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ON

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

THE ROME STATUTE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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1. Introduction

One of the highlights in the evolution of international law during the past decade has been the emergence of ad hoc international criminal tribunals and the adoption, on 17 July 1998, of the Rome Statute for the International Criminal Court (ICC).1 The present paper will explore the relationship between that Statute, which came into force on 1 July 2002,2 and the European Convention on Human Rights of 4 November 1950 (ECHR), including the Protocols annexed thereto.3 There is, indeed, a possibility that, for the States Parties to both instruments, conflicts between treaty obligations could arise, as some provisions of the Rome Statute, which aims at promoting the respect of international humanitarian law (IHL), might prove incompatible with the ECHR and its Protocols.

The aim of the present contribution is not to explore each and every aspect of this issue. In addition, the 1998 Statute has not yet received any practical application; some problems of compatibility with the European Convention might crystallise only with the effective implementation of the Statute. Accordingly, the present study will focus on some of the more obvious possibilities of conflict in order to stimulate further reflection on the relationship between the two instruments.

As will be shown later,4 there have already been contacts, and incipient conflicts, between international criminal courts and the European systems for the protection of human rights, particularly in the framework of the activities of the International Criminal Tribunal for the Former Yugoslavia at The Hague (ICTY). Of course problems and even collisions could also occur between the Rome Statute and other regional or universal human rights instruments such as the American Convention of 22 November 1969⁵ and the United Nations Covenant for the Protection of Civil and Political Rights, of 16 December 1966.6 While the issue cannot be dealt with here in this broader context, the problems will likely be very similar to those addressed here.

Accordingly, the contribution which is to follow shall address the following points: (i) the relationship between IHL and human rights law; (ii) the provisions of the ECHR and of its Protocols likely to be affected in international criminal proceedings: (iii) the provisions of the Rome Statute and of the ICC's Rules of Procedure and Evidence (RPE)⁷ intended to protect human rights; and (iv) possible conflicts between international criminal courts and tribunals, in particular the ICC, on the one hand, and the European Court of Human Rights (EurCourtHR), on the other.

2. International Humanitarian Law and Human Rights Law

Traditionally the expression "international humanitarian law" covers the 1899/1907 Hague Conventions on the Laws of War8 and the 1949 Geneva Conventions on the Protection of War Victims together with the Protocols of 1977 additional to them.9 The concept of IHL has now been broadened to include other treaties, notably: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide:10 the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare;11 the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxic Weapons and on their Destruction: 12 the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention);13 the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons;14 the 1993 Convention on the Prohibition of the

- ³ European Treaty Series, No. 5, 9, 46, 114 and 117.
- 4 Below. pp. 9 et seq.
- ⁵ Council of Europe, Human Rights in International Law. Collected Texts, 2nd ed., Strasbourg, 2000, p. 453.
- 6 Ibid., p. 102.
- ⁷ United Nations document PCN/CC/2000/INF/3/Add. 1 of 12 July 2000.
- 8 A. Roberts / R. Guelff, Documents on the Laws of War, 3rd ed., Oxford, Oxford University Press, 2000, p. 67.
 - 9 Ibid., pp. 195, 419.
 - 10 Ibid., p. 179.
 - 11 Ibid., p. 155.
 - ¹² International Legal Materials, Vol. XI, 1972, p. 310.
 - 13 Roberts/Guelff, op.cit. note 8, p. 407.
 - 14 Ibid., p. 515.

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United Nations document A/CONF.183/9*, reprinted in 19 HRLJ 453 (1998) as well as in Ch. Bassiouni, The Statute of the International Criminal Court. A Documentary History, Ardsley, N.Y., Transnational Publishers, 1998, p. 39.

² According to its Article 126, the Statute was to enter into force on the first day of the month after the sixtieth day following the date of deposit of the sixtieth instrument of ratification. That instrument was in fact deposited by the Democratic Republic of Congo on 10 April 2002, and the Statute entered into force on 1 July 2002.

Development. Production, Stockpiling and Use of Chemical Weapons, and on their Destruction; ¹⁵ and the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines, and on their Destruction. ¹⁶

Most of these instruments aim at protecting the human person against acts which may occur in both wartime and time of peace. This is made evident, e. g., by the Ottawa Convention of 1977: the laying, production, stockpiling and transfer of the kind of mines prohibited may occur in time of armed conflict as well as of peace, and, accordingly, those activities are proscribed in both.

While these agreements are intended to differ, conceptually, from human rights conventions, they too contribute, in fact, to the protection of the human person. Until recently the implementation of the former was abandoned to individual States, a lack of implementation possibly generating international responsibility for the State concerned, as may be deduced from Article 1 common to the four 1949 Geneva Conventions.17 By contrast, human rights stricto sensu, though equally defined in treaty provisions, have progressively become rights the respect of which may be claimed directly, on the international level, by the individuals concerned. This evolution has culminated in the mechanism of individual applications established under the ECHR to which every Contracting State is subjected.¹⁸ Within the scope of that mechanism, or of similar systems, the individual has thus become a subject of international law entitled to seek protection from international bodies.

In recent times the above process has spilled over to IHL. There is a new tendency to hold that individuals, in addition to being able to claim *rights* on the international level, are burdened with *obligations* at that level and that non-compliance with such duties exposes them to sanctions inflicted by international bodies. International responsibility of the individual is added to the international responsibility incurred by the State if the individual concerned has acted as an organ of that State; thus human *rights* are now complemented by human *duties*.

IIIL and international human rights law penetrate and overlap each other: the international criminal tribunals and courts, which are intended to uphold IHL, contribute to the protection of individuals who are actual or potential victims of infringements of that law. In that sense, the Security Council Resolutions establishing the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), 19 together with the 1998 Rome Statute, may be viewed as instruments enhancing the protection of human rights.

It is not on this particular way of viewing IHL as a contribution to the protection of human rights, however, that the present contribution shall focus. Rather, it will examine whether and to what extent the human rights guaranteed by the ECHR and its Protocols to individuals brought before international criminal courts and tribunals in particular before the ICC - are protected if, in the course of the proceedings, those rights have allegedly been violated by such a court or tribunal. To deal with this issue, it will be necessary: (i) to identify the rights guaranteed by the Convention and its Protocols which are likely to be infringed in the course of international criminal proceedings; and (ii) the extent to which the constitutive acts of international criminal courts or tribunals, particularly the Rome Statute, protect the human rights of those who participate in such proceedings.

3. Rights Guaranteed by the European Convention Likely to Be Curtailed in International Criminal Proceedings

A quick perusal of Section I of the ECHR ("Rights and freedoms") shows that the rights mainly in issue are those found in Articles 5 and 6 of the Convention, viz.: the rights guaranteed in the event of arrest and detention. particularly with regard to the length of pre-trial detention (Article 5); and the vast array of procedural guarantees deriving from Article 6 and known under the label of "fair trial". Questions of length also can, and often do, arise in the framework of Article 6, this time with regard to the time taken up by the proceedings. Article 6(1) providing that, in civil and criminal matters, "everyone is entitled to a fair and public hearing within a reasonable time". Other possible Article 6 issues relate to the examination of witnesses and of other evidence. Still in connexion with Article 6, questions may arise with reference to the requirement of an "independent and impartial tribunal established by law". Problems may also be caused by the publicity requirements of Article 6(1) of the ECHR and of the Rome Statute, respectively.

Furthermore, in the context of preliminary investigations, of pre-trial detention and of the serving of prison terms, charges of torture and of inhuman or degrading treatment or punishment could be brought under Article 3 of the European Convention.

Other areas must be considered as well. Article 7 of the ECHR embodies the so-called principle of legality – *Nullum crimen, nulla poena sine lege* – which might serve as a ground for complaints before the European Court. Problems could also arise in connexion with the additional Protocols, notably Articles 2 and 4 of Protocol No. 7, which grant a right of appeal in criminal matters and recall the principle *Ne bis in idem*.

4. Human Rights Provisions in the Rome Statute and in the ICC's Rules of Procedure and Evidence

(a) Preliminary Observation

A determined effort has been made by the makers of the Rome Statute to protect the human rights of those participating in proceedings before the ICC, in particular the rights of suspects and accused, even though those very individuals themselves are suspected or accused of having violated the human rights of others.

A full analysis of all provisions of the Statute and the RPE protecting the human rights of persons involved in international criminal proceedings would undoubtedly require a book-length study. Such a study appears neither possible nor necessary since much ground has been covered already in A.-M. La Rosa's monograph on evidence and procedure before international criminal courts and tribunals.²⁰ Accordingly, a selection had to be made.

¹⁵ International Legal Materials, Vol. XXXIII, 1993. p. 800.

¹⁶ Roberts/Guelff, op. cit. note 8, p. 645.

¹⁷ That Article provides: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

¹⁸ For a short description of that mechanism, see Ph. Sands / R. Mackenzie / Y. Shani (ed.), Manual on International Courts and Tribunals, London, Butterworths, 1999, pp. 199-213.

¹⁹ Resolutions 827 of 25 May 1993 = 14 HRLJ 197 (1993) and 955 of 8 November 1994 = 16 HRLJ 124 (1995).

²⁰ A.-M. La Rosa, Preuve et procédure devant les juridictions pénales internationales, Geneva, The Graduate Institute of International Studies, 2002, 543 pp. (manuscript). See further H. Friman, "Rights of Persons Suspected or Accused of a Crime", in

(b) Pre-Trial Detention

The general human rights rule in this matter is that pretrial detention should be the exception – release being the rule –, that its lawfulness must be reviewed by a judge or other officer authorised by law to exercise judicial power, and that such detention should be as brief as possible so as not to amount to punishment in disguise, contrary to the presumption of innocence.²¹

The above rule and the related practice have been confined to the national level, however. They do not meet the requirements of international criminal proceedings for three reasons. First, there are no police forces to assist international criminal courts and tribunals which, therefore, have to rely on national authorities for arresting suspects or re-arresting individuals who have been provisionally released and do not show up for the opening of their trial. Second, accusations of war crimes, crimes against humanity and acts of genoeide generally call for time-consuming investigations and trials, sometimes requiring the hearing of a large number of witnesses. Third, the provisional release of a suspect may entail serious risks for witnesses and victims.

For all these reasons the Hague International Criminal Tribunals have long disregarded the domestic practices described above: lengthy periods of detention on remand were the rule, provisional release being the exception. As a result, pre-trial detention could be unduly protracted, especially in cases where the suspect or accused had been detained on the national level prior to his transfer to The Hague. It was, moreover, up to the defence to establish that the accused would be present at the trial and that, if released, he would present no threat to the victims and witnesses. In addition, the defence had to prove the presence of "exceptional circumstances" provisional release.²² such as the extremely rare situations where the health of the accused made release inevitable. Except for the last element - the health of the detainee. which could be objectively determined by doctors - none of these circumstances could be established with any degree of certainty.

At the end of 1999, the ICTY liberalised its practice, however, and amended its Rules of Procedure and Evidence.²³ Under the new practice, "exceptional circumstances" are no longer required. The only remaining elements are a guarantee of the presence of the accused at the opening of his trial and the absence of any threat to victims and witnesses. A co-operative attitude on the part of that person or a guarantee of his presence at the trial given by his State will go a long way toward his release.²⁴

So far as the *ICC* is concerned, the Prosecutor may ask the Pre-Trial Chamber for a warrant of arrest if there are "reasonable grounds" to believe that a person has committed one or several crimes falling under the Court's jurisdiction, if pre-trial detention is required for the purposes of the investigation, and if it is necessary to prevent that person from committing further crimes. According to Article 58(1) of the Rome Statute, it is up to the Prosecutor to show that such grounds exist, and up to the Pre-Trial Chamber to appreciate the evidence submitted.

The detainee may request his release at any time, however, and so may the Prosecutor. In addition, the Pre-Trial Chamber of the ICC shall periodically review its detention rulings (Article 60(2) and (3)). To justify the prolongation of such a ruling, the Prosecutor will have to convince the Chamber that continued detention is indispensable to prevent the suspect from hampering the

investigation, to ensure his presence at the trial and to prevent him from resuming his criminal activities (Article 60(2) read in conjunction with Article 58(1)(b)). If the Pre-Trial Chamber envisages the renewal of a detention ruling, it will examine whether the above conditions are met; it will also make sure that renewal does not unduly prolong the detention because of inexcusable delays caused by the Prosecutor (Article 60(4)).

If the detainee is provisionally set free, his release may be unconditional or conditional (Article 60(2) to (4)), one of the possible conditions being that of posting bail. The Pre-Trial Chamber may also add to the order for release a warrant of arrest to ensure the presence at the trial of the individual released (Article 60(5)).

The provisions summarised above show that the authors of the 1998 Statute were perfectly aware of the humanrights aspect of the ICC's future activities. The case-law of the ICTY, as was pointed out earlier, has become far more liberal than it used to be in matters of pre-trial detention. more pragmatic as well, and more in line with the practice of national courts and that of the EurCourtHR in Article 5 matters. This means that the danger of excessive detentions has receded without, however, disappearing altogether. Indeed, as has been noted, the crimes listed in the 1998 Statute are among those requiring protracted and complex investigations and hence long periods of detention. To these periods pre-trial detention on the national level may have to be added, the aggregate amounting to time-spans far exceeding what is usually tolerated by human rights rules. It would seem, however, that the ensuing difficulty could be overcome by taking into account - as, indeed the Strasbourg Court does in normal pre-trial detention cases brought before it under Article 525 - the special nature and requirements of investigations related to international crimes.

(c) Length of Main Proceedings

The issue of the length of detention on remand, addressed in Article 5 of the ECHR, must be distinguished from the question of whether the applicant's case has been heard, in conformity with Article 6(1), "within a reasonable time". More than half of the countless

R.S. Lee (ed.), The International Criminal Court. The Making of the Rome Statute. The Hague, Kluwer, 1999, pp. 247-261: P. Robinson, "Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia", European Journal of International Law, Vol. XI, 2000, pp. 569-590; G. Vassalli, "Diritti dell'uomo et diritto internazionale penale", I Diritti dell'uomo. Vol. IV. 1993, pp. 42-45; R.E. Vinuesa, "Interface. Correspondence and Convergence of Human Rights and International Humanitarian Law", Yearbook of International Humanitarian Law, Vol. I. 1998, pp. 69-110.

²¹ The link between the length-of-proceedings issue and the presumption of innocence is highlighted by a judgment of the EurCourtHR of 10 November 1969 in *Stögmüller v. Austria*, Series A, No. 9, § 4, p. 40.

²² Article 65 of the Rules of Procedure and Evidence of ICTY, in V. Morris / M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Irvington-on-Hudson, Transnational Publishers, 1995, p. 41. The requirement of "exceptional circumstances" has been maintained, however, in the framework of the ICTR.

²³ La Rosa, op. cit. note 20, p. 119.

²⁴ *Ibid.*, pp. 119-121.

²⁵ See W. v. Switzerland, judgment of 26 January 1993, Series A, No. 254-A, §§ 41-42 = 14 HRLJ 178 (1993).

applications submitted to the EurCourtIIR bear on this point.²⁶ While the Court interprets this requirement in the light of the circumstances of each case – complexity of the subject-matter, number of degrees of jurisdiction involved, conduct of the applicant and the courts of the defendant State²⁷ –, lengths of proceedings of more than five years will often be judged excessive.

As pointed out already, investigations and trials related to the types of international crimes placed under the jurisdiction of the ICC will invariably be complex and time-consuming; in addition, they may involve successive procedures on the national and international levels, and possibly appellate proceedings as well.28 At first sight, the best remedy would seem to be to speed up the proceedings. This may prove impossible, however, or lead the judges to work in haste. As the EurCourtHR said in the case of W. v. Switzerland, "the right of an accused to have his case examined with particular expedition must not hinder the efforts of the courts to carry out their tasks with proper care (...)".29 It would, therefore appear that, as in the field of pre-trial detention, the EurCourtHR could turn to standards which may not be the usual ones in matters of length of proceedings and take account of the special difficulties inherent in international war crimes trials. Such a flexible approach would, incidentally, be in line with the Court's case-law generally, which calls for treatment attuned to the circumstances of each case.

(d) Testimony

Under Article 6(3)(d) of the ECHR, everyone charged with a criminal offence has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

Considering the nature of the cases to be examined by the ICC. the protection of victims and witnesses - often victims are witnesses as well - will be one of the Court's main preoccupations. Article 68 of the Rome Statute attempts to strike a reasonable balance between the requirement of a fair trial and the need to provide adequate protection to those persons. Article 87(3) of the RPE lists a series of measures which may be taken to that end: (i) expunging the names of victims, witnesses and other persons at risk from the Chamber's public records; (ii) enjoining the Prosecutor, the defence or any other participant in the proceedings from disclosing them; (iii) using electronic or other special devices for receiving testimony - including means to alter the picture or the voice -, in particular video-conferencing, close-circuit television and the exclusive use of sound means; (iv) having recourse to pseudonyms; and (v) conducting part of the meetings in camera, 30

Article 56 of the Rome Statute provides the Prosecutor with an interesting opportunity which, however, could be problematic from the angle of the rights of the defence. Article 56 enables the Prosecutor to seek the approval of the Pre-Trial Chamber to secure evidence if a "unique investigative opportunity" offers itself in the course of an investigation, i.e. the possibility of collecting or testing evidence which, otherwise, might be lost forever. The Pre-Trial Chamber may also use that opportunity proprio motu. Situations where such a procedure appears appropriate are those of a witness who is ill or very old, or likely to disappear, or where a measure ordered in the course of an investigation - such as the opening of a mass grave - offers an opportunity unlikely to repeat itself.31 If this special procedure is used, the person concerned must be heard if he has been arrested or if he has appeared in response to a summons issued in connexion with the investigation (Article 56(1(c)): and the Pre-Trial Chamber must take such measures as may be required to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence (Article 56(1)(b)). Article 56(2) lists a number of possible measures to that end: the drawing up of a record of the proceedings: the appointment of an expert: the authorisation given to counsel of a person arrested or summoned to attend, or the appointment of counsel, to represent the rights of the defence: and the designation of a judge to make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons.

Rule 68 of the RPE, in turn, allows for the submission of pre-recorded audio or video testimony,³² provided that the witness who gave such testimony and is present before the Trial Chamber does not object and can be examined by the Prosecutor, the defence, provided also that the Chamber has the opportunity to examine the witness during the proceedings.

As the disclosure of evidence or information "may lead to the grave endangerment of the security of a witness or his or her family", the Prosecutor may even. "for the purposes of any proceedings conducted prior to the commencement of the trial", withhold such evidence or information and, instead, present a summary thereof. He shall do so, however, "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial" (Article 68(5) of the Rome Statute). Moreover, says Rule 81(5) of the RPE, material or information in the Prosecutor's possession or under his control may be used in evidence during the trial only if they have been previously disclosed to the defence. A

²⁶ More than half of the applications addressed to the Court raise Article 6 matters. More than half of the latter – *i.e.* more than a quarter of the total number of applications submitted to the Court – relate to length-of-proceedings issues.

²⁷ See, for example, Frydlender v. France, No. 30979/96, Grand Chamber, judgment of 27 June 2000.

²⁸ Articles 25 of the Statute of the ICTY and 24 of that of the ICTR: Articles 81 to 85 of the Rome Statute.

²⁹ Cf. the judgment cited in note 25, § 42.

The basic rule of the ECHR on this issue is Article 40(1), under which "[h]earings shall be in public unless the Court in exceptional circumstances decides otherwise". Rule 33(2) of the Rules of Court of 4 November 1998 adds that "[t]he press and the public may be excluded from all or part of a hearing in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Chamber in special circumstances where publicity would prejudice the interests of justice". A private hearing took place, for example, in *Scozzari and Giunta v. Italy*, No. 39221/98 and 41963/98, *see* judgment of 13 July 2000. § 9.

³¹ Message du Conseil fédéral à l'Assemblée fédérale, du 15 novembre 2000, relatif au Statut de Rome de la Cour pénale internationale ... [Report of the Swiss Government to the Federal Parliament Relating to the Rome Statute of the ICC], Feuille fédérale 2001, p. 359(517).

³² This Rule is based on Article 69(2) of the Rome Statute which, though prescribing that testimony at trials shall be given by the witness in person. provides that "[t]he Court may ... permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts ... These measures shall not be prejudicial to or inconsistent with the rights of the accused."

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similar rule applies to evidence in the possession or under the control of the defence, which must be communicated to the Prosecutor (Rule 81(6)). Finally, under Article 15(2) of the 1998 Statute, the Prosecutor "may receive written or oral testimony at the seat of the Court".33 This formula mainly covers the device of "affidavits" 34 Such evidence, as it cannot be the object of examination by the Prosecutor or cross-examination by the defence, is evidently less valuable than regular testimony. It is useful. none the less, since it enables agents of States and of international organisations to cooperate with the ICC without having to provide data relevant to national security or information the divulgation of which would compromise the activities of the organisation.

The rules described above are undoubtedly well suited to the conduct of international criminal proceedings, where the evidence essentially consists of testimony. It will also be noted that, in that type of proceedings, witnesses or victims who are witnesses as well are particularly exposed to threats of violence or acts of revenge. Moreover, while some of the rules examined above allow for the presentation of particular forms of evidence - prerecorded testimony, summaries submitted by the Prosecutor -, this is to be done while fully respecting the rights of the defence. This proviso may amount to a mere pious wish, however, for such respect is not always possible, for instance where pre-recorded testimony was given by a witness who has died before he could be questioned in court.

Accordingly, some of the rules on evidence examined here could unquestionably result in accused persons turning to the EurCourtHR. To avoid serious problems, the latter should show some flexibility and remember, once again, that proceedings before international courts and tribunals are not run-of-the-mill criminal trials.35

(e) Refusal to Disclose Information for Reasons of National Security or on Other Important Grounds³⁶

Generally speaking States and their agents, as well as governmental and non-governmental organisations, are duty-bound to cooperate with international criminal courts and tribunals. There may, however, be obstacles to such cooperation. Three examples may illustrate the point: (i) a State ordered to provide evidence to the Prosecutor, the Pre-Trial Chamber or the Court may refuse to comply with the order because of an alleged threat to its national security; (ii) a State may refuse to hand over confidential documents or information obtained from another State or an international organisation; (iii) an international organisation may not wish to transmit evidence to the Court because its disclosure would threaten the pursuit of its activities. To this last hypothesis, one may add situations where the testimony of an agent of the organisation could have a similar result.

This point had received little attention when the initial texts governing the Criminal Tribunals of The Hague and Arusha were drawn up, except when it came to the issue of whether the Prosecutor should be entitled to refuse to inform the defence of evidence likely to jeopardise the national security of a State or evidence that has been communicated confidentially.37 Practical needs made it necessary, later on, to address the question. In its 1997 decision relating to the Blaškić case,38 the Appeals Chamber of the ICTY ruled that while the Tribunal could order the transmittal of documents directly relevant to the proceedings, such orders had to be reconciled with the legitimate security interests of States. Therefore, although the final decision belonged to the Tribunal, the latter had

to take into account elements such as the State's readiness to cooperate with it. This it could achieve by appointing a single one of its members to examine the evidence in question, so as to protect its confidential character, or by studying it in camera, or by accepting expurgated versions accompanied by an explanatory declaration made under oath and stating the reasons for the expurgation.39

Still in the Blaškić case, and also in Todorović.40 the ICTY was confronted with the question of whether members of multinational forces placed under United Nations command, or of intervention forces authorised by resolutions of the United Nations Security Council, could be compelled to testify. The Tribunal found that they could and that a prohibition made by the organisation or State concerned would engage the latter's international responsibility. Moreover, in Todorović, where the accused challenged the legality of his arrest by the international Stabilisation Force (SFOR), the ICTY held that it was entitled, not only to seek the assistance of the Force to get hold of the persons it was looking for, but also, as pointed out by one judge, to request the Force to show the documents concerning the detention of a person accused before the Tribunal and that person's transfer to it.⁴¹

A particularly delicate issue arising in this context is the position of international humanitarian agencies, in particular the International Committee of the Red Cross

³³ Article 15(1) further provides that the Prosecutor himself may, on the basis of information received, initiate investigations on crimes falling under the jurisdiction of the Court. Article 15(2). in addition to the passage quoted in the text. allows the Prosecutor, for the purpose of measuring the seriousness of information received by him, to "seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate".

³⁴ According to the Concise Dictionary of Law, 2nd ed., Oxford. Oxford University Press, 1990, an affidavit is a "sworn written statement used mainly to support certain applications and. in some circumstances, as evidence in court proceedings. The person who makes the affidavit must swear or affirm that the contents are true before a person authorized to take oaths in respect of the particular kind of affidavit."

³⁵ Even though the authors of the 1998 Statute themselves have not always shown similar flexibility, for instance when, at the Rome Conference, it came to defining the qualifications of judges. While the Statutes of the ICTY and the ICTR, very wisely. abstain from issuing rules on this point. Article 36 of the Rome Statute requires that at least half of the Court's 18 members shall be criminal lawyers with "relevant experience" as judges. prosecutors, or advocates, or in another similar capacity, while the other half may be experts in "relevant areas" of international law such as IHL or human rights law. Article 39(1) of the Statute. moreover, prescribes that the "Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience"

³⁶ On this issue in general, see La Rosa, op.cit. note 20, pp. 344-383.

³⁷ Articles 66(C) and 70(B) of the Statutes of the ICTY and the

³⁸ Judgment of 29 October 1997 on a request by the Croatian Government for review of a decision made on 18 July 1997 by Trial Chamber II; La Rosa, op.cit. note 20, pp. 346-347.

³⁹ Article 54bis of the Rules of Procedure and Evidence of the ICTY (added in November 1999).

⁴⁰ Case IT-95-9-PT, decision of Trial Chamber III of 18 October 2000.

⁴¹ Separate opinion of judge Robinson, ibid.

(ICRC).42 The latter will be able to perform its task if and as long as it has the trust of the parties to the conflict, and that trust largely depends on the Committee's discretion a postulate difficult to reconcile with the idea that an agent of the ICRC could be forced to testify before an international criminal court or tribunal. This specific issue arose in the Simić case.43 where a former agent of the Committee had actually volunteered to testify but was prevented from doing so by the ICRC. The majority of the ICTY's Trial Chamber III found that, on account of the unique role assigned to the Committee by the 1949 Geneva Conventions and the Additional Protocols of 1977, those texts had to be interpreted in a way that would enable the ICRC effectively to discharge its task. When subscribing to the instruments of 1949 and 1977, the States Parties had approved the mandate of the Committee and what derived from it, namely, a treaty obligation - which by now had reached customary status - not to compel the ICRC to disclose information if this could result in a loss of confidence and, thereby, in a threat to the Committee's activities.44

So far as the *ICC* is concerned, the issue addressed above is essentially dealt with in Articles 72 and 73 of the Rome Statute and in Rule 73 of the RPE.

Article 72 of the Statute covers three situations: (i) cases where the disclosure of information or documents of a State would prejudice that State's national security interests (paragraph 1); (ii) the situation of persons who have been requested to submit information or evidence but have refused or have not been authorised to do so because disclosure would jeopardise the national security interests of the State concerned (paragraph 2); and (iii) the case of a State which learns that information or documents pertaining to it are being, or likely to be, disclosed at any stage of the proceedings, if that State deems that disclosure would harm its security interests (paragraph 4). In no case should disclosure run counter to previously made confidentiality agreements (paragraph 3).

In the above three hypotheses, the State concerned will begin by contacting the competent organ of the Court -Prosecutor, Pre-Trial Chamber, Trial Chamber - in order to reach an agreed solution (paragraph 5). The latter may consist in modifying or clarifying the Court's request for assistance, or in obtaining the evidence from a different source or in a different form. If no solution can be found through co-operative channels and if the State concerned maintains that there are no means or conditions allowing for disclosure without prejudicing its security interests, it notifies the Prosecutor or the Court (paragraph 6) of the specific reasons for its attitude. The ICC will then determine whether the information or document sought is indeed relevant and necessary for the case at hand, request further consultations with the State or make such inferences as may appear appropriate in circumstances, or refer the matter to the Assembly of States Parties under Article 87(7) of the Statute.

Article 73 of the Statute deals with third-Party information or documents, *i.e.* situations where the ICC requests a State Party to provide a document or information which has been transmitted to it in confidence by a third State or an international organisation. If the originator of the document or information is a State Party to the Statute, it will either have to authorise disclosure or to submit to the Article 72 procedure. If it is not, and if it objects to disclosure, the requested State or organisation shall inform the Court of its inability to disclose due to "a pre-existing obligation of confidentiality to the originator". As noted by A.-M. La Rosa, the adequacy of

these rules and procedures will have to be judged on the performance. The same author observes that the hearin to be held for the purpose of clarifying the position of tl State holding the information or document "must nunduly prolong the procedure".⁴⁵

The inclusion of the above-described provisions in the Rome Statute was unavoidable but may deprive the Coulof evidence and, hence, of the faculty to decide a case of the basis of all the facts. This will occur whenever the State possessing the evidence has good cause to invoke nation security interests, or whenever the organisation concernentle ICRC in particular, refuses to transmit information of prevents one of its agents or former agents from testifyin One wonders whether in situations where cases may have to be decided on the basis of incomplete evidence, the requirement of a "fair trial" embodied in Article 6(1) of the ECHR would still be respected.

Regardless of the procedure followed and the outcom of the confidentiality issue, the consultations an procedures called for in Articles 72 and 73 of the Rom Statute will take time. This may generate another probler relating to the "reasonable time" requirement of Articl 6(1) of the ECHR and, accordingly, yet another potentia for conflict between the Statute and the ECHR. T prevent conflicts, the EurCourtHR should be sensitive the genuine security problems that may arise in the cours of proceedings before the ICC; the latter should, in turn make sure that the consultations and proceedings unde Articles 72 and 73 of the Rome Statute are conducted a expeditiously as possible.

The particular problem of evidence possessed by th ICRC is addressed in Rule 73(4) to (6) of the RPE According to these provisions, the Court shall regard a privileged and not subject to disclosure informatior documents or other evidence, including that submitted b present or past ICRC officials, which came into possession of the Committee in the course or as a consequence of the performance of its functions, except: (i) if consultation between the Court and the Committee have led the latte to agree to disclosure: or (ii) if the information, document or other evidence in question can be found in publis statements and documents of the ICRC.

The elements just described are, generally, in line with the ICTY's practice in the Simić case.

(f) Other Article 6 Issues?

As pointed out previously, other aspects of Article 6 of the ECHR may cause difficulties as well. One issue could arise in relation to the requirement of an "independent and impartial tribunal established by law" found in Article 6(1). The argument of lack of independence was raised twice, in connexion with the ICTY, before the EurCourtHR. It was based, essentially, on the fact that the Tribunal had been established through a resolution of the United Nations Security Council based on Chapter VII of the Charter. According to the applicants this meant, first, that the Council had acted *ultra vires*, as Chapter VII provided no legal basis for setting up such a tribunal, and,

⁴² The question is examined in detail by La Rosa, *op.cit.* note 20, pp. 363-383.

⁴³ Case IT-95-PT. Trial Chamber III, decision of 27 July 1999 on a request made by the Prosecution under Article 73 of the Rules and relating to the hearing of a witness, §§ 38 et seq.

⁴⁴ For a survey of the weaknesses of the decision, *see* La Rosa, *op.cit.* note 20, pp. 372-374.

⁴⁵ *Ibid.*, p. 355.

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second, that the latter was neither "established by law" nor "independent". In one case - Naletilić v. Croatia46 the EurCourtHR rejected the argument. In another -Milosević v. The Netherlands⁴⁷ - it side-stepped it by declaring the application inadmissible for non-exhaustion of domestic remedies. But such objections cannot be made in respect of the ICC since the latter has been "established by law" - the Rome Statute - and is "independent" from any particular States or international agencies.

The issue of independence could, however, arise in connexion with the composition of the ICC's organs or with individual members of the Court. Those who drafted the Rome Statute made a determined effort to avoid problems of this kind. They did so, firstly, by preventing the same judges from sitting simultaneously, in a given case, in the Pre-Trial, Trial and Appeals Chambers;48 accordingly problems are unlikely to arise regarding the composition of the organs of the Court.

Difficulties are possible, however, with individual members of the Court, especially if the latter is called upon to operate on a part-time basis. Article 40(3) of the Rome Statute provides that "[j]udges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature", this language inferring, a contrario, that some judges may work on a part-time basis. Members belonging to either category are required, by paragraph 2 of the same Article, "not [to] engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence". In addition, Rule 34 of the RPE, which applies to all judges as well, contains a non-exhaustive list of grounds for disqualification (paragraph 1).49 Disqualification may take place at the initiative of the judge concerned or of the Court; it may also be requested by the Prosecutor or by the defence.

It seems evident, however, that despite the precautions taken, problems could appear. The defence could object to the presence of a given judge, for instance by alleging that he has, in the past, been involved in the case, such involvement being more likely in the case of part-time members of the Court who may engage in other activities. If the ICC refuses to disqualify the judge concerned, the defence could be tempted to turn to the EurCourtHR and to question the independence of the ICC from the angle of Article 6(1). In such situations, the possibility of conflict cannot be totally ruled out, although the European Court would undoubtedly be reluctant to interfere with the inner workings of a fellow international tribunal. The issue would, of course, be disposed of easily if the defence had omitted to raise the argument previously, in the context of the ICC, and did so for the first time before the EurCourtHR. Applying by analogy the domestic remedies rule contained in Article 35(1) of the ECHR - and there are good reasons for doing so50 - the European Court would probably declare inadmissible such an application.

Under Article 64(7) of the Statute, trials shall be held in public. The Trial Chamber may, however, decide to conduct certain proceedings in closed session, particularly to protect victims and witnesses (see Article 68 of the Statute). The judgment shall be pronounced in public and, wherever possible, in the presence of the accused (Article 76(4) of the Statute). The same rule can be found in Article 6(1) of the ECHR, which adds that

"the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of

It is conceivable that, after the conclusion of a trial before the ICC, the defence will turn to the Strasbourg Court with a complaint that the rule of publicity laid down in Article 6(1) of the ECHR has not been respected because victims or witnesses have been heard in camera, a possibility not explicitly contemplated in that provision. If the complaint were upheld by the EurCourtHR, a conflict would arise between the two legal systems. The European Court could avoid conflict, however, by holding that the exclusion of the public and the press was justified, under the last member of the second phrase of Article 6(1), by the presence of "special circumstances where publicity would prejudice the interests of justice", which include the need to protect victims and witnesses.

(g) The Principle of Legality

Nullum crimen, nulla poena sine lege, also known as the principle of legality, is a basic element of both national and international criminal law. According to that principle, a given conduct is punishable only: (i) if, at the time of that conduct, there was a valid rule characterising it as criminal; and (ii) if, at that time, there existed rules establishing, in relation to such conduct, a reasonably precise scale of punishments. The first requirement is set out in Article 22, the second in Article 23 of the Rome Statute. Both elements are also present in Article 7 of the ECHR, which provides as follows:

- "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.3

As the ICC will exercise jurisdiction over conduct prohibited by customary international law (see Articles 6 to 8 of the 1998 Statute), the first element – Nullum crimen sine lege – causes little difficulty, all the more since Article 11 prohibits the retroactive application of the Rome

⁴⁶ No. 51891/99, Fourth Section, decision of 4 May 2000 = 21 HRLJ 450 (2000).

 $^{^{47}}$ No. 77631/01, Second Section, decision of 19 March 2002 = 23HRLJ 65 (2002). See also below, p. 10.

⁴⁸ Article 39(4) of the Rome Statute.

⁴⁹ These grounds are: a personal interest in a given case, including one based on family, personal or professional relationships with a party, or on subordination to it; the performance of functions, prior to taking office, in the exercise of which the judge could be expected to have formed an opinion on the case or on the parties involved in it and which, objectively, could affect his or her impartiality; and the expression of opinions, in the media, in writing or through public action, which could have that effect.

⁵⁰ Here the EurCourtHR would be reviewing, not the activities of national tribunals, but those of an international court. The rationale of Article 35(1), in the former context, is to allow the State concerned and its judiciary to put right alleged wrongs before the EurCourtHR intervenes. There is no reason to hold that this rule could or should not apply in the latter situation. where the wrong is said to have been committed by an international tribunal for the acts of which that tribunal's constituent States could be held accountable. See also below. note

Statute, which means that the ICC will have jurisdiction only over crimes which, at the time of their commission, were recognised as such by the Statute. Problems could arise only if, under the amendment or review procedure of Articles 121 and 123, some categories of treaty crimes were added to those listed in Articles 5 to 8. Over these new category of crimes the Court would have jurisdiction only if they were committed by nationals, or on the territory, of a State Party to the Statute which has accepted the amendment, provided also that the latter has come into force.

By contrast, problems could present themselves regarding the second element. Nulla poena sine lege. Indeed, it must be noted that while the conduct presently proscribed by the Rome Statute is, as pointed out, covered by customary law as well as the rule of non-retroactivity of Article 11, the Statute remains vague as to the scale of punishment. It could be argued, it is true, that such scales are sometimes supplied by internal legislation which incorporates and supplements international criminal law rules. None the less, the scale of "applicable penalties" embodied in Article 77 of the Rome Statute remains unduly imprecise as all it calls for is "imprisonment for a specified number of years, which may not exceed a maximum of 30 years"51 and "life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person". It will be noted, however, that these provisions are followed by Article 78(1), which requires the Court to "take into account", when fixing the penalty, "such factors as the gravity of the crime and the individual circumstances of the convicted person". There is also Article 145 of the RPE, which enjoins the ICC to bear in mind elements such as: the relation between culpability and punishment; the extent of the damage caused, in particular to the victims and their families; the nature of the crime and the means used to execute it: the degree of participation of the convicted person: the degree of that person's intent: the circumstances surrounding the act: the age, education and social and economic condition of the convicted person; and a series of mitigating⁵² and aggravating⁵³ circumstances.

The prolixity of the above texts, unfortunately, does not make for precision. The scale of punishments is vague, and prison terms may well reach from a few days⁵⁴ to life. This being so, it may fail to satisfy the requirements of Article 23 of the Rome Statute and of the principle *Nulla poena sine lege* included in Article 7(1) of the ECHR.

One reason for answering that question in the affirmative could be that the crimes defined by the Statute are also crimes under customary international law and that, while the latter does not necessarily establish a precise and complete scale of punishments, the ensuing lacuna can be filled by referring to domestic law. Another argument would be that the categories of crimes coming under the Court's jurisdiction may be covered by paragraph 2 of Article 7 of the ECHR rather than by its paragraph 1, i.e. fall into the category of acts and omissions which, at the time at which they occurred, were "criminal according to the general principles of law recognised by civilised nations". As paragraph 2 of Article 7, unlike its paragraph 1, does not contain the requirement of Nulla poena sine lege, but only that of Nullum crimen sine lege, no problem arises, except, again, if the list of crimes of the Rome Statute were to be enlarged by adding treaty crimes via the amendment and review procedures provided for in Articles 122 and 123 of the Rome Statute.

(h) Rights Secured by Protocol No. 7

Under Article 2(1) of Protocol No. 7 of the ECHR,

"[e]veryone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

Paragraph 2 of that Article adds that

"[t]his right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal".

Article 2 of Protocol No. 7 only applies to criminal proceedings on the national level. There was and is no reason for extending it to the international sphere. First, a rule prescribing a right of appeal would make little sense in the framework of a mechanism for verifying the implementation of a treaty such as the ECHR. Second, it could undermine the authority of the Court's decisions. 55 In any event, the Rome Statute *does* in fact provide for a double degree of jurisdiction. 56 and so do the constitutive acts of the Hague Tribunals. 57

The prohibition of double jeopardy, expressed in the principle Ne bis in idem, is embodied in Article 4 of Protocol No. 7 and echoed in Article 20 of the Rome Statute. Article 20 covers cases where an individual already has been tried by the ICC for criminal activities and convicted or acquitted -, as well as instances where an individual, before to being brought before the Court, has been tried elsewhere, in particular on the national level. Ne bis in idem will not apply, however, if the trial on that level was intended "for the purpose of shielding the person concerned from criminal responsibility for crimes whithin the jurisdiction of the Court", or was not, otherwise, "conducted independently or impartially in accordance with the norms of due process recognised by international law" and "in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice". This exception aims at preventing States from staging sham trials to avail themselves of Ne bis in idem and, thereby, at shielding individuals from prosecution in the ICC.

Whether there is a likelihood of conflict between Article 4 of Protocol No. 7 and Article 20 of the Rome Statute will depend on the interpretation that will be given by the ICC

⁵² Although Article 77 only speaks of years, one wonders whether it would be possible, under this provision, to impose prison terms of less than one year or of a specified number of years and months.

⁵² Substantially diminished mental capacity falling short, however, of being a ground for the exclusion of criminal responsibility; the convicted person's conduct after the deed, including efforts to compensate the victims and readiness to cooperate with the Court.

⁵³ Prior convictions in areas under the Court's jurisdiction or for crimes of a similar character; abuse of power or of an official capacity; commission of crimes against particularly defenceless victims; the fact of having acted with special cruelty, or against multiple victims, or with discriminatory intent; other, similar circumstances.

⁵⁴ Owing to the gravity of the acts falling under the Court's jurisdiction, such minimal punishment, even if considered possible – see note 51 –, is most unlikely.

⁵⁵ For a discussion, see La Rosa, op. cit. note 20, pp. 237-238.

⁵⁶ Above, p. 4 and note 28.

 $^{^{57}\,}See$ Articles 9 and 10 of the Statute of the ICTY, and Articles 8 and 9 of the Statute of the ICTR.

to the above exception. As long as that interpretation is aimed at ensuring that *Ne bis in idem* is applied in good faith by the Contracting Parties, there should be no difficulties.

5. The Relationship between International Criminal Courts or Tribunals and the European Court of Human Rights

The 1998 Rome Statute has now been ratified by more than the required number of sixty States and has come into force on 1 July 2002 in accordance with its Article 126(1). It is no longer idle, therefore, to speculate about the future relationship between the ICC and the EurCourtHR and, in particular, the conflicts which could oppose them, all the more so as precedents related to the ICTY show that individuals on trial before international criminal courts and tribunals have already turned to the Strasbourg organs to complain of treatment received in those *fora* or in national courts. The critical text on this point is Article 1 of the ECHR, which prescribes that the Contracting Parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I [Articles 2 to 18] of this Convention."

This provision means that individual applications shall be directed at the State Party or States Parties to the ECHR under whose "jurisdiction" the applicant found himself when the alleged violation occurred and to whose organs that violation might be imputable. If the organs concerned are Dutch or Croatian courts, for example, the application has to be aimed at the Netherlands or Croatia. provided of course that domestic remedies have been exhausted as required by Article 35(1) of the ECHR.58 This was, essentially, the situation in Naletilić v. Croatia.⁵⁹ An individual suspected of having committed crimes during the conflict in the Former Yugoslavia was transferred to the ICTY by the Croatian authorities after having been detained on similar charges by the latter. He then complained to the EurCourtHR of violations of Articles 6(1) and 7 of the ECHR, arguing: (i) that his "extradition" to the ICTY and the ensuing interruption of his trial in Croatia would result in a violation of his right to be tried within a reasonable time; (ii) that the ICTY was not "an independent and impartial tribunal established by law" as required by Article 6(1) and that, consequently, the Croatian authorities should not have transferred him to The Hague; and (iii) that that transfer was also unlawful from the angle of Article 7 of the ECHR because in Croatia he could have been sentenced to a maximum term of twenty years, whereas the ICTY, established ex post facto, was empowered to impose a life term.

The application was declared inadmissible by a chamber of the Court's Fourth Section. In explaining its decision, the Chamber made the following points:

(i) As the application was directed against Croatia, only the length of the proceedings before the Croatian courts was relevant, and that length was not unreasonable. The time that might be taken up by future litigation before Croatian courts was purely hypothetical. Indeed, a resumption of the trial on the national level, at the end of the ICTY proceedings, was improbable "because they might be continued only in the event the applicant is acquitted in The Hague or if the proceedings before the ICTY are stayed for some reason". 60

(ii) The rules contained in the Statute of the ICTY and in its Rules of Procedure and Evidence showed that the requirement of "an independent and impartial tribunal established by law" formulated in Article 6(1) of the ECHR was met by the ICTY and that, consequently, there

was no risk of a flagrant denial of fair trial. It was also pointed out, in this connexion, that the transfer of the applicant to the ICTY was "not an act in the nature of an extradition ... but the surrender to an international court".61

(iii) The principle *Nulla poena sine lege* inserted in Article 7(1) of the ECHR did not apply to Mr. Naletilić. Moreover, even if it did, it was paragraph 2 rather than paragraph 1 of that Article which was relevant here, and, as pointed out earlier, that provision makes no reference to the principle in question.

To understand fully the Court's decision in *Naletilić*, one should stress again that the application was made against Croatia, a State Party to the ECHR, and related to the conduct of organs of that State. It was not aimed at the ICTY as such, although one of the applicant's arguments did question the independence, impartiality and legality of the Tribunal; that argument, however, was directed, not at the latter, but at the Croatian authorities which had resolved to send the applicant to The Hague.

What if an alleged violation of the ECHR is imputable. not to the organs of a State, but to those of an intergovernmental organisation - NATO or the European Union, for example – or to an international judicial organ such as the ICTY, the ICTR or the Iran/United States Claims Tribunal, all of which are headquartered at The Hague? Two hypotheses should be distinguished here: (i) that of a possible responsibility of the State on whose territory the organisation or tribunal is established - in which case the responsibility would flow from the fact that that State has allowed the organisation's or tribunal's headquarters to be established on its territory; and (ii) the responsibility of one or several States Parties to the ECHR which, by joining the treaty setting up the international organisation or tribunal, have placed themselves into a situation which no longer allows them to

⁵⁸ The local-remedies rule allows a State and its authorities to put right the wrongs they are alleged to have committed. Similarly, if such wrongs have been committed by an intergovernmental organisation, for which the host and/or member States might be held responsible, applicants should first exhaust the remedies offered within the organisation (*see* above, note 50), and exhaustion presupposes that the subject-matter of the complaint has been raised already in that context.

⁵⁹ See note 46.

of In fact this does not appear wholly accurate. If the ICTY were to acquit the accused, no further prosecution would be possible under the *Ne bis in idem* rule embodied in Article 10(2) of the Tribunal's Statute. The same would apply if the proceedings were simply stayed, *i.e.* suspended by the ICTY. It follows that new proceedings could be opened on the national level only if the prosecution were to be abandoned voluntarily and *definitively* on the international level. It is also conceivable, of course, that proceedings would subsequently be opened at the national level on the basis of other facts; there will then be a new case, however, which is not identical with that previously disposed of by the ICTY.

of In the event of State-to-State extradition, the detaining State, acting under a treaty or *ad hoc*, relinquishes its – usually territorial – jurisdiction over an individual in favour of another State. Thus, one country gives way to another, renouncing one of its basic rights, that of trying individuals within its power. Remittal to an international court is a different matter: the individual concerned is handed over by the detaining country to an international tribunal established by a community of States which includes the transferring country. Accordingly, the person is handed over to a judicial organism of which the remitting State is part and parcel.

conform to both the European Convention and the treaty in question.

The case of X. and Mrs X. v. Federal Republic of Germany,62 brought before the European Commission on Human Rights (EurCommHR), belongs to the first category.63 The application pertained to a claim for restitution of assets unlawfully confiscated during the Nazi era. Restitution had been denied to the applicants by an international tribunal at the end of proceedings which, according to them, violated Article 6 of the European Convention. Always according to the applicants, the Federal Republic of Germany, host State to the Tribunal, was responsible for the violations of the ECHR perpetrated by it. The EurCommHR declared the application inadmissible, however, because the Tribunal's host State did not, when the treaty setting up the international restitution mechanism came into force, have the authority of a sovereign State in that matter and could not, therefore, be held responsible. But the Commission

"it is clear that, if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty".64

The next case, Spaans v. The Netherlands,65 related to a temporary employment contract between the applicant and the Iran/United States Claims Tribunal. That contract was subsequently modified, unilaterally, by the employer who, when sued by the employee, invoked and obtained immunity from suit on the domestic level. Before the EurCommHR, the applicant contended that the Netherlands, in granting immunity to the Tribunal when allowing it to settle at The Hague and in omitting to ascertain that there were means of redress for labour conflicts within the framework of that Tribunal, had contravened Article 6(1) of the ECHR (access to court). The Commission declared the application inadmissible, pointing out that the grant by the host State of diplomatic privileges and immunities to intergovernmental bodies was in harmony with international law and that the conduct of the Iran/United States Claims Tribunal, because of that immunity, was outside the jurisdiction of the Dutch courts and, hence, did not give rise to problems in relation to the European Convention.66

Beer and Regan and Waite and Kennedy v. Federal Republic of Germany⁶⁷ are among the first cases with which the EurCourtHR re-constitued in 1998 had to deal. On the basis of sovereign immunity, the German courts had refused to take jurisdiction over labour disputes opposing several individuals to a subsidiary of the European Space Agency headquartered in Germany. The Court found no violation of the duty to grant access to domestic courts (Article 6(1) by Germany on account of the immunity extended to the Agency but added that the host State could have incurred responsibility had the Agency offered no internal channels of redress.⁶⁸

The last case to be considered is a request for release recently addressed by *Mr. Slobodan Milosević* to the District Court of The Hague. In a decision taken in early September 2001, that Court decided that it lacked jurisdiction to deal with the request since, pursuant to the Headquarters Agreement between the Netherlands and the United Nations, acting on behalf of the ICTY and the ICTR, and to the Dutch implementing legislation, the host State had transferred the power to deal with such requests to the Tribunals.⁶⁹ This decision made Mr. Milosević turn

to the EurCourtHR, asking it to find a violation of Article 6(1) because the ICTY was not "an independent and impartial tribunal established by law" and because the defendant State, by allowing that organ to settle on its territory and by transferring powers to it, had violated the above provision and, consequently, had incurred responsibility toward the applicant. The question raised by the applicant remained unanswered, however, as the application was declared inadmissible by a chamber of the Second Section of the Court for non-exhaustion of (Dutch) domestic remedies.⁷⁰

To conclude on the hypothesis just examined – the residual responsibility for Convention violations of the State on whose territory the international organisation or tribunal is established and which has granted it immunity –, it would seem that the conduct of such entities is beyond the host State's control and cannot be attributed to that State, even if such immunity has been specifically granted by treaty rules, except in the context of employment disputes for which no remedy is available within the organisation or tribunal.

The *second category* of cases to be dealt with relate to the possible residual responsibility of States Parties to both the constitutive instrument of the organisation or court and to the ECHR.⁷¹

ⁿ² No. 235/56, decision of 10 June 1958. Yearbook of the European Convention on Human Rights 1958-1959, p. 256.

⁶³ On this category of cases in general, see D. Frank, Verantwortlichkeit für die Verletzung der Europäischen Menschenrechtskonvention durch internationale Organisationen, Basel, Helbing & Lichtenhahn, 1999, pp. 346-371.

⁶⁴ Case cited at note 62, p. 300.

No. 12516/86. decision of 12 December 1988, D.R. 58, p. 119.
 Ibid., p. 122. In the same sense De Sangro v. Italy, No. 13551/88, decision of 7 February 1990.

⁶⁷ No. 28934/95, GC, judgments of 18 February 1999; the Waite and Kennedy judgment is published in Reports 1999-I, p. 393. For a similar decision on the domestic level and pertaining to the immunity of intergovernmental organisations, see the judgment of the Swiss Supreme Court of 25 January 1999 in A. v. League of Arab States, reprinted in "La pratique suisse en matière de droit international public 1999", No. 3.3. Revue suisse de droit international et de droit européen, Vol. 10, 2000, p. 642.

⁶⁸ The case of *Pellegrini v. Italy*, No. 30882/96, decision of 20 July 2001 by a chamber of the Second Section, could have followed a similar pattern. That case related to proceedings for the annulment of a marriage instituted before an ecclesiastical tribunal (rota), established in Italy by the Holy See. The proceedings resulted in a judgment which had to be examined by the Italian civil courts for purposes of registration. In the course of the registration process, the applicant alleged that the Ecclesiastical Tribunal had violated Article 6 of the ECHR. This argument was rejected by the Italian courts, however, and the judgment registered. A chamber of the Court's Second Section did find a violation of Article 6 but refrained from invoking Italy's possible residual responsibility for actions of the tribunals of the Holy See established on Italian territory, holding instead that Italy was responsible for the conduct of the Italian courts which. in granting registration, had neglected to react to the violations of Article 6 suffered by the applicant (§ 40). Thus Italy was charged with a direct responsibility for the violation rather than simply a residual one. For a commentary of this judgment, see J.-P. Costa. "Le Tribunal de la Rote et l'article 6 de la Convention européenne des droits de l'homme", Revue trimestrielle des droits de l'homme, Vol. 13, 2000, pp. 470-476.

⁵⁹ http://archiv.nzz.ch/books\$7M6Q1\$T.html of 3 September 2001

⁷⁰ See note 47.

⁷¹ On that hypothesis in general, *see* Frank, *op.cit.* note 63, pp. 204-345.

Beginning with the practice of the EurCommHR, a first dispute pitted the French trade union CFDT against the European Community or its member States. The Commission declared the application inadmissible, essentially on the basis of an argument drawn from Article 1 of the Convention, thereby eluding the question of whether a Community act can engage the responsibility of a member State Party to the ECHR.⁷²

Such a responsibility was negated altogether in the next case, *M. and Co. v. Federal Republic of Germany*, ⁷³ where the Commission had this to say:

"The Convention does not prohibit a member State from transferring powers to international organisations. Nonetheless, the Commission recalls that if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty [extract from *X. and Mrs. X. v. Germany*, above, p. 10]. The Commission considers that a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees could wantonly be limited or excluded and thus be deprived of their peremptory character."⁷⁴

Another relevant case dealt with by the Commission was that of Heinz v. Contracting States Also Parties to the European Patent Convention.75 In its decision declaring the application inadmissible, the EurCommHR pointed out that, since the European Community was not a Party to the ECHR, it lacked jurisdiction ratione personae to review Community acts or decisions. The same obtained, pursued the Commission, for the decisions of the European Patent Office, one of which formed the object of the application. In subscribing to the European Patent Convention in 1973,76 the States Parties had replaced their national laws in the matter by a common single European patent system. To this end, they had transferred the necessary powers to the intergovernmental organisation established by the 1973 Convention, which they were perfectly entitled to do. Recalling the above-mentioned case of X. and Mrs. X., the Commission expressed itself as follows:

"It has to be observed in this context that the Convention does not prohibit a High Contracting Party from transferring powers to international organisations. Nonetheless. the Commission recalls: if a State contracts treaty obligations and subsequently concludes another agreement which disables it from performing its obligations under the first treaty, it will be answerable for any breach of its obligations under the earlier treaty.' [Extract from X. and Mrs. X.] Thus the transfer of such powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of those powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character."⁷⁷

Moving to the case-law of the EurCourtHR, the first decision to be mentioned here is *Matthews v. United Kingdom.*⁷⁸ This time the provision in issue was not Article 6(1) of the ECHR, on access to courts, but Article 3 of Protocol No. 1 to the Convention, which secures the right of free election of the legislature. By an act of the European Community – subsequent to the conclusion of the ECHR –, the population of Gibraltar had been prevented from participating in the direct election of the members of the European Parliament. This lead a potential – and frustrated – voter to complain to the EurCourtHR, which held that Article 3 of Protocol No. 1⁷⁹

had been violated and that the United Kingdom was responsible. In its judgment of 18 February 1999, the Grand Chamber of the Court explained that

"acts of the EC [European Communities] as such cannot be challenged before the Court because the EC is not a Contracting Party [of the ECHR]. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer." 80

Another recently decided case is Banković and Others v. European Member States of NATO.81 The application was presented by nationals of the Federal Republic of Yugoslavia, not a Party to the ECHR, and related to the consequences of the bombing by NATO forces, on 23 April 1999, of the Serb Radio and Television Building at Belgrade. The attack, which was connected with the Kosovo conflict, caused loss of human lives and material damage. Under Article 1 of the ECHR.82 the application could not be directed against NATO, which is not a Party to the Convention: however, in the light of the case-law rehearsed above, it could, possibly, be aimed at those NATO States which were also Parties to the ECHR. In this way, the States in question might be held accountable for violations of that Convention resulting from the bombings, in particular violations of Article 2 protecting the right to life. In a unanimous decision made on 12 December 2001, the Court's Grand Chamber declared itself to be without jurisdiction, however, as the situation giving rise to the application was not, in its view, "within the jurisdiction" of the defendant States within the meaning of Article 1 nor, as a result, within that of the Court.83 Thus the latter did not have to rule on the defendant States' residual responsibility for the alleged violations of the Convention.

There is, finally, the case of DSR-Senator Lines GmbH v. Fifteen Member States of the European Union. 84 The application, currently pending before a chamber of the Court's Third Section, concerns a heavy fine imposed by the European Commission on a German company – and many other entities – held to have violated the Union's competition rules. The applicant has contested that fine within the Community's judicial system, challenging the content of the decision and requesting its suspension. It has also turned to the EurCourtHR. Invoking the

⁷² CFDT v. The European Communities. Alternatively: Their Member States, Jointly and Severally, No. 8030/77, decision of 10 July 1978. D.R. 13, p. 231.

⁷³ No. 13258/87, decision of 9 February 1990, D.R. 64, p. 138.

⁷⁴ Ibid., p. 145.

⁷⁵ No. 21090/92, decision of 10 January 1994, D.R. 76-A, p. 125.

⁷⁶ Convention dated 5 October 1973. International Legal Materials, Vol. XIII, 1974. p. 268.

⁷⁷ D.R. 76-A, p. 127.

 $^{^{78}}$ No. 24833/94, GC, judgment of 18 February 1999, Reports 1999-I, p. 251 = 20 HRLJ 4 (1999).

⁷⁹ That provision reads: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

⁸⁰ Ibid., § 32

 $^{^{81}}$ No. 52207/99, GC, decision of 12 December 2001 = 22 HRLJ 453 (2001).

⁸² For the content of this provision, see above, p. 9.

⁸³ Decision cited at note \$1, §§ 59-82.

⁸⁴ Application No. 56672/00 of 30 March 2000. The text of the application is published in 21 HRLJ 112 (2000).

Matthews judgment. DSR-Senator Lines contends that that Court has jurisdiction to examine the compatibility of Community acts with the ECHR and that the Union's member States may, in the last resort, bear responsibility for such acts.

The practice and case-law examined above have shown that the responsibility of States Parties to the ECHR and members or headquarters States of international organisations or tribunals cannot be ruled out altogether when these entities are alleged to be responsible for violations of the European Convention. This is particularly true in the context of labour disputes, where individuals have no access to courts, contrary to the right secured by Article 6(1) of the ECHR, on account of the sovereign immunity of jurisdiction granted to the employer, an international organisation or tribunal, and of a concomitant lack of legal remedies within the organisation or tribunal.

6. General Conclusion

The present paper was devoted to a prospection of the possible areas of conflict between the Rome Statute and the ICC, on the one hand, and the Strasbourg system, on the other

The first result deriving from this enquiry is that some substantive rules of the 1998 Statute may clash with the rights and freedoms guaranteed by Section I of the European Convention. This is possible, in particular, in the fields of pre-trial detention and length of proceedings because, for the reasons indicated, such detention and the subsequent trial can be protracted owing to the nature of the crimes placed under the jurisdiction of international criminal courts and tribunals. Conflicts may also occur in matters of evidence, especially where there have been refusals to authorise the presentation of testimony or other evidence for reasons of national security or of protecting international organisations. In addition, difficulties could arise in connexion with the - rather imprecise - scale of punishments found in the Rome Statute.

Regarding issues of jurisdiction, it seems evident that the ICC, not being a Party to the ECHR, is not as such accountable to the EurCourtHR for its conduct. There is, however, the possibility, for individuals claiming to have suffered violations of the rights guaranteed by the European Convention in the course of investigations or proceedings before the ICC, to submit applications to the EurCourtHR against States Parties to both the ECHR and the Rome Statute, claiming those States to be residually responsible.

This may appear surprising, considering that the ICC is endowed, on the international level, with a legal personality separate from that of its member States (see Article 4(1) of the 1998 Statute), which means that its responsibility is, in principle, distinct from that of the States Parties to its Statute. This is indeed a line of argument that could be followed if the issue were to be envisaged exclusively from the angle of the legal theory of intergovernmental organisations. The situation is different, however, if the basic rules of the law of treaties and on State responsibility are brought into the picture;85 and the ECHR and the Rome Statute are, after all, international treaties. Using the latter approach, one will find that if a State enters into a treaty such as the European Convention, if subsequently it becomes a Party to a second treaty - the European Patent Convention, for example -, and if the latter contradicts the former, a conflict of treaty obligations arises. Such conflicts, if they

are not settled amicably, cannot be disposed of simply b declaring one or the other instrument null and voic indeed, as a general proposition, the international order unlike domestic legal systems, is based on coexistence an cooperation rather than on hierarchy and subordinatior International law leaves it to the State Party to the two contradictory texts to decide whether it wishes to complwith the one or the other. When making that decision, the State concerned accepts that in performing one obligation it will violate the other and, thereby, incur internationa responsibility.86 In the Heinz case, for instance, the defendant States. Parties to the ECHR, had resolved to conclude the European Patent Convention and to abide by its rules. In so doing, they assumed internationa responsibility, should compliance with one of these instruments result in the violation of the other. As the EurCommHR pointed out in Heinz, M. and X., deciding otherwise would mean that States may freely discarc treaty obligations that have become cumbersome, even those which have acquired the status of jus cogens, particularly in the field of human rights, simply by subscribing to new treaties which contradict them.

The situation thus described may appear unsatisfactory in that it leads to limiting the independence of the ICC, even though the violations of the ECHR which it might commit would be attributed, not to that Court as such, but to the States Parties to its Statute which happen to be Parties to the European Convention as well. It is made less unacceptable, however, by the fact that the authors of the 1998 Statute have lavished great care on the protection of the human rights of all those called upon to participate in international criminal proceedings. In addition, one may reasonably expect that the EurCourtHR, should it be confronted with situations such as those described in the present study, will do its utmost to avoid rather than to seek confrontation.

In sum, therefore, conflicts are likely to be rare, but they remain possible. For that reason, attention should be paid to these issues now. "Gouverner c'est prévoir", says a French proverb. This equally applies to the matters addressed above.

⁸⁵ See, in particular, Article 30(5) of the Vienna Convention on the Law of Treaties. of 23 May 1969, United Nations Treaty Series, Vol. 1155, p. 354.

⁸⁶ S.A. Sadat-Akhavi. Methods of Resolving Conflicts between Treaties, Geneva. The Graduate Institute of International Studies, 2001, pp. 66-68.