



the global voice of
the legal profession



IBA International Criminal Court and International Criminal Law Programme

Report on 'Seeing justice through: long-term issues in international justice: An Experts' Roundtable Discussion'

June 2020

Front cover images: Elodie Burrillon/Hucopix

Table of contents

About the programme	3
About the International Bar Association	3
About the International Bar Association Criminal Court and International Criminal Law Programme	3
Introduction	4
Introductory address by Mr Horacio Bernardes Neto	6
Opening remarks by Ambassador Paul van den IJssel	6
Keynote address by Judge Kimberly Prost	7
Introduction of the IBA Discussion Paper by Kate Orlovsky	8
Panel 1: International criminal law and human rights perspectives	9
Human rights considerations for convicted and acquitted persons	10
Early release	13
Cooperation for post-release and post-acquittal relocation	15
Refugee law and the Article 1F consideration	16
<i>Ne bis in idem</i> and the right to finality	19
Panel 2: Facilitating cooperation for the long term	20
State cooperation with international criminal courts and tribunals	20
Cooperation for the enforcement of sentences	23
Conditional early release	24
Defence perspective on state cooperation	25
Closing remarks by Ambassador Stephen Rapp	27
Seeing justice through: future considerations and recommendations	28

About the programme

About the International Bar Association

The International Bar Association (IBA) – the global voice of the legal profession – is the foremost organisation for international legal practitioners, bar associations and law societies. Established in 1947, shortly after the creation of the United Nations, it was born out of the conviction that an organisation made up of the world's bar associations could contribute to global stability and peace through the administration of justice. In the ensuing 70 years since its creation, the organisation has evolved, from an association comprised exclusively of bar associations and law societies, to one that incorporates individual international lawyers and entire law firms. The present membership comprises more than 80,000 individual international lawyers from most of the world's leading law firms and some 190 bar associations and law societies spanning more than 170 countries.

The IBA has considerable expertise in providing assistance to the global legal community, and through its global membership it influences the development of international law reform and shapes the future of the legal profession throughout the world.

About the IBA International Criminal Court and International Criminal Law Programme

The IBA commenced the IBA International Criminal Court (ICC) programme in 2005.

The Programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals and encourages the legal community to engage with the work of these Courts. The IBA's work includes thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative and institutional issues which could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice.

The Programme also acts as the interface between the Courts and the global legal community. As such, special focus is placed on monitoring emerging issues of particular relevance to lawyers and collaborating with key partners on specific activities to increase engagement of the legal community on ICC and international criminal law (ICL) issues.

Programme information is disseminated through regular reports, expert discussions, workshops and other events and expert legal analysis on issues relevant to our mandate.

The IBA's ICC & ICL programme consults and interacts with Courts' officials, civil society organisations, academics and international lawyers.

Introduction

On 21 October 2019, the International Bar Association (IBA) International Criminal Court (ICC) and International Criminal Law (ICL) Programme convened an Experts' Roundtable on 'Seeing justice through: long-term issues in international justice' at the Peace Palace (the 'Experts' Roundtable').¹ The event was attended by over 150 delegates, including judges, senior officials and staff of international criminal courts and tribunals, diplomats, civil society and academics.

The Experts' Roundtable began with a welcome message from IBA President Mr Horacio Bernardes Neto, followed by introductory remarks by HE Ambassador Paul van den IJssel, Permanent Representative of the Netherlands to the Organisation for the Prohibition of Chemical Weapons (OPCW) and the ICC, and the keynote address from Judge Kimberly Prost of the ICC. Afterwards, IBA ICC & ICL Programme Director Kate Orlovsky launched the Discussion Paper titled 'Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals'. This was followed by discussions with two panels of experts.

The first panel discussed '**International criminal law and human rights perspectives**' and was moderated by Ms Marie O'Leary, Counsel/Legal Adviser, Office of Public Counsel for the Defence, ICC. The panel consisted of Dr Barbora Holá, Senior Researcher, Netherlands Institute for the Study of Crime and Law Enforcement; Mr Steven Powles QC, Head, Doughty Street International and Co-Chair of the IBA War Crimes Committee; Mr Peter Robinson, Defence Counsel, ICC and UN International Residual Mechanism for Criminal Tribunals (IRMCT); and Professor Dr Elies van Sliedregt, Chair in International & Comparative Criminal Justice, University of Leeds.

The second panel addressed '**Facilitating cooperation for the long term**' and was moderated by Ms Antônia Pereira de Sousa, External Relations and Cooperation Officer, Registry, ICC. The panel consisted of Ms Caroline Buteau, Chief of the Legal Advisory Section, Defence Office, Special Tribunal for Lebanon (STL); Dr Fidelma Donlon, Registrar, Kosovo Specialist Chambers (KSC); Dr Mark Ellis, Executive Director, IBA; and Judge Alphons M M Orie, IRMCT.

Closing remarks were provided by Ambassador Stephen Rapp, Distinguished Fellow, Simon-Skjoldt Center for the Prevention of Genocide, United States Holocaust Memorial Museum and Visiting Fellow of Practice, Blavatnik School of Government, University of Oxford.

This report summarises and highlights key themes that arose from the Experts' Roundtable.² Themes addressed include human rights considerations for convicted and acquitted persons; practice and standards for early release; state cooperation for enforcement of sentences and relocation of persons post-acquittal and post-sentence; the relevant standards and application of refugee and domestic law; *ne*

1 We are grateful to the IBA War Crimes Committee for their support and participation in this event.

2 The IBA extends its sincere gratitude to all the speakers and panellists for their contributions to the Experts' Roundtable. Most panellists spoke in their personal capacity, benefiting from their professional experience and expertise. Except as otherwise noted, the summaries in this report reflect the IBA's interpretation of panellists' presentations and interventions, and any errors are the IBA's own. For the full verbatim presentations of the panels, see the videos available at www.ibanet.org/Conferences/Seeing-Justice-Through-long-term-issues-in-international-justice.aspx accessed 30 March 2020.

bis in idem and the right to finality; and cooperation from a defence perspective. The report concludes with some future considerations with regard to long-term issues in international justice.

Introductory address by Mr Horacio Bernardes Neto

‘Take care of the rule of law and the rule of law will take care of you. This is the motto we have to keep in our minds and in our hearts. And this is what we are doing here today. Spreading the promotion and the protection of the rule of law.’

Mr Horacio Bernardes Neto *President of the IBA*

In opening the Experts’ Roundtable, IBA President Horacio Bernardes Neto emphasised the core values of the rule of law that the IBA seeks to further, and that all lawyers are responsible for protecting. As President of the IBA, Mr Bernardes Neto announced a new IBA initiative to strengthen domestic legislation that can facilitate state cooperation with the ICC. The ‘Implementing Legislation Project’ aims at bringing IBA members who are key legal actors in domestic jurisdictions to The Hague, with the goal of deepening their engagement with institutions in The Hague and encouraging them to participate in shaping legislation in their national jurisdictions. The goals of this project are strongly aligned with the themes of the conference, which underscored the importance of state cooperation, and appropriate legislation to facilitate cooperation, to support domestic and international justice for serious crimes.

Opening remarks by Ambassador Paul van den IJssel

‘Insufficient voluntary cooperation by states may test fair trial considerations to their limit and could ultimately even lead to human rights violations.’

Ambassador Paul van den IJssel *Permanent Representative of the Netherlands to the OPCW and the ICC*

As a starting point, Ambassador van den IJssel called attention to the revolutionary and unique nature of the Rome Statute system; a system both rightly praised and in need of defence. Ambassador van den IJssel identified two challenges to the ICC that could significantly limit the system’s effectiveness: when states fail to live up to their primary responsibility for the investigation and prosecution of international crimes in line with the complementarity principle; and when states fail to cooperate adequately with the ICC in those cases that are investigated by the ICC Prosecutor. Even though arrest and surrender are fundamental obligations under the Rome Statute and constitute ‘compulsory cooperation’, their absence in a considerable number of cases forms a crucial challenge to the credibility of the Rome Statute system as a whole. The Rome Statute system is also challenged when it comes to voluntary cooperation of States Parties, which is required to give effect to the rights of victims and witnesses, and the rights of the accused.

Ambassador van den IJssel saw criticism of the drafters of the Rome Statute over their choice of a voluntary rather than compulsory system as unwarranted, as the magnitude of current challenges faced by the ICC could not have been easily foreseen. Moreover, assuming that the current state of international relations will make real improvements difficult, the system must work with the tools available. Ambassador van den IJssel highlighted the importance of voluntary cooperation

agreements and commended the ICC for its efforts to develop legal instruments addressing relocation, enforcement of sentences, and final and interim release. Ambassador van den IJssel further noted the particular challenges posed when seeking agreements for final and interim release, as these are often politically sensitive acts that may not be disclosed to the public and come at a large financial cost. However, he urged states to do better, as a lack of improvement on this matter may have significant negative consequences, both for the effectiveness of the fight against impunity and the credibility of international criminal law.

Keynote address by Judge Kimberly Prost

‘There are all these issues which are naturally addressed in a national justice system... but need to be very consciously and specifically constructed in the context of an international system, particularly those which impact on the accused in the pre-and during trial phases, as well as post-conviction or acquittal, and these are often overlooked and forgotten as we build this global justice system.’

Judge Kimberly Prost *ICC*

Judge Prost focused her address on the need to view the ICC as a permanent institution. The tendency to focus on the immediate challenges means that change and initiative, especially in the international sphere, is often driven by crisis and the need to find immediate solutions to particularly pressing problems. The immediate challenges in international criminal justice, and specifically for the ICC, are serious, complex and merit attention. In this regard, Judge Prost emphasised that to find sustainable solutions to immediate challenges, we must change our thinking from that of ad hoc institutions to a permanent court.

Judge Prost spoke of provisional release as one of the most fundamental core principles for any justice system. In her view, provisional release is the implementation of the presumption of innocence. Yet, it is one of the most difficult challenges, even in national systems, to strike a balance between recognising the rights of the accused and ensuring the presence of the accused at trial, as well as preventing obstruction of justice and further crime. Judge Prost noted that provisional release was discussed at length during the negotiations in Rome, but the complexity of the matter was not properly addressed and consequently requires attention now. For this reason, Judge Prost called for more states to support the provisional release system.

Judge Prost spoke from her experience as part of the Canadian negotiating team at the Rome Conference and from her involvement in developing the core provisions related to the criminal process of the ICC, particularly the cooperation regime. From this perspective, the low numbers of cooperation agreements are disappointing, given that the section on cooperation, particularly enforcement of sentences, was drafted to attract states through its emphasis on state discretion. In Judge Prost’s view, the low level of cooperation indicated yet again that every situation is being dealt with as an ad hoc situation for an ad hoc court. She urged States Parties to increase their cooperation as appropriate for the ICC as a permanent institution.

Judge Prost noted that the issue of cooperation for post-conviction or acquittal situations receives insufficient attention. Cooperation needs for the post-conviction or acquittal phase can clash with other international law principles, including principles of refugee law, with a significant impact on how courts can manage such situations. Judge Prost also highlighted other questions, including whether it is improper to continue to apply restrictive measures to individuals after they are released or acquitted. These issues were later discussed by the panels.

Introduction of the IBA Discussion Paper by Kate Orlovsky

Ms Orlovsky launched the IBA Discussion Paper titled ‘Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals’.³ The Discussion Paper is a result of the monitoring of jurisprudence, analysis of legal frameworks and consultations with key actors, including state representatives, court officials and counsel. It seeks to promote greater consideration and clarity in relation to the law and practice of provisional release, release during advanced stages of proceedings and early release, as well as residual issues that arise post-sentence or post-acquittal. The Discussion Paper questions the consistency of international courts’ practices with human rights standards and suggests ways to strengthen this area of the law.

Ms Orlovsky stressed that the powers of international criminal courts and tribunals to hold individuals in custody, and to sentence or acquit them, raise a number of issues relating to fairness and the fundamental human rights of the accused. Moreover, such situations bring attention to the role of states and put the central importance of state cooperation in sharp relief. Low levels of state cooperation for provisional, conditional and final release can keep individuals *de facto* detained contrary to their individual and statutory rights, and prevent courts from being able to implement judicial orders.

3 IBA, ‘Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals’ (2019) www.ibanet.org/Document/Default.aspx?DocumentUId=7acf3b18-454e-4a9b-b253-b1ba5da46d03 accessed 9 March 2020.

Panel 1: International criminal law and human rights perspectives

Ms Marie O’Leary began the first panel by noting that, while the prosecution is present at the very early stage of a case, that is, during investigations, the party still present at the very end is often the defence as it deals with residual issues, such as early release and motions for detention conditions. Ms O’Leary introduced a discussion around human rights considerations for defendants at these later stages, and in particular, what happens to defendants and what is expected of them in relation to reintegration.

Ms O’Leary highlighted the *Gbagbo and Blé Goudé* case, which presents the first conditional release of acquitted persons by the ICC. Following the majority of the Trial Chamber’s acquittal on the basis of a ‘no case to answer’ motion, the prosecution, citing International Criminal Tribunal for Rwanda (ICTR) jurisprudence, argued that conditional release was possible within the ambit of the legal framework of the ICC.⁴ The Appeals Chamber held that ‘before continued detention can be ordered, all reasonable measures less severe than detention must be considered and found to be insufficient’.⁵ Furthermore, the Appeals Chamber held that the Trial Chamber’s statutory power to continue to detain an acquitted person meant that it also had the power to order conditional release, finding that ‘[t]he possibility to impose conditions on an acquitted person is justified by the Court’s continued jurisdictional interest in the acquitted person pending the appeal against the acquittal’.⁶ Following this, Mr Gbagbo was conditionally released to Belgium, while Mr Blé Goudé remained under the supervision of the ICC in the Netherlands, without a state ready to accept him.⁷ In October 2019, the Defence for Mr Gbagbo filed an application to vary conditions on release arguing that, despite being acquitted of all charges against him, Mr Gbagbo was not a free man.⁸

Ms O’Leary noted that the defence’s application was filed because these conditions were infringing upon Mr Gbagbo’s fundamental human rights, including the right to privacy, the right to private life, the right to family, the right to free movement and all the rights enshrined in the Universal Declaration of Human Rights. She questioned how human rights come into play for the people placed in the international legal system, whether or not they are acquitted or convicted. How do such individuals retain their rights, and should these rights be curtailed, what are the justifications?

4 ICC, Prosecutor *v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1235, Urgent Prosecution’s request pursuant to article 81(3)(c)(i) of the Statute, 15 January 2019.

5 ICC, Prosecutor *v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1251-Red2, Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 21 February 2019, para 52.

6 *Ibid*, para 53.

7 Vincent Duhem, ‘Côte d’Ivoire: Charles Blé Goudé n’a pas encore trouvé de pays d’accueil’ (JeuneAfrique, 21 January 2019) www.jeuneafrique.com/mag/710170/politique/cote-divoire-charles-ble-goude-na-pas-encore-trouve-de-pays-daccueil accessed 13 March 2020.

8 ICC, Prosecutor *v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1272-Red, Version publique expurgée de la «Requête de la Défense afin d’obtenir que la Chambre d’appel restitue à Laurent Gbagbo, acquitté de toutes les charges portées contre lui, l’intégralité de ses droits humains fondamentaux.», 7 October 2019.

Human rights considerations for convicted and acquitted persons

Dr Barbora Holá's research into post-conviction and post-acquittal issues began in 2012. From a criminological perspective, her research examines what happens to those who are convicted or acquitted. Dr Holá spoke about different challenges associated with the incarceration stage from a human rights angle, including family visits and the right to family life, a particular challenge for convicted persons serving their sentences in foreign countries. In some instances, family visits might not be provided for and sometimes families encounter visa restrictions and thus cannot visit the convicted person. Convicted persons also face language difficulties in foreign prisons, affecting interactions with other prisoners and prison staff. This could also be exacerbated by cultural and religious differences. Further, Dr Holá stressed that legal aid is not provided for by international tribunals after the conviction and acquittal stages, yet remains vital during the incarceration stage.

Mr Steven Powles QC emphasised that applying the highest standards of human rights to defendants in international criminal proceedings is important not only for the defendants but also the victims and the process as a whole. Upholding the highest standards of due process and the rule of law is fundamental to ensuring that international criminal justice works for all parties involved. Mr Powles also noted that the purpose of guaranteeing human rights in international criminal law proceedings is not to frustrate the criminal process but to ensure that the process is fair and only those who are guilty are convicted. This is in the interest of justice for the victims as much as it is in the interest of the defendants.

Mr Powles discussed the *Barayagwiza* case at the ICTR as an example of an international tribunal applying human rights standards. Articles 19 and 20 of the ICTR Statute guarantee a fair and expeditious trial and that the accused will be informed of the charges without undue delay.⁹ Mr Barayagwiza was arrested in Cameroon, where he was detained for 19 months prior to being transferred to the ICTR, where he was also detained for months prior to being formally charged. The ICTR Appeals Chamber found that the appellant's right to be promptly charged and the right to initial appearance without undue delay were violated in part by the state and in part by the ICTR itself, and as a remedy, the accused should be released and the charges dismissed.¹⁰ The Appeals Chamber concluded:

⁹ Statute of the ICTR, Art 19 reads in full:

'1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Art 20 reads in full:

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.'

¹⁰ ICTR, Prosecutor *v Jean Bosco Barayagwiza*, Case ICTR-97-19-AR72, Decision, 3 November 1999.

‘The Tribunal – an institution whose primary purpose is to ensure that justice is done – must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals – including those charged with unthinkable crimes – would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.’¹¹

However, a differently constituted Appeals Chamber later reviewed the decision on the basis of newly discovered facts, and found that those new facts decreased the culpability of the Prosecutor for the violation of Mr Barayagwiza’s rights. The Appeals Chamber ruled that Mr Barayagwiza should remain in detention and proceed to trial, and if found not guilty, would receive monetary compensation, while if found guilty, would receive a reduction in sentence.¹² Mr Barayagwiza was convicted, but received a reduction in sentence as a result of the human rights violation.

Mr Powles also referred to the *Bemba et al* case at the ICC during which Mr Bemba and his legal team were charged with offences against the administration of justice, including witness tampering, bribery and corruption. On appeal, the defendants alleged that Western Union records obtained and tendered as evidence by the Prosecution were obtained in violation of Austrian Law, and that these records were used to justify the prosecution’s phone taps of the lawyers and the accused in the *Bemba* main case. The question was whether this was in compliance with Article 69(7) of the Rome Statute.¹³ Article 69(7) of the Rome Statute provides:

‘Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.’

Regarding the Western Union records, Mr Powles noted that bank and financial transaction records are considered to be of a private nature and that acquiring them without following the proper legal channels would amount to a violation of Article 8 of the European Convention on Human Rights and the right to privacy. In the *Bemba et al* case, the Appeals Chamber recalled that financial transactions are, ‘in principle, protected by a general right to privacy, as an internationally recognised human right within the meaning of article 69(7) of the Statute’.¹⁴ However, the Appeals Chamber also noted that the right to privacy is not an absolute right ‘but may be subject to legitimate interference in accordance

11 *Ibid*, para 112.

12 ICTR, Prosecutor *v Jean Bosco Barayagwiza*, Case ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), 31 March 2000, paras 71–75.

13 See, eg, ICC, Prosecutor *v Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-1830, Response on behalf of Mr Kilolo to Article 69(7) Applications submitted by other Defence teams, 29 April 2016.

14 ICC, Prosecutor *v Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’, 8 March 2018, para 284.

with the law and as necessary for the protection of important public interests, such as national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others'.¹⁵ On this basis, the Appeals Chamber observed that the requirement that any interference with an individual's right to privacy be made 'in accordance with the law' raised 'the question of the scope of the inquiry into the compliance with national law that could or should be conducted by the Court for the purposes of a determination under article 69(7) of the Statute'.¹⁶ The Appeals Chamber thus found it necessary to evaluate the facts against Article 69(8) before considering whether the ICC could exclude the evidence obtained on that basis, that is, not in accordance with Austrian law and therefore not in accordance with Article 8 of the European Convention. Article 69(8) provides:

'When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.'

The Appeals Chamber considered this article an 'unequivocal bar' to considering whether violations of domestic law in the collection of evidence could trigger the exclusionary rule under Article 69(7).¹⁷ The Appeals Chamber held that 'there is no legal basis under the Statute for a chamber to "review the application of national law", including with a view to determining whether a "manifest" violation of national law occurred'.¹⁸ Thus, the scope of inquiry under Article 69(7) cannot include an assessment on whether there had been violations 'manifest or otherwise' of Austrian law in the collection of Western Union records.¹⁹

As a consequence, the Appeals Chamber held that there was no need to consider the alleged violations of internationally recognised human rights. The Higher Regional Court of Vienna ('the Vienna Court') had ruled in two separate decisions that there had been a violation of the right to privacy in the collection of the Western Union Records. However, the ICC Appeals Chamber held:

'it must be stressed that any domestic decision is not, as such, directed at the Court nor is it otherwise binding on the Court, which must apply its own sources of law and cannot simply "import" findings made by national courts, including for determination of admissibility of evidence under article 69(7) of the Statute'.²⁰

Further:

'the issuance of the two rulings by the Higher Regional Court of Vienna does not indicate that a violation of the Statute or internationally recognised human rights occurred in the collection of the Western Union Records'.²¹

Mr Powles noted that, while this was in many ways understandable, it remains unclear whether the decision of the ICC would have been the same if the Vienna Court had expressly held that there had

15 *Ibid*, para 285.

16 *Ibid*, para 286.

17 *Ibid*, para 287.

18 *Ibid*, para 296.

19 *Ibid*, para 298.

20 *Ibid*, para 345.

21 *Ibid*, para 346.

been a violation of international human rights; that this infringement of Austrian law amounts to a violation of Article 8 and of internationally recognised human rights standards and the right of privacy. This, in Mr Powles' opinion, could lead to appeals at the domestic or at the international level, for example, at the European Court of Human Rights (ECtHR).

In terms of alternative avenues of redress for human rights abuses, Mr Powles suggested the possibility for a person charged before an international tribunal to litigate at domestic courts in certain circumstances and subsequently to appeal to international human rights bodies, such as the ECtHR. Mr Powles suggested further examination of how the ECtHR has considered cases from the ICTR and ICC to assess how prepared the ECtHR would be to rule on potential violations of human rights when they have allegedly occurred within the context of international criminal proceedings.

Early release

With regard to early release, Dr Holá explained the practice of the ad hoc tribunals, which was subsequently adopted by the IRMCT.²² Rule 125 (ICTY) and Rule 126 (ICTR) establish the criteria that the President must take into account when deciding on applications for early release. These are:

- the gravity of the crime or crimes for which the prisoner was convicted;
- the treatment of similarly situated prisoners;
- the prisoner's demonstration of rehabilitation; and
- any substantial cooperation of the prisoner with the Prosecutor.

Further, according to the ICTY Practice Directions, the Registrar shall 'request reports and observations from the relevant authorities in the enforcing State as to the behaviour of the convicted person during his/her period of incarceration and the general conditions under which he/she was imprisoned, and request from such authorities any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration'.²³

Dr Holá noted that the criteria are very much open to interpretation, and emphasised the importance of real expertise to assess the criteria. In this regard, Dr Holá questioned assessments of rehabilitation. Here, she noted that, while some domestic jurisdictions have the requisite expertise, international tribunals, in her view, have lacked expertise to assess rehabilitation. Dr Holá's research showed that rehabilitation in international criminal tribunals is treated in the same way as in domestic jurisdictions, meaning that good conduct is seen as an indication of rehabilitation. In this regard, Dr Holá questioned whether a soldier who obeyed orders during conflict and obeys orders in prison can truly be seen as rehabilitated.

22 The IRMCT Practice Directions are the only ones currently in force. They are materially identical to the ICTY Practice Directions.

23 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia since 1991, Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, UN Doc IT/146/Rev. 3 (adopted 16 September 2010) para 3(b).

Mr Peter Robinson also addressed early release and the case of his client, Mr Laurent Semanza. Mr Semanza, who had applied for early release after serving two-thirds of his sentence, had been waiting for over a year for a determination. Mr Robinson explained that the IRMCT had harmonised the practices of the ICTY and ICTR by establishing that a convicted person could be granted early release after having served two-thirds of his or her sentence. As of 2012, IRMCT President Theodor Meron had ruled that all convicted persons supervised by the IRMCT should be treated equally for purposes of early release determinations, irrespective of the tribunal that convicted them.²⁴ Noting that the practice of releasing a convicted person after two-thirds of his or her sentence was served originated from the ICTY, President Meron was of the view that ‘fundamental fairness and justice are best served if the ICTY practice applies uniformly to the entire prisoner population to be ultimately supervised by the Mechanism’.²⁵ This led to the granting of early release to ICTR persons who had served at least two-thirds of their sentences.²⁶

However, this practice appears to have changed. Recent applications for early release by persons who had already served two-thirds of their sentences had not yet been decided upon. Mr Robinson stated that he did not know what the IRMCT’s current practice on early release entailed or how the criteria will be judged.

Mr Robinson noted that the practice at the ICC is similar to the IRMCT to the extent that early release is also set at two-thirds of the original sentence. However, it is not decided by the President, but by a panel of three judges from the Appeals Chamber. The ICC includes seven factors for the judges to consider, including disassociation from criminal behaviour and the effect on society should the individual be released. So far, the ICC has received two applications for early release, where one has been accepted and the other denied.²⁷

According to Mr Robinson, the biggest challenge to early release is that it is political and not legal. He explained that the Government of Rwanda had lobbied against the former President of the IRMCT because he had granted early release to Rwandan prisoners who had served two-thirds of their sentences. In addition, the Government of Rwanda persuaded the Security Council to encourage the judges to place a number of conditions on early release, including that the defendant could not talk about the case with anyone except his or her lawyer.²⁸ Mr Robinson expressed concern about the prospect for early release for his clients and for others, and recommended that early release at the IRMCT be adjudicated by a panel of three judges, as is the practice at the ICC.

24 IRMCT, Prosecutor *v Paul Bisengimana*, Case MICT-12-07, Decision of the President on Early Release of *Paul Bisengimana* and on Motion to File a Public Redacted Application, 11 December 2012, para 20.

25 *Ibid.*

26 Eg, *Ibid.*, para 20; IRMCT, Prosecutor *v Obed Ruzindana*, Case MICT-12-10-ES, Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014; IRMCT, Prosecutor *v Gérard Ntakirutimana*, Case MICT-12-17-ES, Public Redacted Version of the 26 March 2014 Decision of the President on the Early Release of Gérard Ntakirutimana, 24 April 2014; IRMCT, Prosecutor *v Alphonse Nteziryayo*, Case MICT15-90, Decision of the President on the Early Release of Alphonse Nteziryayo, 9 March 2016; IRMCT, Prosecutor *v Ferdinand Nahimana*, Case MICT-13-37-ES.1, Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana, 5 December 2016; IRMCT, Prosecutor *v Emmanuel Rukundo*, Case MICT- 13-35-ES, Public Redacted Version of the 19 July 2016 Decision of the President on the Early Release of Emmanuel Rukundo, 5 December 2016; IRMCT, Prosecutor *v Aloys Simba*, Case MICT-14-62-ES.1, Public Redacted Version of the President’s 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019.

27 For a detailed examination of the practice of early release at the ICC, see ‘Early Release’ in IBA (see n 3 above) 53–57.

28 UNSC Res 2422 (27 June 2018) UN Doc SC/RES/2422, which, inter alia, encourages the IRMCT to consider placing conditions on early release.

Cooperation for post-release and post-acquittal relocation

Mr Robinson discussed the situation of his client Mr François-Xavier Nzuwonemeye. Mr Nzuwonemeye was living in France in 2000 when he was arrested and transferred to Arusha for trial at the ICTR. He was in detention for 14 years before he was acquitted. Mr Nzuwonemeye's wish was to go back to France where his wife and four children have been granted citizenship. However, he remains at the ICTR safe house in Arusha, with no legal possibility of returning to France. According to Mr Robinson, there are eight more people in Arusha, four in Mali and two in Benin who have already served their sentences and yet are unable to rejoin their families.

In the *Ntagerura* case, the ICTR held that it did not have the power to order a state to take an acquitted person or persons into its territory. This decision was based on the fact that the language requiring cooperation with the tribunal only applies to the investigation and prosecution of the accused.²⁹ Once an individual is no longer accused of a crime, he or she is no longer subject to Article 28 of the Rome Statute and an order cannot be made for his or her benefit.³⁰ Article 28 provides:

'1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons *accused* of committing serious violations of international humanitarian law'. [Emphasis author's own.]

When the IRMCT came into being, that statute language was modified and now provides:

'1. States shall cooperate with the Mechanism in the investigation and prosecution of persons covered by Article 1 of this Statute.'

Mr Robinson recalled that, in the *Ntagerura* decision, ICTR President Dennis Byron held that:

'The question of whether an application for relocation of an acquitted person is part of the investigation and prosecution process would require being answerable in the affirmative.'³¹

Thus, the lack of the word 'accused' in the IRMCT language would, in Mr Robinson's view, mean a difference that 'the power under Article 28 extends beyond the issuance of a final judgement'.³² The Appeals Chamber however ruled that, despite the change to the Rome Statute, it was intended that the IRMCT would not have any greater powers than the ICTR or ICTY. Thus, the IRMCT did not have the power to order France or any other state to take him back.³³ Mr Robinson was of the view that this was a political decision made at a time of retrenchment for international criminal justice, and thus judges were reluctant to impose obligations on states.

At the time of writing, Mr Nzuwonemeye remains in Arusha with no legal remedy. Mr Robinson expressed hope that the ICC would come up with better solutions to such situations. In this regard, Ms

29 ICTR, Prosecutor *v André Ntagerura*, Case ICTR-99-46-A2, Decision on Motion to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008, 18 November 2008, para 15.

30 *Ibid*, paras 14–15.

31 ICTR, Prosecutor *v André Ntagerura*, Case ICTR-99-46-A28, Decision on Motion of Andre Ntagerura for Cooperation with Canada and for Reporting to the Security Council, 31 March 2008, para 7.

32 IRMCT, Prosecutor *v François Xavier Nzuwonemeye*, Case MICT-13-43, Appeal from Decision on Motion for Order to the Government of France, 17 December 2018, paras 21–27.

33 IRMCT, Prosecutor *v François Xavier Nzuwonemeye*, Case MICT-13-43, Decision on the Appeal of the Single Judge's Decision of 22 October 2018, 17 April 2019, paras 27–30.

O’Leary recalled that only one state, Argentina, has signed an agreement with the ICC to take released persons, making this a situation that could recur in the ICC context.

Refugee law and the Article 1F consideration

In the French court, Mr Nzuwonemeye’s application for asylum was denied on the basis of Article 1F of the 1951 Convention relating to the Status of Refugees which states:

‘The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’

The threshold of ‘serious reasons to consider’ is considerably lower than the ‘beyond reasonable doubt’ standard of proof required in criminal proceedings. Essentially, an indictment by an international criminal court or tribunal alone is enough to trigger the exclusion clause, notwithstanding that some indictments result in acquittal. In *Nzuwonemeye*, the *Conseil d’État* recalled this lower threshold, reiterating that these provisions do not require proof or conviction beyond reasonable doubt, and that the rule of the presumption of innocence under criminal law was no longer applicable.³⁴ Further, the *Conseil d’État* held that Mr Nzuwonemeye’s position as commander of the Kigali Armoured Reconnaissance Battalion (one of the three elite units of the Rwandan Army directly involved in the planning, organisation and commission of massacres), meant that there were ‘serious reasons to consider that he had contributed to the preparation and commission of the crime of genocide or had facilitated its commission without seeking at any moment, in the context of his situation, to prevent or dissociate himself from it’.³⁵

34 Unofficial translation of the *Conseil d’État* ruling on Case No 414821, Hearing of 18 February 2019, Reading of 28 February 2019, para 7:

‘D’autre part, il ressort des termes mêmes de l’article 1er de la Convention de Genève que les clauses d’exclusion peuvent être mises en oeuvre dès lors qu’il existe « des raisons sérieuses de penser » que le demandeur d’asile a commis un ou plusieurs des crimes qui y sont mentionnés, l’application de ces stipulations n’exigeant pas l’existence d’une preuve ou d’une conviction au-delà de tout doute raisonnable et faisant obstacle à l’application de la règle pénale de la présomption d’innocence.’

35 Unofficial translation of *Ibid*, para 9:

‘Au cours de l’année 1994, notamment entre les 6 avril et 4 juillet 1994, alors qu’avaient lieu des massacres génocidaires de masse décidés par le gouvernement intérimaire auquel il avait prêté allégeance, il a commandé à Kigali le bataillon blindé de reconnaissance, dit bataillon RECCE, l’une des trois unités d’élite de l’armée rwandaises, qui a directement pris part à la planification, à l’organisation et à la réalisation des massacres. S’il fait valoir qu’il se serait en réalité opposé au génocide et aurait protégé des personnes menacées, de telles assertions ne sont pas corroborées par les pièces versées au dossier des juges du fond. Dans ces conditions, en estimant qu’il existait des raisons sérieuses de penser qu’il avait contribué à la préparation ou à la réalisation du crime de génocide ou en avait facilité la commission ou avait assisté à son exécution sans chercher à aucun moment, eu égard à sa situation, à le prévenir ou à s’en dissocier, au sens et pour l’application du a) de l’article 1er de la Convention de Genève, et devait, par suite, être exclu du statut de réfugié, la Cour nationale du droit d’asile, qui n’a pas méconnu les règles de dévolution de la charge de la preuve, n’a pas inexactement qualifié les faits de l’espèce.’

Professor Dr Elies van Sliedregt noted that Article 1F is much more important to international criminal justice than was first realised. For example, the persons in the ICTR safe house, all of whom have been acquitted or completed their sentences, cannot be sent back to the countries where their families reside based on the states' finding 'serious reasons for considering that they have committed international crimes'. The exclusion clause of Article 1F creates an obstacle for giving them refugee status, which would allow them to reside in the countries with their families. Professor van Sliedregt noted that the 'serious reasons for considering' threshold is not a criminal law standard and is in fact considered to be much lower and can be an obstacle, even to the acquitted. She noted a United Nations High Commissioner for Refugees (UNHCR) roundtable where it was concluded that the serious reasons test corresponds to the lower standard of proof that is required for indicting a defendant (that there is a *prima facie* case).

Professor van Sliedregt noted that there has been a long debate on this exclusion clause, particularly surrounding the consideration of changing the standard to align with the 'reasonable grounds test', which is the ICC test that triggers the issuance of an arrest warrant (Article 58(1) of the ICC Statute). Under this scenario, reasonable grounds to believe an individual has committed a crime, as required to issue an ICC arrest warrant, would be used as grounds for exclusion. Professor van Sliedregt stated that the UNHCR had proposed this alignment as a way of ensuring the adherence to an existing criminal justice test that would counter the use of exclusion purely as a tool for restrictive asylum and migration policies.

Professor van Sliedregt also proposed seeking more precise definitions for the term 'acquittal'. She referred to the *Ngudjolo* case at the ICC in which Mr Ngudjolo was acquitted by the ICC and applied for, but was denied, refugee status in the Netherlands on the basis of Article 1F.³⁶ The Dutch court cited from the *Ngudjolo* judgment, where the ICC Trial Chamber stated:

'finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent. Such a finding merely demonstrates that the evidence presented in support of the accused's guilt has not satisfied the Chamber "beyond reasonable doubt"'.³⁷

The Dutch court thus held that Mr Ngudjolo could still be excluded on the basis of Article 1F. Professor van Sliedregt suggested defining the concept of 'acquittal' so as to make the distinction between a 'full' acquittal for lack of evidence and an acquittal on formal grounds (eg, as provided for in some systems to respond to misconduct by prosecuting authorities). Thus, in the former case, a full acquittal on the basis of evidence would provide no grounds for Article 1F exclusion.

Professor van Sliedregt argued that the real challenges with Article 1F arose at the domestic level. For example, in the Netherlands and other European countries, the majority of the exclusion orders are issued against those persons who have never been indicted, including asylum seekers from Afghanistan and Iraq. These are persons seeking refugee status after fleeing their home countries where they were part of a regime that was engaged in human rights violations. Their files are passed on to the European states' prosecuting authorities, who may not have enough evidence to build a case for various reasons,

36 Raad van State, ECLI:NL:RVS:2014:3833, 15 October 2014, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2014:3833> accessed 4 July 2019, para 2.5.

37 ICC, Prosecutor *v Mathieu Ngudjolo*, ICC-01/04-02/12-3-t-ENG, Judgment pursuant to article 74 of the Statute, 12 April 2013, para 36.

including unreliable witnesses, lack of resources and the alleged crimes having been committed long ago in other countries. They are thus denied refugee status but cannot be sent back due to states' human rights obligations. For example, the convention against torture provides that '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.³⁸ These people thus remain in a 'legal limbo', often against their will.

Professor van Sliedregt addressed another example of refugee law colliding with international criminal law, that is, how refugee adjudicators decide on the exclusion clause. When interpreting the phrase 'there are serious reasons for considering that these people have committed', adjudicators interpret the phrase 'committed' with reference to 'international instruments' in Article 1F(a). They thus rely on *sui generis* concepts of criminal participation loosely modelled on international criminal law. Adjudicators in the Netherlands, Canada, New Zealand and the United Kingdom have often used a very broad concept that was proposed in Nuremberg of 'membership in a criminal organization', which they refer to as a 'personal and knowing participation test'. If someone is a member of an organisation but cannot show that he or she was involuntarily drafted into it, then he or she is associated with the crimes perpetrated by that particular organisation or regime and that is sufficient to exclude him or her from such protection.

Professor van Sliedregt emphasised that decision-makers should be critical in taking international criminal law as the prism through which to determine eligibility for refugee status, as criminal law and refugee law differ fundamentally. Decision making in refugee law is binary, and a person will either qualify for protection or not. International criminal law on the other hand, is much more nuanced, as age and other mitigating factors are taken into account during sentencing. It is therefore insufficient for adjudicators to apply binary thinking in these cases, while continuing to rely on broad concepts of international criminal law. Only when adjudicators take full account of criminal law – also looking at the averting side of crime responsibility and mitigating factors, and not just attribution – can it be a reference point for refugee decision-making.

Professor van Sliedregt noted that there has been a move away from applying broad concepts of liability. The Supreme Courts of the UK, New Zealand and Canada held that the 'personal and knowing participation' concept is too broad and that exclusion requires the stricter test of a 'voluntary, knowing and significant contribution' to a crime. The Canadian Supreme Court, in the case of Mr Rachidi Ekanza Ezokola, found that 20 years of Canadian jurisprudence on exclusion had been overly expansive. This case concerned an official from the Democratic Republic of Congo (DRC) whose (alleged) personal and knowing participation had made him complicit in the crimes of the government of President Kabila by remaining in the position without protest and continuing to defend the interests of the government while aware of the crimes committed by the government. Overturning the Federal Court of Appeal's decision, the Supreme Court held that, 'it is necessary to rearticulate the Canadian approach to bring it in line with the purpose of the Refugee Convention and art. 1F(a) to firmly foreclose exclusions based on such broad forms of complicity'.³⁹ Professor van Sliedregt was of the opinion that this was a step in the right direction.

38 UNGA 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984, entered into force 26 June 1987) Art 3.

39 *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, para 81.

***Ne bis in idem* and the right to finality**

According to the legal frameworks of the international courts and tribunals, a person should not be tried by another court for a crime for which he or she has already been convicted or acquitted by that court. When there is an acquittal at the international level, nothing prohibits a domestic prosecutor from initiating charges should new evidence arise. Professor van Sliedregt noted that domestic prosecutors are in a better position than international prosecutors to obtain new evidence and it may be easier for them to secure cooperation than it is for international tribunals. Subsequent prosecutions could also relate to additional crimes, particularly as international prosecutors might limit the charges they put on the sheet to have better chances of conviction. Professor van Sliedregt gave the example of the *Ngudjolo* case at the ICC, which is based on one single attack on one village on one day. Mr Ngudjolo was acquitted by the ICC, however, he was subsequently charged by the DRC.

This then raises the question of whether these persons have to face an ongoing cascade of prosecutions, which, formally speaking, is possible as there is nothing that prohibits it. What is more problematic, according to Professor van Sliedregt, is that subsequent prosecutions may be fuelled by political and ethnic reasons. She referred to the example of Mr Naser Orić, who was acquitted by the ICTY, then prosecuted by national authorities, and acquitted again.⁴⁰ In light of such continued prosecutions, Professor van Sliedregt questioned whether there can be a right to finality.

In support of a right to finality, Professor van Sliedregt suggested looking at *ne bis in idem* in a specific, ‘expressivist’ way, where we concede that indictments are strategically narrowed to a limited number of charges, but a defendant’s trial is representative of wider violence in the region. As a consequence, subsequent prosecutions for related charges violate this broad expressivist reading of *ne bis in idem*. This, Professor van Sliedregt conceded, may be a controversial way of looking at *ne bis in idem*, if only that it admits that the trial is centred on more than that specific individual and more than the specific charges.

40 Admir Muslimovic, ‘Bosnia Acquits Srebrenica Commander Naser Oric at Retrial’ (Balkan Insight, 30 November 2018) <https://balkaninsight.com/2018/11/30/srebrenica-commander-naser-oric-war-crimes-retrial-verdict-11-30-2018> accessed 9 March 2020.

Panel 2: Facilitating cooperation for the long term

Ms Antônia Pereira de Sousa began the second panel discussion by stating that cooperation is key to understanding the mandate and work of international courts and tribunals. International courts are self-sufficient, with all necessary elements for justice to be carried out, but are also dependent on state cooperation. Thus, without cooperation, international justice remains a theoretical exercise. Part 9 of the Rome Statute of the ICC sets out areas related to mandatory cooperation. Article 86 specifically stipulates that States Parties shall cooperate fully with the court in its investigations and prosecutions. However, the experience of these international courts and tribunals shows that certain key areas of their operations where this cooperation is needed are not entirely defined in the core legal text, though they remain fundamental for the success of these institutions.

These areas, Ms Pereira de Sousa stated, are also key for the implementation of essential principles, such as those of fair trial and the rights of the accused. Cooperation is also key at the very beginning – for example, during investigations and implementation of arrest warrants – and towards the end of the processes in relation to early release, enforcement of sentences and acquittal. Voluntary forms of cooperation are important in order to guarantee the legitimacy of international justice, as well as to ensure the efficiency of legal proceedings. However, Ms Pereira de Sousa noted that the implementation of voluntary cooperation has been challenging. Different organs and different actors of international justice have tried to address these challenges and identify remedies from their different perspectives. Ms Pereira de Sousa invited panellists to assess these challenges regarding cooperation, and identify tools and avenues that will be available to continue to advance cooperation in the long term.

State cooperation with international criminal tribunals and courts

Judge Alphonse M M Orié began by noting the complexity of cooperation. There is a general obligation to cooperate with the UN's ad hoc tribunals, as found in Article 29 of the ICTY statute and Article 28 of the IRMCT statute. With the ICC, on the other hand, while States Parties have obligations to cooperate under the statute, these obligations also depend on the nature of the situation's referral. For example, a referral by the Security Council might result in obligations for non-States Parties. In the case of the tribunals established by the UN and the state involved, such as the STL and the Extraordinary Chambers in the Courts of Cambodia (ECCC), or tribunals established by domestic legislation with international presence on the bench, such as the KSC, the cooperation structure differs. Judge Orié stated that, in his experience as a judge in an ad hoc tribunal, states are very much willing to cooperate, for both good and bad reasons. An example of the latter is when a state attempts to obscure its role in the crimes committed or when states follow the political preferences of the day.

Judge Orié stressed the important role played by the judges of the ICC in the scope of provisional release in ensuring that cooperation is guaranteed both from an accused and the state to which he or she is released. He gave the example of the *Šešelj* case at the ICTY. The Trial Chamber, acting *proprio motu* in response to the deteriorating health of Mr Šešelj, granted provisional release without imposing

conditions.⁴¹ After release, Mr Šešelj stated that he would not return to the tribunal, and also threatened people who cooperated with the prosecution.⁴² On appeal, Mr Šešelj's provisional release was revoked.⁴³ However, Mr Šešelj did not return to the tribunal as Serbia initially refused to extradite him,⁴⁴ and later informed the tribunal that Mr Šešelj's medical treatment could not be interrupted or continued in The Hague.⁴⁵

Judge Orić also addressed more technical situations in which cooperation becomes problematic. For instance, states may be willing to cooperate in relation to the core crimes of the tribunal but unwilling to cooperate in cases dealing with contempt of court perpetrated by their own nationals. Judge Orić noted that provisions addressing contempt of court were introduced into the legal framework later, through the ICTY Rules of Procedure and Evidence, and were not included in the ICTY Statute. Consequently, some states, perhaps due to their domestic legislation, had difficulty cooperating in contempt of court cases. This could be resolved by entering into a new agreement with the ICTY and by amending domestic legislation. This was done by the US, which signed an 'Agreement on Surrender of Persons between the Government of the United States and the Tribunal' in 1994 for persons 'found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal as defined in the Statute'. In 2011, this agreement was amended to include persons 'found in its territory whom the Tribunal has charged with or found guilty of:

- a) contempt of the Tribunal under the Tribunal's Rules of Procedure and Evidence;
- b) false testimony under solemn declaration under the Tribunal's Rules of Procedure and Evidence; or
- c) any other offense provided for under the Tribunal's Rules of Procedure and Evidence that relates to obstruction of, or interference with, the Tribunal's administration of justice'.⁴⁶

Judge Orić gave an example of Serbia, a country that was initially very willing to cooperate with the ICTY in relation to both core crimes and contempt of court cases. However, that changed when a contempt of court proceeding was initiated against Mr Petar Jojić, a Serbian national.⁴⁷ The Serbian Higher Court in Belgrade ruled that Mr Jojić could not be arrested and transferred to The Hague for

41 ICTY, Prosecutor *v* *Vojislav Šešelj*, Case IT-03-67-T, Dissenting Opinion of Judge Mandiaye Niang to the Order on the Provisional Release of the Accused *Proprio Motu*, 11 November 2014, para 4.

42 ICTY, Prosecutor *v* *Vojislav Šešelj*, Case IT-03-67-T, Prosecution Motion to Revoke Provisional Release, 28 November 2014, para 3.

43 ICTY, Prosecutor *v* *Vojislav Šešelj*, Case IT -03-67-AR65.1, Decision on Prosecution Appeal Against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused, 30 March 2015.

44 See Denic Džidić and Denis Dzidic, 'UN Court to Deliver Mr Šešelj Vojislav Verdict' (Balkan Insight, 11 April 2018) <https://balkaninsight.com/2018/04/11/un-court-to-deliver-vojislav-seselj-verdict-04-10-2018> accessed 7 May 2019.

45 ICTY, Prosecutor *v* *Vojislav Šešelj*, Case IT-03-67-T, Order on Arrangements for Delivery of Judgment, 16 March 2016, 2.

46 Agreement on Surrender of Persons between the Government of the United States and the Tribunal (last amended 5 July 2011) www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/implementation_legislation_united_states_1994_en.pdf accessed 25 February 2020, Art 1.

47 ICTY, Prosecutor *v* *Petar Jojić, Jovo Ostojic, and Vjerica Radeta*, Case IT-03-67-R77.5, International Arrest Warrant and Order for Surrender, 5 October 2016 (confidentiality lifted on 29 November 2016) ('ICTY Arrest Warrant'). See also Prosecutor *v* *Petar Jojić, Jovo Ostojic, and Vjerica Radeta*, Case IT-03-67-R77.5, Warrant of Arrest and Order for Surrender of Petar Jojić, 19 January 2015 (confidentiality lifted on 1 December 2015).

trial because this was not in line with the Serbian law on cooperation with the ICTY.⁴⁸ Judge Orić noted that the IRMCT Statute has resolved this ambiguity by ensuring that the obligation to cooperate extends to both core crimes and contempt of court cases.

Dr Mark Ellis discussed political will as two-pronged, that is, involving both domestic political will and international pressure. A state must have at least one of the two to successfully play its part in accountability for atrocity crimes. However, often both are needed. He gave the example of the ICTY cases of Mr Slobodan Milošević, Mr Ratko Mladić and Mr Radovan Karadžić, who were free for a long time as there was clearly no domestic political will at that time. However, with the elections in 2000 and a new government, domestic political will changed. This was due to international pressure, primarily by the European Union and US, in support of the ICTY and in support of accountability and justice.

Dr Ellis also spoke of the role of civil society in international criminal justice. In particular, he gave an example of the Southern African Litigation Centre (SALC) that brought a legal action regarding South Africa's 2015 failure to arrest then President Omar al-Bashir of Sudan, pursuant to ICC arrest warrants, while Mr al-Bashir was in South Africa.⁴⁹ This was followed by an interim order from the High Court prohibiting Mr al-Bashir from leaving South Africa and directing the Government of South Africa to take all necessary steps to prevent Mr al-Bashir from leaving.⁵⁰ Following the interim order, the High Court, with information provided that Mr al-Bashir was still in the country, ordered:

'That the respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court.'⁵¹

Immediately after this order was made, counsel for the Government of South Africa told the ICC that Mr al-Bashir had left the country earlier that day.⁵² Nevertheless, the South African Supreme Court ultimately ruled that immunities did not apply in the case of Mr al-Bashir. The judgment held:

'I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made. I accept, in the light of the earlier discussion of head of state immunity, that in doing so South Africa was taking a step that many other nations have not yet taken. If that puts this country in the vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national

48 Marija Ristic, 'Serbian Court Refuses to Extradite Wanted Radicals' (Balkan Insight, 18 May 2016) <https://balkaninsight.com/2016/05/18/serbia-refused-to-extradite-wanted-radicals-05-18-2016> accessed 27 February 2020.

49 High Court of South Africa (North Gauteng High Court, Pretoria), *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development et al Notice of Motion* (14 June 2015).

50 High Court of South Africa (North Gauteng High Court, Pretoria), *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development et al Interim Order*, Case number 27740/15 (14 June 2015).

51 *Supreme Court of Appeal of South Africa, The Minister of Justice and Constitutional Development v The Southern Africa Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016), para 6, citing High Court ruling of 15 June 2015.

52 *Ibid.*

pride rather than concern. It is wholly consistent with our commitment to human rights both at a national and an international level. And it does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in s232 of the Constitution. What is commendable is that it is a departure in a progressive direction'.⁵³

The fact that Mr al-Bashir was still allowed to leave, Dr Ellis stressed, is an indictment on states. He underscored the importance of implementing legislation, and ensuring that such legislation corresponds with the framework of international courts and tribunals. The ability to align with the long-term success of the ICC, he noted, is preconditioned on the alignment of national law with the Rome Statute and international law in general. States have a responsibility to embrace a much broader view of their responsibility to engage the international community on the importance of international justice and the ICC. Dr Ellis however noted that the reality is quite different from the perspectives of different member states. Few States Parties to the Rome Statute have implemented legislation regarding the core crimes, but even fewer have implemented legislation for general cooperation. This makes the role of lawyers exceedingly important both in the national and international community in engaging their countries with the work of the ICC. Dr Ellis stressed the importance of implementing domestic legislation. This leads to the strengthening of a state's judicial system, the emphasis on victims' rights and ensuring that fair trial standards are adopted.

Cooperation for the enforcement of sentences

Dr Fidelma Donlon underscored the remarks made by Judge Prost by stating that certain forms of cooperation with states are absolutely critical for the correct and proper functioning of the system of international criminal justice. These forms of cooperation arise from the early stages of the investigations to well after final verdicts have been rendered, and include witness relocation, asset forfeiture and the enforcement of prison sentences. Dr Donlon focused on the latter with case studies on the Bosnian War Crimes Chamber and Special Court for Sierra Leone (SCSL). These two institutions bear some similarities. For instance, as legal entities and institutions, they did not have prisons suitable for long-term (post-verdict) sentences. This created problems in terms of the rights of the accused from a security perspective, and regarding witnesses and victims. The Bosnian War Crimes Chamber was catalysed by the completion strategy of the ICTY. A funding structure was put forward, not only for judges and prosecutors but also for institutions that are fundamental to any justice system, such as prisons. In the request for funding, it was noted that the penitentiary system in Bosnia did not have maximum high-security prisons and the prisons that did exist were divided along ethnic lines. Thus, to bring back indictees from the ICTY for domestic trial, funding was needed to construct a maximum-security facility for long-term service. Unfortunately, the funding request was unsuccessful as donors were more interested in the creation of the chamber and its functioning over the five years, specifically for investigation and trials. The donors had indicated that they would perhaps contemplate a facility for custody during trial, but were not interested in funding a penitentiary system that would include a long-term investment in a prison.

The consequences of this decision were visible in 2005, when the first indictee transferred to the Bosnian War Crimes Chamber, Mr Radovan Stanković, was tried and sentenced to 20 years

53 *Ibid*, para 103.

imprisonment for crimes against humanity, including rape, torture and enslavement of women and girls.⁵⁴ With nowhere to transfer him to serve his sentence, Mr Stanković was transferred to a prison in the region where those crimes had been committed. Subsequently, while going to a dental appointment, Mr Stanković escaped and went missing for five years.⁵⁵ He was later re-incarcerated. To underscore the issue of getting enforcement right, Dr Donlon quoted the former President of the Bosnian War Crimes Chambers:

‘Each escape sends a bad message to victims and constitutes a major blow to the court and prosecution which invests huge efforts and resources to ensure successful trials of individuals indicted for grave crimes. This makes our work purposeless.’

Dr Donlon emphasised the importance of these remarks, particularly in the view of the protection and security of victims and witnesses.

In terms of effectiveness of the current cooperation system, Dr Donlon stated that it is absolutely essential in the initial phases of discussions with member states to highlight that cooperation will not be confined to money. Further, in terms of strategies, Dr Donlon offered a suggestion of having a group of states that have specialised wings for incarceration and the long-term serving of sentences of international prisoners. This would allow for a centralised system with expertise in handling the nature of international crimes and on rehabilitation programmes rather than the current system of an extremely diverse collection of prisons.

Conditional early release

Dr Donlon emphasised that there are many lessons that the ICC can learn from the experiences of other international courts and tribunals. For example, the SCSL was the first and only hybrid or international tribunal to adopt a practice direction on conditional early release.⁵⁶ It created a system much more akin to a national system of parole in which conditions were placed on early release. Convicted persons would be supervised by a specific and designated monitoring authority in the community on conditions that promote good behaviour while respecting the original sentence. Should the conditions be violated, the system provides for the immediate transfer of the convicted person back to the custody of the Residual SCSL (RSCSL) with potential re-incarceration for the continuation of the original sentence. Essentially, the original sentence remains in place and what is introduced is a system whereby the sentence is effectively served, not in a prison, but on conditions within a community.

Dr Donlon further discussed the purpose of conditional early release. The preamble of the SCSL Practice Direction recalls Article 10 of the International Covenant on Civil and Political Rights (ICCPR), which provides that ‘[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’. The preamble further recalls the Mandela

54 Statement of the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia on the arrest of Radovan Stanković (21 January 2012) www.icty.org/en/press/statement-office-prosecutor-international-criminal-tribunal-former-yugoslavia-arrest-radovan accessed 9 March 2020.

55 BIRN, ‘Radovan Stanković Refuses to Come to Court’ (Balkan Insight, 10 September 2012) <https://balkaninsight.com/2012/09/10/radovan-stankovic-refuses-to-come-to-court> accessed 9 March 2020.

56 Residual Special Court for Sierra Leone, ‘Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone’ (1 October 2013).

Rules for the treatment of prisoners and notes that ‘penal institutions should utilize all the remedial, educational, moral, spiritual and other forms of assistance which are appropriate and available and should seek to apply them according to the individual needs of individual prisoners’.

Dr Donlon stated that the preamble is a nod towards rehabilitation with incentives for the individual to work towards release and reintegration into the community. In practice, eligibility for conditional early release requires not only having served two-thirds of the sentence but also a demonstration that the convicted person has completed remedial, educational or other prison programmes, and establishes that he or she is not a danger to the community or other persons. This is indicated by prison reports that are analysed by judges in making their determination. Furthermore, to be conditionally released, a convicted person must show respect for the fairness of the process in which he or she was convicted, including by making a public acknowledgment of guilt and apologising to victims.⁵⁷

Dr Donlon noted that the role of the SCSL Registrar is to compile analyses for the President to consider. Ultimately, if there is clear and convincing evidence that the individual will be a safe member of the community and will comply with the conditions imposed, the conditional early release agreement can be signed by the individual. Dr Donlon gave an example of the case of Mr Moinina Fofana who was eligible for, and therefore granted, early release. The conditional early release agreement, which was signed by Mr Fofana, stated that in the event he violates any condition of early release, the early release order may be revoked and the order for re-imprisonment for the time remaining on his sentence may be issued. The prosecution, together with the monitoring authority, argued that Mr Fofana had violated his conditions by attending a conference, and given Mr Fofana’s past position of authority and the esteem in which many Sierra Leoneans hold him, his attendance carried ‘significant import’.⁵⁸ The President held that Mr Fofana’s attendance of the conference had minimal impact on the political climate of Sierra Leone. However, his attendance was significant as it reflected his general attitude of disregard and contempt for the orders of the ICC and the terms of his conditional release.⁵⁹ While Mr Fofana was allowed to return to his community, the decision reinforced stringent conditions of release.

With this in mind, Dr Donlon strongly advocated for a system similar to that of the SCSL, with a focus on conditional early release and rehabilitation.

Defence perspective on state cooperation

Ms Caroline Buteau gave a defence perspective on cooperation matters, stating that cooperation is vital in order to protect the rights of the defendants and to guarantee equality of arms and fairness of proceedings. Ms Buteau was a member of the *Lubanga* defence team at the ICC, and in her experience, it was only through cooperation with the UN that the team was able to conduct lengthy and thorough investigations in the DRC. The defence team was, for example, provided with cooperation in the form of visas to enter the country. Ms Buteau stated that though this seemed obvious and trivial, it is not a guarantee that defence teams will receive visas. The defence was also granted access to detained witnesses for questioning. Further, the defence received assistance to meet government officials and

⁵⁷ *Ibid*, Annex A, Form A, 1.

⁵⁸ RSCSL, Prosecutor *v Moinina Fofana*, Disposition on the Matter of Moinina Fofana’s Violations of the Terms of his Conditional Early Release, 25 April 2016, para 2.

⁵⁹ *Ibid*, para 80.

obtain official records from the DRC in the form of identification cards. This information was later used by the defence to show that some witnesses who claimed to have been child soldiers might not have been truthful about their age. On that basis, the Trial Chamber excluded these witnesses' testimonies from the judgment. Further, as the situation in the DRC was very volatile, the defence team was afforded local police protection.

While this was a positive experience with regard to cooperation for the defence, Ms Buteau stressed that this was not the norm. She gave a few examples of the experiences of other defence teams, such as that of the defence team of Mr Abdallah Banda Abakaer Nourain (Banda) at the ICC, which was denied access to the country (Sudan) and was thus unable to investigate, locate and meet with witnesses. The defence team thus, with the view that a fair trial was impossible, asked for a stay in proceedings, which was denied.⁶⁰

Ms Buteau also stressed that defence teams usually operate without the same safeguards as prosecution teams. As an example, she has had to travel on a tourist visa and in hostile environments for work-related matters. In this regard, she stressed that it is important for states to cooperate to ensure that immunities are given to counsel. Further, Ms Buteau spoke about the situation of Mr Blé Goudé. In 2019, developments in the *Gbagbo and Blé Goudé* case highlighted that, without sufficient cooperation, there remain real challenges for upholding the rights of persons tried at the ICC, and logistical problems for the ICC and the Netherlands as the host state of the ICC. Following a ruling on conditional release, Mr Blé Goudé remained under the supervision of the ICC in the Netherlands, without a state ready to accept him.⁶¹

Noting that the STL is the first international court to have an independent defence office, Ms Buteau recalled that the office is mandated to request assistance for cooperation in the defence of an accused. This is contrary to the ICC, for example, where defence matters are handled by the Registry. In this regard, the head of the STL Defence Office has signed a memorandum of understanding (MOU) for cooperation between Lebanon and the Defence Office. The MOU is important because defence counsel in Lebanese domestic practice do not conduct investigations, and it therefore provides a channel within which defence counsel at the STL, and in particular defence counsel from Lebanon, can conduct investigations without violating any ethical rules. Since 2011, the Defence Office has conveyed

60 ICC, Prosecutor *v Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus*, ICC-02/05-03/09-410, Decision on the defence request for a temporary stay of proceedings, 26 October 2012.

61 Vincent Duhem (n 7).

170 requests of cooperation for the defence. If the office finds the response unsatisfactory or if they do not receive any response, they can address that to the Pre-Trial Chamber pursuant to Rule 20.⁶²

Ms Buteau emphasised the importance of a defence office in relation to cooperation. First, the sole mandate of the office is to protect the rights of the defence. Staff members have previously worked for the defence in other courts and tribunals, and therefore understand the needs of the defence. There is also a liaison officer in the field who is there to ensure that any requests for cooperation are transmitted, which minimises delay. Second, confidentiality is respected. The defence is usually reluctant to reveal its line of investigations, however, with an office for the defence, the defence teams are assured of confidentiality and thus more confident in requesting cooperation. Lastly, the Head of the Defence Office, as with other organs of the tribunal, has direct access to states and their representatives, which provides the opportunity to discuss matters related to defence and cooperation.

Ms Buteau concluded that there must be a change in states' perceptions of the defence, the accused and the acquitted persons. Further, she emphasised the need for a defence office in international criminal tribunals and courts, and for the defence to be included in cooperation forums and outreach activities.

Closing remarks by Ambassador Stephen Rapp

Ambassador Rapp spoke from his experience as the US Ambassador at Large for War Crimes, a position that originated in 1997 after the advent of the ICTY and ICTR. This came from the recognition that, even though these courts have Chapter VII powers, these powers would not be enough to guarantee the cooperation of states. Ambassador Rapp recalled that Justice Robert Jackson at Nuremberg saw international criminal justice as fundamentally a universal project. Justice Jackson said, 'the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass

62 Special Tribunal for Lebanon, Rules of Procedure and Evidence (adopted 20 March 2009, last amended 10 April 2019) STL-BD-2009-01-Rev.10, Rule 20 reads in full:

'(A) Whenever the Lebanese authorities receive a request for information, cooperation or deferral under Rules 16 and 17, they shall provide such assistance without delay and in accordance with the timeframe specified in the request. Where, within thirty days of notification of the request to the Lebanese authorities, or such longer delay as is provided in the request, such authorities fail to comply with the request, the Parties may seek an Order from the Pre-Trial Judge or a Chamber, as appropriate, to the Lebanese authorities to compel the requested assistance. (amended 5 June 2009)

(B) Where the Lebanese authorities receive a summons to appear, a warrant of arrest, a transfer order, an order for the production of documents or information or any order for cooperation issued by the Pre-Trial Judge or a Chamber, they shall provide the requested assistance without delay.

(C) Where the Lebanese authorities fail, within thirty days of notification of an order under paragraphs (A) and (B), to comply with it, the Pre-Trial Judge or a Chamber, as appropriate, may make a finding to that effect. The President shall engage in consultations with the relevant Lebanese authorities with a view to obtaining the required cooperation. If, in the view of the Pre-Trial Judge or a Chamber, after consultation with the President, a satisfactory response has still not been provided within a reasonable timeframe, the President shall make a judicial finding to that effect and refer the matter to the Security Council for consideration and further action, as the Council deems appropriate.

(D) Unless otherwise indicated, this Rule shall apply to any Tribunal request or order directed to Lebanon pursuant to the Rules.'

these defendants a poisoned chalice is to put it to our own lips as well'.⁶³ Ambassador Rapp noted that we all benefit if these rules are established, enforced and done fairly.

Ambassador Rapp was of the view that, even though the US is not a state party to the ICC, it has always intended to be a 'non-party partner' and extend support in terms of cooperation. An example he gave was that of the surrender of Mr Bosco Ntaganda and Mr Dominic Ongwen to the US Embassies. Both were later transferred to the ICC. Further, Ambassador Rapp, together with other former International Chief Prosecutors David M Crane, Benjamin B Ferencz, Richard J Goldstone and Carla del Ponte, provided *amicus curiae* submissions in the Situation in Afghanistan in support of the ICC prosecutor's appeal for an investigation. This, Ambassador Rapp stated, was in support of his belief that the international justice process gains when fairness is done.

Ambassador Rapp emphasised that states need to engage with the process. He noted that the ICTY and ICTR have had greater success in cooperation requests in relation to relocation and enforcement of sentences than the ICC, despite states voluntarily taking up membership of the ICC. Ambassador Rapp concluded by urging states to cooperate with these international courts and tribunals, as no institution, no matter its power or mandate, will be worth anything unless it has support.

Seeing justice through: future considerations and recommendations

During the Experts' Roundtable discussions, speakers and panellists outlined multiple issues presented by the long-term nature of international justice, addressing, among other things, the importance of upholding international standards of fairness and human rights throughout and subsequent to trials and sentencing. Participants pointed out structural and substantive issues in international and domestic law that can be further examined and improved. The experts present at the roundtable also emphasised the importance of cooperation, and the need for states to be forthcoming with increased cooperation for essential needs of international courts, in particular for a permanent institution, such as the ICC. This section highlights some of these issues. Many of these considerations and recommendations are also reflected in the IBA Discussion Paper 'Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals'.

States should support the long-term project of international justice by prioritising and actively pursuing all forms of cooperation.

At both the ICC and ad hoc tribunals, key cooperation needs remain unaddressed. At the creation of the ICC, the cooperation framework was designed to respect state sovereignty and discretion, and did not foresee the current situation in which state cooperation with the ICC is not forthcoming. However, the present situation shows that there is an urgent need for more cooperation in a number

63 'Second Day, Wednesday, 11/21/1945, Part 04', in Trial of the Major War Criminals before the International Military Tribunal, Volume II, Proceedings: 11/14/1945-11/30/1945, [Official text in the English language.] Nuremberg: IMT, 1947, 98-102 www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal accessed 9 March 2020.

of areas, including voluntary cooperation agreements for provisional and final release. While the ICC continually works with States Parties towards concluding voluntary agreements, not enough states are coming forward to provide this support. States Parties, together with the ICC, should prioritise efforts to conclude more agreements of this nature, and should generally seek to cooperate with all requests of the ICC.

The Experts' Roundtable also made clear that post-conviction and post-acquittal cooperation remains a problem for the IRMCT, and other hybrid tribunals. The situation at the ICTR Safe House has been referred to as a humanitarian crisis by IRMCT President Carmel Agius.⁶⁴ As part of their commitment to international justice, states must offer their support to these courts in an effort to find a permanent solution for the resettlement of these persons. In this regard, and as discussed below, states should examine any barriers created by their domestic legal regimes with a view towards finding solutions for legal barriers that prevent cooperation.

Courts and states must also take responsibility for addressing the specific cooperation needs of the defence. The experience of the STL shows the value of creating a defence office as an organ of the court, mandated to protect the rights of the defence, which can serve to facilitate and streamline cooperation for the defence. A Head of Defence Office appointed at the same level as other heads of organs will also have direct access to states and their representatives, which provides the opportunity to discuss matters related to defence and cooperation, as well as to ensure defence representation in cooperation forums. When defence cooperation needs are addressed through the Registry, sufficient resources and technical assistance should be allocated to ensure efficient and effective support for defence cooperation.

Domestic legislation is central for facilitating cooperation, and should continue to be a priority for states as part of their commitment to fair and effective international justice and the rule of law.

The existence and quality of domestic legislation for facilitating cooperation is an important factor for ensuring timely and effective state cooperation. Additional attention should be given to the drafting and passage of legislation, and in particular to including specific provisions or agreements that will allow cooperation with international courts and tribunals. Having legislation in place facilitates the handling of cooperation requests, including for requests for arrest, summonses to appear and implementing conditions on release. Many actors can support the drafting and passage of legislation, including civil society, parliamentarians and legal professionals. Civil society and legal professionals may also play an important role in using domestic litigation to challenge states' non-cooperation, following the example of SALC in South Africa.

Courts and tribunals should have clear and consistent guidelines that include criteria for determinations of provisional, early and conditional release, for example, in the form of practice directions. Such guidelines should also address criteria for assessing rehabilitation, and include timeframes for returning decisions on release.

64 UNSC 'Letter dated 20 May 2019 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council' (20 May 2019) S/2019/417.

Chambers' willingness to grant provisional, conditional or early release may depend in part on states' willingness and ability to implement any conditions on release. Chambers should consider enumerating the conditions they are willing to accept from states, prior to deciding on applications for provisional release, as such observations are necessary for chambers to ascertain a state's willingness to implement conditions on release, and to ensure that any risk identified may be mitigated by measures short of detention.

Further consideration should be given to the appropriateness of conditional release for persons who have been acquitted. Due to the time it may take to conclude an appeals process, the conditions placed on release can be imposed for long periods of time, which has implications on the rights of the acquitted person. These rights and conditions are further affected by external factors, such as the availability of states willing to accept acquitted persons and impose the conditions.

The concept of rehabilitation, as it applies to persons who have been convicted by an international criminal court or tribunal, needs further attention and consideration. Courts should seek to clarify the criteria used for assessing early release, including rehabilitation, as well as the feasibility of using a more consistent and transparent set of criteria between detainees, notwithstanding different states of enforcement. In this regard, the system used by the SCSL in its Practice Direction could serve as a model for criteria for conditional early release and rehabilitation.

States should review and seek to clarify any inconsistencies raised by refugee law criteria and international criminal law concepts and definitions to ensure outcomes are fair and consistent with states' human rights obligations.

Article 1F of the Refugee Convention has proven to be a significant barrier to the relocation of persons who have been indicted by international courts and tribunals, and who have been acquitted or completed their sentences. Further consideration is due to the distinction between a full acquittal for lack of evidence and an acquittal on formal grounds, and how acquittals are assessed in refugee status determinations and by domestic courts. Distinguishing between a full acquittal on the basis of evidence and acquittal on a technicality could lead to a more limited use of the Article 1F exclusion. In making determinations under Article 1F, state adjudicators should also take note of the distinctions between the binary determinations for refugee status and the more complex analysis of guilt in international criminal law, including any mitigating factors.

International justice has long-term implications, in particular when it comes to issues that arise after acquittals and once sentences are served. States should prepare for long-term investment as part of their support for the goals of international justice, and when engaging with and creating courts to adjudicate international crimes.

In the creation of international courts and tribunals, states are urged to carefully consider the issue of enforcement of sentences from the very beginning. In this regard, it is essential that state support to international institutions should include support for functioning custodial facilities for long-term service, and that states and courts should seek to develop custodial staff with expertise in handling this nature of criminality, as well as developing rehabilitation programmes. The expertise, facilities and resources needed for imprisonment and rehabilitation should be considered as important as functioning chambers, registry, prosecution and defence.

Further attention should also be given to the issue of retrials and domestic trials following a trial by an international criminal court or tribunal. In this regard, states should consider establishing a right to finality, and to define parameters for individuals who have been charged to obtain finality. Establishing a right to finality will ensure that acquitted persons or persons who have completed their sentences can have certainty and limitations regarding further prosecutions.

International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom

Tel: +44 (0)20 7842 0090

Fax: +44 (0)20 7842 0091

Website: www.ibanet.org