 1966 on 22 December 2010, in terms of its statutory developments compared to the ICTYand ICTR.

1. Introduction: Expected Limited Lifespan of the Ad Hoc Tribunals

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were both

[1] Senior Legal Officer, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia (ICTY). Views expressed herein are solely those of the author and not of the ICTY or the United Nations. The author thanks Robert Schaeffer for his helpful review of the draft submission of this article. [pittmanth@gmail.com]

created as ad hoc measures under Chapter VII of the UN Charter and with the unspoken idea of a finite lifespan.[2] It is unclear how long the ICTY and ICTR were supposed to last, as it was not entirely certain whether, once established, they would even succeed.[3] The duration of the Nuremberg and Tokyo tribunals were roughly one and two years' duration, respectively,[4] but the desire for something other than 'victor's justice' necessitated at minimum more procedural guarantees that would necessarily lengthen trials of the ICTY and ICTR.

Perhaps it is best to deduce that there was no pressing concern with the length of the mandates of theseTribunals, while their existence and developing success was beginning to earn for the world community the peace and security dividends sought by their establishment.[5]

By the new millennium, however, it became clear that these Tribunals could not last forever. On the one hand, the first permanent international criminal court had been established. On the other, the Tribunals themselves started to reflect upon their destiny. The first estimates of likely completion dates were being communicated by the Tribunals in the context of reporting on their activities. Due to the increased workload and the need for additional resources, the Tribunals started to set out the first tentative calendars for completion.[6]

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2 SC Res. 808 (1993); SC Res. 827 (1993), preamble, x 11(2); SC Res. 955 (1994), preamble, x 11(1).

3 P. Hazan, Justice in a Time ofWar: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia (College Station: Texas A & M University Press, 2004), at 43^63.

4 The International Military Tribunal (Nuremberg) convened 20 November 1945 and adjourned 1 October 1946. (This omits trials by the occupying powers in their respective zones under Control Council Law No. 10). The International Military Tribunal for the Far East (Tokyo) convened 29 April 1946 and adjourned 12 November 1948.

5 The role of the ICTY in the Dayton Agreement negotiations of November 1995 might serve as one example. See R. Holbrooke, To End aWar (New York: Random House, 1998), at 90, 190 and 233.

6 'In November 1999, the new President, the judges, the Registrar and the Chambers Legal Support Service began to consider ways to permit the Tribunal to accomplish its mission more effectively and to deal with its greatly increased workload. They concluded that the work of the Tribunal ::: , could go on until 2016 if no change were to be made. In April 2000, at an extraordinary plenary :::, they also considered several solutions, including holding some trials elsewhere, having recourse to single-judge Chambers and creating an additional Chamber. In the end, the judges advocated a more flexible two-tier solution which would accelerate pre-trial case management through increased utilization of senior legal officers from Chambers and increase the Tribunal's trial capacity through the setting up of a pool of ad litem judges. This system should allow all the accused to be tried without undue delay and theTribunal to accomplish its mission by about year 2007.' Seventh annual report of the ICTY, 2007A/55/273-S/2000/777 (2000).

Over time, developments in completion projections were typically expressed in terms of three milestones: the end of all prosecutorial investigations; the end of all first instance trials; and the date for complete closure, corresponding to conclusion of all appeals from trial judgments.[7] It might be a useful study at some point to track how each of these projections was quantified, and on what basis each was changed (usually by extension) over the course of time. Certainly now, the Tribunals are required to explain any changes to the milestones, even on a case-by-case basis, in their Completion Strategy reports to the Security Council mandated by Resolution 1534 (2004).

2. Completion Strategies of the Ad Hoc Tribunals: From Resolution 1329 to Resolution 1534

The first formal mention of the future closure of either tribunal was in a 12 May 2000 letter from the President of the ICTY, Judge Claude Jorda, to the UN Secretary-General Kofi Annan. The purpose of the letter was to request the establishment of a pool of ad litem judges in the ICTY and an increase in the number of judges in the common Appeals Chamber of the ICTY and ICTR, in order to 'expedite the conclusion of their work at the earliest possible date'.[8] This was followed shortly thereafter by a similar letter to the Secretary-General on 14 June 2000 from the President of the ICTR, Judge Navanethem Pillay.[9]

Less than 3 months later, on 5 December 2000, the Security Council issued its first resolution addressing the completion of the two ad hoc tribunals.[10] Noting with appreciation the efforts of the ICTY 'to allow competent organs of the United Nations to begin to form a relatively exact idea of the length of the mandate of the Tribunal', it requested the Secretary-General submit as soon as possible, a 'report containing

7 Eleventh annual report of the ICTY, A/59/215.S/2004/627 (2004), summary: 'The Registrar continued to facilitate the implementation of the Tribunal's strategy to accomplish its mandate by 2010, with the closing of investigations at the end of 2004, the closing of trials at the end of 2008 and of appeals at the end of 2010.'

8 A/55/382-S/2000/865 (2000), Annex I: Letter dated 12 May 2000 from the President of the ICTY (attached 'Current State of the International Tribunal for the Former Yugoslavia: future prospects and reforms proposals'), Annex II: Letter dated 14 June 2000, from the President of the ICTR.

9 Ibid.

10 SC Res. 1329 (2000).

an assessment and proposals regarding the date ending the temporal jurisdiction' of the ICTY.[11] With Resolution 1329 (2000), the Security Council began to focus on three areas toward mandate finality that would eventually emerge as the 'completion strategy' reform measures of both tribunals, emphasizing improvement of the Rules of Procedures and Evidence (i.e. the procedural 'speeding up' of trials); a preference for trial of civilian, military and paramilitary leaders rather than minor actors or so-called 'little fish';[12] and suspension of indictments to allow for national courts with concurrent jurisdiction to deal with particular cases.[13]

By 13 August 2001, Judge Jorda was able to inform the Security Council and General Assembly that 34 states had responded to the invitation of the Secretary-General for ICTY ad litem judge candidates by submitting a total of 64 candidates when only 54 were required, reaffirming 'the support of the international community for the completion of its mission'.[14] To hammer home the point, in his 27 November 2001 address to the UN General Assembly, Judge Jorda referred to completing the mission of the ICTY in various terms no less than eleven times.

[F]ulfilment of the International Tribunal's mission … bring the mission you conferred on us to the swiftest possible conclusion … without which it could not fulfil its mission … accomplishing our mission at the earliest opportunity … achieve the mission of the International Tribunal within the intended timeframe ::: bringing our mission to a swift close … finish our mission as rapidly as possible ::: legal rules available to them for fulfilling their mission … so that they may accomplish their mission ::: bring the end of our mission within sight … fulfilling the mission you conferred on us … .[15]

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11 Ibid., at preamble and x 6. The Report would be submitted in June 2002, infra note 20.

12 It bears repeating that '[t]alk of big fish and little fish implies that unless you are high on the scale of authority you are not worth going after, and that's an insult to the person whose family was blown away by a little fish.' P. Wald, 'Foreward: War Tales and War Trials', 106 Michigan Law Review (April 2008) 901, at 916, note 70, citing P. Ford, 'How to Prosecute a War Crime', Christian Science Monitor, 13 March 2000, at 6 (quoting Brenda Hollis, Prosecutor, Special Court for Sierra Leone, and former ICTY Prosecutor).

13 SC Res. 1329, supra note 9, preamble

14 Eighth annual report of the ICTY, A/56/352-S/2001/865 (2001), x 15.

15 Address by his Excellency, Judge Claude Jorda, President of the ICTY to the UN General Assembly, 26 November 2001, ICTY Press Release ('26 November 2001 ICTY President Address'), The Hague, 27 November 2001, available at http://www.icty.org/sid/7929 (visited 5 July 2011).

It was not until 23 April 2002, however, in an ICTY press release heralding the 'Completion Strategy' for the mandate of the Tribunal that the enduring phrase was coined.[16] The press release followed an extraordinary plenary session of the ICTY Judges to consider a preliminary report[17] submitted by the President, Prosecutor and Registrar on the judicial status of the Tribunal and the prospects for referring some of its cases to states of the former Yugoslavia for trial in domestic courts, one of the emerging reform measures aimed at concluding the mandate.[18]

The next significant development toward formation of a completion strategy was a 10 June 2002 letter from Judge Jorda to the Secretary-General, for the purpose of informing the Security Council of 'avenues of thought regarding the reforms to be undertaken for the implementation of a referral process'[19] - a process which would address the latter two of the three focus areas of the Security Council for the completion of the Tribunals' mandates.[20] An enclosure to the letter

16 Extraordinary Plenary Session of Tuesday 23 April 2002, ICTY Press Release ('23 April 2002 Extraordinary Plenary'), The Hague, 24 April 2002, available at http://www.icty.org/sid/8104 (visited 5 July 2011).

17 The author refers to the report as 'preliminary' since it was a stepping-stone in the process of preparing a 27-page report ultimately submitted to the Security Council, infra note 20.

18 According to the 23 April 2002 Extraordinary Plenary, it was believed that the report's proposals, coupled with the addition of ad litem Judges, 'should allow the Tribunal to complete its first instance proceedings in 2008, provided that unimpeded access is granted to the Office of the Prosecutor and to defence counsel for all their ongoing investigations, that all the current and future accused are arrested without delay, and that those in the same indictments are brought in at the same time'.

19 S/2002/678 (2002), Annex: Letter dated 10 June 2002 from the President of the ICTY, at 1.

20 The notion of a referral process was not a new one. An Expert Group appointed by the UN Secretary-General at the request of the General Assembly for the purpose of evaluating the efficient use of resources at the ad hoc tribunals (UN GA Res. 53/212 and 53/213, 18 December 1998), noted as early as 11 November 1999, that Rule 11bis of the ICTY Rules of Procedure and evidence (RPE) provided a 'potentially useful mechanism in dealing with … second-tier perpetrators as the Office of the Prosecutor concentrates on leadership cases', and in fact recommended that the ICTR adopt a similar provision. Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, S/2000/597, annex I, x 101. Current ad litem Judge Pedro R. David (ICTY) was a member of the Expert Group. Likewise, as early as 6 October 2000, the ICTY Prosecutor welcomed in a press release the notion of a division of labour between Tribunal and national prosecutors based upon the level of the perpetrator. PR/P.I.S./532-e, Statement by Carla del Ponte, Prosecutor of the International Criminal Tribunal for the formerYugoslavia, 6 October 2000.

contained a 27-page report prepared by the President, Prosecutor and Registrar of the ICTY, highlighting the potential for 'referral of certain cases to national courts', and it was in this long-awaited report that the 'Tribunal's completion strategy' as such was first formalized.[21] The Secretary-General's 17 June 2002 accompanying letter to the President of the Security Council summarized the measures believed necessary by the ICTY in order to be in 'position to achieve the objective of completing all trial activities at first instance by 2008'.21 These measures were to concentrate on the 'prosecution and trial of the highest-ranking political, military and paramilitary leaders'and to'transfer cases involving mid-level accused ::: to national courts for prosecution and trial', with the newly established State Court of Bosnia and Herzegovina deemed to have 'potential to be an appropriate forum to which it might refer cases for prosecution and trial'.[22] If the Security Council's endorsement were to be given, the ICTY was prepared to amend its Rules of Procedure and Evidence to facilitate referral of indicted cases.[23]

What followed was a formal statement by the President of the Security Council on 23 July 2002, endorsing the ICTY's 'broad strategy' for the transfer of certain cases to competent national jurisdictions to achieve its goal of completing all first instance trials by 2008.[24] Only a few days later, Judge Jorda in a 26 July 2002 address to the Security Council underscored the significance of acting expeditiously on the strategy: It is of primary importance that we carry out the two main components of our strategy … to prosecute as a priority before the International Tribunal, those presumed responsible for crimes which most seriously violate international public order and to give certain cases of lesser significance to the national courts. In fact, this is the only way we will be able to honour the commitments we made to you … to close the investigations around 2004 and finish the first instance trials around 2008.[25]

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21 S/2002/678, supra note 18, Annex Enclosure: Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, June 2002 ('June 2002 Report'), x 8.

22 17 June 2002 SG Letter, at 1^2.

23 Ibid., at 2. The amendment concerns Rule 11bis of the ICTY RPE. See text accompanying note 36, infra.

24 S/PRST/2002/21 (2002), Statement by the President of the Security Council, 23 July 2002.

25 26 November 2001 ICTY President Address, supra note 14.

All the while, the ICTR was pursuing its related completion strategy, and on 14 August 2002, the Security Council requested the Secretary-General to make practical arrangements for the election as soon as possible of 18 ad litem judges in order to enable the ICTR to 'expedite the conclusion of its work at the earliest possible date'. [26] Nearly a year later, on 28 July 2003, the Secretary-General wrote to the President of the Security Council requesting to split the positions of Prosecutor of the ICTYand ICTR, so that they could be occupied by different people:

As the two Tribunals move towards implementing their respective completion strategies, it [is] … essential, in the interests of efficiency and effectiveness, that each Tribunal have its own Prosecutor, who is able to devote his or her entire energies and attention to the organization, oversight, management and conduct of the outstanding investigations and prosecutions before that Tribunal.[27]

With ICTY and ICTR implementation forging ahead, the Security Council issued its first resolutions endorsing their 'completions strategies' as such. Resolution 1503 (2003) was issued on 28 August 2003, approximately 10 years after the ICTY's creation.[28] On 26 March 2004, with the tenth anniversary of the ICTR approaching, the Security Council issued Resolution 1534 (2004).[29] As to the ICTR, Resolution 1503 (2003) not only granted the Secretary-General's request that the ICTR have its own separate Prosecutor, it also urged the ICTR to 'formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions'.[30] For both Tribunals, it advanced the earlier focus

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26 SC Res. 1431 (2002).

27 S/2003/766 (2003), Letter dated 28 July 2003 from the Secretary-General addressed to the President of the Security Council. At the time, Art. 15(3) ICTRSt. provided that the Prosecutor of the ICTY serve also as Prosecutor of the ICTR. Although 'efficiency and effectiveness' were the formal rationale for separate Prosecutors, the Secretary-General's request followed a period of highly contentious disagreement between Madame Prosecutor Carla del Ponte and Rwandan President Paul Kagame concerning whether to investigate allegations of criminal conduct by the Rwandan Patriotic Front. C. del Ponte with C. Sudetic, Madame Prosecutor ^ Confrontations with Humanity'sWorst Criminals and the Culture of Impunity ^ a Memoir (New York: Other Press, 2009), at 223-241.

28 SC Res. 1503 (2003).

29 SC Res. 1534 (2004).

30 SC Res. 1503, supra note 28, preamble and x 8.

areas of Resolution 1329 (2000)[31] beyond the reform measures stage and into concrete calendar terms of 'completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010'; and it was primarily to these self-imposed time estimates that the Security Council referred in Resolution 1503 (2003) as being the 'ICTY Completion Strategy', the 'ICTR Completion Strategy', and jointly, the 'Completion Strategies'.[32] Effectively, the definition evolved over time from a form of describing the means to a clearer identification of the ends. While Resolution 1503 called for progress on several other fronts, including state cooperation in national jurisdiction capacity building, development and improvement of outreach programmes, and apprehension of at-large indictees, [33] it's most immediate 'completion strategy' impact may have resulted from its call on the donor community to support the creation of a war crimes chamber within the State Court of Bosnia and Herzegovina which might receive ICTY cases of lower- or intermediate-rank accused by means of referral.[34] Following Resolution 1534 - which served largely to buttress Resolution 1503[35] - the ICTYamended Rule 11bis of its Rules of Procedure and Evidence to permit referral of those cases involving accused persons who were the subject of a confirmed indictment and considered appropriate for transfer to national jurisdictions in terms of the gravity of the crimes charged and the level of responsibility of the accused.[36]

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31 See text accompanying notes 9^12, supra.

32 SC Res. 1503, supra note 28, preamble and x 7.

33 Ibid., xx 1^4.

34 Ibid., x 5. The call to create this war crimes chamber must be read together with the Preamble nexus between the ICTY Completion Strategy and its concentration on prosecution and trial of 'the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions'.

35 SC Res. 1534, supra note 29, xx 4 and 5 pointedly called on each Tribunal to 'concentrate on the most senior leaders suspected of being most responsible for crimes' and to determine which cases should be 'transferred to competent national jurisdictions'. The President of the Security Council would later state that Resolution 1534 'emphasized the importance of fully implementing the completion strategies'. S/PRST/2008/47 (2008), infra note 43.

36 The 'Referral Bench' assigned under the amended Rule 11bis looked not only to the gravity (or seriousness) of the crimes charged in the indictment and the level of responsibility of the accused, but also to whether the authorities of the state concerned were able to ensure a fair trial and not impose the death penalty.

This referral process resulted in the transfer of eight cases involving 13 accused to national jurisdictions between 2005 and 2007, 10 accused of whom were ultimately tried in the War Crimes Chamber in Bosnia and Herzegovina.[37]

Resolution 1534 (2004) also created an important reporting mechanism by requesting assessments of each tribunal every 6 months 'setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the Completion Strategy and what measures remain to be taken' by the President and Prosecutor.[38]

The unique contributions of the Office of the Prosecutor (OTP) should not be understated with regard to the many developments and processes highlighted above. Well before adoption of Resolution 1503 (2003), the OTP partnered itself with national prosecutors, particularly in Bosnia and Herzegovina, where the majority of crimes under investigation and indictment had been committed. In a role intended primarily to aid in freedom of movement within the country, the OTP was tasked under the 'Rules of the Road Agreement' with reviewing whether arrest by national authorities was supported by evidence meeting an international prima facie standard, and thereby vetting national war crimes prosecutions.[39] Following Resolution 1503 (2003), this responsibility was transferred to national prosecutors as the OTP's focus shifted to 'the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction'.[40] However, the Rule 11bis pro-

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37 For comprehensive coverage of the ICTY referral process under Rule 11bis, see T. Blumenstock and W. Pittman, 'The Transfer of Cases Before the International Criminal Tribunal for the Former Yugoslavia to Competent National Jurisdiction', 2 Humanitæres Völkerrecht - Informationsschriften (Journal of International Law of Peace and Armed Conflict) (2008) 106-115.

38 SC Res. 1534, supra note 29, x 6.

39 Rome Agreement, Agreed Measures, 18 February 1996, available at http://www.ohr.int/ohrdept/hr-rol/thedept/war-crime-tr/default.asp?content_id6093 (visited 5 July 2011). Art. 5, 'Cooperation on War Crimes and Respect for Human Rights', contained: 'Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action'.

40 SC Res. 1503, supra note 28, preamble.

cess brought about a new OTP requirement of monitoring the national court proceedings of the referred intermediate- and lower rank accused, which the Organization for Security and Cooperation in Europe (OSCE) agreed to fulfil on its behalf.[41] Additionally, the OTP began the process of transferring collections of materials related to particular un-indicted crimes (distinguished from Rules 11bis cases by the moniker 'Category 2' cases) to national prosecutors, while providing a range of support and assistance not the least of which is through responding to specific Requests for Assistance by national courts and prosecutors seeking investigative material and information.[42]

3. From Completion to Continuation: The Need to Establish Some Sort of 'Residual Mechanism'

The intervening time between Resolution 1534 on 26 March 2004 and the Secretary-General's Report of 21 May 2009 (responding to the Security Council's Presidential Statement of 19 December 2008 on the need to establish an ad hoc residual mechanism to carry out essential functions after closure of the Tribunals[43]) was a period marked by unprecedented tribunal activity.[44] It was also a period characterized by a subtle shift in the approach of the tribunals from implementation of a completion strategy per se to what ICTY President and Judge Fausto Pocar termed a 'continuation strategy', with greater focus on capacity building and partnership with the countries of the former Yugoslavia (in order to bring long-term peace), as evidenced in his 4 June 2008 address to the Security Council.

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41 Decision No. 673, Cooperation Between the Organization for Security and Cooperation in Europe and the International Criminal Tribunal for the former Yugoslavia, 19 May 2005, at http://www.osce.org/pc/14887 (visited 5 July 2011).

42 See generally D. Tolbert and A. Kontic. 'The International Criminal Tribunal For The Former Yugoslavia: Transitional Justice, The Transfer of Cases to National Courts, and Lessons for the ICC', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009) 135 - 162; and D. Orenlichter, That Someone Guilty Be Punished - The Impact of the ICTY in Bosnia, Open Society Justice Initiative and International Center for Transitional Justice, 2010, available at http://ictj.org/publication/someone-guilty-be-punished-impact-icty-bosnia (visited 5 July 2011), at 108-126.

43 S/PRST/2008/47 (2008), 19 December 2008 Statement by the President of the Security Council ('19 December 2008 SC President Statement').

44 By the time of its Sixteenth Annual Report (A/64/205^S/2009/394) in 2009, x 3, for example, the ICTY's three Trial Chambers were functioning at full capacity, running up to eight trials simultaneously in its three courtrooms.

As I have often recalled, the Tribunal was never expected to try all persons responsible for the atrocities committed during the conflict, and there are in fact thousands of war crimes cases pending before the courts of Bosnia and Herzegovina alone. In this perspective, one should in fact view the so-called Completion Strategy as a strategy devised to allow the continuation by domestic actors of those activities that were initiated by the ICTY, as mandated by the Security Council.[45]

Judge Pocar's point that in order for the rule of law to be embedded in the post-conflict societies of the former Yugoslavia, the national courts must continue the work began by the ICTY was to steer emphasis away from the completion strategy as the end in itself, and toward the residual mechanism as one vehicle for facilitating assistance to the national courts after the ad hoc tribunals had shut their doors.[46]

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[45] S/PV.5904 (2008), available at http://www.securitycouncilreport.org/atf/cf/%7B65BF-CF9B-6D27-4E9C-8CD3-CF6E4FF96FF9% 7D/ICTR%20S%20PV%205904.pdf. (visited 5 July 2011).

[46] Already the previous year, both the ICTYand ICTR included for the first time in their completion strategy reports some mention of a 'residual mechanism' with respect to their legacies. See S/2007/283 (2007), Annex I, Assessment and Report of Judge Fausto Pocar, President of the ICTY ('15 May 2007 Completion Strategy Report'), xx 34^35; S/2007/676 (2007), Letter from the President of the ICTR with Enclosure: Completion Strategy Report, esp. x 18. Since 2004 and 2005, when the 'legacy' of the Tribunals was first introduced as a consideration into annual reports (A/59/215.S/2004/627, ICTY Eleventh Annual Report, x 389: 'The (Administrative Records Management) Unit also supports the Registrar's legacy initiative, researching a variety of issues that will continue beyond the Tribunal's direct mandate') and completion strategy reports (S/2005/781, (2005), Annex I, ICTY 30 November 2005 Completion Strategy Report, x 50: 'It is crucial that the message and legacy of the Tribunal not be lost by a closing of its doors without all remaining fugitives being tried.'), it was understood to mean both the 'message'of the tribunal (how it would be remembered with respect to ending impunity for serious violations of international humanitarian law) and those 'issues that will continuebeyond the Tribunal's direct mandate' (15 May 2007 Completion Strategy Report, ibid., x 34. The 15 May 2007 Completion Strategy Report, under the heading 'Legacy of the International Tribunal', provides: 'For over a year now, the International Tribunal has focused attention on its legacy and most crucially on mechanisms that will need to remain in place to dispose of residual issues once the International Tribunal completes all trials and appeals on its docket'. It also refers to a Legacy Report provided to the UN Office of the Legal Adviser in December 2005 and a follow-up report in April 2007), the latter being the forerunner to the residual mechanism.
Additionally, there was growing academic and NGO interest in the topics of the legacy and residual functions of the Tribunals. See e.g., L. Johnson, 'Closing an International Criminal TribunalWhile Maintaining International Human Rights Standards and Excluding Impunity', 99 American Journal of International Law (2005) 158^174; D. Tolbert, 'The Ends of International Justice: Closing Tribunals', in 2007:Year of Assessment, Issues and Prospects at the Closing of the First International Tribunals (Forward), International Justice Tribune Series No. 2; F. Pocar, 'Completion or

On 19 December 2008, the President of the Security Council issued a statement marking the body's first formal pronouncement of the need for a residual mechanism:

The Security Council acknowledges the need to establish an ad hoc mechanism to carry out a number of essential functions of the Tribunals, including the trial of high-level fugitives, after the closure of the Tribunals. In view of the substantially reduced nature of these residual functions, this mechanism should be a small, temporary, and efficient structure. Its functions and size will diminish over time.[47]

The immediate context appeared to be a pragmatic one ç 2008 was ending without the completion of all first instance trials:

The Security Council takes note of the presentations made on 12 December 2008 by the Presidents and Prosecutors of the Tribunals … on the implementation of the completion strategies. Noting with concern that the deadline for completion of trial activities at first instance has not been met and that the Tribunals have indicated that their work is not likely to end in 2010, the Security Council emphasizes that trials must be conducted by the Tribunals as quickly and efficiently as possible and expresses its determination to support their efforts toward the completion of their work at the earliest date.[48]

This is not to say, however, that the Security Council's acknowledge-

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Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY', 6 Journal of International Criminal Justice (2008) 655^665; G. Oosthuizen and R. Schaeffer, 'Complete justice: Residual functions and potential residual mechanisms of the ICTY, ICTR and SCSL', 3 Hague Justice Journal (2008) 48^67. In reference to an Expert Group meeting he attended along with other ICTY officials, Judge Pocar identified the two key concerns of these groups: '[t]he structure of judicial mechanisms to remain in place
following the closing of the international courts and the administration of archives. The discussions on residual judicial mechanisms focused on the necessary functions that must remain in place, including: trials of fugitives; supervision and commutation of sentences of convicted persons; review of cases; witness protection and monitoring of referred cases. The debate on the archives of the International Tribunal focused on their accessibility to other courts and the general public, particularly in the region of the former Yugoslavia.' See 15 May 2007 Completion Strategy Report, ibid., x 35 (the Expert Group meeting, held in February 2007, was organized by the Faculty of Law at the University of Western Ontario and the International
Center for Transitional Justice and hosted by the Canadian Government).

47 19 December 2008 SC President Statement, supra note 43.

48 Ibid.

ment of the need for a residual mechanism was linked to the Tribunals' 12 December 2008 presentations on the implementation of the completion strategies. Indeed, the Security Council expressed 'appreciation to its Informal Working Group on International Tribunals for its work to date on the establishment of this mechanism, including through a thorough examination of which functions of the Tribunals are necessary for the administration of justice after their closure'.[49] Nonetheless, the now-public revelation that the Tribunals' work would be likely extending beyond 2010 made timely the Security Council's pronouncement of its new development, the purpose of which was to carry out a number of essential functions of the Tribunals *after their closure*.

The 19 December 2008 Presidential Statement provided further insight into the direction this residual mechanism was heading. Although not expressly termed a 'tribunal', the mechanism would administer justice and conduct judicial proceedings to include the trial of high-level fugitives.[50] Its authority would derive from a Security Council Resolution and from statutes and rules of procedure and evidence based on those existing for the ICTY and the ICTR.[51] It would be ad hoc in nature with functions and size that would diminish over time and its structure was projected to be small, temporary and efficient. Looking ahead, the Informal Working Group in International Tribunals was to continue its efforts with a view to drafting as soon as possible appropriate instruments needed for the mechanism to perform the residual functions of the Tribunals. To facilitate these efforts, the Secretary-General was asked to present a report on the administrative and budgetary aspects of the options for possible locations of the Tribunals' archives and the seat of the residual mechanisms. (At this time it was yet to be decided whether there would be more than one mechanism).

On 31 December 2008, a 19 December 2008 letter of the Chair of the Working Group on International Tribunals to the President of the Se-

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49 Ibid. Details on the progress of the InformalWorking Group on International Tribunals would be revealed in a letter from its Chair to the President of the Security Council, infra note 52.

50 Ibid.

51 Ibid. It was recognized that the mechanism's statute and rules of procedure and evidence would require appropriate modification, and that the differing needs and circumstances of the two Tribunals might require accommodation.

curity Council was distributed,[52] providing insight into its organization and activities, principally with respect to establishment of the residual mechanism. As discussed further below, this letter will likely have value later in interpreting the Mechanism Statute.[53]

In compliance with the Security Council request contained in the 19 December 2008 Presidential Statement, [54] the Secretary-General issued a 60-page report on 21May 2009 covering administrative and budgetary aspects of the options for possible locations for the archives of the ICTYand ICTR and the seat of the residual mechanism.[55] It would be this document upon which the Security Council would foremost rely in later issuing its resolution establishing the International Residual Mechanism for Criminal Tribunals.[56]

In providing information regarding the location options for the archives and seat of the residual mechanism, it was necessary to delve deep into the many substantive issues with respect to establishment of a residual mechanism tribunal. While discussion continued on such issues in the Security Council InformalWorking Group on the International Tribunals - the work of whom the Report was aimed at furthering[57] - there remained 'many key areas where further decisions [we]re needed'.[58] Although the Report sought to provide as much information as possible, the Secretary-General warned that '[u]ntil further decisions

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52 S/2008/849 (2008), Letter dated 19 December 2008 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council.

53 See text accompanying infra note 63.

54 19 December 2008 SC President Statement, supra note 43.

55 S/2009/258 (2009), 21May 2009, Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the FormerYugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals ('21 May 2009 SG Report'). The report was to include the availability of suitable premises for the conduct of judicial proceedings by the mechanism(s), with particular emphasis on locations where the United Nations has an existing presence.

56 SC Res. 1966 (2010), infra note 66.

57 21 May 2009 SG Report, supra note 55, x 5.

58 Ibid., at x 2. It was further clarified in x 6 that the Working Group is 'an informal body, which consists of the legal advisers of the members of the Council, is not itself a decision-making entity, but conducts substantive consideration of the issues, and will ultimately make recommendations to the Council', and in x 7 that the working group was 'informed by a number of non-papers on the potential residual functions produced by the Chairman, with the assistance of the Office of Legal Affairs, and with input by the Tribunals'.

are taken, any estimates of administrative and budgetary implications are necessarily speculative and preliminary and cannot be validated'.[59] To assist in the decision-making process, the Report identified key areas requiring Security Council decisions, particularly on which potential residual functions were to be transferred to the residual mechanism trial of fugitives; trial of contempt cases; protection of witnesses; review of judgements; referral of cases to national jurisdictions; supervision of enforcement of sentences; assistance to national authorities and management of the archives.[60] It then provided illustrative examples of a possible mechanism or mechanisms to arrive at 'very tentative rough estimates' of the staffing requirements and costs, as well as information regarding the feasibility and costs of potential locations for the mechanism and/or archives.[61]

Contextually, agreement among theWorking Group members was limited to a residual mechanism with a trial capacity based on a roster of judges; that it be small, and efficient, and made up of a small staff reflective of reduced functions following completion of the work of the Tribunals; and to a lesser extent, that its statute be based on amended ICTY and ICTR statutes.[62] The key issues to be decided on the basis of the Report's discussion were

which of the potential residual functions should be transferred to the residual mechanism(s); whether there should be one mechanism or two, and the related question of its (their) location;

whether the resolution should determine a specific date on which the mechanism(s) will commence functioning, or whether that date should be determined later in the light of the progress of the Tribunals towards completion;

whether the jurisdiction of the mechanism(s) should extend to all fugitive indictees at the date of closure of the Tribunals, or only to a limited list of such indictees, and, if the latter, how to ensure that there is no impunity for the remaining indictees;

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59 Ibid., at x 2.

60 Ibid., at xx 13-59.

61 Ibid., at x 3.

62 Ibid., at x 7.

whether the mechanism(s) should have authority to refer further cases to national jurisdictions, and whether it (they) should have authority to revoke such referrals, or any referrals previously made by the Tribunals; what the structure of the mechanism(s) should be, including whether the judges on the roster(s) of the mechanism(s) should be chosen from the permanent and ad litem judges of the Tribunals, and whether the roster(s) should be supplemented by election and/or appointment by the Secretary-General; and

where the archives should be located, including whether they should be co-located with the mechanism(s).[63]

Without addressing each of the above issues here, it can probably best be said that the report's value in the future, much like that of the 19 December 2008 letter of the Chair of theWorking Group'which set out the main elements of the Working Group's discussions and conclusions at that stage',[64] will be as travaux preparatoires for the Mechanism's Statute. For example (ahead of the next section), Article 1(1) of the Statute provides, inter alia, that the Mechanism shall continue the 'rights and obligations' of the ICTY and the ICTR. Only by way of the report, paragraph 100, do we understand from where this language was derived:

There has been discussion in the Working Group of the residual mechanism(s) continuing the Tribunals' 'rights and obligations'. Such reference in the eventual Security Council resolution establishing the mechanism(s) would assist in clarifying that the mechanism(s) would take on the Tribunals' rights and obligations under bilateral agreements with States, and contractual and other such rights and obligations, but would not be sufficient to ensure the continuity of the jurisdiction of the Tribunals. It would be advisable for the Council to make this continuity of jurisdiction between the Tribunals and the residual mechanism(s) explicit in its eventual resolution. Basing the statutes of the mechanism(s) on amended ICTYand ICTR statutes may also contribute to making clear this continuity of jurisdiction.[65]

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63 Ibid., at x 8.

64 Ibid., at x 6; S/2008/849, supra note 52.

65 Ibid., at x 100 (footnote omitted).

4. Main Features of the International Residual Mechanism for Criminal Tribunals

All of the previous efforts culminated in the issuance by the Security Council on 22 December 2010 of Resolution 1966,[66] not only establishing the International Residual Mechanism for Criminal Tribunals ('IRMCT' or 'Mechanism'[67]) and its two branches (one for the ICTY; one for the ICTR), but also adopting its statute and making it (and the Statutes of the ICTY and ICTR) subject to specific transitional arrangements[68] in detailed annexes.

Several key dates are set forth in the Resolution text. The Secretary-General is to submit draft Rules of Procedure and Evidence and initiate the procedures for selecting the roster of judges of the Mechanism no later than 30 June 2011.[69] The commencement dates of the two branches are 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY).[70] The Mechanism is to operate for an initial period of four years from the first commencement date, and thereafter continue to operate for subsequent periods of two years following review, unless the Security Council decides otherwise.[71] The ICTY and

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66 SC Res. 1966 (2010), 22 December 2010.

67 The International Residual Mechanism for Criminal Tribunals is referred to by its acronym (IRMCT) in the title of the Annex, but as the 'Mechanism' within the body of the Statute and hereinafter in the text.

68 The 'Transitional Arrangements' in Annex 2 of SC Res. 1966 are not covered herein, but themselves comprise seven Articles covering: Trial Proceedings; Appeals Proceedings; Review Proceedings; Contempt of Court and False Testimony; Protection of Victims and Witnesses; Coordinated Transition of other Functions and Transitional Arrangements for the President, Judges, Prosecutor, Registrar and Staff.

69 SC Res. 1966, supra note 66, xx 5 and 13. The schedule for adoption of the RPE is as follows: 'In cooperation with the Office of Legal Affairs, the International Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda have commenced a massive Project to prepare draft rules of procedure and evidence to be adopted by the Residual Mechanism.
Stage 1 of this project has commenced and will conclude with the creation of a single, first draft of the rules. Stage 2 will entail the Judges, Prosecutions, Registries and Associations of Defence Council [sic] of both Tribunals commenting upon the draft and these comments being harmonized into a second draft of the rules. Stage 3 will involve the Presidents of the Tribunals agreeing upon the draft and then remitting it to the Office of Legal Affairs'. S/2011/316 (2011), Annex I: ICTY 12 May 2011 Completion Strategy Report, x 99.

70 SC Res. 1966, supra note 66, at x 1.

71 Ibid., at x 7.

the ICTR are to take all possible measures to expeditiously complete all their remaining work no later than 31 December 2014.[72]

Annex 1 to Resolution 1966 contains the 'Statute of the International Residual Mechanism for Criminal Tribunals (IRMCT)',[73] consisting of a Preamble and 32 Articles, which largely tracks the Statutes of the ICTY and ICTR in terms of order and substance. What follows is a description of the main features of the Mechanism Statute by means of comparing its developments to the long-standing framework common to the Statutes of the ICTYand ICTR.

The Preamble provides that the Mechanism, like the ICTYand ICTR, is established by the Security Council acting under Chapter VII of the UN Charter. Its purpose is to 'carry out residual functions' of the ICTYand ICTR.[74] The competence of the Mechanism is neatly condensed into Article 1(1) as continuing unaltered 'the material, territorial, temporal and personal jurisdiction of the ICTY and the ICTR'[75] as set out in Articles 1^8 of the ICTY Statute[76] and Articles 1^7 of the ICTR Statute,[77] which includes the core crimes and modes of responsibility applicable to each tribunal. Article 1(2) draws upon Security Council Resolution 1503 (2003) in empowering the Mechanism to prosecute 'persons indicted by the ICTYor the ICTR who are among the most senior leaders suspected of being most responsible' for the crimes covered in paragraph 1(1), considering the gravity of the crimes charged and the level

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72 Ibid., at x 3.

73 Ibid., at Annexe 1: Statute of the International Residual Mechanism for Criminal Tribunals (hereinafter 'IRMCTSt.' in the notes and as 'Mechanism Statute' in the text) and Annex 2: Transitional Arrangements

74 Preamble and Art. 2 IRMCTSt.: Functions of the Mechanism ç 'The Mechanism shall continue the functions of the ICTYand of the ICTR, as set out in the present Statute ('residual functions'), during the period of its operation'.

75 Art. 1(1) IRMCTSt.

76 Arts 1^8 ICTYSt. These Arts cover Art. 1: Competence of the International Tribunal; Art. 2: Grave breaches of the Geneva Conventions of 1949; Art. 3: Violations of the laws or customs of war; Art. 4: Genocide; Art. 5: Crimes against humanity; Art. 6: Personal jurisdiction; Art. 7: Individual criminal responsibility and Art. 8: Territorial and temporal jurisdiction.

77 Arts 1^7 ICTRSt. These Arts cover Art. 1: Competence of the International Tribunal for Rwanda; Art. 2: Genocide; Art. 3: Crimes against Humanity; Art. 4: Violations of Art. 3 Common to the Geneva Conventions and of Additional Protocol II; Art. 5: Personal Jurisdiction; Art. 6: Individual Criminal Responsibility and Art. 7: Territorial and Temporal Jurisdiction.

of responsibility of the accused.[78] At the same time, Article 1(3) grants the Mechanism authority to prosecute persons indicted by the ICTY or the ICTR who are not among the most senior leaders, provided that it may do so only after exhausting all reasonable efforts to refer the case to national authorities for prosecution under Article 6 below.

A wholly new development from the ad hoc tribunal statutes is the power to prosecute the crimes of contempt and false testimony under Articles 1(4)(a) and (b), respectively. The crimes cover not only knowing and wilful interference with the administration of justice or false testimony before the Mechanism itself, but also the Tribunals. Presently, these crimes are investigated and prosecuted at the ICTY and ICTR on the basis on Rules of Procedure and Evidence.[79] Before proceeding to try such persons, however, the Mechanism must first consider referring the case to state authorities, taking into account the interests of justice and expediency.[80]

To ensure that jurisdictional competence is not widened by prosecutorial/judicial fiat, Article 1(5) provides that the Mechanism shall not have the power to issue any new indictments against persons other than those covered by Article 1.

Article 3 provides that the Mechanism shall have two structural branches, one for the ICTY with its seat in The Hague and one for the ICTR with its seat in Arusha.[81] The organization of the Mechanism consists of a Prosecutor and Registry common to both branches, with the Chambers organ comprised of a common Appeals Chamber and a single Trial Chamber for each branch.[82]

The Mechanism and national courts have concurrent jurisdiction to prosecute persons covered by Article 1 of the Statute,[83] with the Mech-

78 SC Res. 1503, supra note 28.

79 Art. 77 ICTYSt.; Art. 77 ICTRSt.

80 In accordance with Art. 6 IRMCTSt.

81 Art. 31 ICTYSt., dictates its seat as being in The Hague, whereas SC Res. 977 (1995) designates Arusha as the seat of the ICTR.

82 Art. 4 IRMCTSt. Compare Art. 4(a) to the three trial chambers authorized respectively under Art. 11(a) ICTYSt. and Art. 10(a) ICTRSt.

83 Art. 5(1) IRMCTSt. Compare Art. 9 ICTYSt. and Art. 10 ICTRSt.

anism having primacy over national courts.[84] However, the discretion of the Mechanism to formally request national courts to defer to its competence at any stage of the procedure is explicitly limited to cases involving persons under Article 1(2) who are among the 'most senior leaders suspected of being most responsible' for crimes within the jurisdiction of the Mechanism.[85]

Article 6 embodies what is Rule 11bis under the Rules and Procedure of Evidence at the ICTYand ICTR into the Statute of the Mechanism, providing a basis for referral of certain cases to national jurisdictions.[86] The Mechanism is empowered to refer cases involving persons indicted by the ICTY or the ICTR who are not among the most senior leaders under Article 1(3) and indeed is required to 'undertake every effort' to do so ç as well as to refer cases involving persons charged with the crimes of contempt and false testimony under Articles 1(4).[87] The Mechanism's referral process, set forth in Article 6(2)^(6), is largely consistent with that found in Rule 11bis(A), (C), (B), (D)(4) and (F), respectively, of the ICTY Statute. For example, in both Article 6(3) of the Statute of IRMCT and Rule 11bis(C) of the ICTY Rules of Procedure and Evidence, the trial chamber in determining whether to refer a specific case, 'shall, consistent with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused'.[88] One new development, found in Article 6(5), is the abandonment of discretionary monitoring of cases referred to national jurisdictions in favour of a mandatory scheme, which relies upon the assistance of international and regional organizations and bodies.

The legal principle of non bis in idem applies in the Mechanism Statute under Article 7, just as it does in the ICTY Statute Article 10 and ICTR Statute Article 9 with respect to its application in cases of trial before a national court following trial by the ICTY, the ICTR or

84 Art. 5(2) IRMCTSt.

85 Provided that it is also in accordance with the IRMCTSt. 'and the Rules of Procedure and Evidence of the Mechanism': Art. 5(2) IRMCTSt.

86 Supra text accompanying notes 36 and 37.

87 Art. 6(1) IRMCTSt.

88 Although SC Res. 1534 addressed both the ICTYand ICTR, Rule 11bis under the ICTR RPE was not amended to cite the Resolution, and in other respects is an abbreviated version of that contained in the ICTY RPE.

the Mechanism,[89] or in cases tried by the Mechanism following trial before a national court.[90] Articles 8^12 of the Mechanism Statute address the roster, qualification and election of Judges, the appointment of a President, and the assignment of Judges and composition of the Chambers. Article 8 provides that the Mechanism shall have a roster of 25 independent judges, not more than two of whom may be nationals of the same state.[91] This is a departure from the ICTYand ICTR statutes in three ways: (1) the roster system of judges who function on a per diem basis[92] vis-a'-vis the appointment of permanent and ad litem judges;[93] (2) the specific number of judges (25 judges as opposed to 16 permanent judges supplemented by either 9 or 12 ad litem judges[94]) and (3) the increase from one to two in the number of judges who may be nationals of a given state.[95] Apart from the President, who shall be present full-time at either seat of the branches of the Mechanism,[96] the remaining judges function only at the request of the President and to the extent possible, may do so remotely.[97]

In determining qualifications of judges, '[p]articular account shall be taken of experience as judges of the ICTY or the ICTR'.[98] The judges of the Mechanism are elected by the UN General Assembly from a list submitted by the Security Council, which is formed upon receipt of nominees forwarded by states at the invitation of the Secretary-General.[99] The term of appointment is four years and judges are eligible for reappointment by the Secretary-General after consultation with the

89 Art. 7(1) IRMCTSt.

90 Art. 7(2) and (3) IRMCTSt.

91 Art. 8(1) IRMCTSt.

92 Art. 8(4) IRMCTSt. provides that the judges of the Mechanism receive remuneration for each day on which they exercise their functions, and not simply for being on the roster.

93 Arts 12(1) and 11(1) of the ICTYand ICTR Statutes, respectively.

94 Art.12(1) ICTYSt. permits a maximum of 12 ad litem judges at any one time. Art.11(1) ICTRSt. permits only nine.

95 Arts 12(1) and 11(1) of the ICTYand ICTR Statutes, respectively. See also Art. 10(d) IRMCTSt.

96 Art. 11 IRMCTSt.

97 Art. 8(3) IRMCTSt.

98 Art. 9(1) IRMCTSt. Additionally, Art. 10(2) expresses a similar preference for persons with experience as judges of the ICTY and ICTR in the context of the Secretary-General's invitation for judicial nominees.

99 Art. 10(1) IRMCTSt.

Presidents of the Security Council and of the General Assembly.[100] In a departure from the ICTY and ICTR Statutes, the President of the Mechanism is appointed by the Secretary-General rather than elected by the (permanent) judges from among their number.[101]

Article 12 of the Mechanism Statute introduces some new developments in comparison to the assignment of judges and composition of Chambers at the ICTY and ICTR. First is the use of what the Mechanism Statute refers to as a 'Single Judge'[102] to deal with all judicial matters apart from the trial or referral consideration of a case brought under Article 1(2) or 1(3) of the Statute.[103] This means that a lone judge, rather than a Chamber of three, will try all cases involving crimes other than the core crimes of war crimes, genocide and crimes against humanity; in other words, all cases involving contempt and false testimony.[104] Further, in the event of an appeal against a decision by a Single Judge, the Appeals Chamber shall be composed of three, rather than five, judges.[105]

The article requiring adoption of Rules of Procedure and Evidence by the judges of the Mechanism contains three new provisions over the statutes of the ICTYand ICTR.[106] First, it permits Amendments of the Rules to be decided remotely by the judges of the Mechanism by written procedure, as opposed to being decided in a plenary meeting, without regard to unanimity.[107] Secondly, the Rules and any amend-

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100 Art. 10(3) IRMCTSt. Comparatively, see Arts 13bis/13ter and 12bis/12ter of the ICTYand ICTR Statutes, respectively.

101 Art. 11(1) IRMCTSt.; Arts 14(1) and 13(1) of the ICTYand ICTR Statutes, respectively.

102 On a humorous note, 'Single' refers to the solitary nature of the judicial function to be performed, and not to the marital status of the judge concerned.

103 Art. 12(1) IRMCTSt.

104 Art. 12(1) IRMCTSt., which explicitly includes 'trials pursuant to para. 4 of Article 1 of this Statute'as being within the circumstances under which a Single Judge would function.

105 Art. 12(3) IRMCTSt. By comparison, Arts 12(3) and 11(3) of the ICTY and ICTR Statutes, respectively, provide that the Appeals Chamber 'shall, for each appeal, be composed of five of its members'.

106 Art. 13 IRMCTSt. All three statutes share a common requirement that RPE are to govern 'the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters'. Compare Art. 13(1) IRMCTSt. with Arts 15 and 14 ICTYand ICTR statutes, respectively.

107 Art. 13(2) IRMCTSt. Contrast with Rule 6(A) and (B) of the ICTY RPE, which requires a plenary meeting of the Judges to amend the Rules unless unanimously approved by the permanent Judges

ments thereto take effect upon adoption by the judges of the Mechanism unless the Security Council decides otherwise, an exception previously unexpressed in the Statutes or Rules of Procedure and Evidence of the ICTY or ICTR.[108] Thirdly, the Rules must be consistent with the Statute, a likewise silent condition in the Statutes or Rules of the ICTY and ICTR.[109]

Articles 14 and 15 of the Mechanism Statute concern the Prosecutor and Registry organs and followArticles 16 and 17 of the ICTY Statute and Articles 15 and 16 of the ICTR Statute with few changes. We have already seen that the Mechanism consists of a Prosecutor and Registry common to both branches. The Prosecutor and Registrar are to be present at either seat of the branches of the Mechanism as necessary to exercise his or her functions, and each organ is additionally staffed by an officer in charge at the seat of each branch of the Mechanism and such other qualified staff as may be required.[110] The Prosecutor and Registry are to retain a small number of staff commensurate with the reduced functions of the Mechanism, and to maintain a roster of qualified potential staff to enable it to recruit rapidly as may be required to perform its functions. Similar to judicial nominees, a preference exists for persons with experience at the ICTYand ICTR.[111]

Article 16 grants the Prosecutor power to conduct investigations against persons covered byArticle 1 of the Mechanism Statute; however, it is expressly provided that the Prosecutor has no power to prepare new indictments against persons other than those covered by Article 1.[112] The corollary of this latter constraint appears to say that the Prosecutor may prepare new indictments against previous indictees of the ICTY and ICTR - presumably only those still awaiting trial - but against no one else save those involving contempt or false testimony.[113]

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108 Art. 13(3) IRMCTSt.; Arts 15 and 14 of ICTYand ICTR statutes, respectively; Rules 1 and 6(D) of the ICTY RPE and Rules 1 and 6(C) of the ICTR RPE.

109 Art. 13(4) IRMCTSt.

110 Arts14(3) and15(2) IRMCTSt.

111 Arts 14(5) and 15(4) IRMCTSt.

112 Art. 16(1) IRMCTSt.

113 Art. 1(2)^(4) IRMCTSt., See also Art. 1(5): 'The Mechanism shall not have the power to issue any new indictments against persons other than those covered by this Article.'

Articles 17-23, which address review of the indictment; commencement and conduct of trial proceedings; rights of the accused; protection of victims and witnesses; judgements; penalties and appellate proceedings, remain largely the same as Articles 19^25 of the ICTY Statute and Articles 18^24 of the ICTR Statute except, for example, changes due to substitution of 'Mechanism' for the tribunal concerned or reference to the function of the Single Judge.[114] However, Article 22, concerning penalties, sets forth a term of imprisonment not exceeding seven years, or a fine to be determined in the Rules of Procedures and Evidence, or both, for conviction of the crimes of contempt or false testimony.[115]

Articles 24^26 dictate the post-appeal process of review proceedings; enforcement of sentences and pardon or commutation of sentences. With respect to review proceedings, Article 24 provides a new development in allowing the Prosecutor to submit an application for review of the judgement within one year from the day that the final judgement was pronounced. The Chamber shall only review the judgement if after a preliminary examination a majority of judges of the Chamber agree that the new fact, if proved, could have been a decisive factor in reaching a decision. This development is based upon Rules 119 and 120 of the ICTYand ICTR Rules of Procedure and Evidence, respectively. [116] Article 25 of the Mechanism Statute, governing sentence enforcement, contains a new provision empowering the Mechanism with supervision over the enforcement of sentences pronounced by the ICTY, ICTR or the Mechanism, including the implementation of sentence enforcement agreements earlier entered into.[117]

Articles 27^32 concern several important Registry functions containing a few wholly new developments in the Mechanism Statute over

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114 Such as in Art. 18(1) and (2) IRMCTSt.

115 Art. 22(1) IRMCTSt. The maximum penalty for contempt under the ICTY RPE, Art. 77(G), is seven years imprisonment or E10,000 fine or both, and under the ICTR RPE, Art. 77(G), is five years or US$10,000 fine or both.

116 ICTY RPE, Rule 119(A), provides in part that where a'new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement'.

117 Art. 25(2) IRMCTSt.

the ICTY and ICTR Statutes. The functions include management of the archives; cooperation and judicial assistance; the status, privileges and immunities of the Mechanism; expenses of the Mechanism; working languages and reports. Chief among these new developments is Article 27, concerning management of the archives of the ICTY, ICTR and the Mechanism. Like Article 6, which addresses referral of cases to national jurisdictions, Article 27 is an entirely new statutory provision relative to the ICTY and ICTR Statutes. Unlike Article 6, it does not have a basis in the Rules of Procedure and Evidence of either ad hoc tribunal. For this reason, it is worth setting it out in full.

Article 27: Management of the Archives

(1) Without prejudice to any prior conditions stipulated by, or arrangements with, the providers of information and documents, the archives of the ICTY, the ICTR and the Mechanism shall remain the property of the United Nations. These archives shall be inviolable wherever located pursuant to Section 4 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

(2) The Mechanism shall be responsible for the management, including preservation and access, of these archives. The archives of the ICTYand the ICTR shall be co-located with the respective branches of the Mechanism.

(3) In managing access to these archives, the Mechanism shall ensure the continued protection of confidential information, including information concerning protected witnesses, and information provided on a confidential basis. For this purpose, the Mechanism shall implement an information security and access regime, including for the classification and declassification as appropriate of the archives.

Article 27 serves as an example of remaining work to be done, for example, with respect to the implementation of an information and access regime, including for the classification and declassification of the archives.[118]

New developments in the areas covered by the remainder of the

[118] In this regard, the Mechanism will likely be aided by reference to ST/SGB/2007/6 (2007), 12 February 2007, Secretary-General's bulletin on 'Information sensitivity, classification and handling'.

Mechanism Statute are found in Articles 28, 29 and 32. Article 28, which covers cooperation and judicial assistance provides that states shall cooperate with the Mechanism in the investigation and prosecution of persons covered by Article 1 of this Statute, which includes the crimes of contempt and false testimony, heretofore not expressly the subject of mandatory cooperation.[119] Further, Article 28(3) newly provides that the Mechanism shall respond to requests for assistance from national authorities in relation to investigation, prosecution and trial of those responsible for serious violations of international humanitarian law in the countries of former Yugoslavia and Rwanda, including, where appropriate, providing assistance in tracking fugitives whose cases have been referred to national authorities by the ICTY, the ICTR or the Mechanism.[120]

Article 29, governing the status, privileges and immunities of the mechanism, deals with the issue of rostered judges who do not serve full-time by providing that they 'shall enjoy the same privileges and immunities, exemptions and facilities when engaged on the business of the Mechanism'.[121] This Article also newly covers privileges and immunities applicable to Defence counsel under certain conditions.[122]

Finally, Article 32 imposes a semi-annual reporting obligation on the President and Prosecutor of the Mechanism to the Security Council not previously set forth in the ICTYor ICTR Statutes.[123]

5. Conclusion

The establishment of the IMCRT is, of course, not the end of the matter. There are a number of issues to be worked out in the early phase of any tribunal, and a 'residual mechanism' tribunal will be no

119 Art. 28(1) IRMCTSt.

120 Art. 28(3) IRMCTSt

121 Art. 29(2) IRMCTSt.

122 Art. 29(4) IRMCTSt. The privileges and immunities apply when Defence counsel holds'a certificate that he or she has been admitted as counsel by the Mechanism and when performing their official functions, and after prior notification by the Mechanism to the receiving State of their mission, arrival and final departure'.

123 Art. 32(2) IRMCTSt. The ICTY and ICTR are under obligations to file an annual report, although both Tribunals must file a semi-annual completion strategy report pursuant to SC Res. 1534. Supra text accompanying note 37-38.

exception. However, it will have the distinct advantage of being parented by two long-running and successful ad hoc Tribunals, whose task it already is to ensure a coordinated transition of functions. Looking ahead, there is much work to be done in arriving at a commencement date for each respective branch of the Mechanism, including selection of Judges, Prosecutor and Registrar, as well as staff members; adoption of Rules of Procedure and Evidence (a task led by the UN Office of Legal Affairs, of which a first draft proposal was expected to be submitted by the Secretary-General to the Security Council on 30 June 2011, but as of the time of finalizing this article it had been delayed and a text is not yet available) and implementation of an information and access regime for the archives. Provided all goes well in the handover and the Mechanism generates its own successful record, the meaning of 'legacy' of the ad hoc tribunals may come full circle to be understood once again in its initial two-fold sense: as both a message of how each tribunal will be remembered, as well as its residual functions connotation. For the sake of the national jurisdictions who continue the work of the ICTYand ICTR over the years ahead, let us hope for the successful operation of the Mechanism.