*Leiden Journal of International Law*, 20 (2007), pp. 613–636
 Printed in the United Kingdom doi:10.1017/S0922156507004281

# Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations

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**Abstract**

The UN Security Council, as 'parent body' of the two ad hoc Tribunals, never introduced explicit rules on how to compensate accused persons for violations of their rights imputable to the Tribunals' organs. Notwithstanding the absence of such rules, a series of decisions by ICTY and ICTR chambers show the willingness of these institutions to address such violations when they occur. In doing so, the Tribunals appear to have followed some of the same principles on responsibility of international organizations as are being elaborated by the International Law Commission (ILC). By analysing these parallel processes, the author suggests that the elaboration of rules by the ad hoc Tribunals in the field of human rights violations and the codification by the ILC of rules on international responsibility, although distinct in aim and scope, might mutually benefit each other and shed some light on the difficulties of applying such principles in practice.

**Key words**

human rights; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; responsibility of international organizations; rights of accused persons; United Nations

## 1. Introduction

It is in principle a settled issue that states can incur international responsibility for breaching their obligations under international law. Thus it is somewhat surprising that responsibility of other subjects of international law, such as international organizations, has long been a neglected topic among legal scholars.[1] The International Law Commission (ILC) only decided to include the topic of 'Responsibility of international organizations' in its long-term programme of work in 2000, at its 52nd session.[2] In 2001 the UN General Assembly requested the ILC to begin its

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1. For a brief overview of the matter see R. Dupuy (ed.), *Manuel sur les organisations internationales* (1998), at 886–96; T. Ueki, 'Responsibility of International Organizations and the Role of the International Court of Justice', in N. Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda* (2002), at 237–49.
2. Report of the International Law Commission on the Work of Its Fifty-Fourth Session, UN Doc. A/55/10 (2002), paras. 458–64.

work on this topic.[3] On 8 May 2002, Professor Giorgio Gaja was appointed Special Rapporteur for the topic, and a working group was established to draft a preliminary report, which was adopted at the end of the 54th session the same year.[4]

Despite vigorous debates in past decades on international organizations' subjectivity and responsibility under international law, it is now recognized that, insofar as international organizations are subjects of international law,[5] they cannot but be bound by those rules of customary and treaty law applicable to them.[6] It would be absurd at this point in the development of international relations to suggest that states can shield their own breaches of human rights by creating international organizations which would be immune from such obligations.[7]

The law of international responsibility traditionally distinguishes between primary and secondary rules. The former category embraces rules that impose substantive obligations on subjects of international law – rules that, if not complied with, potentially give rise to liability. The secondary rules establish the prerequisites, content, and consequences of breaches of primary rules.[8]

The present article focuses on certain aspects of the case law of ad hoc tribunals related to international responsibility for violations of the rights of accused persons. It uses the first three reports on responsibility of international organizations, which contain Draft Articles 1 to 16 (Draft Articles), as a benchmark to assess this case law.[9] Draft Article 2 defines an international organization, 'for the purposes of the present draft articles', as 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality'

3. Ibid.
4. See ibid.
5. See F. Seyersted, 'International Personality of International Organizations', (1964) 4 *Indian Journal of International Law* 22; G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law, with an Appendix on the Concept of International Law and the Theory of International Organizations* (1979); P. H. F. Becker, *The Legal Position of Intergovernmental Organizations* (1994) (see in particular introduction and conclusions); A. Reinisch, *International Organizations before National Courts* (2000) (see in particular pp. 258 et seq.); D. Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government', (2004) 25 *Michigan Journal of International Law* 1107.
6. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, [1980] ICJ Rep. 73, at 89–90. See also C. Eagleton, 'International Organizations and the Law of Responsibility', (1950/I) 76 RCADI 319; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (1995); W. Czaplinski, 'International Responsibility of International Organizations: An Outline', (2004–5) 27 *Polish Yearbook of International Law* 120; E. A. Vorobjova, 'K voprosu o kodifikatsii prava mezhdunarodnoi otvestvennosti: Proekt statei ob otvestvennosti mezhdunarodnikh organizazii', (2006) 3 *Zhurnal mezhdunarodnogo prava i mezhdunarodnikh otnoshenii* (available at http://evolutio.info/index.php?option=com_content&task=view&id=145&Itemid=137).
7. C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law', (1999) 281 RCADI 129–30.
8. See, e.g., J. Combacau and D. Alland, 'Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations', (1985) 16 *Netherlands Yearbook of International Law* 81; A. Bleckmann, 'General Theory of Obligations under Public International Law', (1995) 38 *German Yearbook of International Law* 26–40; J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), at 14–16.
9. G. Gaja, First Report of the Special Rapporteur, UN Doc. A/CN.4/532 (2003); G. Gaja, Second Report of the Special Rapporteur, UN Doc. A/CN.4/541 (2004); G. Gaja, Third Report of the Special Rapporteur, UN Doc. A/CN.4/553 (2005) (hereinafter, collectively, Draft Articles).

and made up of states or 'other entities'.[10] This is the definition that will be used throughout this article.

One of the most dramatic developments in international law after the creation of the United Nations – with its ever expanding system aimed at protecting human rights more effectively – and the establishment of various regional human rights bodies has been the shift from a system that envisaged only the possibility of states settling violations of international law committed by other states to a system that, under certain circumstances, allows individuals to set into motion complaint mechanisms against states and their organs.[11] Indeed, the existence of effective remedies is the cornerstone of the implementation of human rights law.[12] Considering the consensus that generally recognized human rights norms are among the (primary) rules that bind international organizations,[13] the issue arises of what consequences flow from breaches of human rights committed by, or otherwise imputable to, non-state entities. When such non-state entities exercise judicial functions, as does the United Nations through the ad hoc Tribunals, it is logical to extend the safeguards required of domestic judicial systems to these entities.

This article proceeds by discussing the experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR, respectively; together also ad hoc Tribunals or Tribunals) in addressing human rights violations against individuals brought before them. A brief introduction discusses attribution of responsibility for conduct of the Tribunals' organs (section 2). The issue of which violations of rights are recognized before these bodies is then analysed, first in theory (sections 3 and 4) and then through relevant jurisprudence of the ICTY and ICTR (section 5). Having outlined some of the issues left open by the jurisprudence and not addressed by explicit norms within the Statutes of the Tribunals (section 6), the relevance of both the Draft Articles and the practice before the Tribunals is considered (section 7).

## 2. Imputing responsibility for conduct of the ad hoc Tribunals

The attribution to an entity of responsibility for illegitimate actions under international law is strictly connected with the issue of the international subjectivity of that entity. It would seem logical that no legal responsibility can rest on an entity

10. Draft Articles, *supra* note 9, Art. 2. For a critique of this definition see M. Mendelson, 'The Definition of "International Organization" in the International Law Commission Current Project on the Responsibility of International Organizations', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2004), at 371.
11. D. Shelton, *Remedies in International Human Rights Law* (1999), at 7–14.
12. Ibid., at 37.
13. K. Wellens, *Remedies against International Organisations* (2002); R. Kolb et al. (eds.), *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales* (2005) (see in particular pp. 464–9); A. Reinisch, 'The Changing International Legal Framework for Dealing with Non-state Actors', in P. Alston (ed.), *Non-state Actors and Human Rights* (2005), at 37; A. Clapham, *Human Rights Obligations of Non-state Actors* (2006). See also T. Ahmed and I. de Jésus Butler, 'The European Union and Human Rights: An International Law Perspective', (2006) 17 EJIL 771.

that is not a subject according to the legal system considered. On the other hand, imputing responsibility for certain acts to an entity implies at least prima facie evidence that the entity in question is indeed a distinct subject.[14]

Both the ICTY and the ICTR were established by the Security Council, which enacted their Statutes pursuant to its authority under Chapter VII of the UN Charter,[15] in order to punish violations of international law committed during the conflicts in the regions of the former Yugoslavia and Rwanda. Despite being separate entities, their respective Appeals Chambers are composed of the same judges; this is a structure intended to co-ordinate the law applied within those two otherwise distinct jurisdictions.[16]

The main characteristic relevant to the present narrative is that the ad hoc Tribunals are subsidiary organs of the Security Council, itself an organ of the organizations of the United Nations as a whole.[17] In its seminal decision on jurisdiction in the *Tadić* case, the ICTY Appeals Chamber convincingly argued that, despite the fact that the Security Council had created the ICTY as a subsidiary organ, the latter could not be considered a '"creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy'.[18] Moreover, even if the Security Council itself is not endowed with judicial functions, nothing prevents it from establishing a 'judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security'.[19] Subsequent decisions have elaborated on this concept, stating, for example, that the Security Council is to be considered the 'parent body' of the ICTY, to which reports can be addressed in case of non-compliance of orders by states,[20] or delineating a division of competencies between the two organs: judicial functions

14. G. Acquaviva, 'Subjects of International Law: A Power-Based Analysis', (2005) 38 *Vanderbilt Journal of Transnational Law* 345, at 384–96.
15. As is well known, Chapter VII of the UN Charter deals with 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' and provides the Security Council with both non-binding and binding powers (with respect to member states) to confront such situations. See UN Charter, Arts. 39–51.
16. The legal literature on the two ad hoc Tribunals is immense. Some of the works dealing with the topics raised in the present article are R. Dixon, 'Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals', (1997) 7 *Transnational Law and Contemporary Problems* 81; A. La Rosa, 'Réflections sur l'apport du Tribunal Pénal International pour l'ex Yougoslavie au droit à un procès équitable', (1997) 101 *Revue générale de droit international public* 945; W. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 *Duke Journal of Comparative and International Law* 461; S. Stapleton, 'Note: Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation', (1999) 31 *New York University Journal of International Law and Policy* 535; P. L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', (2000) 11 EJIL 569; C. DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters', (2001) 87 *Viginia Law Review* 1381; J. K. Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', (2002) 27 *Yale Journal of International Law* 111; A. La Rosa, *Jurisdictions pénales internationals: La procédure et la preuve* (2003); S. Zappalà, *Human Rights in International Criminal Proceedings* (2003); A. Cassese, *International Criminal Law* (2005). On the issue of respect for the human rights of the accused within the framework of the 'completion strategy' of the ad hoc Tribunals, see L. D. Johnson, 'Closing an International Criminal Tribunal while Maintaining International Human Rights Standards and Excluding Impunity', (2005) 99 AJIL 158.
17. A general discussion on the quality and attributions of 'subsidiary organs' of international organizations is provided by S. T. Bernández, 'Subsidiary Organs', in Dupuy, *supra* note 1, at 109–53.
18. *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 15 (hereafter *Tadić* Jurisdiction Decision).
19. Ibid., para. 38.
20. *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 33 (hereinafter *Blaškić* Decision).

are to be carried out by the Tribunals, while administrative tasks that do not impact on the independence of a judicial body – such as the appointment of judges or the extension of their mandate – may legitimately be exercised by the Security Council.[21] It should be added that the ad hoc Tribunals are financially dependent on the General Assembly, the organ mandated to consider and approve the budget of the United Nations as a whole.[22] This strongly suggests that the ICTY and the ICTR are subsidiary organs of the Security Council and, thus, of the United Nations. At the same time, the decisions mentioned above, representative of the case law of the ad hoc Tribunals on this issue, contain reassuring language that such a relationship does not per se curtail the independence that is the necessary characteristic of any judicial institution.[23]

With respect to attribution of responsibility to an international organization, Draft Article 4 ('General rule on attribution of conduct to an international organization') reads, in part,

> The conduct of an organ of an international organization, of one of its officials or another person entrusted with part of the organization's functions shall be considered as an act of that organization under international law, whatever the position the organ, official or person holds in the structure of the organization.[24]

This Draft Article further explains that organs, officials, and persons for the purposes of the Article are those identified as such by the rules of the organization itself. Following this principle, violations of primary rules by organs of the ad hoc Tribunals must be considered attributable to the United Nations as a whole.[25] The situation is further complicated by the fact that the ICTY and the ICTR are actually composed of separate organs with specific attributions and competencies (chambers; Office of the Prosecutor; Registry). These organs are envisaged as exercising the functions mandated by the respective two Statutes independent of each other. Accordingly, it is the conduct of the individuals working for these organs which is in general attributable to one of the Tribunals and, thus, to the United Nations as a whole. Keeping this complex chain of attribution of responsibility in mind, this article generally refers to the responsibility of the ad hoc Tribunals as the most immediate way to describe imputation for breach of the primary rules.

## 3. Infringement of human rights as breaches of primary rules

While it is not easy to establish an exhaustive list of primary rules applicable to the ad hoc Tribunals in the exercise of their judicial functions as subsidiary organs of the Security Council, it is considered 'axiomatic' that the ICTY and the ICTR 'fully

21. *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Defence Motion for a Ruling that His Honour Judge Canivell Is Unable to Continue Sitting in this Case, 16 June 2006 (confirmed by the Appeals Chamber on 15 September 2006).
22. UN Charter, Art. 17(1).
23. *Tadić* Jurisdiction Decision, *supra* note 18, paras. 17–22 (explaining the ICTY's inherent power to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council).
24. Draft Articles, *supra* note 9, Art. 4.
25. That the UN has traditionally accepted responsibility for acts of its subsidiary organs is explored in M. Zwanenburg, *Accountability of Peace Support Operations* (2005), ch. 2.

respect internationally recognised standards on the rights of suspects and accused'.[26] When organs of the United Nations such as these are concerned – bodies that aim to 'uphold the highest standards of due process such that justice is done and is seen to be done'[27] – this assumption is cogent. Such an aspiration appears to be important not only because of the relevance commonly assigned to the respect of fundamental human rights in criminal proceedings, but also due to the peculiarity of the Tribunals as ad hoc judicial institutions. By their very nature, the ICTY and the ICTR cannot rely on a long tradition of delivering justice and upholding the rule of law. Thus in order to appear, and ultimately act, as legitimate bodies, it is essential to their mission that they strictly respect the rights of the accused.

Draft Article 3 ('General principles') reads,

> 1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
>
> 2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
>
> (a) is attributable to the international organization under international law;
>
> (b) constitutes a breach of an international obligation of that international organization.[28]

Draft Article 7 ('Conduct acknowledged and adopted by an international organization as its own') reads,

> Conduct which is not attributable to an international organization under the preceding articles [Draft Articles 4 to 6] shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.[29]

With specific regard to breaches of international obligations, Draft Article 8 reads, in part,

> There is a breach of an international obligation by an international organization when an act of that organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.[30]

The question is, therefore, what specific 'international obligations' bind the ICTY and the ICTR vis-à-vis individual accused persons. According to the Statutes of the two ad hoc Tribunals, accused persons are entitled to specific guarantees founded in

26. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993), para. 106. See also S. Beresford, 'Redressing the Wrongs of the International Criminal Justice System: Compensation for Persons Erroneously Detained, Prosecuted or Convicted by the Ad Hoc Tribunals', (2002) 96 AJIL 628.

27. Address by Fausto Pocar, President of the ICTY, to the United Nations General Assembly, 9 October 2006, available at http://www.un.org/icty/pressreal/2006/p1122e-annex.htm.

28. Draft Articles, *supra* note 9, Art. 3.

29. Ibid., Art. 7. Except for their reference to international organizations, the wording of this and the following articles mirrors that of Articles 11, 12, and 13 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. See Report of the International Law Commission on the Work of Its Fifty-Third Session, UN Doc. A/56/10 (2001), ch. IV(E)(1) (containing the Draft Articles on State Responsibility).

30. Draft Articles, *supra* note 9, Art. 8. Draft Article 9 adds, somewhat unnecessarily, that '[a]n act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs'. Ibid., Art. 9.

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major international instruments for the protection of human rights. In particular, an accused is entitled 'in full equality'

> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) to be tried without undue delay;
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the [ad hoc Tribunals];
>
> (g) not to be compelled to testify against himself or to confess guilt.[31]

Other rights, such as the right of appeal and of revision of the verdict, are provided for in other articles of the Statutes and in the Rules of Procedure and Evidence.[32] A further number of internationally recognized rights, such as the right to be tried by an independent and impartial tribunal, are clearly considered applicable to any accused subject to the jurisdiction of the Tribunals.[33] This principle has been recognized by the ICTY since the *Tadić* case, cited above, when the Appeals Chamber stated:

> [an international court] must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.[34]

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31. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, (1993) 32 ILM 1159, as amended by Security Council Resolution 1660 of 28 February 2006 (hereinafter ICTY Statute), Art. 21(4); Statute of the International Criminal Tribunal for Rwanda, (1994) 33 ILM 1602, as amended by Security Council Resolution 1534 of 26 March 2004 (hereinafter ICTR Statute), Art. 20(4).
32. See ICTY Statute, *supra* note 31, Arts. 25–26; ICTR Statute, *supra* note 31, Arts. 24–25. With respect to the right of the convicted person to lodge an appeal, a problem might be caused by Articles 25(2) of the ICTY Statute and 24(2) of the ICTR Statute, which contain identical language: 'The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.' ICTY Statute, *supra* note 31, Art. 25(2); ICTR Statute, *supra* note 31, Art. 24(2). Since the Prosecution is also allowed to lodge appeals and appeals proceedings may therefore result in the reversal of prior acquittals, the accused does not seem to be afforded a right to appeal this (new) conviction. On this issue see the brief but potent dissent of Judge Pocar in *Semanza v. Prosecutor*, Case No. ICTR-97–20-A, Judgement, 20 May 2005, at 131 (also cited in subsequent opinions by Judge Pocar).
33. The rationale for the Tribunals' duty to apply generally recognized human rights standards is explored in L. Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms . . . or Tied Down?', (2006) 19 LJIL 847. For a tentative list of 'rights of accused persons', see N. Jayawickrama, *The Judicial Application of Human Rights Law* (2002), at 527–94.
34. *Tadić* Jurisdiction Decision, *supra* note 18, para. 45.

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Similarly, the ICTR has recognized that

> Under the Statute and the Rules of Procedure and Evidence, the Tribunal will ensure that the accused receives a fair trial. This principle of fair trial is further entrenched in Article 20 which embodies the major principles for the provision of a fair trial . . .[35]

In neither Statute of the ad hoc Tribunals, however, is there any explicit provision for possible remedies in case of violations of the enumerated rights. The following pages address the consequences of the Security Council not including a rule on the issue of reparations for violation of an accused's rights by the organs of the Tribunals. The existence of a normative provision in this sense would provide a definite legal basis for redress in these matters, specifying and clarifying the competence of judges, on the one hand, and administrative organs such as the Registrar, on the other. Such a provision would also align the Tribunals with the dispositions of many domestic legal systems and with what seems to be the current *opinio juris* of states, as evidenced by the Statute of the International Criminal Court (ICC).[36]

It should be borne in mind that not all limitations upon rights necessarily entail a violation of such rights. In particular, in the course of all legal proceedings – and not just before international criminal tribunals – rights of various individuals (the accused, witnesses, and other concerned persons) are balanced against each other to accommodate the other interests involved. For example, the ICTY takes into account a variety of 'interests' when weighing the rights of accused persons and possible limitations thereof, including the interests of the international community in a fair and expeditious trial and in the effective presentation of evidence,[37] the protection of victims and witnesses,[38] the interests of the Tribunal in effectively discharging its judicial role,[39] and the interests of other accused persons in being tried without undue delay.[40] For instance, the right to examine witnesses does not entail the possibility of endless cross-examination on any conceivable issue, while the right to adequate time and facilities for the preparation of the defence does not afford the opportunity to postpone the commencement of the trial indefinitely in order to reach a state of 'perfect' preparation for the trial.[41] Trial records are replete with examples of limitations of rights of the accused that do not prompt accused

35. *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on Defence Motion on Jurisdiction, 18 June 1997, para. 44.
36. See Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (1998), Art. 85 (quoted at note 52 *infra*) (hereinafter ICC Statute).
37. See *Prosecutor v. Šešelj*, Case No. IT-03-97-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defence, 9 May 2003, para. 21.
38. See ICTY Statute, *supra* note 31, Arts. 20–22; Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.39 (22 September 2006), Rule 69 (hereinafter ICTY Rules).
39. See *Blaškić* Decision, *supra* note 20, para. 33.
40. See *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Reasons for Oral Decision Denying Mr Krajišnik's Request to Proceed Unrepresented by Counsel, 18 August 2005, para. 32.
41. See, e.g., *Mayzit v. Russia*, Judgment, 20 January 2005, [2005] ECHR (Ser. A), para. 78 ('The accused must have the opportunity to organise his defence in an *appropriate* way and without restriction as to the possibility to put all *relevant* defence arguments before the trial court, and thus to *influence* the outcome of the proceedings. The provision is violated only if this is made *impossible*' (emphasis added)).

persons to request specific remedies outside the general right of appeal or redress vested in chambers.[42]

A 'short circuit' of the system may therefore surface when a miscarriage of justice occurs and the rules do not afford an explicit way adequately to address the matter within the normal course of the proceedings, such as through appeals or requests for modifications of previous decisions.

## 4. Breaches and the need for remedies

Discussing the general matter of reparations to accused persons for wrongful conduct of the Tribunals, on 26 September 2000 the president of the ICTY (at the time, Claude Jorda) sent a letter to the UN Secretary-General in order to raise his concerns with the United Nations and in particular with the Security Council.[43] Similar messages were also transmitted by the ICTR president (at the time, Navanethem Pillay).[44]

On one hand, President Jorda admonished that 'the issue of compensation needs ['mérite' in the original French version] to be addressed as soon as possible';[45] on the other, he also warned that the Tribunal does not consider itself to be directly responsible for such eventual violations. His letter stated that '[s]ince it is a subsidiary body of the Security Council, the actions of the International Tribunal for the former Yugoslavia can be imputed ['sont imputables' in the original French version] to the United Nations'.[46] He clarified that, 'when the conduct that gave rise to the violation is legally imputed to the Tribunal and thus to the United Nations, the latter would be legally bound to award compensation to the victim of this violation'.[47] This issue was also mentioned, for example, in the reports of the president of the Tribunal to the Security Council dated 7 August 2000[48] and 4 August 2002.[49]

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42. Among the multitude of examples, violation of disclosure obligations by the Office of the Prosecutor should be mentioned. Under Rule 68(i) of the ICTY Rules, 'the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence'. ICTY Rules, *supra* note 38, Rule 68(i). Where the Office of the Prosecutor is found to have breached this duty, Chambers enact the remedy deemed appropriate in the circumstances of the case within the normal course of the proceedings, such as ordering short adjournments or other solutions. See, e.g., *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Decision, 16 July 1998 (ordering the reopening of the case due to a breach of this rule as it was worded at the time).
43. See Letter Dated 19 September 2000 from the President of the International Tribunal for the Former Yugoslavia Addressed to the Secretary-General, UN Doc. S/2000/904 (2000), Annex (hereinafter Jorda letter). The original version of this letter was written in French. See Lettre datée du 19 septembre 2000, adressée au Secrétaire general par le Président du Tribunal international pour l'ex-Yougoslavie, UN Doc. S/2000/904 (2000), Annexe.
44. See Letter Dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda Addressed to the Secretary-General, UN Doc. S/2000/925 (2000), Annex; Letter Dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda Addressed to the Secretary-General, UN Doc. S/2000/1198 (2000), Annex.
45. Jorda letter, *supra* note 43, at 1.
46. Ibid., at 3.
47. Ibid., at 4.
48. See Seventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/55/273, S/2000/777 (2000), para. 285.
49. See Ninth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Docs. A/57/379, S/2002/985 (2002), paras. 28, 31.

In his letter, President Jorda identified three scenarios that might result in an 'obligation of reparation' on the part of the ICTY. The first referred to individuals wrongfully convicted by a trial chamber and subsequently recognized to be innocent on appeal or during review.[50] This type of case is considered by Article 14(6) of the International Covenant on Civil and Political Rights (ICCPR)[51] and has been acknowledged, with some variations, in Article 85(2) of the ICC Statute.[52] With respect to the practical implications of the issue, it is worth noting that, up to December 2006, eight individuals have been found not guilty by the ICTY alone.[53] Among these, five were acquitted by a trial chamber and three by the Appeals Chamber reversing previous convictions. In the same time frame, the ICTY convicted 45 persons with a final judgment. Thus the issue arises for a relevant number of accused.

Second, potential liability was envisaged in circumstances where people were arrested by serious and manifest error and then acquitted.[54] In other words if, in the exercise of its powers, the prosecution starts proceedings against people who then turn out to be innocent, in some cases this could lead to an abuse of power and, consequently, qualify as an offence giving rise to an actionable right to compensation. Despite not appearing in universal instruments on human rights, this principle is set forth in Article 85(3) of the ICC Statute.[55] Many advanced legal systems provide for mechanisms to indemnify, *under specific conditions and within established limits*, the damage suffered by persons detained for reasons subsequently revealed to be wrong or groundless.[56]

The last scenario mentioned by President Jorda to the Security Council was that of reparation to 'a person . . . arrested or detained under the Tribunal's authority in a manner or in circumstances which constitute a violation of the right to liberty

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50. Jorda letter, *supra* note 43, at 3–4.
51. 1966 International Covenant for Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 14(6) (hereinafter ICCPR).
52. Article 85 of the ICC Statute reads as follows:
    1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
    2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.
    3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason. (ICC Statute, *supra* note 36, Art. 85)
53. These are Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Dragan Papić, Zejnil Delalić, Sefer Halilović, Fatmir Limaj, and Isak Musliu. Another five individuals – Emmanuel Bagambiki, Ignace Bagilishema, Jean Mpambara, André Ntagerura, and André Rwamakuba – were acquitted by the ICTR.
54. Jorda letter, *supra* note 43, at 4.
55. For the text of Article 85 of the ICC Statute, see *supra* note 52.
56. While this principle is recognized by most domestic legal systems, it is inconsistently applied by states and tends to be confounded with the principle under Art. 14(6) of the ICCPR previously mentioned. See ICCPR, *supra* note 51, Art. 14(6). Under US federal statutory law, persons wrongfully convicted of federal crimes can bring an action for damages in the US Court for Federal Claims. 28 USC §§ 1495, 2513. Art. 643 of the Italian Code of Criminal Procedure only grants this right during review proceedings, and only if the acquitted person did not contribute, wilfully or by negligence, to the judicial error. In Dutch law, Art. 89 of the Code of Criminal Procedure establishes a right to compensation for unjust pre-trial detention.

and security of a person',[57] which is essentially the case contemplated by Article 9(5) of the ICCPR and Article 85(1) of the ICC Statute.[58] Illegal detention occurs, for example, in cases of detention not provided for by law and detention not followed by prompt information as to its causes or by a proper review by a court of the lawfulness of the detention.[59]

These communications are important for two reasons. First, authoritative statements of this kind illustrate that the ad hoc Tribunals consider themselves to be subsidiary organs of the United Nations and act on this assumption. Second, and more importantly, they show that the Tribunals consider the violation of certain categories of rights an issue to be reckoned with. However, the Security Council has not yet decided to intervene in this delicate matter by modifying the Statutes of the Tribunals.[60] Unless these Statutes are modified, it is hard to envisage the adoption by these two institutions of a rule providing for suitable reparation – which, among other things, would inevitably bring about remarkable financial costs for the institution. In the absence of a pronunciation by the 'legislator', these bodies have difficulties in shaping general rules to face such situations.

Yet, despite the inaction of the Security Council on this matter, several cases falling within the categories mentioned by President Jorda's letter have surfaced and been dealt with by the judges of the two Tribunals. Decisions in the cases examined below are instances where the ad hoc Tribunals have openly and explicitly dealt with the seeming violation of the rights of accused individuals in apparent compliance with some of the principles enshrined in the Draft Articles, despite – as remarked in the ICTY president's letter mentioned above – the absence of an explicit norm mandating, or even regulating, such cases. Although not representing the complete jurisprudence on the issue, they do not appear to be contradicted by other decisions and should, therefore, be considered illustrative of the position of these institutions in this matter as of 31 January 2006.

## 5. Case law

### 5.1. Agim Murtezi

In more than one instance the ICTY has faced the issue of unlawful detention of individuals arrested because of mistaken identity. In the *Lajić* case, for example, Goran Lajić was arrested by the German authorities on 18 March 1996 and subsequently transferred to the Tribunal. Lajić was detained on remand until 17 June 1996, when the competent chamber[61] set him free, as he turned out not to be implicated in the *Sikirica et al.* case.[62]

57. Jorda letter, *supra* note 43, at 4–5.
58. Art. 9(5) of the ICCPR and Art. 85(1) of the ICC Statute are identical, and both read: 'Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. ICCPR, *supra* note 51, Art. 9(5); ICC Statute, *supra* note 36, Art. 85(1).
59. See, e.g., *Smirnova v. Russian Federation*, Communication No. 712/1996, UN Human Rights Comm., 81st Sess., UN Doc. CCPR/C/81/D/712/1996 (2004), paras.10.1–10.5.
60. Beresford, *supra* note 26, at 644–5.
61. Composed of Judges Claude Jorda, Elizabeth Odio Benito, and Fuad Riad.
62. *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-PT, Order for the Withdrawal of the Charges against the Person Named Goran Lajić and for His Release, 17 June 1996. For a brief analysis of this case see F. Patel King and A. La Rosa, 'International Criminal Tribunal for the Former Yugoslavia: Current Survey', (1997) 8 EJIL 123.

Other suspects have had the charges against them withdrawn after their arrest.[63] In particular, the case of Agim Murtezi deserves to be examined in detail, since it is the latest involving one of the two ad hoc Tribunals and may be considered illustrative of the current position of the ICTY on the issue.

On the basis of Article 19 of the ICTY Statute, on 27 January 2003, Judge Amin El Mahdi confirmed an indictment issued by the Prosecutor against four Kosovo Albanians: Fatmir Limaj (aka Celiku), Haradin Bala (aka Shala), Isak Musliu (aka Qerquiz), and Agim Murtezi (aka Murrini). All four were charged with war crimes and crimes against humanity against civilians and prisoners of war during the conflict in that region of the former Yugoslavia. As was common in these cases, the judge coupled the confirmation of the indictment with arrest warrants for the accused and search warrants for their residences.[64]

On 17 February 2003, Agim Murtezi was arrested by the NATO-led international force in Kosovo (KFOR) on the basis of the above-mentioned warrant. On the following day he was transferred to the Tribunal. During the arrest, KFOR searched Murtezi's residence and removed some objects. During his initial appearance on 20 February, Murtezi (like Bala and Musliu) pleaded not guilty.[65] Moreover, Murtezi stated that his nickname was not the one mentioned in the indictment and maintained that he was actually a different person.[66]

In the following days, on the basis of Rules 42 and 43 of the Rules of Procedure and Evidence of the Tribunal, the Office of the Prosecutor (OTP or Prosecution) questioned Murtezi and conducted further investigations in Kosovo and The Hague. On 28 February the Prosecution filed a motion to withdraw the indictment against Murtezi.[67] The motion was based on the fact that, considering the interviews, the investigations, and the material found in Murtezi's residence, the Prosecution believed that there was, in its words, 'considerable doubt as to whether this man that sits before you today is in fact the actor in the events that are outlined in the indictment'.[68] Thus the Prosecution requested that the seven charges against Murtezi be immediately dropped and that he be sent back to Kosovo as soon as possible.[69]

On the same day Murtezi filed a response with the Registry supporting the motion of the Prosecution.[70] In particular, Murtezi stated that, since the day of his initial

63. The persons wrongly accused, and as to whom all charges were dropped, are Marino Katava, Ivan Santić, Pero Skopljak, Nenad Banović, and Agim Murtezi.
64. Part of the procedural history of this case is recounted in *Prosecutor v. Limaj et al.*, Case No. IT-03-66-I, Order to Withdraw the Indictment against Agim Murtezi and Order for His Immediate Release, 28 February 2003 (hereinafter Order to Withdraw Indictment). See also the transcript of the initial appearance of the accused on 20 February 2003, available at http://www.un.org/icty/transe66/030220IA.htm (hereinafter 20 February 2003 transcript); and the transcript of the motion hearing of 28 February 2003, available at http://www.un.org/icty/transe66/030228ME.htm (hereinafter 28 February 2003 transcript); *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgement, paras. 744–5 (hereinafter *Limaj et al.* Trial Judgement).
65. See 20 February 2003 transcript, *supra* note 64, at 23–4.
66. See 28 February 2003 transcript, *supra* note 64, at 29.
67. See *Prosecutor v. Limaj et al.*, Case No. IT-03-66-I, Prosecutor's Motion to Withdraw Indictment against Agim Murtezi, 28 February 2003 (hereinafter Motion to Withdraw Indictment).
68. See 28 February 2003 transcript, *supra* note 64, at 29–33.
69. Motion to Withdraw Indictment, *supra* note 67, at 3; Order to Withdraw Indictment, *supra* note 64, at 2.
70. See *Prosecutor v. Limaj et al.*, Case No. IT-03-66-I, Urgent Preliminary Response to Prosecution's Motion to Withdraw Indictment against Agim Murtezi, 28 February 2003.

appearance, he had not only declared his innocence but had also stated in an unequivocal way that he was a different person from the one mentioned in the indictment. Murtezi asked for the indictment to be dropped 'with prejudice to the Prosecution', thus preventing the OTP in the future from bringing the same charges. Even more urgently, Murtezi asked to be set free at once. After a brief hearing on the same day, the appointed chamber[71] ordered the withdrawal of the indictment and Murtezi's consequent immediate release.[72] The following day Agim Murtezi was flown back to Kosovo.[73]

KFOR, on behalf of the OTP, had undoubtedly encroached on Murtezi's fundamental rights by detaining him, thus depriving him of his right to freedom. Due to the fact that KFOR[74] was acting on behalf of an organ of the ICTY – which does not possess a police force of its own and must rely on law-enforcement authorities lawfully present on the territory to implement many aspects of its orders – and considering the principles of imputation outlined above, conduct attributable to the ICTY caused a violation of an individual's right. It is not important, for the purpose of the present analysis, to try and ascertain whether this breach was caused by negligence on the part of the Tribunal. What this case suggests, among other things, is that important developments in the matter of rights of (even unjustly) accused individuals lie with the OTP and the judges, and that their role in the protection of individual rights turns out to be fundamental. It was thanks to prompt and good-faith action by the Prosecution, to which the judges concerned responded swiftly, that Murtezi was flown back to his home town in a relatively short period of time, thus limiting the curtailment of his right to freedom.

### 5.2. Jean-Bosco Barayagwiza

Jean-Bosco Barayagwiza, charged by the OTP of the ICTR with genocide and crimes against humanity, was arrested by the authorities of Cameroon on 15 April 1996 and detained there for over a year. He apparently did not receive notification of the charges against him for at least 11 months and was informed only in a generic way of the reasons for his arrest. After this period of detention, he was transferred to the ICTR, where he did not appear before a judge for 96 days.[75] Protesting against such violation of his rights, the accused turned to the competent trial chamber, which rejected his appeal. However, on 3 November 1999 the ICTR Appeals Chamber[76] reversed the decision and ordered his release. Moreover, it dismissed the indictment against the appellant with prejudice to the Prosecution and directed the appellant's immediate

71. Composed of Judges Liu Daqun, Alphons Orie, and Amin El Mahdi.
72. Order to Withdraw Indictment, *supra* note 64, at 3. There was no specification of whether the indictment was to be considered withdrawn with prejudice, as requested by Murtezi.
73. See United Nations Mission in Kosovo Press Release, 1 March 2003, available at http://www.unmikonline.org/press/2003/mon/mar/lmm%20010303.htm.
74. The *Limaj et al.* Trial Judgement, mentions SFOR in this respect. See *Limaj et al.* Trial Judgement, *supra* note 64, para. 745. But see 20 February 2003 transcript, *supra* note 64, at 25 (referring to KFOR).
75. That this type of conduct does indeed constitute a violation of the rights of the accused has been confirmed by the European Court of Human Rights. See, e.g., *Kamasinski v. Austria*, Judgement, 19 December 1989, [1989] ECHR (Ser. A), at 33; *T. v. Italy*, Judgment, 12 October 1992, [1992] ECHR (Ser. A), at 65.
76. Composed of Judges Gabrielle Kirk McDonald, Mohamed Shahabuddeen, Lal Chand Vorah, Wang Tieya, and Rafael Nieto-Navia.

release because he had been deemed subject to serious human rights violations.[77] The justification for such a drastic outcome was described by the Appeals Chamber as follows:

> [T]he fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.[78]

The Prosecution filed a request for revision of the decision, asserting that new facts had come to light. The 'new facts' brought forth by the Prosecution showed that the notification of the charges had occurred after 18 days, instead of 11 months. Moreover, the delay in the transfer to the Tribunal was imputable to the government of Cameroon rather than to the OTP; the responsibility for human rights violations was therefore not directly attributable to the ICTR. Furthermore, 20 days after the transfer, Barayagwiza's counsel had accepted the postponement of his initial appearance. Accordingly, the impact of the violation of the right of the accused to be promptly charged and informed of the charges against him, as well as of his right to an initial appearance without delay, was notably reduced. On the basis of this new analysis of the facts, the differently constituted Appeals Chamber[79] deemed a revision of the previous decision necessary and, on 31 March 2000, issued a new disposition.[80] The Appeals Chamber decided that the dismissal of the charges with prejudice – resulting in the immediate release of the accused – was disproportionate to the specific violations of human rights suffered by the accused. In the words of the Appeals Chamber,

> [t]he new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effect of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new facts being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified.[81]

However, the Appeals Chamber did find that, because certain violations of Barayagwiza's rights were imputable to the OTP and to the trial judges, some remedy was warranted:

> [T]he Appellant's rights were violated, and . . . all violations demand a remedy. However, the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded. Accordingly, the remedy ordered [by the First Barayagwiza Decision], which consisted in the dismissal of the indictment and the release of the Appellant, must be altered.[82]

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77. See *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 (hereinafter First *Barayagwiza* Decision).
78. Ibid., para. 106.
79. Composed of Judges Claude Jorda, Lal Chand Vorah, Mohamed Shahabuddeen, Rafael Nieto-Navia, and Fausto Pocar.
80. See *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 31 March 2000.
81. Ibid., para. 71.
82. Ibid., para. 74.

Without any detailed explanation of how it reached this new result, the Appeals Chamber then proceeded to order *how* the trial chamber that would deal with the case – and would decide on the charges – should take into consideration the violations suffered by the accused and apply the appropriate remedy. In the disposition of the Second *Barayagwiza* Decision, the Appeals Chamber ordered that, if the accused were to be found innocent at the end of the trial, he would be entitled to monetary compensation. Conversely, were he to be found guilty, his sentence would have to be reduced in order to compensate him for the violation of his rights during the pre-trial phase.[83]

Barayagwiza was convicted on 3 December 2003 by the trial chamber[84] for genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, extermination, and persecution. The trial chamber concluded that, in the absence of mitigating circumstances, it would have imposed a life sentence. However, considering the order contained in the Second *Barayagwiza* Decision, the trial chamber sentenced him to a reduced prison term of 35 years.[85] The appeal in this case is still pending.[86]

### 5.3. Juvénal Kajelijeli

The principle that the sentence should be reduced because of egregious violations of fundamental rights of the accused has more recently been confirmed by the Appeals Chamber of the ICTR in the case of Juvénal Kajelijeli, who had been unduly held for a total of 85 days in Benin on request of the Tribunal, and for 211 days in the ICTR detention facility prior to his initial appearance. Moreover, during the first 147 days in which he was in the custody of the ICTR, he had been without legal representation.

In this case, the Appeals Chamber[87] stated that the trial chamber had erred in not making an explicit finding that such a situation amounted to a breach of the accused's right to counsel. Moreover, it found that the time during which Kajelijeli was held in custody without appearing before a judge constituted 'extreme undue delay'.[88]

In particular, the Appeals Chamber found that

> fault is attributable to the Prosecution for violations to the Appellant's rights during this first period of arrest and detention. The Prosecution failed to effect its prosecutorial duties with due diligence out of respect for the Appellant's rights following

83. Ibid., para. 75.
84. Composed of Judges Nevanethem Pillay, Erik Møse, and Asoka de Zoysa Gunawardana.
85. *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003, paras. 1106–1107.
86. On the issues raised by the revision of the First *Barayagwiza* Decision, see Zappalà, *supra* note 16, at 187–9, and G. Sluiter, 'International Criminal Proceedings and the Protection of Human Rights', (2003) 37 *New England Law Review* 935.
87. Composed of Judges Fausto Pocar, Mohamed Shahabuddeen, Florence Ndele Mwachande Mumba, Wolfgang Schomburg, and Inés Mónica Weinberg de Roca.
88. For the whole of the relevant discussion, see *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 197–255 (hereinafter *Kajelijeli* Appeal Judgement).

https://doi.org/10.1017/S0922156507004281 Published online by Cambridge University Press

> its Rule 40 request to Benin. Thus, the Appellant is entitled to a remedy from the Tribunal.[89]

And it added that

> [w]ith regard to the violations of the Appellant's right to counsel and to an initial appearance without delay during the second period of his detention in the custody of the Tribunal, the Appeals Chamber finds that responsibility for those violations is attributable to the Tribunal.[90]

Having considered these violations, the Appeals Chamber concluded that the right to a remedy specifically applied to this case, stating that 'any violation of the accused's rights entails the provision of an effective remedy *pursuant to* Article 2(3)(a) of the ICCPR'.[91] This provision recites, 'Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'.[92]

In theory, the term 'remedy' contained in the ICCPR may admittedly refer to two different concepts: a judicial remedy that states must provide for possible violations of rights, or actual reparation, monetary or otherwise, for those individuals whose rights are violated. The first interpretation would not have meant much to Kajelijeli, since it would have offered him little more than a forum to address his complaints. In this case, however, the Tribunal clearly intended the norm to refer to effective reparation for the infringement of Kajelijeli's rights. This interpretation is consistent with the rule enshrined in Article 85(1) of the ICC Statute, which states that '[a]nyone

89. Ibid., para. 252. In particular,

> [the trial chamber] erred in failing to find that [Kajelijeli's] detention in Benin for a total of 85 days without charge and without being brought promptly before a Judge was clearly unlawful and was in violation of his rights under the Tribunal's Statute and Rules as well as international human rights law. The Appeals Chamber finds that the Prosecution is responsible for these violations because it failed to make a request within a reasonable time under Rules 40 and 40bis for [Kajelijeli's] provisional arrest and transfer to the Tribunal[.] (Ibid., para. 231)

Moreover,

> 85 days of provisional detention without even an informal indication of the charges to be brought against the suspect is not reasonable under international human rights law, given that nothing less than an individual's fundamental right to liberty is at issue. While it is true that [Kajelijeli] was served with the arrest warrant and redacted indictment within days of their issuance by a Judge of this Tribunal on 29 August 1998, at a minimum, the Appellant should have been informed as soon as possible after his arrest on 5 June 1998 of any reliable information possessed by the Prosecution with regard to why he was considered a suspect and as to any provisional charges against him. (Ibid.)

90. Ibid., para. 253. In particular,

> Rule 44bis of the Rules clearly obliges the Registrar to provide a detainee with duty counsel, with no prejudice to the accused's right to waive the right to counsel. It constitutes a violation of Rule 44bis of the Rules and provision 10bis of the Directive on the Assignment of Defence Counsel not to assign duty counsel, in spite of ongoing efforts to assign counsel of choice in light of the outstanding initial appearance. Also . . . such a duty exists from the very moment of transfer to the Tribunal and is not confined to purposes of the initial appearance only[.] (Ibid., para. 245)

Moreover, '[t]he difficulties in assigning [Kajelijeli] counsel in this case should not have been an obstacle for the Tribunal to ensure that [his] initial appearance was scheduled without delay.' Ibid., para. 248.

91. Ibid., para. 255 (emphasis added).

92. ICCPR, *supra* note 51, Art. 2(3)(a).

https://doi.org/10.1017/S0922156507004281 Published online by Cambridge University Press

who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.[93]

Since the violation was not so serious as to justify the immediate release of Kajelijeli, the Appeals Chamber reduced the sentence imposed on him by the trial chamber – two life sentences and 15 years – to 45 years of detention.[94] As in the Second *Barayagwiza* Decision, the Appeals Chamber did not explicitly discuss the various options that might have been open to it in providing for an effective remedy to the convicted person in this specific instance, merely stating that '[t]he Appeals Chamber therefore finds it appropriate to reduce the Appellant's sentences as imposed by the Trial Chamber for his convictions at trial, which have been affirmed in this appeal'.[95]

What is absolutely remarkable in this decision by the Appeals Chamber is that the Tribunal directly applied a norm contained in the ICCPR, an international instrument expressly intended to put obligations on states and not on international organizations or international tribunals. In other words, the Appeals Chamber did not state that the *principles* enshrined in Article 2 of the ICCPR also applied to the ad hoc Tribunals – as the ICTY and ICTR routinely do, for example, when referring to the jurisprudence of the European Court of Human Rights – but simply proceeded to apply those principles directly to the case before it.

Assuming that the reference to the text of the ICCPR is not a mere mistake on the part of the Appeals Chamber, the rationale of this decision might be based on two concurring, but distinct, premises. First, the Appeals Chamber might have considered that the ICCPR enshrines a rule of international law binding not only on states, but on all subjects of international law and their organs. Second, it may have considered that a UN-sponsored treaty such as the ICCPR[96] was binding on UN organs, including the ad hoc Tribunals. Whatever the underlying reason for such a bold statement, the ICCPR may really be conceived – in accordance with the intention of its drafters – as a rudimentary form of an 'international bill of rights', applicable to conduct by all subjects of international law.[97]

### 5.4. Dragan Nikolić

On 21 April 2000 Dragan Nikolić, who had been charged with various crimes against humanity in the exercise of his functions of commander of the Sušica prison camp near the town of Vlasenica in Bosnia and Herzegovina,[98] was arrested in unclear circumstances. In particular, Nikolić stated that unknown individuals abducted him on Serbian territory where he resided, and transferred him against his will to

93. ICC Statute, *supra* note 36, Art. 85(1).
94. See *Kajelijeli* Appeal Judgement, *supra* note 88, paras. 320–4.
95. Ibid., para. 320.
96. See GA Res. 2200A, UN GAOR, Supp. No. 16, Annex (1966) (adopting the ICCPR and opening it for signature and ratification).
97. For this expression see F. Francioni, 'An International Bill of Rights: Why It Matters, How It Can Be Used', (1997) 32 *Texas International Law Journal* 471. The *Kajelijeli* holding can arguably be considered one of the first attempts at applying in practice the principles enshrined in the 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms'. See GA Res. 53/144, UN Doc. A/RES/53/144 (1999), Annex (see in particular Arts. 9 and 18 of the Declaration).
98. *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, Third Amended Indictment, 31 October 2003.

Bosnia and Herzegovina. These same individuals then handed him over to officials of the Stabilization Force in Bosnia and Herzegovina (SFOR), which had been created pursuant to the Dayton Accords.[99] SFOR then surrendered him to ICTY OTP officials.

Nikolić complained to the trial chamber, pleading a lack of jurisdiction of the Tribunal based on the illegality of his arrest. On 9 October 2002 the trial chamber[100] concluded that the conduct of the unknown individuals who had handed Nikolić over to SFOR could be attributed neither to SFOR nor to the OTP.[101] The principle expressed by the three trial chamber judges, reflecting the wording of the Appeals Chamber in *Barayagwiza*, was the following:

> In a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious treatment.[102]

Yet after analysing all the relevant circumstances, the chamber reached the conclusion that the events leading to the surrender of Nikolić to the ICTY were not imputable to the Tribunal, and did not involve such serious violations of Nikolić's rights as to mandate his release. Thus the judges decided to continue the proceeding against Nikolić and dismissed his request for release.[103] On 27 January 2003, however, Nikolić appealed against the trial chamber decision.[104]

The Appeals Chamber[105] examined the matter in two separate steps. First, it considered whether the appropriate remedy for the possible violation of Serbia's sovereignty or of Nikolić's individual rights on the Tribunal's part could be for the Tribunal to refuse to exert jurisdiction. Second, it assessed whether the conduct of the kidnappers might be attributed to SFOR and, in a wider sense, to the OTP.[106] After meticulous analysis of the domestic case law on the seizure of suspects without authorization by local authorities,[107] the Appeals Chamber reached the conclusion that it is possible to exert jurisdiction over individuals *male capti* in the case of

99. See *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, Direction of the Pre-Trial Judge, 6 July 2001.
100. Composed of Judges Wolfgang Schomburg, Florence Ndepele Mwachande Mumba, and Carmel Agius.
101. *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002 (hereinafter *Nikolić* Trial Decision).
102. Ibid., para. 114. The chamber did, however, note that the facts as presented by the parties showed that the conduct of SFOR 'did not amount to "adoption" or "acknowledgement" of the illegal conduct "as their own"'. Ibid., para. 106.
103. Ibid., at 40 (Section VIII of the decision).
104. *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, Appellant's Brief on Appeal against a Decision of the Trial Chamber Dated 9th October 2002, 27 January 2003.
105. Composed of Judges Theodor Meron, Fausto Pocar, Mohammed Shahabuddeen, Mehmet Güney, and Amin El Mahdi.
106. *Prosecutor v. Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 (hereinafter *Nikolić* Decision on Interlocutory Appeal).
107. The case law analysed by the Appeals Chamber included the following interesting cases: *People of Israel v. Eichmann*, Judgment, 36 ILR 306 (Supreme Court of Israel, 1962); *In re Argoud*, Judgment, 45 ILR 97 (French Court of Cassation 1964); *Fédération nationale des déportés et internés résistants et patriotes et autres v. Barbie*, Judgment, 78 ILR 130 (French Court of Cassation, Criminal Chamber, 1983); *Stocke v. Federal Republic of Germany*, Decision, AZ: 2 BvR 1190/84 (German Federal Constitutional Court, 1985); *State v. Ebrahim*, Opinion, (1992) 31 ILM 899 (Supreme Court of South Africa, Appellate Division, 1991); *United States v. Alvarez-Machain*, 504 US 655 (1992). On the issue in general, see the seminal work: F. Pocar, *L'esercizio non autorizzato del potere statale in territorio straniero* (1974).

universally recognized crimes such as genocide, war crimes, and crimes against humanity, because the international community has a 'legitimate expectation that those accused of these crimes will be brought to justice swiftly. Accountability for these crimes is a necessary condition for the achievement of international justice'.[108] Additionally, consent of the state where the abduction took place – even subsequent, or implicit for lack of protest – 'cures' matters regarding violation of sovereignty (although, obviously, not violations of individual rights).[109] Because the Appeals Chamber concluded that it would not have been necessary to decline its jurisdiction, there was no need to analyse the second matter – that is, the attribution to the Tribunal of the conduct of the unknown kidnappers or of SFOR.

Nevertheless, the Appeals Chamber reasoned that, apart from the abduction itself, other violations of the rights of the accused might have occurred. Thus the Appeals Chamber examined another aspect of the case: whether jurisdiction must be declined in cases of serious violations of the rights of the accused, independently of the question of attribution. On the basis of the precedent in *Barayagwiza*, supported by national case law, the Appeals Chamber held that in case of egregious human rights violations, '[i]t would be inappropriate for a court of law to try the victims of these abuses'.[110] In other words, to meet the essential international interest of bringing to justice individuals suspected of serious violations of humanitarian law, the Appeals Chamber deemed that only *serious* violations of the rights of the accused will prompt the Tribunal to refuse jurisdiction. In *Nikolić*, the Appeals Chamber believed that the facts surrounding the abduction of the accused would not have consisted of such serious violations as to require his immediate release. It therefore ruled that proceedings should continue.[111]

It is not clear whether the Appeals Chamber, on the basis of the principle expressed in *Barayagwiza*, might have chosen to order payment of a monetary compensation to Nikolić (in case of acquittal) or reduction of his sentence (in case of conviction) for the infringements of his rights.[112] In any event, Nikolić decided to plead guilty to an amended indictment less than three months after the Appeals Chamber decision was issued.[113]

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108. *Nikolić* Decision on Interlocutory Appeal, *supra* note 106, para. 25.
109. With these two statements, the Appeals Chamber implicitly rejected the troubling precedent of *Alvarez-Machain*, the 1992 opinion in which the US Supreme Court admitted the possibility of trying an individual abducted by federal law-enforcement agents from the territory of another country (Mexico), with which the United States had a valid extradition treaty, for ordinary domestic crimes and despite Mexico's protests. See *US v. Alvarez Machain*, *supra* note 107.
110. *Nikolić* Decision on Interlocutory Appeal, *supra* note 106, para. 30.
111. Ibid., para. 34.
112. On the *Nikolić* case, scholars have expressed differing views. See A. Carcano, 'The ICTY Appeals Chamber's Nikolić Decision on Legality of Arrest: Can an International Criminal Court Assert Jurisdiction over Illegally Seized Offenders?', (2003) 13 *Italian Yearbook of International Law* 77; J. Sloan, 'Prosecutor v. Dragan Nikolić (Decision of the Interlocutory Appeal Concerning Legality of Arrest)', (2005) 4 *Law and Practice of International Courts and Tribunals* 491; A. Sridhar, 'The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of Transnational Abduction', (2006) 42 *Stanford Journal of International Law* 343.
113. *Prosecutor v. Nikolić*, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003, para. 35. Stevan Todorović, another individual accused before the ICTY, had also been transferred to the Tribunal as a consequence of events similar to those involving Nikolić described above. See *Prosecutor v. Todorović*, Case No. IT-95-9-1/S, Sentencing Judgement, 31 July 2001, para. 2. Todorović also decided to plead guilty. On this case see J. Sloan,

## 6. Violations and remedies: issues still pending

In principle, the two ad hoc Tribunals seem ready to accept responsibility for conduct attributable to them and impacting on certain rights of the accused. As clarified in the two decisions of the *Barayagwiza* case, they exercise powers of supervision that go beyond human rights violations during proceedings. In fact, the Tribunals seem to hold the (justified) opinion that violation of fair trial guarantees occurring before an accused person has appeared in court may invalidate or seriously impair the integrity of the entire proceedings. Such supervision clearly aims to ensure that proceedings always reflect the principle of a 'just justice'. It should not be forgotten that remedies not only provide redress for the individual aggrieved by the violation, but also serve the general interest of providing sanctions for undue encroachments on human rights, thus possibly deterring future violations.[114]

Detention on remand is considered to be a particularly acute problem by the ad hoc Tribunals because of the delays that proceedings before international courts often face.[115] When such violations of the rights of the accused are coupled with other violations such as treatment below UN-established standards or late recognition of innocence, the ad hoc Tribunals have intervened and attempted to redress the perceived wrongs. The concerns expressed by the presidents of the two institutions in their letters in 2000 to the Security Council are revealing in this respect. The decision in the *Murtezi* case, by which the organs of the Tribunal proved to be able to remedy such errors in a swift manner, shows that this issue is particularly important to both the OTP and to judges.

Yet an amendment of the Statutes adding an explicit norm seems necessary, at least in the field of responsibility for judicial errors. Cases of alleged liability for judicial errors often involve an evaluation of whether an acquittal *ipso facto* implies reparation for damages suffered by the accused during pre-trial and trial phases. Further problematic issues are the criteria for reparation allocation and quantification. Taking into account the broad policy issues involved, it is submitted that such evaluations pertain more to the competence of political organs such as the Security Council and the General Assembly than to judicial bodies.

The decisions examined in this article tend to show that two separate elements must always be considered. On one hand, one must determine the attribution of particular kinds of wrongful conduct (violations of primary rules) to organs of the Tribunals. On the other, it also must be established whether the gravity of such conduct is tantamount to infringements that should invalidate the proceedings against an accused, or at least warrant lesser measures such as monetary compensation. Such an assessment is necessarily to be made on a case-by-case basis. Taking into account the jurisprudence discussed in this article, it appears that these two institutions feel

'Prosecutor v. Todorović: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction', (2003) 16 LJIL 85.

114. See Shelton, *supra* note 11, at 358.

115. In at least one instance, the length of the time spent in detention (over eight years) 'pending a final outcome in his case' has been accorded weight in mitigation. See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 728 (see especially the somewhat unclear discussion in note 1559 of the Judgement).

https://doi.org/10.1017/S0922156507004281 Published online by Cambridge University Press

bound to take adequate steps at least when both the above-mentioned elements – that is, 'attribution' and 'miscarriage of justice' stemming from a serious violation of the individual rights of the accused – are shown to be present. Moreover, in cases of 'acknowledgement' or 'endorsement' by organs of the Tribunals, even the conduct of other entities may be considered a source of liability. 'Adequate steps' may include, but are probably not limited to, the reparation of the prejudice suffered by, and the immediate release of, the accused. This appears to exclude from the scope of this review those infringements of rights that can be cured through the ordinary means provided for in the judicial process, as well as those limitations that, having regard to the balancing exercise necessary to consider all interests involved in criminal prosecutions, do not amount to a 'miscarriage of justice'.

There is, undoubtedly, uncertainty about the appropriate kind of reparation and about the level required for violations to qualify as sufficiently 'serious'. Yet such uncertainty is not due to the fact that the Statutes do not provide for reimbursement or for other forms of reparation, but is rather inherent in the complexity of the situations in which these types of violations may occur. The rule contained in Article 85 of the ICC Statute, which seems complete at first sight,[116] does not in fact clarify *which* violations result in a subjective right of the accused to be compensated. Moreover, that rule would seem to exclude the possibility of immediate release of the accused subject to the most serious violations, a remedy still contemplated by ICTY judges, at least in extreme cases.

Despite the plurality of interests and the needs that international criminal jurisdictions face, and regardless of the fact that they are not specifically mandated to supervise compliance with international human rights obligations, the cases examined above show that the judges of the ad hoc Tribunals intend to protect in an effective manner what they deem to be fundamental individual rights of accused persons. Such decisions may even end up influencing the standards applied by domestic courts.[117] This appears to be so not only when these rights are specifically provided for in the Statutes, but also when they can be inferred from customary international law. The delicate task of reconciling these rights with the interest of the international community that 'justice be done' lies, as it should, with independent and impartial judges.

In any event, the readiness of the Tribunals to recognize that inappropriate conduct creates liability might have something to do with the overall concern with the fairness and the integrity of the proceedings. As explained in the *Nikolić* case, it would be wrong to exercise jurisdiction where the accused's rights were seriously infringed in the process of bringing him to justice or subjecting him to criminal proceedings. Whatever the rationale underlying such judicial choices, it is certainly interesting that the ad hoc Tribunals have adopted a less-than-formalistic approach to the issue of attribution of responsibility. They have generally acted in good faith

116. For the text of Art. 85 of the ICC Statute, see *supra* note 52.
117. On this issue and, in general, on the relationship between international and domestic procedural law in cases related to international crimes, see G. Sluiter, 'The Law of International Criminal Procedure and Domestic War Crimes Trials', (2006) 6 *International Criminal Law Review* 605 (see especially 625 et seq.).

in considering possible remedies for misconduct attributable to the Tribunals, and the judges have tried to address these situations adequately.[118] This does not mean that all the decisions taken are immune to criticism or that the solutions envisaged might not be improved. The limited scope of these conclusions is that the ad hoc Tribunals, even if not formally obliged to do so, have conducted themselves no worse than states are required to do pursuant to international law and, even in the absence of explicit provisions to this effect, do try to solve problems when they arise.

## 7. Concluding observations

The Draft Articles intend to codify existing rules of customary international law related to responsibility of international organizations. Similarly, the two ad hoc Tribunals have striven, in their own words, to apply the same customary principles to the multifaceted and often complex factual situations that they face, attempting to strike a hard balance between the rights and interests involved. It is not surprising, then, that the conclusions reached by the ILC and the two Tribunals do not appear to diverge on any major issue. On the contrary, this convergence tends to confirm that the analysis of the law by those institutions is a credible one – in short, one which meets the *opinio juris* of the international community. While the ad hoc Tribunals have not participated in the consultation process before the ILC by submitting comments to the Draft Articles,[119] it is noteworthy that the Commentary to the Draft Articles does cite the *Nikolić* case with respect to Article 7 ('Conduct acknowledged and adopted by an international organization as its own'), noting that the trial chamber's Decision found that SFOR's actions did not amount to acknowledgement or adoption of the actions of the unknown individuals who had kidnapped Nikolić.[120] On the other hand the ad hoc Tribunal's jurisprudence generally refers to the ILC Articles on State Responsibility purely as 'general legal guidance',[121] and has not paid much attention to the codification efforts by the ILC in the specific field of international organizations.

With regard to the pivotal issue of attribution of responsibility, the practice of the Tribunals, as evidenced by the *Nikolić* case, generally appears to follow Draft Articles 4 and 7. Whether the conduct was carried out by NATO forces acting on behalf of the Prosecution (as in *Murtezi*) or by state authorities acting on behalf of the

118. Another issue might stem from this aspect, namely the fora available to defendants whose rights have been breached when the violation is found to have been imputable partly to the Tribunals *and* partly to a state. The complex interaction between Draft Articles 5, 7, 13, 15, and 16 must be carefully studied on a case-by-case basis where, for example, a Tribunal issued an arrest warrant and a state acted on it but breached fundamental human rights in detaining the person. A defendant might easily find himself in a legal vacuum should the Tribunals not act swiftly in ensuring that all rights are guaranteed. There appears to be no definitive answer to this set of problems, and the case law on such issues is still limited.

119. See Responsibility of International Organizations: Comments and Observations Received from International Organizations, UN Doc. A/CN/4.545 (2004); Responsibility of International Organizations: Comments and Observations Received from Governments and International Organizations, UN Doc. A/CN/4.556 (2005); Comments and Observations Received from International Organizations, UN Doc. A/CN.4/568 (2006).

120. Report of the International Law Commission on the Work of Its Fifty-Sixth Session, UN Doc. A/59/10 (2004), at 28. The trial chamber's decision was modified by the Appeals Chamber, which, however, did not need to revisit this specific issue.

121. See, e.g., *Nikolić* Trial Decision, *supra* note 101, para. 61.

ICTR (*Barayagwiza* and *Kajelijeli*), individuals on trial were deemed to have a cause for complaint. It would be interesting to test the limits of this theory and analyse what type of conduct by entities acting on behalf of the Tribunals is attributable to them. For example, the Tribunals are responsible for illegal detention by a state on the Tribunals' behalf when the OTP has not swiftly proceeded formally to charge the individual in question or has not requested his transfer.[122] However, what if abuses (or even torture) occur while an individual is detained 'on behalf' of one of the Tribunals? Should the Tribunal be considered responsible, even if there was no way to foresee such events? No chamber has ruled so far on this type of matter and the nuances of the specific situations may make it fairly complicated to set specific rules in advance of such a situation arising *in concreto*.

Moreover, with regard to the nature of an internationally wrongful act (as detailed in Draft Articles 3, 8, and 9), the Tribunals accept as an 'international obligation' not only customary international rules on fundamental human rights in criminal proceedings, but also treaty law that formally would not be binding on them or on the United Nations as a whole such as, for example, the ICCPR, cited in *Kajelijeli*. Despite being somewhat vague in the exact definition of certain rights, the Tribunals have applied respectable standards, at least if one compares them with what happens in many countries formally bound by the same instruments of international law.

All of the above notwithstanding, serious uncertainties persist. A comprehensive list of enumerated 'guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments',[123] is nowhere to be found – and could probably never realistically be drawn up *in abstracto*. The same could be said of a list of 'effective remedies'[124] available in case of breach of such guarantees.

It seems that, in this field, a carefully drafted mechanism involving general principles established by the 'legislator' (the Security Council) and appropriate remedies left to the determination of an independent and impartial judiciary (the Tribunals) would provide the best effort to avoid difficult situations for the organization as a whole. Most of the time, having one's rights vindicated on appeal undoubtedly constitutes an 'effective remedy'. On other occasions, a more robust intervention by an independent organ might be warranted in order to take appropriate measures, up to and including the possibility that an accused be set free for egregious violations of his or her fundamental rights.

While the Draft Articles do not yet address the issue of the *consequences* of unlawful conduct attributable to international organizations and how compensation should be awarded for breaches of human rights, it is not too early to assert that the stance taken by the Tribunals, and specifically the willingness to provide effective remedies to redress violations of the rights of the accused, is in line with a *bona fide* interpretation of the general principles derived from state practice. All in all, the Tribunals have shown that, where their organs are responsible for violations of

122. See *Kajelijeli* Appeal Judgement, *supra* note 88, para. 252.
123. *Tadić* Jurisdiction Decision, *supra* note 18, para. 45.
124. ICCPR, *supra* note 51, Art. 2(3)(a).

https://doi.org/10.1017/S0922156507004281 Published online by Cambridge University Press

international law in carrying out their mandates, they are willing to take steps to remedy these violations, even in the absence of specific provisions in their Statutes requiring them to do so.

Hence, while the scenarios under which violations of human rights occur before the ad hoc Tribunals are not those typically envisioned by the Draft Articles, the practice of the ICTY and the ICTR in this field might provide useful insights on several topics touched upon by the ILC during its work. On the other hand, the ad hoc Tribunals would surely benefit from a careful analysis of the principles enshrined in the Draft Articles in carrying out their mandates.